EXHIBIT "2"

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration" during the 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

ANALYSIS

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . becomes due. . . .
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or,

> in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312[1] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. . .

NRS 116.3116 further provides that "Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116. (1994)	**NRS 116.3116 Liens against units for assessments.**(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to,	(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
(ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments***.[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	**NRS 116.3116 Liens against units for assessments**. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any . . . **fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except: * * * (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of: (I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	2. A lien under this section is prior to all other liens and encumbrances on a unit except: * * * The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding** institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [Emphasis added.]

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> SECTION 3-116. LIEN FOR ~~ASSESSMENTS;~~ SUMS DUE ASSOCIATION; ENFORCEMENT.
>
> (a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit . . .. Unless the declaration otherwise provides, **reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest** charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> ~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~;
>
> ~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent~~,~~ or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and
>
> ~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> (c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of **both** the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien**.. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> **First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien'** – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b).[5] The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although the assessment portion of the super priority lien is limited to a finite number of months, because the assessment lien itself includes "fees, charges, late charges, attorney fees, fines, and interest," these charges may be included as part of the super priority lien amount. This language is the same as NRS 116.3116, which states that "fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
>
> (k) Impose charges for late payment of assessments pursuant to NRS 116.3115.
>
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
>
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
>
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders"[6] have all concluded otherwise.

Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

> **NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.**
>
> 1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
>
> 2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
>
> 3. As used in this section:
>
> (a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
>
> (b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

EXHIBIT "3"

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject:	Advisory No. **13-01**	21 pages
The Super Priority Lien	Issued By: Real Estate Division	
	Amends/ Supersedes N/A	
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01		Issue Date: December 12, 2012

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

> The association has a lien on a unit for **any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines** imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. **Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments** under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

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[1] Charges for late payment of assessments comes from NRS 116.3102(1)(k) and is incorporated into NRS 116.3116(1).
[2] NRS 116.310313.
[3] "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court. NRS 116.310313(3)(a).
[4] NRS 116.3102(1)(k) (incorporated into NRS 116.3116(1)).

right to charge a unit owner "reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313 is not referenced in NRS 116.3116 or NRS 116.3102, nor does NRS 116.310313 specifically provide for the association's right to lien the unit for such costs.

In contrast, NRS 116.310312, also adopted in 2009, allows an association to enter the grounds of a unit to maintain the property or abate a nuisance existing on the exterior of the unit. NRS 116.310312 specifically provides for the association's expenses to be a lien on the unit and provides that the lien is prior to the first security interest.[5] NRS 116.3102(1)(j) was amended to allow these expenses to be part of the lien described in NRS 116.3116(1). And NRS 116.3116(2) was amended to allow these expenses to be included in the association's super priority lien.

The Commission's advisory opinion from December 2010 also relies on changes to the Uniform Act from 2008 to support the notion that collection costs should be part of the association's super priority lien. Nevada has not adopted those changes to the Uniform Act. Since the Commission's advisory opinion, the Nevada Legislature had an opportunity to clarify the law in this regard.

In 2011, the Nevada Legislature considered Senate Bill 174, which proposed changes to NRS 116.3116. S.B. 174 originally included changes to NRS 116.3116(1) such that the association's lien would specifically include "costs of collecting" as defined in NRS 116.310313. S.B. 174 proposed changes to NRS 116.3116 (1) and (2) to bring the statute in line with the changes to the same provision in the Uniform Act amended in 2008.

The Uniform Act's amendments were removed from S.B. 174 by the first reprint. As amended, S.B. 174 proposed changes to NRS 116.3116(2) expanding the super priority lien amount to include costs of collecting not to exceed $1,950, in addition to 9 months

[5] See NRS 116.310312(4) and (6).

of assessments. S.B. 174 was discussed in great detail and ultimately died in committee.[6]

Also in 2011, Senate Bill 204 – as originally introduced – included changes to NRS 116.3116(1) to expand the association's lien to include attorney's fees and costs and "any other sums due to the association."[7] The bill's language was taken from the Uniform Act amendments in 2008. All changes to NRS 116.3116(1) were removed from the bill prior to approval.

The Nevada Legislature's actions in the 2009 and 2011 sessions are indicative of its intent not to make costs of collecting part of the lien. The Nevada Legislature could have made the costs of collecting part of the association's lien, like it did for costs under NRS 116.310312. It did not do so. In order for the association to have a right to lien a unit under NRS 116.3116(1), the charge or expense must fall within a category listed in the plain language of the statute. Costs of collecting do not fall within that language. Based on the foregoing, the Division concludes that the association's lien does not include "costs of collecting" as defined by NRS 116.310313.

A possible concern regarding this outcome could be that an association may not be able to recover their collection costs relating to a foreclosure of an assessment lien. While that may seem like an unreasonable outcome, a look at the bigger picture must be considered to put it in perspective. NRS 116.31162 through NRS 116.31168, inclusive, outlines the association's ability to enforce its lien through foreclosure. Associations have a lien for assessments that is enforced through foreclosure. The association's expenses are reimbursed to the association from the proceeds of the sale. NRS 116.31164(3)(c) allows the proceeds of the foreclosure sale to be distributed in the following order:

(1) The reasonable expenses of sale;

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[6] See http://leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=423.
[7] Senate Bill No. 204 – Senator Copening, Sec. 49, ln. 1-16, February 28, 2011.

(2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
(3) Satisfaction of the association's lien;
(4) Satisfaction in the order of priority of any subordinate claim of record; and
(5) Remittance of any excess to the unit's owner.

Subsections (1) and (2) allow the association to receive its expenses to enforce its lien through foreclosure *before* the association's lien is satisfied. Obviously, if there are no proceeds from a sale or a sale never takes place, the association has no way to collect its expenses other than through a civil action against the unit owner. Associations must consider this consequence when making decisions regarding collection policies understanding that every delinquent assessment may not be treated the same.

II. NRS 116.3116(2) ESTABLISHES THE PRIORITY OF THE ASSOCIATION'S LIEN.

Having established that the association has a lien on the unit as described in subsection (1) of NRS 116.3116, we now turn to subsection (2) to determine the lien's priority in relation to other liens recorded against the unit. The lien described by NRS 116.3116(1) is what is referred to in subsection (2). Understanding the priority of the lien is an important consideration for any board of directors looking to enforce the lien through foreclosure or to preserve the lien in the event of foreclosure by a first security interest.

NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest. The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to

distinguish it from the other portion of the association's lien that is subordinate to a first security interest.

The ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security. NRS 116.3116 is found in the Uniform Act at § 3-116. Nevada adopted the original language from § 3-116 of the Uniform Act in 1991. From its inception, the concept of a super priority lien was a novel approach. The Uniform Act comments to § 3-116 state:

> [A]s to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association.

III. THE AMOUNT OF THE SUPER PRIORITY LIEN IS LIMITED BY THE PLAIN LANGUAGE OF NRS 116.3116(2).

NRS 116.3116(2) states:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
> ***The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien***, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(emphasis added)

Having found previously that costs of collecting are not part of the lien means they are not part of the super priority lien. The question then becomes what can be included as part of the super priority lien. Prior to 2009, the super priority lien was limited to 6 months of assessments. In 2009, the Nevada legislature changed the 6 months of

assessments to 9 months and added expenses for abatement under NRS 116.310312 to the super priority lien amount. But to the extent federal law applicable to the first security interest limits the super priority lien, the super priority lien is limited to 6 months of assessments.

The emphasized language in the portion of the statute above identifies the portion of the association's lien that is prior to the first security interest, i.e. what comprises the super priority lien. This language states that there are two components to the super priority lien. The first is "to the extent of any charges" incurred by the association pursuant to NRS 116.310312. NRS 116.310312(4) makes clear that the charges assessed against the unit pursuant to this section are a lien on the unit and subsection (6) makes it clear that such lien is prior to first security interests. These costs are also specifically part of the lien described in NRS 116.3116(1) incorporated through NRS 116.3102(1)(j). This portion of the super priority lien is specific to charges incurred pursuant to NRS 116.310312. Payment of those charges relieves their super priority lien status. There does not seem to be any confusion as to what this part of the super priority lien is. Analysis of the super priority lien will focus on the second portion.

A. THE SUPER PRIORITY LIEN ATTRIBUTABLE TO ASSESSMENTS IS LIMITED TO 9 MONTHS OF ASSESSMENTS AND CONSISTS ONLY OF ASSESSMENTS.

The second portion of the super priority lien is "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

The statute uses the language "to the extent of the assessments" to illustrate that there is a limit on the amount of the super priority lien, just like the language concerning expenses pursuant to NRS 116.310312, but this portion concerns assessments. The limit on the super priority lien is based on the assessments for

common expenses reflected in a budget adopted pursuant to NRS 116.3115 which would have become due in 9 months. The assessment portion of the super priority lien is no different than the portion derived from NRS 116.310312. Each portion of the super priority lien is limited to the specific charge stated and nothing else.

Therefore, while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102 (1) (j) to (n), inclusive, the total amount of the *super priority lien* attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget. Association budgets do not reflect late charges or interest attributed to an anticipated delinquent owner, so there is no basis to conclude that such charges could be included in the super priority lien or in addition to the assessments. Such extraneous charges are not included in the association's super priority lien.

NRS 116.3116 originally provided for 6 months of assessments as the super priority lien. Comments to the Uniform Act quoted previously support the conclusion that the original intent was for 6 months of the assessments alone to comprise the super priority lien amount and not the penalties, charges, or interest. It is possible that an argument could be made that the language is so clear in this regard one should not look to legislative intent. But considering the controversy surrounding the meaning of this statute, the better argument is that legislative intent should be used to determine the meaning.

The Commission's advisory opinion of December 2010 concluded that assessments *and* additional costs are part of the super priority lien. The Commission's advisory opinion relies in part on a Wake Forest Law Review[8] article from 1992 discussing the Uniform Act. This article actually concludes that the Uniform Act language limits the

[8] See James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992).

amount of the super priority lien to 6 months of assessments, but that the super priority lien does not necessarily consist of only delinquent assessments.[9] It can include fines, interest, and late charges.[10] The concept here is that all parts of the lien are prior to a first security interest and that reference to assessments for the super priority lien is only to define a specific dollar amount.

The Division disagrees with this interpretation because of the unreasonable consequences it leaves open. For example, a unit owner may pay the delinquent assessment amount leaving late charges and interest as part of the super priority lien. If the super priority lien can encompass more than just delinquent assessments in this situation, it would give the association the right to foreclose its lien consisting only of late charges and interest prior to the first security interest. It is also unreasonable to expect that fines (which cannot be foreclosed generally) survive a foreclosure of the first security interest. Either the lender or the new buyer would be forced to pay the prior owner's fines. The Division does not find that these consequences are reasonable or intended by the drafters of the Uniform Act or by the Nevada Legislature. Even the 2008 revisions to the Uniform Act do not allow for anything other than assessments and costs incurred to foreclose the lien to be included in the super priority lien. Fines, interest, and late charges are not *costs* the association incurs.

In 2009, the Nevada Legislature revised NRS 116.3116 to expand the association's super priority lien. Assembly Bill 204 sought to extend the super priority lien of 6 months of assessments to 2 years of assessments.[11] The Commission's chairman, Michael Buckley, testified on March 6, 2009 before the Assembly Committee on Judiciary on A.B. 204 that the law was unclear as to whether the 6 month priority can

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[9] See id. at 367 (referring to the super priority lien as the "six months assessment ceiling" being computed from the periodic budget).
[10] See id.
[11] See http://leg.state.nv.us/Session/75th2009/Reports/history.cfm?ID=416.

include the association's costs and attorneys' fees.[12] Mr. Buckley explained that the Uniform Act amendments in 2008 allowed for the collection of attorneys' fees and costs incurred by the association in foreclosing the assessment lien as part of the super priority lien. Mr. Buckley requested that the 2008 change to the Uniform Act be included in A.B. 204. Mr. Buckley's requested change to A.B. 204 to expand the super priority lien never made it into A.B. 204. Ultimately, A.B. 204 was adopted to change 6 months to 9 months, but commenting on the intent of the bill, Assemblywoman Ellen Spiegel stated:

> Assessments covered under A.B. 204 are the regular monthly or quarterly dues for their home. *I carefully put this bill together to make sure it did not include any assessments for penalties, fines or late fees.* The bill covers the basic monies the association uses to build its regular budgets.

(emphasis added).[13]

It is significant that the legislative intent in changing 6 months to 9 months was with the understanding that no portion of that amount would be for penalties, fines, or late fees and that it only covers the basic monies associations use to build their regular budgets. It does make sense that a lien superior to a first security interest would not include penalties, fines, and interest. To say that the super priority lien includes more than just 9 months of assessments allows several undesirable and unreasonable consequences.

B. NEVADA HAS NOT ADOPTED AMENDMENTS TO THE UNIFORM ACT TO ALTER THE ORIGINAL INTENT OF THE SUPER PRIORITY LIEN.

The changes to the Uniform Act support the contention that only what is referenced as the super priority lien in NRS 116.3116(2) is what comprises the super priority lien. In 2008, § 3-116 of the Uniform Act was revised as follows:

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[12] See Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-fifth Session, March 6, 2009 at 44-45.

[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

SECTION 3-116. LIEN FOR ~~ASSESSMENTS~~; SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~ ;

~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and

~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. ~~This subsection~~ Subsection (b) and this subsection ~~does~~ do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [~~The~~ A lien under this section is not subject to ~~the provisions of~~ [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

Explaining the reason for the changes to these sections, the Uniform Act includes the following comments:

> Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien' – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.

The Uniform Act's amendment in 2008 is very telling about § 3-116's original intent. The comments state reasonable attorneys' fees and court costs are *added* to the super priority lien stating that it is currently 6 months of regular common assessments. The Uniform Act adds attorneys' fees and costs to subsection (a) which defines the association's lien. Those attorneys' fees and costs attributable to foreclosure efforts are also added to subsection (c) which defines the super priority lien amount.

If the association's lien ever included attorneys' fees and court costs as "charges for late payment of assessments" or if such sum was part of the super priority lien, there would be no reason to add this language to subsection (a) and (c). Or at a minimum, the comments would assert the amendment was simply to make the language more clear. It is also clear by the language that only what is specified as part of the super priority lien can comprise the super priority lien. The additional language defining the super priority lien provides for costs that are *incurred* by the association foreclosing the lien. This is further evidence that the super priority lien does not and never did consist of interest, fines, penalties or late charges. These charges are not incurred by the association and they should not be part of any super priority lien.

The Nevada Legislature had the opportunity to change NRS 116.3116 in 2009 and 2011 to conform to the Uniform Act. It chose not to. While the revisions under the

Uniform Act may make sense to some and they may be adopted in other jurisdictions, the fact of the matter is, Nevada has not adopted those changes. The changes to the Uniform Act cannot be insinuated into the language of NRS 116.3116. Based on the plain language of NRS 116.3116, legislative intent, and the comments to the Uniform Act, the Division concludes that the super priority lien is limited to expenses stemming from NRS 116.310312 and assessments as reflected in the association's budget for the immediately preceding 9 months from institution of an action to enforce the association's lien.

IV. "ACTION" AS USED IN NRS 116.3116 DOES NOT REQUIRE A CIVIL ACTION ON THE PART OF THE ASSOCIATION.

NRS 116.3116(2) provides that the super priority lien pertaining to assessments consists of those assessments "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116 requires that the association take action to enforce its lien in order to determine the immediately preceding 9 months of assessments. The question presented is whether this action must be a civil action.

During the Senate Committee on Judiciary hearing on May 8, 2009, the Chair of the Committee, Terry Care, stated with reference to AB 204:

> One thing that bothers me about section 2 is the duty of the association to enforce the liens, but I understand the argument with the economy and the high rate of delinquencies not only to mortgage payments but monthly assessments. Bill Uffelman, speaking for the Nevada Bankers Association, broke it down to a 210-day scheme that went into the current law of six months. Even though you asked for two years, I looked at nine months, thinking the association has a duty to move on these delinquencies.

NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. This process is started by the mailing of a notice of delinquent

assessment as provided in NRS 116.31162(1)(a). At that point, the immediately preceding 9 months of assessments based on the association's budget determine the amount of the super priority lien. The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2). The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2). Associations should make the delinquent assessment known to the first security holder in an effort to receive the super priority lien amount from them as timely as possible.

ADVISORY CONCLUSION:

An association's lien consists of assessments, construction penalties, and fines. Unless the association's declaration provides otherwise, the association's lien also includes all penalties, fees, charges, late charges, fines and interest pursuant to NRS 116.3102(1)(j) through (n). While charges for late payment of assessments are part of the association's lien, "costs of collecting" as defined by NRS 116.310313, are not. "Costs of collecting" defined by NRS 116.310313 includes costs of collecting any *obligation*, not just assessments. Costs of collecting are not merely a charge for a late payment of assessments. Since costs of collecting are not part of the association's lien in NRS 116.3116(1), they cannot be part of the super priority lien detailed in subsection (2).

The super priority lien consists of two components. By virtue of the detail provided by the statute, the super priority lien applies to the charges incurred under NRS 116.310312 and up to 9 months of assessments as reflected in the association's regular budget. The Nevada Legislature has not adopted changes to NRS 116.3116 that were made to the Uniform Act in 2008 despite multiple opportunities to do so. In fact, the Legislative intent seems rather clear with Assemblywoman Spiegel's comments to A.B. 204 that changed 6 months of assessments to 9 months. Assemblywoman Spiegel stated that she "carefully put this bill together to make sure it did not include any

assessments for penalties, fines or late fees." This is consistent with the comments to the Uniform Act stating the priority is for assessments based on the periodic budget. In other words, when the super priority lien language refers to 9 months of assessments, assessments are the only component. Just as when the language refers to charges pursuant to NRS 116.310312, those charges are the only component. Not in either case can you substitute other portions of the entire lien and make it superior to a first security interest.

Associations need to evaluate their collection policies in a manner that makes sense for the recovery of unpaid assessments. Associations need to consider the foreclosure of the first security interest and the chances that they may not be paid back for the costs of collection. Associations may recover costs of collecting unpaid assessments if there are proceeds from the association's foreclosure.[14] But costs of collecting are not a lien under NRS 116.310313 or NRS 116.3116(1); they are the personal liability of the unit owner.

Perhaps an effective approach for an association is to start with foreclosure of the assessment lien after a nine month assessment delinquency or sooner if the association receives a foreclosure notice from the first security interest holder. The association will always want to enforce its lien for assessments to trigger the super priority lien. This can be accomplished by starting the foreclosure process. The association can use the super priority lien to force the first security interest holder to pay that amount. The association should incur only the expense it believes is necessary to receive payment of assessments. If the first security interest holder does not foreclose, the association will maintain its assessment lien consisting of assessments, late charges, and interest. If a loan modification or short sale is worked out with the owner's lender, the association is better off limiting its expenses and more likely to recover the assessments. Adding unnecessary costs of collection – especially after a short period of delinquency – can

[14] NRS 116.31164.

make it all the more impossible for the owner to come current or for a short sale to close. This situation does not benefit the association or its members.

EXHIBIT "4"

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN,

Respondents,

AND

PREM DEFERRED TRUST; ELSINORE, LLC; MONTESA, LLC; KING FUTTS PFM, LLC; HIGHER GROUND, LLC; on behalf of themselves and as representatives of the class herein defined,

Plaintiffs/Real Parties in Interest.

Supreme Court No.:

District Court No.: A-11-648835-B

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

Petitioner Southern Highlands Community Association (the "Association"), by and through its attorneys of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, hereby seeks a writ of prohibition or alternatively, mandamus to preclude the District Court from proceeding where it lacks subject matter jurisdiction. In the underlying action, the Real Parties in Interest (the "Real Parties") aver that the Association violated the "super priority lien" formula set forth in NRS 116.3116(2) when the Association allegedly overcharged them for delinquent assessments and related fees that the Real Parties paid to remove the Association's liens on their respective properties. Given that all but one of the Real Parties did not first comply with NRS 38.310, the Association moved to dismiss all claims that were not previously submitted to the Nevada Real Estate Division ("NRED") mediation/arbitration program. (1 Petitioner's Appendix ("P. App.") 35-41)

Despite NRS 38.310's express limitation on the District Court's jurisdiction, the District Court says that it has jurisdiction over all of the Real Parties' claims concerning the "interpretation and enforcement of NRS 116.3116(2)". (2 P. App. 393) The District Court has now compounded this error by certifying a class consisting of all "owners or former owners" who obtained title to real property located within the Southern Highlands Community (the "Community") via a foreclosure auction (the "Class"), irrespective of whether they previously arbitrated or mediated, pursuant to NRS Chap. 38, any dispute with the Association. (4 P. App. 937-42) Not only does the District Court part ways with (at least) five (5) of its brethren, but the District Court's position becomes even more awry when juxtaposed with the recently published case of *State of Nevada Dept. of Bus. and Indus., Fin. Inst. Div. v. Nevada Ass'n Servs., Inc., et al.*, -- P.3d --, 128 Nev. Adv. Op. 34, 2012 WL 3127275, *4 (Nev. Aug. 2, 2012) ("*NAS*"), wherein the Court determined that NRED and the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") are "responsible for regulating and administering [NRS Chap. 116]."

In short, every one of these considerations counsels for the Court to intervene here. With all due respect, the District Court's decision to retain those claims that have not been submitted to or arbitrated/mediated with NRED is beyond the bounds of its jurisdiction. A writ of prohibition or alternatively, mandamus should issue.

DATED this 19th day of October, 2012.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

A. Does the District Court lack subject matter jurisdiction to adjudicate any claims involving the interpretation and administration of NRS 116.3116(2), when such claims have not first been submitted to or arbitrated/mediated with NRED?

B. In light of the sharp disagreement amongst certain judges in the Eighth Judicial District Court over the answer to Issue A, do judicial economy and sound judicial administration warrant the issuance of an extraordinary writ?

II. RELIEF SOUGHT

The Association seeks a writ of prohibition or alternatively, mandamus directing the District Court to dismiss any claims brought by the Real Parties that have not first been submitted to or arbitrated/mediated with NRED, and clarifying unsettled law on whether claims concerning NRS 116.3116(2) are exempt from NRS 38.310 requirements.

III. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

A. The Original Plaintiff Brings Its Claims With NRED.

At its heart, this case concerns a dispute over the interpretation and enforcement of the "super priority lien" permitted by NRS 116.3116(2). Implicitly recognizing that such a dispute must first be arbitrated or mediated with NRED, the orginal plaintiff in the underlying action, Prem Deferred Trust ("PDT"), filed a non-binding arbitration claim against the Association with NRED (ADR 11-35). (2 P. App. 391) Citing NRS 116.3116(2), PDT maintained that it was overcharged past due assessments on two properties it (allegedly) acquired at foreclosure auctions, both located in the Community.[1] (*Id.*) PDT also alleged that numerous similarly

[1] The Community is a master planned residential development in Las Vegas, Nevada. All parcels in the Community are subject to the Association's covenants,

situated purchasers were overcharged assessments and, as such, PDT sought to prosecute ADR 11-35 as a class action arbitration. (*Id.*)

On July 27, 2011, the arbitrator granted the Association's motion to dismiss, holding that NRED did not have the authority or jurisdiction to adjudicate class actions. (*Id.*) Ultimately, the arbitrator issued a decision against the Association on the properties at issue in the arbitration. (*Id.*)

B. After PDT Complies With NRS 38.310 And Then Commences The Underlying Action, The District Court Permits All Other Real Parties To Do An End Run Around NRS 38.310.

On September 22, 2011, PDT commenced the underlying action by filing a Complaint seeking *de novo* review of the arbitrator's decision. (1 P. App. 1-22) PDT's Complaint purported to assert claims on behalf of PDT, as well as on behalf of a putative class. (*Id.*) Because any such class members would have to first arbitrate or mediate their disputes with NRED, the Association moved to dismiss those claims. (1 P. App. 35-41)

The District Court granted the Association's motion with respect to those claims that directly alleged or concerned a breach of the Association's CC&Rs; however, the District Court refused to dismiss those claims concerning the interpretation and enforcement of NRS 116.3116(2). (2 P. App. 387-93) Promoting form over substance, the District Court held that the claims concerning NRS 116.3116(2) did not relate to the "application, enforcement or interpretation" of the Association's CC&Rs, and therefore, such claims were not required to be arbitrated or mediated pursuant to NRS 38.310. (*Id.*) The District Court permitted PDT to file an amended complaint to reflect its ruling. (*Id.*)

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conditions, and restrictions, the amendments thereto ("CC&Rs"), and a collection policy. The Association levies base assessments against each parcel in the Community in the amount of $55.00 per month. (1 P. App. 18-19)

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On January 31, 2012, PDT filed its Amended Complaint, which again suffered from serious defects. (2 P. App. 369-86) The Association filed yet another motion to dismiss. (2 P. App. 394-445) All but conceding the merits of the Association's motion, PDT sought leave to further amend its Amended Complaint to add, as plaintiffs, Real Parties Elsinore, LLC ("Elsinore), Montesa, LLC ("Montesa"), King Futts PFM, LLC ("King Futts") and Higher Ground, LLC ("Higher Ground"), which the District Court granted. (3 P. App. 612-41)

On May 10, 2012, PDT, along with the other newly named Real Parties, filed a Second Amended Complaint on behalf of themselves and a putative class. (3 P. App. 713-39) Yet, only PDT had complied with NRS Chap. 38 by submitting its claim to arbitration with NRED. Accordingly, and for a third time, the Association moved to dismiss the Real Parties' operative pleading. (3 P. App. 740-50; 4 P. App. 751-59) The District Court granted the motion in part by dismissing the Real Parties' negligence-based claims. (4 P. App. 903-904) The District Court again declined to dismiss the claims concerning NRS 116.3116(2). (*Id.*)

Importantly, prior to being added as named plaintiffs, Higher Ground, PDT, Elsinore, King Futts, and Montesa had been actively arbitrating claims against the Association, and hundreds of other HOAs, in an arbitration styled *Higher Ground, et al. v. Adagio Homes, et al.*, with NRED (ADR 11-90). Once these entities recognized that the District Court was favorable to their position, they voluntarily dismissed their claims against the Association in ADR 11-90, and are presumably still moving forward with arbitrating against other HOAs. (5 P. App. 1083)

C. The District Court Certifies A Class Consisting Of Parties That Have Not Submitted Their Claims To Arbitration Or Mediation With NRED.

The same day that PDT filed its defective Amended Complaint, PDT filed a Motion for Class Certification ("Certification Motion"), which the Association opposed. (2 P. App. 275-95) However, in light of the faulty pleadings filed by the

Real Parties, and the series of motions to dismiss filed as a result, the hearing on PDT's Certification Motion was postponed and then re-noticed by the Real Parties for September 11, 2012. The District Court granted PDT's Certification Motion and entered an order certifying the Class, thereby greatly enlarging the size of the underlying action and underscoring the need and urgency for the Court's intervention. (4 P. App. 937-42)

IV. REASONS TO GRANT THE WRIT

A. Standard For Obtaining A Writ.

Because litigation can impose a heavy toll on private parties, as well as public resources, the Court has long recognized that writs of prohibition may be issued "to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court." *Green v. Eighth Jud. Dist. Ct.*, 115 Nev. 391, 393, 990 P.2d 184, 185 (1999); *see also State v. Eighth Jud. Dist. Ct.*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) (explaining that Court may entertain writs when "no factual dispute exists and the district court is obligated to dismiss an action"); *Dahya v. Second Jud. Dist. Ct.*, 117 Nev. 208, 216, 19 P.3d 239, 244 (2001) (issuing writ because service of process was not effected and district court lacked jurisdiction). The justification for this extraordinary intervention is obvious: when a district court proceeds in the absence of jurisdiction, an appeal after-the-fact is not a plain, speedy or adequate remedy. *See, e.g.*, NRS 34.330.

Furthermore, while the Court will not normally hear petitions challenging a denial of a motion to dismiss, it will do so when "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law." *Buckwalter v. Eighth Jud. Dist. Ct.*, 126 Nev. Adv. Op. 21, 234 P.3d 920, 921 (2010). Within this sphere, a writ of mandamus may be issued to provide clarity on an important issue of law. *See Winkle v. Foster*, 127 Nev. Adv. Op. 42, 269 P.3d 898, 899 (2011). When this occurs, any failure by a petitioner to meet all of the

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prerequisites for writ relief may be overlooked in favor of "considerations of public policy, sound judicial economy, and administration." *See City of N. Las Vegas v. Eighth Jud. Dist. Ct.*, 122 Nev. 1197, 1204, 147 P.3d 1109, 1114 (2006). Ultimately, the decision whether to issue a writ lies within the broad discretion of the Court. *See D. R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007).

In sum, when a district court erroneously exercises jurisdiction over a dispute or when principles of judicial economy are at stake, the Court has recognized that extraordinary writs may issue. Both are present here.[2]

B. Unless A Party First Complies With NRS 38.310, The District Court Lacks Subject Matter Jurisdiction Over The Party's Claims Concerning The Interpretation And Enforcement NRS 116.3116(2).

To begin, a writ should issue because, respectfully, the District Court's interpretation of NRS 38.310 is erroneous. The Court "reviews de novo a district court's interpretation of a statute, even when the issue is raised in a petition for extraordinary writ relief." *D.R. Horton*, 168 P.3d at 738. When doing so, if the language of the statute is clear and unambiguous, the Court's analysis ends there. *In re Parental Rights as to S.M.M.D.*, 128 Nev. Adv. Op. 2, 272 P.3d 126, 132 (2012).

NRS 38.310 is clear and unambiguous. *See Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. 290, 295, 183 P.3d 895, 899 (2008). NRS 38.310 requires that all claims related to the interpretation, application, and enforcement of CC&Rs must first be submitted to NRED for arbitration or mediation:

1. ***No civil action*** based upon a claim ***relating to***:

[2] The District Court's decision to proceed where it lacks subject matter jurisdiction establishes the level of urgency and need for immediate attention required for the issuance of a writ and, thus, will be addressed herein. The Association is not, however, waiving or conceding by omission any other arguments that justify dismissal of the Real Parties' claims and/or warrant the denial of the Real Parties' Certification Motion. Rather, the Association reserves the right and ability to raise those assignments of error at a later date, should the underlying action proceed to final judgment and then be appealed to the Court.

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(a) ***The interpretation, application or enforcement of any covenants, conditions or restrictions*** applicable to residential property on any bylaws, rules or regulations adopted by an association; or

(b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property, ***may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive. . . .***

2. ***A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.***

Id. (emphasis added).

NRS 38.310 embodies Nevada's strong public policy favoring arbitration of disputes involving CC&Rs.[3] *See Hamm*, 183 P.3d at 902. To foster this policy, the Court broadly applies the language of the statute, and strictly enforces the arbitration/mediation requirements. *Id.* at 899-903.

The Court's holding in *Hamm* guides the present debate. In *Hamm*, plaintiffs owned a parcel subject to a HOA, and after they failed to pay the HOA's assessments, the HOA recorded a lien on the parcel. *See Hamm*, 183 P.3d at 898-99. Shortly thereafter, plaintiffs, without submitting their claims to the NRED arbitration/mediation program, filed a complaint in district court seeking, among other things, a release of the lien and declaratory relief. *Id.* The district court dismissed the matter based on, among other things, plaintiffs' failure to comply with NRS 38.310. *Id.*

On appeal, the Court unanimously upheld the district court's decision, specifically stating that "resolving the merits of [a homeowner's] complaint would

[3] When the Legislature enacted NRS 38.310 (then Assembly Bill 152 ("AB 152")), Assemblyman Schneider, who introduced the bill, testified that it was an attempt to limit the strain on the judiciary and provide an efficient, affordable forum to resolve the numerous disputes that arise between residents and HOAs. *See Minutes of the S. Comm. on Judiciary*, 1995 Leg. 68th Sess. 5 (Nev. 1995). Specifically, Assemblyman Schneider stated that AB 152 was designed to have "any problems between residents of the community or the residents and the board... go to arbitration or mediation, rather than court." *Id.*

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require the district court to interpret the CC&Rs' meaning to determine whether, under that meaning, [the HOA's] assessment was proper." *Id.* at 900. The Court reasoned that a district court must begin its analysis by determining whether the HOA elected to collect assessments, which requires an examination of the relevant CC&Rs. *Id.*; *see also* NRS 38.300.

Here, the determinations the District Court must make mirror those in *Hamm*. Regardless of the label given to the Real Parties' claims for relief, the District Court must ultimately determine the nature and extent of the Association's assessments, which necessarily requires the District Court to look to the Association's CC&Rs. Simply put, NRS 116.3116(2) provides the formula for determining the limits of the "super priority lien". A fact finder must then look to the CC&Rs to provide the values to plug into this formula in order to ascertain the proper amount of the lien. As a result, the District Court does not have jurisdiction to hear any of the Real Parties' claims that have not been arbitrated or mediated pursuant to NRS 38.310—all of them except those of PDT.

Furthermore, the Court's recent decision in *NAS* underscores the fact that NRED has the authority and, indeed, the right to interpret and administer NRS Chap. 116. In *NAS*, the Court determined that the CCICCH and NRED "are responsible for regulating and administering [NRS Chap. 116.]." *NAS*, at *4; *see also* NRS 116.615(1). The Court then concluded that "***[b]ased on a plain, harmonized reading of these statutes, the responsibility of determining which fees may be charged, the maximum amount of such fees, and whether they maintain a priority rests with the Real Estate Division and the CCICCH.***" *Id.* at *4 (emphasis added). As a result, the Court affirmed the district court's order granting a preliminary injunction. *Id.* at *5.

In sum, if NRS 38.310 and NRS Chap. 116 are to be harmonized, and consonant with the Court's decision in *NAS*, the Real Parties (including any member of the Class) must first give NRED the opportunity, through an arbitration or

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otherwise, to "interpret and enforce" NRS 116.3116(2). Until then, the District Court lacks subject matter jurisdiction over their claims. The District Court's refusal to dismiss those claims warrants the issuance of a writ by the Court.

C. The Unsettled And Significant Dispute Over The Law Warrants The Issuance Of An Extraordinary Writ.

There is yet another, equally compelling, reason why a writ should issue. In determining whether the Court will issue an extraordinary writ, judicial economy is the primary concern. *See State*, 42 P.3d at 238. Judicial economy is not simple judicial efficiency, but rather is the strategic use of the Court's powers in situations where there is an urgency and strong necessity for preventing a miscarriage of justice. *See State v. Babayan*, 106 Nev 155, 174, 787 P.2d 805, 819 (1990).

When there is no principled reason to treat similar parties differently and the difference will result in a miscarriage of justice, there is an urgency and strong necessity for extraordinary relief. *Id.*, 787 P.2d at 819. For example, when co-defendants are subject to divergent rulings on the same issue, the situation is sufficiently urgent to warrant extraordinary relief. *Id.* This principle extends beyond co-defendants in the same case to "large community-wide" litigations. *See D. R. Horton,* 168 P.3d at 737. That is, a fundamental disagreement on the interpretation of a statute is not only important to the parties involved, but to all similarly situated entities in the community. *Id.*

Here, the Real Parties cannot seriously dispute that the Association is being subjected to inconsistent rulings based on the district courts' divergent treatment of claims concerning NRS 116.3116(2). On one hand, the Association is aware of two (2) judges in the Eighth Judicial District Court, including the District Court, who have held that claims for violation of NRS 116.3116(2) are exempt from the requirements of NRS 38.310 because, according to these courts, such claims do not relate to the application, enforcement, or interpretation of CC&Rs. (4 P. App. 975) Once these district courts have determined that they have jurisdiction, they grant

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class certification, all to the prejudice of the HOAs and the homeowners that actually live in the communities.

On the other hand, five (5) different judges in the Eighth Judicial District Court, and one (1) federal court judge[4] have held the exact opposite in cases involving one or more of the Real Parties. (4 P. App. 977-1000; 5 P. App. 1000-06) Those courts have found that they do not have subject matter jurisdiction to hear any NRS 116.3116(2) claims until *after* such claims have been arbitrated or mediated with NRED. (*Id.*) As a result, some HOAs are forced to defend against class action claims while others are not, for no reason other than the particular judge's view of NRS 38.310. Because of the prejudicial effect and disparate impact of the District Court's rulings, the Court should entertain this Petition and then take the next step of issuing a writ. A decisive ruling by the Court will provide clarification on the applicability of NRS 38.310 to claims concerning the interpretation and enforcement of NRS 116.3116(2), and will promote considerations of public policy and judicial economy.

V. CONCLUSION

For the foregoing reasons, the Association respectfully requests that the Court issue a writ of prohibition or alternatively, mandamus as set forth above.

DATED this 19th day of October, 2012.

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By: _____

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[4] *See BAC Home Loans Servicing, LP v. Stonefield II Homeowners Ass'n.*, No. 2:11-CV-167 JCM (RJJ), 2011 WL 2976814, at *3 (D. Nev. 2011).

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Writ of Prohibition or Alternatively, Mandamus ("this Petition") complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

2. I further certify that this Petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this Petition exempted by NRAP 32(a)(7)(C), it does not exceed eleven (11) pages.

3. Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in a brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of October, 2012.

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By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1), I certify that on the 19th day of October, 2012, the foregoing **PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** was served to the following:

Via Hand Delivery
James R. Adams, Esq.
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Via U.S. Mail
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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN,

Respondents,

AND

PREM DEFERRED TRUST; ELSINORE, LLC; MONTESA, LLC; KING FUTTS PFM, LLC; HIGHER GROUND, LLC; on behalf of themselves and as representatives of the class herein defined,

Plaintiffs/Real Parties in Interest.

Supreme Court No.:

District Court No.: A-11-648835-B

VERIFICATION OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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STATE OF NEVADA)
):ss
COUNTY OF CLARK)

I, TAMARA BEATTY PETERSON, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice law in the State of Nevada. I am a member of the law firm of Brownstein Hyatt Farber Schreck, LLP, and an attorney of record for Petitioner, Southern Highland Community Association, in the above captioned matter. I make this Affidavit as verification of the Petition for Writ of Prohibition Or Alternatively, Mandamus ("Petition") filed concurrently herewith. I am over the age of eighteen (18) years, and am competent to testify to the matters stated herein.

2. I make this Affidavit pursuant to NRS 15.010 and 34.030, as well as *Thompson v. First Judicial Dist. Ct.*, 100 Nev. 352, 353 n.1, 683 P.2d 17, 18 n.1 (1984). The Petition is being verified by me as Petitioner's counsel because the facts upon which

the Petition is based are within my personal knowledge and concern proceedings in which I was involved before the Eighth Judicial District Court and before NRED in ADR 11-90.

3. I have participated in the drafting and reviewing of the Petition and know the contents thereof. To the best of my knowledge, the Petition and the facts contained therein are true and correct, except those facts stated on information and belief of which I believe to be true.

4. I declare under penalty and perjury that the foregoing is true and correct.

FURTHERMORE, Affiant sayeth naught.

TAMARA BEATTY PETERSON, ESQ.

SUBSCRIBED AND SWORN to
before me this 19th day of October, 2012

NOTARY PUBLIC in and for said
County and State

Notary Public - State of Nevada
County of Clark
ERIN L. PARCELLS
My Appointment Expires
March 14, 2014
No: 08-104446-1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA ASSOCIATION SERVICES, INC.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN,

Respondents,

AND

ELSINORE, LLC, on behalf of itself and as representative of the class defined herein; PECCOLE RANCH COMMUNITY ASSOCIATION; and G.J.L. INCORPORATED,

Real Parties in Interest.

Supreme Court Case No.:

District Court Case No. A-12-658044-C

PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS

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EXHIBIT "5"

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA ASSOCIATION SERVICES, INC.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN,

Respondents,

AND

ELSINORE, LLC, on behalf of itself and as representative of the class defined herein; PECCOLE RANCH COMMUNITY ASSOCIATION; and G.J.L. INCORPORATED,

Real Parties in Interest.

Supreme Ct. Case No.:

District Ct. Case No.: A-12-658044-C

PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS

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Petitioner Nevada Association Services, Inc. ("NAS"), by and through its counsel of record, the law firm of Holland & Hart, LLP, hereby seeks a writ of prohibition or, alternatively, mandamus in the above referenced matter. In the underlying action, Real Party in Interest Elsinore, LLC ("Elsinore") and Peccole Ranch Community Association (the "Association") dispute the "super priority lien" formula set forth in NRS 116.3116(2). Elsinore also claims that the Association overcharged for delinquent assessments and related fees that Elsinore and a purported "Class" allegedly paid to remove association liens on their respective properties.

NAS seeks writ relief based upon the following:

1. The district court lacks subject matter jurisdiction because the purported "Class" failed to comply with NRS 38.310; and

2. Once the district court determined to preside over a case in which it had no jurisdiction, it refused to apply the Voluntary Payment Doctrine, a black letter rule that has been the law in the State of Nevada for 125 years. Application of this rule would have precluded an award of damages for alleged "overpayments" to HOAs for years worth of transactions in which no one objected that they were being overcharged.

Failure by the lower court to apply black letter law in both instances will now force the parties to adjudicate hundreds of class action claims unnecessarily, where the lower court has no jurisdiction, and where money damages plainly cannot be awarded as a matter of law. In addition, the Eighth Judicial District Court is being inundated with similar class action claims—filed by the same lawyers—against numerous different HOAs. Failure by this Court to intervene will likely result in other district courts needlessly adjudicating similar complex cases, and will force those parties to needlessly conduct discovery and trial on class action claims involving *tens of thousands* of class members in numerous district court cases. As such, this writ should be granted because an "important issue of law needs clarification and considerations of sound judicial economy and administration" strongly favor such a review. *See, e.g., International Game Tech., Inc. v. District Ct. ex rel. County of Washoe,* 124 Nev. 193, 179 P.3d 556 (Nev. 2008).

Despite NRS 38.310's express limitation on the lower court's jurisdiction, the lower court took jurisdiction over all of the Real Parties' claims concerning the interpretation and enforcement of NRS 116.3116(2). The lower court compounded this error by certifying a class and concluding, before any evidence was presented or due process given, that "damages are straightforward and should be easy to calculate in this case...." V at 918:23-24. Not only does the lower court part ways with (at least) five (5) of its brethren, but the lower court's position becomes even more suspect when juxtaposed with the recently published case of *State v. Nevada*

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Ass'n Servs., Inc., 128 Nev. Adv. Op. 34, — P.3d —, 2012 WL 3127275, *4 (Aug. 2, 2012), wherein this Court determined that the Commission for Common Interest Communities and Condominium Hotels (the "Commission") is "solely responsible for determining the type and amount of fees that may be collected by associations" and the fact that the Commission issued an Advisory Opinion that wholly disagrees with the lower court's ruling. VI 1250-63.

Then, after accepting jurisdiction over this case, the lower court refused to apply the Voluntary Payment Doctrine, a black letter rule of law that is more than 125 years old in the State of Nevada. In doing so, the lower court affirmatively found and concluded—without a single affidavit or other evidence—that payments by Elsinore and the class members were made under "duress." At the same time, the lower court concluded (again without any evidence) that the remedy expressly designated by the Nevada Legislature (participation in mediation or arbitration before the Nevada Real Estate Division) was "not a reasonable alternative" in the event of an HOA lien dispute. X at 2109:13. In making this decision, the lower court refused to give effect, and essentially overruled, NRS 38.310 and this Court's binding decision in *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 183 P.3d 895 (2008). In the process, the lower court totally abandoned the most basic evidentiary burden shifting standards mandated by NRCP 56.

Every one of these considerations counsels for the Court to intervene here. With all due respect, the lower court's decision to retain those claims that were not submitted to or arbitrated/mediated before the Nevada Real Estate Division (the "NRED") is beyond the bounds of its jurisdiction. And, once it did accept jurisdiction over this case, the lower court refused to give force or effect to the Voluntary Payment Doctrine, NRCP 56, and this Court's decision in *Hamm*. A writ of prohibition or alternative, mandamus, must issue.

///

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This Petition is related in part to writ petitions in Nevada Supreme Court Case Nos. 61940 and 62587, which have been briefed and are currently being reviewed by the Court.

DATED this 6th day of March, 2013.

Patrick J. Reilly, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

A. Does the lower court have jurisdiction to adjudicate any claims involving the interpretation and administration of NRS 116.3116(2) when such claims have not first been submitted to or arbitrated/mediated with the NRED?

B. Does the lower court's refusal to apply black letter law involving the Voluntary Payment Doctrine, the *Hamm* decision, and NRCP 56's mandatory evidentiary rules justify the issuance of an extraordinary writ?

C. In light of sharp disagreement amongst certain judges in the Eighth Judicial District Court over the answer to Issue A, and in light of the lower court's refusal to apply this Court's binding authority as referenced in Issue B, do judicial economy and sound judicial administration warrant the issuance of an extraordinary writ?

II. RELIEF SOUGHT

NAS seeks a writ of prohibition or, alternatively, mandamus directing the lower court to (a) dismiss any claims brought by the Class that have not first been

arbitrated or mediated with the NRED, and clarify unsettled law on whether claims concerning NRS 116.3116(2) are exempt from NRS 38.310 requirements; and (b) grant summary judgment on all money damage claims in which parties seek reimbursement for alleged overpayments to remove association liens over the years.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background of the "Super-Priority Lien" Dispute.

At its heart, this case concerns a dispute over the interpretation and enforcement of "super-priority liens" created by NRS 116.3116(2) and covenants, conditions, and restrictions ("CC&Rs") of applicable associations. Since at least 1991, common interest associations have held a statutory lien on unpaid assessments that enjoys a priority superior to even the first deed of trust holder in the event of a foreclosure by the first deed of trust. For nearly twenty years, this "super-priority lien" was universally understood (and indeed enforced as such by courts) to mean that, in the event of a foreclosure by the holder of a first deed of trust, the association held a surviving residual lien on the equivalent of nine months[1] of unpaid assessments, ***plus*** reasonable "costs of collecting" as provided by NRS 116.310313. Since approximately 2009, with the explosion of foreclosures in the State of Nevada, certain real estate "flippers" who purchase real property at these foreclosure sales have taken the position that the "super-priority lien" in NRS 116.3116(2) is capped at "nine times monthly assessments" and no more.

As there is presently no Nevada Supreme Court opinion defining NRS 116.3116(2), homeowners associations and the Nevada real estate market have been paralyzed by numerous NRED and court disputes concerning ***the amount of the residual lien that exists after a foreclosure by the first deed of trust holder.***

[1] NRS 116.3116 originally provided for a super-priority lien period of six (6) months. It was extended to nine (9) months as a result of a legislative amendment enacted in 2009.

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B. The Elsinore Claim.

The Elsinore claim involved a single parcel of real property located at 2209 Storkspur Way, Las Vegas, Nevada, otherwise identified as Clark County Assessor Parcel No. 163-06-413-007 (the "Property"). VII 1197-1200. The unit owner defaulted on his obligations to the Association, and a Notice of Delinquent Assessment Lien was recorded thereafter on behalf of the Association. VII 1202-03. At a trustee's sale on September 8, 2008, Elsinore purchased the Property for $149,000.00. VII 1205-07. On September 30, 2008, the Association made a demand upon Elsinore for $2,580.70 for its HOA lien. I 12-35 at ¶ 18. Elsinore concedes that it paid this amount on October 6, 2008, just a few days after the demand was made, "[i]n order to clear title" on the Property. VII 1209. On October 10, 2008, in reliance upon the Elsinore payment, the Association executed and recorded a Release of Assessment Lien. VII 1211.

Significantly, at the time of Elsinore's payment, the Association had neither threatened nor scheduled its own foreclosure upon the residual super-priority lien. The existing lien was simply a residual lien that remained after foreclosure on the first deed of trust. Elsinore was well within its rights back in 2008 to commence a NRED arbitration or request mediation, but chose not to do so. Instead, Elsinore paid the amount demanded, and then waited four (4) years to commence the NRED arbitration that resulted in this litigation.

In December 2008, Elsinore "flipped" the Property, selling it to Hua Yu Liao and Qin Ni Liao for $225,000.00. VII 1213-16. In other words, in three short months, Elsinore made a gross profit of $76,000.00, reflecting an annualized investment return of 400%. *Id.*

C. NRED Arbitration and Mediation Between Elsinore and the Association.

Implicitly recognizing that such a dispute must first be arbitrated or mediated with the NRED, Elsinore commenced NRED Arbitration Number 12-30

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against the Association in early 2012. I 9. Thereafter, Elsinore and the Association agreed to participate in NRED mediation, which was unsuccessful. *Id.* At the time that the NRED arbitration and mediation took place, there was no "Class" that had been certified, and counsel for Elsinore had not been appointed as a class representative in accordance with NRCP 23. Only Elsinore and the Association participated in NRED mediation. *See id.*

D. Judge Silver Grants Summary Judgment and Certifies a Class.

The Association commenced the lower court action against Elsinore on March 12, 2012. I 4-11. The Complaint sought only declaratory relief—an interpretation of NRS 116.3116(2). The lower court action was assigned to Department XV—the Honorable Abbi Silver.

In response to the Complaint, Elsinore filed an "Answer and Class Action Counterclaim." I 12-35. In that document, Elsinore similarly sought declaratory relief in the form of an interpretation of NRS 116.3116. In addition, Elsinore, "on behalf of itself and as representatives of the class defined herein," sought money damages for alleged "improper demanding" of lien amounts over the years, as well as punitive damages for the Association's purported willful and material failure "to comply with Nevada Revised Statutes 116.3116(2)." *Id.* at 17:13-60.

The Association moved to dismiss the class action counterclaim on April 30, 2012. I 47-60. After full briefing and argument, Judge Silver denied the motion to dismiss. I 227-32. The legal reasoning underlying this decision was nothing short of shocking. First, the lower court concluded that claims involving the enforcement of a homeowners association lien under NRS Chapter 116 were somehow ***not*** related to the interpretation, application, and enforcement of the underlying CC&Rs. *Id.* at 231:1-3. Second, Judge Silver concluded the Association somehow "stipulated" to mediation of all "class" claims, even though a class had not been certified and counsel had not been appointed as a class

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representative at the time of the mediation. *Id.* at 231:4-8. In making this decision, the lower court completely ignored NRS 38.310 and this Court's binding decision in *Hamm*. The decision also defied common sense and logic, in that a "class" cannot possibly mediate a case before a "class" is certified, and counsel for Elsinore could not possibly have represented the "class" at mediation prior to their appointment as class counsel.

On June 19, 2012, Elsinore filed a "Motion for Class Certification and Motion for Approval of Class Notice and Notification Program" (the "Class Motion"). I 172-226. At that point in time, NAS and G.J.L. Incorporated ("GJL") still were not parties to the case and therefore had no notice or opportunity to object to class certification. The Association filed its opposition to class certification on July 23, 2012, noting *inter alia* that trial of claims concerning settlements and payments of separate liens upon individual parcels of real property would necessarily require separate discovery and separate trials. III 446-512.

At approximately the same time, the Association moved for partial summary judgment on its claim for declaratory relief concerning the interpretation of NRS 116.3116(2). Again, at this time, neither NAS nor GJL were parties to the lawsuit and therefore had no input as to the issues that were raised in said motion.

On September 17, 2012, Judge Silver granted summary judgment in part, concluding that NRS 116.3116 "supersedes" contrary provisions contained in the Association's covenants, conditions, and restrictions. IV 892:3-5. However, Judge Silver also concluded that the Association's "super-priority lien" of NRS 116.3116(2) was limited to "9 months of common expense assessments" and no more. *Id.*

Approximately one week later, Judge Silver granted class certification (the "Class Order"). V 916-20. In the Class Order, Judge Silver concluded without any evidence or due process that there were in fact "damages" for alleged "overpayments" for lien releases over the years and that "[t]he damages are

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straightforward and should be easy to calculate in this case, as the damages are any amount paid by the Class members that exceeds the amount of the Super Priority Lien as defined in the Court's Decision on the Plaintiff/Counter Defendant's Motion for Summary Judgment." *Id.* at 918:23-26. In the same order, Judge Silver granted leave to the Association to file a third party complaint against its collection agents, NAS and GJL. *Id.*

D. NAS's Entry Into the Case and the Voluntary Payment Doctrine.

The Association filed and served a Third Party Complaint against NAS and GJL. In response to the Third Party Complaint, NAS filed a Motion for Summary Judgment, and then an Amended Motion for Summary Judgment, as to all damage claims in the case based upon application of the Voluntary Payment Doctrine. VII 1379-1394; VII 1405-1421. At the same time, NAS requested a Business Court designation, and the case was transferred to Department XXIX, the Hon. Susan Scann. VII 1394-1396.

Under the Voluntary Payment Doctrine, "money voluntarily paid, with full knowledge of the facts, although no obligation to make such payment existed, cannot be recovered back." Randall v. County of Lyon, 20 Nev. 35, 14 P. 583 (1887). In its briefing and argument, NAS noted that Elsinore and every member of the class (based upon the allegations of the class action counterclaim) paid lien demands voluntarily without invoking their rights to NRED arbitration, as required by NRS 38.310 and Hamm.

The Association and GJL joined in NAS's Motion, which was only opposed by Elsinore and the Class. VII 1447-75. In Opposition and at oral argument, Elsinore and the Class conceded that the Voluntary Payment Doctrine was the law of the land in Nevada, but argued that the doctrine did not apply because they were all "coerced" into paying lien demands. *Id.*; X 1982-2071. In opposing summary judgment, however, Elsinore and the Class offered absolutely no evidence of coercion or duress. *Id.* In fact, they did not offer a single affidavit

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in support of their position. *Id.* ***Rather, Elsinore and the Class argued that the mere presence of a residual statutory lien after foreclosure by the first deed of trust, standing alone, created a form of "duress" that precluded application of the Voluntary Payment Doctrine.*** Mr. Adams argued:

> Those are statutory liens. Those cloud title to property. So we know there are liens. The case law says that where you have a lien on property, the payment is under—it's not just compulsion. It's coercion or duress. Business necessity.

X 2047:6-10. In addition, counsel conceded Elsinore and the members of the Class were not homeowners who resided in these properties; rather, counsel conceded that his clients were all real estate "flippers"—and thus sophisticated real estate investors. X 2019-71. Counsel further argued that his clients had developed a business model that involved the quick resale of their properties that in turn required quick removal of liens. X 2047. Rejecting the options of buying and holding property for a short period of time, or even leasing that property to renters, while they pursue the NRED arbitration that is required by NRS 38.310 and *Hamm*, counsel stated (again without any evidence) as follows:

> My clients are not in the business of living in houses. They're in the business of either encumbering them, lending money, taking them back, selling them, getting the money back to relend the property, or they're in the business of buying the properties and selling them as fast as they can, because when they get their money back, they can reinvest it again.
>
> So why should my client have to change their entire business model—and as a matter of fact, they can't be in the business they're in if they sit on a property for two years. It's just not economically feasible. We can't be in the business we're in. It's not a cost benefit analysis. It's do you want to be in business or don't you. This is why it's duress, business duress.

Id. at 2047:11-22.

In further support of their argument, Elsinore and the Class attacked NRED arbitration and mediation (even though Elsinore had previously invoked

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both remedies in this case) as "unreasonable" alternatives to payment. Elsinore and the Class took the position—again without a shred of evidence in the record—that NRED arbitration was not a viable remedy because it "takes too long" and is too expensive. X 1995-1998. Judge Scann ***voiced without hesitation her personal bias against NRED arbitration*** and stated as follows:

> I think—and this is my take on it from having practiced in this area is people pay these things because the cost of litigating them is so far beyond what the amount is and that this just continues and continues and continues. . . .

Id. at 2041:10-13.

On January 29, 2013, the lower court denied NAS's Amended Motion for Summary Judgment. X 2105-12. The lower court based its decision in part on a phantom finding of fact that Elsinore "paid the $2,649.90 lien claim to save their interest in the property," even though the Association had not threatened or scheduled a foreclosure sale, and even though Elsinore had offered absolutely no evidence in support of that conclusion. X 2109 at 5:2. The lower court also expressly based its decision on its predisposed belief—based on her own personal experiences as a practicing attorney prior to taking the bench—that NRED arbitration was "not reasonable" as a remedy. X 2109 at 5:2. Again, this decision completely refused to recognize the binding authority of NRS 38.310, this Court's decision in Hamm, and the most basic evidentiary requirements of NRCP 56.

IV. REASONS TO GRANT THE WRIT

A. Standard for Obtaining a Writ.

Because litigation can impose a heavy toll on private parties, as well as public resources, the Court has long recognized that writs of prohibition may be issued "to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court." Green v. District Ct., 115 Nev. 391, 393, 990 P.2d 184, 185 (1999); *see also* State v. District Ct., 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) (explaining that Court

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may entertain writs when "no factual dispute exists and the district court is obligated to dismiss an action"); Dahya v. District Ct., 117 Nev. 208, 216, 19 P.3d 239, 244 (2001) (issuing writ because service of process was not effected and district court lacked jurisdiction). The justification for extraordinary intervention is obvious: when a district court proceeds in the absence of jurisdiction, an appeal after-the-fact is not a plain, speedy, or adequate remedy at law. *See, e.g.,* NRS 34.330.

Furthermore, while the Court will not normally hear petitions challenging the denial of a dispositive motion, it will do so when "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law." Buckwalter v. District Ct., 126 Nev. Adv. Op. 21, 234 P.3d 920, 921 (2010). Within this sphere, a writ of mandamus may be issued to provide clarity to an important issue of law. Winkle v. Foster, 127 Nev. Adv. Op. 42, 269 P.3d 898, 899 (2011). When this occurs, any failure by a petitioner to meet all of the prerequisites for writ relief may be overlooked in favor of "considerations of public policy, sound judicial economy, and administration." City of N. Las Vegas v. District Ct., 122 Nev. 1197, 1204, 147 P.3d 1109, 1114 (2006). Ultimately, the decision whether to issue a writ lies within the broad discretion of the Court. D.R. Horton, Inc. v. District Ct., 123 Nev. 468, 475, 168 P.3d 731, 737 (2007).

In sum, when a district court erroneously exercises jurisdiction over a dispute, or when principles of judicial economy are at stake, the Court has recognized that extraordinary writs may issue. Both are present here.[2]

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[2] The lower court's decision to proceed where it lacks subject matter jurisdiction, and its refusal to apply black letter law regarding the Voluntary Payment Doctrine, Hamm, and NRCP 56, establishes the level of urgency and need for immediate attention required for the issuance of a writ and, thus, will be addressed herein. NAS, however, is not waiving or conceding by omission any other arguments that justify dismissal of the Real Parties' claims. Rather, NAS reserves the right and ability to raise those arguments of error at a later date, should the underlying action proceed to final judgment and then be appealed to the Court.

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B. Unless a Party First Complies with NRS 38.310, The District Court Lacks Subject Matter Jurisdiction Over The Party's Claims Concernign the Interpretation and Enforcement of NRS 116.3116(2).

To begin, a writ should issue because, respectfully, the lower court's interpretation of NRS 38.310 is erroneous. The Court reviews "de novo a district court's interpretation of a statute, even when the issue is raised in a petition for extraordinary writ relief." *D.R. Horton*, 123 Nev. at 476, 168 P.3d at 737. When doing so, if the language of the statute is clear and unambiguous, the Court's analysis ends there. *In re Parental Rights as to S.M.M.D.*, 128 Nev. Adv. Op. 2, 272 P.3d 126, 132 (2012).

NRS 38.310 is clear and unambiguous. *Hamm*, 124 Nev. at 295, 183 P.3d at 899. NRS 38.310 requires that ***all claims*** related to the interpretation, application, and enforcement of CC&Rs must first be submitted to the NRED for arbitration or mediation:

> 1. ***No civil action*** based upon a claim ***relating to***:
>
> (a) ***The interpretation, application or enforcement of any covenants, conditions or restrictions*** applicable to residential property or any bylaws, rules or regulations adopted by an association; or
>
> (b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,
>
> ***may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive.*** . . .
>
> 2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

NRS 38.310 (emphasis added). NRS 38.310 embodies Nevada's strong public policy favoring arbitration of disputes involving CC&Rs.[3] *Hamm*, 124 Nev. at

[3] When the Nevada Legislature enacted NRS 38.310 (then Assembly Bill 152 or "AB 152"), Assemblyman Schneider, who introduced the bill, testified that it was an attempt to limit the strain on the judiciary and provide an efficient, affordable forum to resolve the numerous disputes that arise between unit owners and HOAs. ***See*** *Minutes of the S. Comm. on Judiciary*,

299, 183 P.3d at 902. To foster this policy, the Court broadly applies the language of the statute, and strictly enforces arbitration and mediation requirements. 124 Nev. at 293-301, 183 P.3d at 899-903. There is no "class action exception" to NRS 38.310, which is not surprising, given that the law views real property and its attributes as "unique." *Hamm*, 124 Nev. at 297, 183 P.3d at 901.

This Court's binding holding in *Hamm* guides the present debate. In *Hamm*, the plaintiffs owned a parcel subject to CC&Rs, and after they failed to pay the HOA's assessments, the HOA recorded a lien on the parcel. *Hamm*, 124 Nev. at 293-96, 183 P.3d at 898-99. Shortly thereafter, plaintiffs, without submitting their claims to the NRED arbitration/mediation program, filed a complaint in district court seeking, among other things, a release of the lien and declaratory relief. *Id.* The district court dismissed the matter based on, among other things, plaintiffs' failure to comply with NRS 38.310. On appeal, this Court unanimously upheld the district court's decision, specifically stating that "resolving the merits of [a unit owner's] complaint would require the district court to interpret the CC&Rs' meaning to determine whether, under that meaning, [the HOA's] assessment was proper." 124 Nev. at 296, 183 P.3d at 900. This Court reasoned that a district court must begin its analysis by determining whether the HOA elected to collect assessments, which requires an examination of the relevant CC&Rs. *Id.*; ***see also*** NRS 38.300.

Notably, this Court has previously issued at least one writ of prohibition in an instance where a party failed to go through NRED arbitration/mediation and a district court refused to dismiss the case. In *Estrella Homeowners Ass'n v. District Ct.*, this Court (relying on *Hamm* and NRS 38.310) directed the district court to dismiss claims for money damages arising out of an association's alleged "failure to apply or enforce" the underlying CC&Rs.

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1995 Leg. 68th Sess. 5 (Nev. 1995). Specifically, Assemblyman Schneider stated that AB 152 was designed to have "any problems" between unit owners and HOAS "go to arbitration or mediation, rather than court."

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Estrella, NSC Case No. 53570, 2009 WL 3428489, at *1 (Oct. 8, 2009) (unpublished). While this case is unpublished, clearly this Court has concluded in the past that claims involving alleged violations of CC&Rs warrant writ relief. Tellingly, Elsinore's Answer and Class Action Counterclaim is rife with allegations of violations of the underlying CC&Rs as well as NRS 116.3116. I 12-35 e.g., at ¶¶ 26, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47(c), 47(e), 48, 54, 55, 56(f), 56(g), 63-69 (asserting a claim for "Breach of Contract/Governing Documents"), 70-75 (asserting a claim for "Breach of Implied Covenant of Good Faith and Fair Dealing"), 86, and 90. For some unexplained reason, Judge Silver completely ignored these allegations when refusing to dismiss the class claims.

Regardless of the label given by the Class claims, the lower court must ultimately determine the nature and extent of the Association's assessments, which necessarily requires the lower court to look at the underlying CC&Rs. The trier of fact must look to the CC&Rs in conjunction with NRS 116.3116 to provide the values to plug into this formula in order to ascertain the proper amount of the lien. All claims—regardless of whether they are founded in contract or statute—necessarily involve (and thus "relate to") the CC&Rs. As a result, the lower court does not have jurisdiction to hear any of the Real Parties' claims that have not been arbitrated or mediated pursuant to NRS 38.310. That includes all Class claims.

This Court's recent decision in *NAS* underscores the fact that the NRED has the responsibility to adminster NRS Chapter 116. 128 Nev. Adv. Op. 34, — P.3d —, 2012 WL 3127275, at *4. Part of this administrative duty is to provide for the very mediation and arbitration forum that the Nevada Legislature directed. Inexplicably, and contrary to NRS 38.310, *Hamm* and a number of other decisions, short shrift was given to this mandatory and binding statute and case law.

In sum, if NRS 38.310 and NRS Chapter 116 are to be harmonized, and consonant with the Court's decision in *NAS*, the Real Parties (including members of the Class) must first give the NRED the opportunity, through arbitration or

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mediation, to administer and enforce NRS 116.3116. Until then, the lower court lacks jurisdiction over those claims, and a writ should be issued by this Court.

C. The Lower Court Refused to Apply Binding Black Letter Case Law Requiring the Dismissal of Damage Claims.

It is one thing for a lower court to issue declaratory relief interpreting a statute. It is quite another to prejudge (without any evidence) that Class members are entitled to money damages in the form "refunds" for alleged "overpayments" when (1) the Class members are all sophisticated real estate investors; (2) who paid to have liens removed without challenging the amount demanded; and (3) who failed to avail themselves of NRED arbitration or mediation as required by law. Worse yet, the lower court determined that these class members should be entitled to damages for "overpayments" on a *post hoc* basis even though the alleged "overpayments" happened before this Court has given any guidance on the meaning of NRS 116.3116, and many lower courts and NRED arbitrators have previously ruled that NRS 116.3116(2) allows for the recovery of "nine times monthly assessments" plus reasonable collection fees and costs.[4] VI 1250-1366.[5]

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[4] Indeed, in 2010, the NRED adopted a regulation limiting the amount of collection fees and costs that could be recovered based upon the belief that said fees and costs were "part of" the super-priority lien and could be recovered. Obviously, the NRED would not have found a need to adopt such a regulation if these amounts were not lienable and not part of the super-priority lien in the first place.

[5] NAS is aware of the following favorable Nevada decisions and opinions: (1) On December 8, 2010, the Commission concluded that all reasonable costs of collecting survive foreclosure by a first deed of trust as part of the super-priority lien, even if the so-called "nine times monthly assessment" amount has been reached - *see* VI 1250-63; (2) Bank of America, N.A. v. Stonefield Homeowners Ass'n, NRED Arbitration No. 12-58 (Sept. 20, 2012) – *see* VI 1265-72; (3) Higher Ground, LLC v. Adagio Homeowners' Ass'n, NRED Case No. 11-90 (Mar. 28, 2012) - *see* VI 1274-78; (4) McAllester v. Silver State Condominium Owners' Ass'n, Inc., NRED Case No. 12-19 (June 15, 2012) - *see* VI 1278-1304; (5) McAllester v. Baker Place Condominium Ass'n, NRED Case No. 12-27 (April 20, 2012) – *see* VI 1306-44; (6) Yaffe v. Spanish Trail Homeowners Ass'n, NRED Case No. 09-35 (March 2, 2009) – *see* VI 1346-48; (7) Montessa, LLC v. Spring Mountain Ranch Master Ass'n, NRED Case No. 12-24 (Aug. 31, 2012) – *see* VI 1350-55; (8) JPMorgan Chase Bank, N.A. v. Countrywide Home Loans, Eighth Judicial District Court Case No. A-08-562678-C – *see* VI 1357-62; and (9) Elkhorn Community Ass'n v. Valenzuela, Eighth Judicial District Court Case No. A-10-607051-C – *see* VI 1364-66.

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This is the worst form of "gotcha" tort litigation. NRS 116.3116 was interpreted and applied one way uniformly in Nevada by the industry and in district courts for nearly two decades. Suddenly, Elsinore is challenging the interpretation of this statute. While they are welcome seek an interpretation of a statute on a going forward basis, it is plainly unfair and contrary to Nevada law to force the Association to "refund" the alleged "overpayments" dating years back that Elsinore and the Class paid without challenge at the time. Make no mistake, under NRS 38.310 and *Hamm*, Elsinore and the Class members had a viable remedy available to them—they simply elected not to invoke it, and instead paid the amounts demanded by the Association out of convenience so they could quickly "flip" their properties and maximize their profit.

Nevada has recognized and followed the Voluntary Payment Doctrine for 125 years. *Randall v. County of Lyon*, 20 Nev. 35, 14 P. 583 (1887). In *Randall*, the Lyon County Sheriff overpaid a jailer, and then later sought an offset for the monies that were erroneously paid. The district court granted the offset based on the overpayment, and the Nevada Supreme Court reversed. It stated:

> Respondent is not entitled to the offset allowed by the court. With a full knowledge of all the facts, and without any fraud or mistake, the commissioners, prior to the presentation of the claim for the services of a jailer, allowed a claim of $120.40 for services rendered by the plaintiff in arresting a prisoner that had escaped from the Lyon county jail and fled to California. This was a voluntary payment of money for services actually performed. ***The rule is well settled that money voluntarily paid, with full knowledge of all the facts, although no obligation to make such payment existed, cannot be recovered back.***

20 Nev. at 35, 14 P. at 584 (emphasis added).[6] The Voluntary Payment Doctrine often (though not exclusively) arises in tax cases, which are not unlike HOA

[6] It appears that the Voluntary Payment Doctrine was actually first applied in *Barnes v. Woodbury*, 17 Nev. 383, 30 P. 1068 (1883). Though the Court did not articulate the rule formally, it stated plainly that a voluntary tax payment made to the wrong assessing body could not be recovered. "If the taxes to be paid upon the latter assessment it is a mere voluntary

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assessments, and in such cases does so to "encourage stability and certainty for the taxing entity." Berrum v. Otto, 127 Nev. —, 255 P.3d 1269 (2011),[7] citing to City of Laredo v. South Texas Nat'l Bank, 775 S.W.2d 729, 731 (Tex. App. 1989); and Budget Rent-A-Car of Tulsa v. Tax Comm'n, 773 P.2d 736, 739 (Okla. 1989). Even when the payment is made expressly under protest, the Voluntary Payment Doctrine precludes a court from unwinding that transaction later on, so long as the payment was made "with full knowledge of all the facts." Bowman v. Boyd, 21 Nev. 281, 30 P. 823, 826 (1892).

In this case, it is undisputed (and is even alleged in Elsinore's Counterclaim) that Elsinore voluntarily paid Peccole Ranch's demand several days after receiving it. VII 1209; I 12-35 at ¶¶ 18-25. Elsinore ***did not*** challenge Peccole Ranch's demand. Elsinore ***did not*** file a lawsuit or a NRED demand for arbitration in 2008 seeking to clear title to the underlying property prior to payment. It simply paid the amount demanded first, shortly after it was demanded, with full knowledge of the facts, and then proceeded to "flip" the Property to Hua Yu Liao and Qin Ni Liao for $225,000.00, realizing ***a gross profit of $76,000.00 or an annualized investment return of 400%.*** Worst of all, Elsinore then ***waited***

(continued)
payment, and is no answer to a demand for payment upon the first....It was the business of the appellants to know whether their cattle had been assessed, in Solano county before their removal; and if so, such assessment and payment thereon would have been a complete, answer to the claim of Alameda county."

[7] This Court held that the Voluntary Payment Doctrine did not apply in Berrum "because of a judicial stay imposed in a pending appeal challenging a prior year's assessments" and because "typical administrative remedies to recover overpaid taxes [did] not apply where the Taxpayers were successful at all levels below." 127 Nev. —, 255 P.3d at 1270. Obviously, those facts are not at play here, and Elsinore and the Class have never suggested that they do. By their own admission, Elsinore (and the members of the class) had multiple remedies available to them prior to payment. They could have filed a NRED arbitration or mediated its claim seeking the removal of the HOA lien ***prior to payment.*** To the extent that Peccole Ranch had actually noticed a foreclosure of its own lien and set an imminent date for foreclosure, Elsinore (and any member of the class) could have gone directly to court to stop foreclosure and remove their lien ***prior to payment. See*** NRS 38.310 and Hamm, 124 Nev. at 301-02, 183 P.3d at 904 (requiring filing of non-binding arbitration prior to suit in cases such as this absent showing of imminent irreparable harm). There is nothing in the record to suggest that Elsinore or any class member actually did that. Rather, Elsinore and the members of the class ***knowingly paid first,*** and then sued years later.

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nearly 4 years—until 2012 to submit a NRED arbitration claim. ***See*** I 4-11 at ¶¶ 6-7 (noting Elsinore's filing of NRED claim number 12-30).

The Class is no different. The Counterclaim specifically defines the "class" as those who overpaid monies to remove Peccole Ranch liens that had remained after trustee's sales had taken place. I 12-35 at ¶¶ 35-43. There is nothing in the Counterclaim alleging (or in the lower court record proving) that the class members paid under duress or without benefit of the facts. When Elsinore and the Class members opposed summary judgment, not a single affidavit was submitted to the lower court contending that they had been forced to pay the Association's demands.

Indeed, in opposing summary judgment, ***Elsinore and the Class took the position that the mere presence of a residual HOA super priority lien on their properties, after foreclosure by the first deed of trust, necessarily and always creates "duress" upon the unit owner, even though the Association has taken absolutely no action to foreclose on the residual lien.*** VII 1447-75. And although there is no legal authority anywhere supporting such a proposition, and no evidence was submitted to support such a conclusion, the lower court concluded that the foregoing circumstances constituted "textbook duress" that precluded application of the Voluntary Payment Doctrine. X 2105-2112. Tellingly, the lower court could find no legal authority supporting the proposition that the mere existence of a residual lien—without an imminent threat of foreclosure—imposed "duress" upon a property owner.

Going even farther afield, and once again ignoring NRS 38.310 and *Hamm*, the lower court concluded that NRED arbitration and mediation is "not a reasonable alternative" to paying an association's demand "because it is neither quick nor inexpensive." *Id.* at 2109:13-14. Once again, there was no evidence in the record to support such a finding—just counsel's unsupported arguments and the lower court's predisposed disdain for NRED mediation and arbitration. To the

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contrary, the class representative—Elsinore—actually invoked NRED arbitration as a remedy in this case, nearly four years after paying the Association's demand. That being said, the lower court's orders effectively overruled *Hamm* and NRS 38.310.

Of course, the principal purpose of the Voluntary Payment Doctrine is to encourage certainty and stability in transactions. *Berrum*, 127 Nev. —, 255 P.3d at 1273 n.5. For years, NAS and the Association relied on the industry standard and practice, in which HOAs and their collection agencies were routinely allowed to collect fees and costs above and beyond Elsinore's narrow interpretation of NRS 116.3116(2) of "six times monthly assessments" (now "nine times"). *See District Cout Order in Korbel v. Spring Mountain Ranch*, VI 1223-1225; *see also* VI 1218-1222. And NAS and the Association were not alone in their reliance on *Korbel* and the industry standard. Even the federal government, namely the Federal Home Loan Mortgage Corporation ("FreddieMac"), relied on the *Korbel* case when it made payments to HOAs based upon similar demands:

> Pursuant to County District Court ruling in *Pursuant to the Clark County District Court's Interpretation of the statute (Korbel v. Spring Mountain Ranch Master Association)*, the amount may include 9 months of pre-foreclosure common area expenses, interest, late fees, and reasonable costs of collection.

VI 1367-78. In an economic environment where HOAs like Peccole Ranch are already struggling due to unit owner defaults and bank foreclosures, the lower court has effectively laid waste to years-worth of HOA budgets after the fact by ordering that Class members are entitled to retroactive refunds of what were voluntary payments.

D. The Unsettled and Significant Dispute Over The Law Warrants Issuance Of an Extraordinary Writ.

There is yet another, equally compelling reason why a writ should issue. In determining whether the Court will issue an extraordinary writ, judicial

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economy is the primary concern. *See* State, 42 P.3d at 238. Judicial economy is not simple judicial efficiency, but rather is the strategic use of the Court's powers in situations where there is urgency and strong necessity for preventing a miscarriage of justice. *See* State v. Babayan, 106 Nev. 155, 174, 787 P.2d 805, 819 (1990).

When there is no principled reason to treat similar parties differently and the difference will result in a miscarriage of justice, there is an urgency and strong necessity for extraordinary relief. Babayan, 106 Nev. at 173-74, 787 P.2d at 819. For example, when co-defendants are subject to divergent rulings on the same issue, the situation is sufficiently urgent to warrant extraordinary relief. Id. This principle extends beyond co-defendants in the same case to "large community-wide" litigations. D.R. Horton, 123 Nev. at 475-77, 168 P.3d at 737. That is, a fundamental disagreement on the interpretation of a statute is not only important to the parties involved, but to all similarly situated entities in the community. Id.

Here, the Real Parties cannot seriously dispute that the Association and NAS are being subjected to inconsistent rulings based on the lower court's divergent treatment of claims concerning NRS 116.3116. In this case, the lower court has concluded that the Class counterclaims are not subject to NRED mediation or arbitration. This decision contradicts at least five (5) different judges in the Eighth Judicial District Court, and two federal judges,[8] who have held the exact opposite in cases involving one or more of the Real Parties. VI 1250-1366. Those courts have found that they do not have subject matter jurisdiction to hear any NRS 116.3116 claims until ***after*** such claims have been arbitrated or mediated with the NRED. As a result, some HOAs and collection agencies are being forced to defend against class action claims while others are not, for no other reason that the particular judge's view of NRS 38.310. Because of the prejudicial effect and

[8] *See* BAC Home Loans Servicing, LP v. Stonefield II Homeowners Ass'n, U.S. District Court Case No. 2:11-CV-167-JCM (RJJ), 2011 WL 2976814, at *3 (D. Nev. 2011); and Taulli v. Rancho Nevada-Nevada Estates Homeowners' Ass'n, et al., U.S. District Court Case No. 2:11-CV-1760-KJD-VCF (D. Nev. June 8, 2012). I 1-3; I 156-160.

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disparate impact of the lower court's rulings, this Court should entertain this Petition and then take the next step of issuing a writ. A decisive ruling by this Court on the issues presented herein will provide great clarity on the applicability of NRS 38.310 and the Voluntary Payment Doctrine to claims concerning the interpretation and enforcement of NRS 116.3116, and will promote considerations of public policy and judicial economy.

Here, waiting to appeal a final judgment is not an adequate legal remedy. Understandably, writs of mandamus and certiorari are extraordinary remedies generally unavailable if the petitioner has a plain, speedy and adequate legal remedy, such as an appeal from a final judgment. *Guerin v. Guerin*, 114 Nev. 127, 131, 953 P.2d 716, 719 (1998), overruled on other grounds by *Pengilly v. Rancho Santa Fe Homeowners*, 116 Nev. 646, 5 P.3d 569 (2000). Yet, this is not the case here, as discussed *supra*, and not the case in the countless other cases dealing with the same exact issue. There is the potential for hundreds of thousands of Nevadans to start flooding the district court seeking the same relief as the "Class." The district courts impropriety needs to be addressed immediately. Indeed, this could be rectified if this Court finds that a district court does not have jurisdiction to adjudicate any claims involving the interpretation and administration of NRS 116.3116(2) when such claims have not first been submitted to or arbitrated/mediated with the NRED or the black letter law of the Voluntary Payment Doctrine prevents real transactions from being undone.

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V. CONCLUSION

Accordingly, and for the foregoing reasons, NAS respectfully requests that this Court issue a writ of prohibition or, alternatively, mandamus, as set forth herein.

DATED this 6th day of March, 2013.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Writ of Prohibition or Alternatively, Mandamus ("this Petition") complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(2)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typefa ce using Microsoft Word in 14-point Times New Roman.

2. I further certify that this Petition complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of this Petition exempted by NRAP 32(a)(7)(C), it does not exceed thirty (30) pages and does not contain more than 14,000 words.

3. Finally, I hereby certify that I have read this Petition, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of March, 2013.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 6th day of March, 2013, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS AND APPENDIX OF DOCUMENTS TO PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS VOLUMES 1 THROUGH 10** by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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The Honorable Susan Scann
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The Eighth Judicial District Court
Clark County
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Susan Thompson
An Employee of Holland & Hart LLP

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IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA ASSOCIATION SERVICES, INC., Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN, Respondents, AND ELSINORE, LLC, on behalf of itself and as representative of the class defined herein; PECCOLE RANCH COMMUNITY ASSOCIATION; and G.J.L. INCORPORATED, Real Parties in Interest.	Supreme Ct. Case No.: District Ct. Case No.: A-12-658044-C **VERIFICATION OF PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS**

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, PATRICK J. REILLY, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice law in the State of Nevada. I am a member of the law firm of Holland & Hart LLP, and an attorney of record for Petitioner, Nevada Association Services, Inc., in the above captioned matter. I make this Affidavit as verification of the Petition for Writ of Prohibition Or Alternatively, Mandamus ("Petition") filed concurrently herewith. I am over the age of eighteen (18) years, and am competent to testify to the matters stated hearing.

2. I make this Affidavit pursuant to NRS 15.010 and 34.030, as well as *Thompson v. District Ct.*, 100 Nev. 352, 353 n.1, 683 P.2d 17, 18 n.1 (1984). The

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Petition is being verified by me as petitioner's counsel because the facts upon which the Petition is based are within my personal knowledge and concern proceedings in which I was involved before the Eighth Judicial District Court.

3. I have participated in the drafting and reviewing of the Petition and know the contents thereof. To the best of my knowledge, the Petition and the facts contained therein are true and correct, except those facts stated on information and belief of which I believe to be true.

4. I declare under penalty and perjury that the foregoing is true and correct.

EXECUTED this 6th day of March, 2013.

PATRICK J. REILLY

SUBSCRIBED AND SWORN to before me this 6th day of March, 2013.

Susann Thompson
Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SUSANN THOMPSON
Appt. No. 04-92131-1
My Appt. Expires Aug. 19, 2016

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EXHIBIT "6"

IN THE SUPREME COURT OF THE STATE OF NEVADA

PREM DEFERRED TRUST; on behalf of itself and as representatives of the class as herein defined,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA; THE HONORABLE SUSAN SCANN;

Respondent,

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,

Real Parties in Interest

CASE NO. _____

Dist. Ct. Case No. A-11-648835-B

PETITION FOR WRIT OF MANDAMUS

Respectfully Submitted By:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

A. After Petitioner, (the class representative plaintiff,) exhausted administrative remedies pursuant to NRS 38.310 regarding claims against Real Party in Interest related to the application, enforcement or interpretation of the Real Party in Interest's covenants, conditions and restrictions ("CC&RS"), but the administrative agency arbitrator declined jurisdiction to arbitrate the matter on a class wide basis, did the District Court err by dismissing the class members' claims related to Real Party in Interest's CC&RS?

B. In light of the divergent orders of various District Court judges in the Eight Judicial District over the answer to Issue A, do judicial economy and sound judicial administration warrant the issuance of an extraordinary writ?

II. RELIEF SOUGHT

Petitioner seeks a writ of mandamus directing the District Court to vacate that portion of its ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION'S MOTION TO DISMISS UN-ARBITRATED CLAIMS AND CLASS ALLEGATIONS which dismissed the class members' claims against Real Party in Interest's relating to Real Party in Interest's CC&RS (3 App. 615-621).[1]

III. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

A. The Arbitration

Real Party in Interest, Southern Highlands Community Association, is a homeowners association in Clark County, Nevada that assesses its homeowner members a monthly assessment charge based upon its periodic budget previously adopted by its Board of Directors (2 App. 230-234). Petitioner, Prem Deferred Trust is an investment entity which purchased a home located within Real Party in Interest's association at a foreclosure auction. Petitioner objected to Real Party in Interest unlawfully liening Petitioner's property and improper demanding amounts of money which were not permitted by law (NRS 116.3116(2)) nor by Real Party in Interest's CC&RS. (2 App. 231)

Therefore, on November 12, 2010, Prem Deferred Trust submitted an NRED non-binding ADR arbitration against the Real Party in Interest in ADR 11-35 (1 App.

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[1] "... Plaintiff's proposed class CC&R Based Claims are not properly before this Court as each such CC&R Based Claim for each individual class member was not fully adjudicated by the assigned arbitrator." (3 App. 620).

114-170). It was submitted as a proposed, class action arbitration. Because, in addition to claims relating to NRS 116.3116(2) (the "Super Priority Lien" statute), ADR 11-35 also contained claims relating to the breach of the Real Party in Interest's CC&RS, the action was filed through NRED pursuant to NRS 38.310. At arbitration, Petitioner alleged that the Real Party in Interest's common scheme was as follows (1 App. 130-132):

a. Homeowners, owning a unit of real property within homeowners' associations ("HOAS,") become delinquent ("Delinquent Homeowners") in the payment of their HOA assessments and other fees and charges ("Homeowners' Past Due Obligations") and also default on their first mortgages;

b. The Homeowners' Past Due Obligations constitute a statutory lien on the Delinquent Homeowners' unit pursuant to NRS §116.3116;

c. Due to the Delinquent Homeowners' inability to pay their first mortgages, the Delinquent Homeowners' first mortgage holders foreclose on the Delinquent Homeowners' unit;

d. At the foreclosure auction, the Delinquent Homeowners' first mortgage holder, or an investor or a government related entity such as Fannie Mae or Freddie Mac, takes title to the subject unit via a trustee's sale deed;

e. At the moment the foreclosure auction concludes on a subject unit, pursuant to NRS §116.3116(2) the HOAS' statutory lien against the unit for the Homeowners' Past Due Obligations becomes extinguished, but for a limited amount commonly referred to as the "Super Priority Lien" amount. In addition, the HOAS' CC&RS also generally limit the prioritized portion of the HOAS' lien;

f. Instead of informing the foreclosure auction transferee that the HOAS' liens against the units have been extinguished do to the foreclosure auction, and that nothing is due but for the Super Priority Lien amount, the HOAS and their collection agents demand from the transferees hundreds or thousands of dollars in excess of any Super Priority Lien amount, often including all those amounts owed by

the original Delinquent Homeowner ("Unlawful Lien Amounts");

g. The HOAS and collection agents make representations, including but not limited to the issuance of demands to the transferees that the HOAS have the right to collect and receive from the transferees the Unlawful Lien Amounts;

h. Such demands and representations are false because the transferees do not owe the Unlawful Lien Amounts. This is so because the statutory lien amounts owed by the original Delinquent Homeowners and which comprise the Homeowners Past Due Obligations were extinguished as against the transferees as a matter of law (NRS §116.3116(2)) as a result of the first trust deed holder's foreclosure auction, but for the Super Priority Lien amount, if any;

i. Under unlawful threats of the continuing clouds on title and/or lien foreclosure, the auction transferees pay the Unlawful Lien Amounts.

By repeatedly employing this very scheme countless times over the last several years, auction transferees have paid to the HOAS and collection agents tens of millions of dollars (in Nevada alone) which the transferees did not owe, and to which the HOAS and collection agents had no legal entitlement (1 App. 130-132).

At arbitration, in response to Petitioner's Motion for Class Certification in ADR 11-35 (1 App. 171-189), the Real Party in Interest filed a Motion for Order Dismissing Class Allegations arguing that NRED did not have jurisdiction to hear class-wide arbitrations and that pursuant to NRS 38.255(3), class actions were "excluded" from NRED's ADR program (1 App. 190-203).

Without ruling on the merits of the proposed class action suit, Arbitrator Richard Prato agreed with Real Party in Interest and ruled that NRS 38.255(3) "excluded" class-wide arbitrations from the NRED ADR program and further ruled that, therefore, NRED did not have jurisdiction to hear class-wide arbitrations (1 App. 204-205). Following an arbitration hearing on Petitioner's individual claims, Arbitrator Prato ruled in favor of Petitioner on the merits (1 App. 206-209).

B. The District Court Action

On September 22, 2011, Petitioner filed District Court Case No. A-11-648835-B (a "*de novo*" action pursuant to NRS 38.330(5)). (2. App. 229-250). The proposed class action was filed by Petitioner, as the sole, named class representative plaintiff and alleged identical claims as previously submitted to the NRED non-binding arbitration program. After answering the Complaint, the Real Party in Interest filed yet another Motion to Dismiss Class Allegations (2. App. 263-269) but now arguing that pursuant to NRS 38.310, every single one of the over 1,800 individual claims against Petitioner must be first fully arbitrated by each and every class member in the ADR program before being brought in a single, class-wide litigation in District Court (2 .App. 265).

On the one hand, the Real Party in Interest cited NRS 38.255(3) and first argued in ADR 11-35 that NRED had no jurisdiction to hear a class action in a non-binding ADR program (1 App. 190-203). Then, on the other hand, the Real Party in Interest argued in District Court that since NRED had no jurisdiction to hear class action arbitrations, the District Court had no jurisdiction to hear the claims of the class members because such claims were not first fully "adjudicated" through an administrative tribunal which had no jurisdiction in the first place (2 App. 263-269). This circular reasoning was tantamount to an express prohibition against homeowners' association class action suits.

Thus, the Real Party in Interest's true motive is clear. It is to block any class actions against homeowners' associations from ever being maintained in District Court for violations of NRS 116 or an association's CC&RS. One must certainly doubt this was the intent of the legislature when passing NRS 38.310. NRS 38.310 is the statute which requires claims relating to the application, interpretation and enforcement of an association's CC&RS to be first arbitrated with an NRED assigned arbitrator before being brought in District Court. The Real Party in Interest's clever legal strategy was to block class certification at the administrative level so it could

later argue in District Court that each of the proposed class member's claims had not been first arbitrated pursuant to NRS 38.310. Because each proposed class member's claim had not been first arbitrated (because, it argued, NRED lacked jurisdiction to hear class arbitrations pursuant to NRS 38.255) (1 App. 199-200), then the District Court is without jurisdiction to hear the proposed class member's claims. In considering this argument, this Honorable Court should be under no illusion of the true motives of the Real Party in Interest, i.e., to forever block class actions from being maintained against it... a position surely never contemplated by the legislature.

In her Order on Real Party in Interest's Motion to Dismiss Class Allegations (3 App. 615-621) the Honorable Susan Scann essentially delineated the claims in the Complaint as either "Statutory Based Claims" or "CC&R Based Claims." She ruled that the "Statutory Based Claims"[2] related "solely to the interpretation and enforcement of NRS 116.3116(2)...." and were not subject to the mandatory arbitration requirements of NRS 38.310 as they did not relate to the application, enforcement or interpretation of any CC&R provision, rule or regulation (3 App. 620). The $55 monthly assessment was already pre-established by the Real Party in Interest and its amount and authority to assess this figure is not, nor has it ever been in dispute (3 App. 482-483). Accordingly, Judge Scann held that the Statutory Based Claims on a proposed class wide basis were properly before the Court. (3 App. 618-621). However, the District Court also ruled that because Arbitrator Prato agreed with Real Party in Interest's argument that NRED arbitrators had no jurisdiction to hear class-wide arbitration in the non-binding arbitration proceeding, Petitioner's proposed

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[2] Declaratory Relief on the meaning and application of NRS 116.3116(2), Breach of NRS 116.3116(2), negligence per se because Petitioner was within the class of persons NRS 116.3116(2) was meant to protect, injunctive relief to enjoin Real Party in Interest from violating NRS 116.3116(2), negligent misrepresentation for representing to the class that they owed more than NRS 116.3116(2) permitted, and conversion based upon violation of NRS 116.3116(2).

class CC&R Based Claims were not properly before the District Court as each of the almost 1,800 identical, CC&R Based Claims for each of the hundreds of individual class members were not "fully adjudicated" by the assigned arbitrator. (3 App. 618-621). The District Court then directed Petitioner to file an amended complaint deleting the proposed class CC&R Based Claims, and allowing the proposed class Statutory Based Claims to remain. (3 App. 618-621).

Consistent with the Court's ruling, Petitioner filed its First Amended Complaint (3 App. 597-614) alleging only the Statutory Based Claims. On September 11, 2012, the Honorable Susan Scann granted Petitioner's Motion for Class Certification on the Statutory Based Claims (5 App. 1168-1173). Because the case dealt with an extremely simple and common question which applied to all the class members (i.e., did the Real Party in Interest charge more to the class members for its homeowners' association "Super Priority Lien" than what NRS 116.3116(2) allows, i.e., a figure equaling 9 months of assessments), Judge Scann recognized the common factual and legal questions regarding the pillars of class certification.

Judge Scann also recognized that the class members' claims relating to NRS 116.3116(2) clearly did not relate to the application, enforcement or interpretation of any provision contained in the Real Party in Interest's CC&RS (3 App. 615-621). This was because of the straightforward language of NRS 116.3116(2), which states that the Super Priority Lien exists "... to the extent of the assessments for common expenses **based on the periodic budget** adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien...." NRS 116.3116(2). In short, the Super Priority Lien is not based upon the application or enforcement of any provision of the CC&RS, but is based upon assessments for common expenses contained in an association's **periodic budget**, which is neither a

governing document, bylaw nor condition, covenant or restriction.[3]

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[3] This very issue was discussed between counsel for Real Party in Interest and Judge Scann at the January 25, 2012, hearing, on Real Party in Interest's Motion to Dismiss Class Allegations (3 App. 480-483).

MR. SPRINGMEYER: You come to the question, plaintiff's statutory claim.
THE COURT: Right. That's–
MR. SPRINGMEYER: And that's the broader net that we're talking about. Are plaintiff's claims on the super priority lien independent of the CC&Rs? Can the plaintiff assert its entitlement to recoup amounts it says were inappropriately charged without reference to the CC&Rs? (3 App. 480).

* * *

THE COURT: Yeah, but 116 -- 31162(c) limits the super priority lien to the extent of the assessments for common expenses based on the periodic budget. That's–
MR. SPRINGMEYER: Right.
THE COURT: -- the dues. I mean, I'm using a –
MR. SPRINGMEYER: No, no. No, no.
THE COURT: Yeah, it is. Because the other things are not the monthly common expenses assessment based on the budget.
MR. SPRINGMEYER: No, because the budget would establish for the next year
THE COURT: Right.
MR. SPRINGMEYER: the dues which would include a standard monthly assessment and a possible special assessment, a possible capital improvement assessment, and a possible reserve assessment.
THE COURT: But none of those things fall within 116(c). It just says the extent of the assessment for common expenses based on the periodic budget.
MR. SPRINGMEYER: Right. And the budget is what establishes whether those things are included in the monthly dues for that coming year or not.
THE COURT: Right. But they come up with a number and -- and that's it.
MR. SPRINGMEYER: Right. But you can't know what that number is without seeing the budget and without –
THE COURT: Sure you can.
MR. SPRINGMEYER: seeing the CC&Rs.

However, most pertinent to the Petition, even though the District Court granted class certification over the Statutory Based Claims which were unrelated to the CC&RS, for the reasons discussed below, Judge Scann erred when dismissing the class members' CC&R Based Claims.

IV. REASONS TO GRANT THE WRIT

Considering the facts of this particular action, Judge Scann erred by ruling that the class members' claims relating to the CC&RS were not properly before the District Court for the following reasons:

a. Even when there is a statute requiring the exhaustion of administrative remedies, class member exhaustion is not required when the named representative satisfies pre-litigation requirements. The doctrine of "vicarious exhaustion" applies as the named class representative plaintiff has exhausted administrative remedies;

b. Because it has been held by the assigned arbitrator that NRED lacks jurisdiction to hear class-wide arbitration, pursuant to *Engelmann v. Westergard,* 98 Nev. 348, 353, 647 P.2d 385, 389 (Nev., 1982) the doctrine of exhaustion of administrative remedies does not require each class member to participate in the administrative proceedings;

c. The legislative history of the NRED ADR Program clearly evidences that thousands of individual class members need not individually arbitrate each claim, and does not support any legislative prohibition of class actions against homeowners' associations in District Court;

d. The exhaustion of NRED's non-binding administrative remedies by each and every class member is futile, and would subject the class members to unreasonable delay and hardship;

THE COURT: In the escrow they tell you what it is. If you're going to buy a condo, they have to tell you what it is.
MR. SPRINGMEYER: Well, that's –
THE COURT: It's not a big secret.
MR. SPRINGMEYER: I'm not suggesting it's a secret. I'm suggesting you have to look at the CC&Rs and the other governing documents to know what you've got to pay.
THE COURT: Not really, because it is whatever the association establishes. I don't think anybody gets to second guess that. (3 App. 482-483)

e. The proposed class-action litigation was already submitted to non-binding NRED arbitration pursuant to NRS 38.310.

f. Real Party in Interest argued, and the Arbitrator and the District Court agreed that NRS 38.255 excludes class actions from arbitration requirements.

A. Standard For Obtaining A Writ.

A writ of mandamus may be issued by the supreme court or a district court "to compel the performance of an act" of an inferior state tribunal, corporation, board or person. NRS 34.160. It enjoins the inferior body or person to affirmatively act in a manner which the law already compels the body or person to act. See *Willmes v. Reno Mun. Court*, 118 Nev. 831, 59 P.3d 1197, 1200 (2002). NRAP 21 states that an "application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition thereof with the clerk of the Supreme court with proof of service on the respondent judge or judges and on all parties to the action in the trial court." NRAP 21(a) (2007). A writ "shall be issued in all causes where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170 (2007). However, the "mere existence of other possible remedies does not necessarily precede mandamus." *State ex rel. List v. Douglas County*, 90 Nev. 272, 277, 524 P.2d 1271, 1274 (1974). Indeed, "... while the availability of a remedy by appeal may be taken into consideration in determining the propriety of granting a writ of mandamus, it is not jurisdictional. As in cases involving applications for a writ of prohibition, remedy by appeal is not always speedy or adequate." *La Gue v. Second Judicial Dist. Court, Washoe County, Dept. No. 1,* 68 Nev. 131, 133, 229 P.2d 162, 163 (1951). As the Supreme Court noted, "... each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted." *Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In and For Washoe County*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

In this case, appeal in the ordinary course is not a speedy or adequate remedy. Further, there is an urgent and strong necessity (both procedurally and substantively)

for the Supreme Court to hear this Petition. The Nevada Supreme Court has stated that some of the considerations which may weigh towards considering mandamus petitions include "substantial issues of public policy," precedential value, or other "compelling" reasons. *Poulos v. Eighth Judicial Dist. Court of State of Nev. In & For Clark County*, 98 Nev. 453, 455-56, 652 P.2d 1177, 1178 (1982). The Supreme Court has also found that "... when an important issue of law requires clarification," mandamus may be available. *Desert Fireplaces Plus, Inc. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 120 Nev. 632, 636, 97 P.3d 607, 609 (2004) Writ relief is also available when, "an important issue of law needs clarification and consideration for sound judicial economy and administration militate in favor of granting the petition." *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Court ex rel. County fo Clark*, 120 Nev. 575, 578-79, 97 P.3d 1132, 1135 (2004) (citations and quotations removed).

To date, two Eighth Judicial District Court judges have ruled on the issue of whether, after completing NRED arbitration by the named class representative plaintiff (where the arbitrator declined jurisdiction to conduct a class arbitration,) the District Court may grant class certification to class members whose claims relate to the application, interpretation and enforcement of CC&RS. In the present case, Judge Scann ruled that since claims relating to the application, interpretation and enforcement of NRS 116.3116 do not implicate the application of CC&R provisions, such claims do not need to be first arbitrated pursuant to NRS 38.310 in order to be granted class certification in District Court (3 App. 615-621). Judge Silver ruled similarly in Case No. A-12-658044-C and also granted class certification (5 App. 1174-1178) for such statutory based claims.[4] However, Judge Silver and Judge Scann entered differing orders relating to the issue of whether each class member had to individually arbitrate each CC&R based claim before the District Court could grant

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[4] Judge Silver also granted class certification on the claims relating to CC&RS. (5 App. 1174-1178)

class consideration over such CC&R based claims. Unlike Judge Scann, Judge Silver denied a motion brought by the homeowners's association to dismiss the CC&R based claims which had previously been brought by the named class representative in arbitration, but where the arbitrator ruled that he had no jurisdiction to conduct class arbitrations. Judge Silver ruled:

> First, the Court would note that NRS 38.310 cannot bar this action insofar as Defendant's claims relating solely to the interpretation and enforcement of NRS 116.3116(2). These "statutory based claims" are not subject to the mandatory arbitration requirements of NRS 38.310 as they do not relate to the application, enforcement or interpretation of CC&Rs. Therefore, these claims are properly before this Court.... Finally, the Court disagrees with Plaintiff [homeowners' association] that each and every member of the purported class must first adjudicate their claim in arbitration or mediation prior to a class action being filed in district court. Where resort to administrative procedure would be futile, exhaustion of administrative remedy is not required. Englemann v. Westergard, 98 Nev. 348, 353 (1982). The "doctrine of exhaustion of remedies does not require one to initiate and participate in proceedings which are vain and futile." Id. Here, as admitted by Plaintiff, Elsinore has already exhausted the administrative remedy (purportedly on behalf of a class of owners allegedly suffering the same harm by Plaintiff). There would be no useful purpose requiring every class member with identical claims based upon identical law to go through thousands of identical NRED arbitrations. To require every single party to file for NRED arbitration would have a deleterious effect on the purpose of NRS 38.300, et. seq., and impose an unnecessary hurdle to recovery for any wrong inflicted.
>
> THEREFORE, THE COURT HEREBY ORDERS that Peccole Ranch Community Association's Motion to Dismiss Un-Arbitrated Claims and Class Allegations is DENIED. (5 App. 1092-1095).

Thus, while both Judge Scann and Judge Silver agree that class claims relating to NRS 116.3116 do not require NRED arbitration pursuant to NRS 38.310 because such claims do not relate to the application of any CC&R provision, Judge Silver ruled that where the named class representative plaintiff brought CC&R based claims in arbitration but was jurisdictionally denied the opportunity to adjudicate the arbitration on a class wide basis, the District Court may hear class claims relating to

CC&R provisions (5 App. 1092-1095 and 5 App. 1174-1178). Judge Silver ruled that because the NRED arbitrator ruled he had no jurisdiction to hear a class arbitration, NRED arbitration for each class member was futile and there, "... would be no useful purpose requiring every class member with identical claims based upon identical law to go through thousands of identical NRED arbitrations. (5 App. 1092-1095).

Therefore, because there are differing rulings in the Eighth Judicial District Court on an important issue that will be likely visited on numerous occasions in the near future by other District Court Judges,[5] the law in this area needs clarification and consideration for sound judicial economy which militates in favor of granting the petition.

B. BECAUSE PETITIONER, THE NAMED CLASS REPRESENTATIVE PLAINTIFF, HAS EXHAUSTED ADMINISTRATIVE REMEDIES, EXHAUSTION OF EACH CLAIM OF THE CLASS MEMBERS IS NOT REQUIRED

In the class action context, specifically in cases where there are statutory requirements to exhaust administrative remedies as a precondition to a state court suit, state courts have consistently ruled that where the named class representative plaintiff exhausts administrative remedies, each and every one of the class members' claims need not proceed through the administrative process.

Petitioner, in its capacity as named class representative plaintiff, has arbitrated ADR 11-35 pursuant to NRS 38.310. In fact, Petitioner expressly brought ADR 11-35 on behalf of all of those similarly situated to vindicate the rights of identically aggrieved purchasers at foreclosure who are confronted with unlawful and limitless liens for assessments and collections costs (most of which was incurred by the prior owner that was the subject of foreclosure) (1 App. 114-170). Courts have recognized that only a single class representative need exhaust administrative remedies prior to

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[5] See ADR 11-90 now making its way through the NRED ADR program wherein 27 investment entities have sued hundreds of HOAS. (1 App. 215).

representing the proposed class in district court litigation.[6] For example, citing *Newberg on Class Actions*, the California courts have ruled:

> "[w]hen exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiff normally will avoid the necessity for each class member to satisfy this requirement independently." Newberg, et al., Newberg on Class Actions § 5:15 (4th ed.2006). *Kingsbury v. U.S. Greenfiber, LLC* 2009 WL 2997389, 8 (C.D.Cal.) (C.D.Cal.,2009)

"Indeed, most courts agree that at least one named plaintiff must satisfy jurisdictional and exhaustion of remedies requirements before proceeding with a class action." *Davis v. Washington State Dept. of Labor & Industries* 159 Wash.App. 437, 443-444, 245 P.3d 253, 256 (Wash.App. Div. 2,2011). See also e.g., *Oda v. State*, 111 Wash.App. 79, 87–88, 44 P.3d 8 (2002) (named plaintiff's compliance with statutory notice requirements sufficient for class action to proceed); *Phillips v. Klassen*, 502 F.2d 362, 369 (D.C.Cir.1974) (at least one named member of class must meet the exhaustion requirement for the class as a whole).

For example, the Washington Tort Claims Act requires that a tort claimant, before commencing an action against the State, must present a verified claim to the risk management office at least 60 days before filing suit. RCW 4.92.100–110. Strict compliance with the requirements of notice of claim statutes is generally a condition precedent to recovery. *Hardesty v. Stenchever*, 82 Wash.App. 253, 259, 917 P.2d 577 (1996). Dismissal of the action is the proper remedy for a plaintiff's failure to comply. *Hardesty*, 82 Wash.App. at 259, 917 P.2d 577. However, in a case where a plaintiff

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[6] See, for example, *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 395 (E.D.Pa.2001) ("[I]n the context of an ERISA class action, only the named plaintiffs must exhaust their administrative remedies."); *Laurenzano v. Blue Cross & Blue Shield of Massachusetts, Inc. Ret. Income Trust*, 134 F.Supp.2d 189, 211 (D.Mass.2001) ("[B]ecause this is a class action, all that matters is whether the lead plaintiff has exhausted his remedies.") (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975)).

complied with the administrative exhaustion requirements of the Washington Tort Claims Act and then commenced a class action lawsuit in a Washington district court, the Washington Appellate Court held:

> It is the very nature of a class action to gather into a single lawsuit a large number of individuals whose names may be unknown to the original parties. The mechanisms that fully identify and notify the members of the class are not available until someone commences the action and then obtains permission to proceed under Civil Rule 23. To require dismissal of all class plaintiffs who had not filed a verified tort claim at least 60 days before commencement of the suit would make it virtually impossible to proceed with a class tort action against the State....
>
> We hold that once a tort action is properly commenced against the State, a CR 23 certification motion may not be defeated by the fact that the claimants to be added as plaintiffs have not previously filed a tort claim. *Oda v. State* 111 Wash.App. 79, 87-88, 44 P.3d 8, 12 - 13 (Wash.App. Div. 1,2002)

Similarly, in the context of tax case, the Supreme Court of the State of Arizona answered a question practically identical to the one before this Court. The Arizona Court asked, once the state tax court judge decides that the requirements for a class action have been met, may the class include taxpayers who have not filed individual administrative claims as required by ARS 42-1118(E)? In *Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862 (2001), a taxpayer filed a class action lawsuit challenging as unconstitutional the denial of deductions for dividends received from corporations not doing more than half of their business in the State during certain tax years. Helen H. Ladewig ("Ladewig") first filed an administrative refund claim with Arizona Department of Revenue ("ADOR"), claiming that its denial of analogous deductions for dividends received from corporations not doing more than half of their business in Arizona was unconstitutional. Once she exhausted her required administrative remedies on an individual basis (see A.R.S. § 42-1254,) she filed a complaint in the state tax court, where she sought class action certification under Arizona Rule of Civil Procedure 23. Over ADOR's opposition, the tax court certified a class comprised of all present and former Arizona residents who paid

Arizona income taxes during the tax years 1986 through 1989 on dividends received from corporations whose business was principally outside the state of Arizona. On appeal, Arizona's intermediate appellate court held that the class must be limited to only taxpayers who had actually filed individual administrative claims with ADOR pursuant to ARS 42-1118(E). *Id.* at 517. A position apparently consistent with the Real Party in Interest in this case. In response:

> Ladewig petitioned for review, claiming that the court of appeals' opinion effectively rendered the class action unavailable as a means of pursuing a refund claim in tax court. ADOR countered that Ladewig is attempting to use the class form as a means of circumventing the statutory requirement that each taxpayer must file an individual claim and then exhaust administrative remedies before resorting to the courts for relief." *Id.*

Interestingly, like NRS 38.310 which only allows a 30 day window with which to file a "de novo" action with the District Court following arbitration, ARS 42-1254(D)(2) only allowed 30 days after a plaintiff's administrative remedies had been concluded to file a tax court lawsuit. In recognizing such a procedural glitch would necessarily preclude a class action from ever being maintained against ADOR, the Arizona Supreme Court noted,

> Tax court lawsuits may only be filed within thirty days after all of a plaintiff's administrative remedies have been exhausted. See A.R.S. § 42-1254(D)(2) (2000 Supp.). Even assuming the unlikely event that all members of a putative class might be able to begin individual administrative claims at the same time, it is probable that many will miss the window of opportunity for joining a class. Under such conditions, one wonders whether a class could ever be assembled outside the realm of theory. *Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515, 522, 29 P.3d 862, 869 (2001).

Ultimately, unless there is an express prohibition for class adjudication within the statute itself, the Arizona Supreme Court held that a district court class action could be maintained despite the taxpayer class members not having each submitted claims to ADOR pursuant to ARS 42-1118(E):

> ADOR has failed to make any showing that it will be prejudiced if Ladewig's lawsuit is allowed to proceed in

> class form, and requiring individual exhaustion in this case would essentially negate the possibility of bringing a class action in the tax court.... we hold that the class device is a suitable vehicle for exhaustion of administrative remedies when not expressly prohibited by statute. Nothing in A.R.S. § 42-1118(E) expressly precludes use of the class device as a means of exhausting administrative remedies with ADOR. No question having been raised about whether the requirements of Rule 23 were satisfied, we conclude the tax court did not err when it certified the class in Ladewig's lawsuit. *Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515, 522, 29 P.3d 862, 869 (2001)

Likewise, the California Supreme Court addressed the issue of the exhaustion of administrative remedies in *Friends of Mammoth v. Board of Supervisors* 8 Cal.3d 247, 267-68 (1972). Two plaintiffs there pleaded a class action challenging a planning commission's decision to grant a developer a conditional use permit. The individual and group that were named as plaintiffs in the suit had not participated in the required administrative review. However, there were members of the putative class who had done so. The Supreme Court wrote that the unnamed plaintiffs who had participated in the administrative review "will have expressed the position of the representative plaintiff in the class suit, and the Board will have had its opportunity to act..." *Id.*, at 267. Thus, the California Supreme Court's conclusion was that "Nothing more could effectuate the policy of the exhaustion doctrine" (i.e., individual participation of all putative class members before the Board-presenting the same arguments and arguing the same law-"would serve no additional useful purpose." *Id.*, at 268.

Such is the case here. There would be no useful purpose in requiring every class member, with identical claims based upon identical law to go through thousands of identical NRED arbitrations. The *Friends of Mammoth* court recognized that people who have a sufficient interest in the subject matter to seek administrative review will possess the "community of interest" with the other class members to justify inclusion of those class members in subsequent class action. *Id.*, at 267. Thus, so long as a "well defined community of interest" in questions of law and fact are

involved affecting the parties to be represented, further exhaustion by class members is not required. *Daar v. Yellow Cab Co.*, 433 P.2d 732 (1967); see also 3 Witkin, Cal. Procedure (2.d ed 1971) Pleading Sec. 181, at pp. 1853-1854.

Tarkington v. California Unemployment Ins. Appeals Bd., presents a similar analysis. 172 Cal.App.4th 1494, 92 Cal.Rptr.3d 131, Cal.App. 2 Dist. (2009). In *Tarkington*, the individual litigants appealed the employment division's rejection of their claim for unemployment benefits to the Administrative Law Judge Knipe. Upon denial of their appeal by Judge Knipe, relief was sought from the California Unemployment Insurance Appeals Board. The decisions by both Knipe and the Board squarely addressed the legal issue of whether Albertson's employees, who could not work because of a lockout, were not entitled to unemployment benefits. The Court found that the legal question was common to all members of the putative class. By giving the Board the opportunity to consider the situation, use its expertise, decide this issue, Tarkington and Straub fulfilled all the purposes of the exhaustion doctrine on behalf of the proposed class.

Like the Supreme Court in *Friends of Mammoth*, the *Tarkington* court concluded that requiring all putative class members to exhaust their remedies "would serve no additional useful purpose" because "[n]othing more could effectuate the policy of the exhaustion doctrine." *Id.*, citing *Friends of Mammoth, supra*, 8 Cal.3d at p. 268, 104 Cal.Rptr. 761, 502 P.2d 1049.) As in *Friends of Mammoth*, the putative class contained members who had already exhausted their administrative remedies, namely Tarkington and Straub. Further individual participation by all class members would not any better effectuate the policy of the exhaustion doctrine. In short, the same legal arguments would be presented time and time again and repeatedly arguing the same law would serve no additional useful purpose.

Additionally, employment discrimination cases brought under Title VII and accompanying state anti-discrimination statutes face similar analysis when only the named representative plaintiff has satisfied the exhaustion requirement of filing a

charge with the Equal Employment Opportunity Commission. Just like the requirements of NRS 38.310, in the context of a Title VII civil rights action by an individual against his employer, the aggrieved party claiming discrimination must first, before bringing a lawsuit, file an administrative complaint with the EEOC, have a hearing, and wait for a final determination (see 29 CFR § 1614.310 and 29 CFR 1614.110). In the earlier days of Title VII claims (prior to a legislative amendment formally allowing class claims) courts recognized that only the named class representative need exhaust administrative remedies:

> "The petitioners also contend that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC. We reject this contention. The Courts of Appeals that have confronted the issue are unanimous in recognizing that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members." *Albemarle Paper Co. v. Moody* 422 U.S. 405, 414, 95 S.Ct. 2362, 2370 (U.S.N.C. 1975)

The federal appellate courts understood the harm that requiring each member of a similarly situated class of hundreds or thousands to have to file the exact same administrative grievance regarding the exact same harm caused by the exact same facts. The federal courts held, "To require that each employee file a charge with the EEOC and then join in the suit would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted. *Bowe v. Colgate-Palmolive Co.* 416 F.2d 711, 720 (C.A.Ind. 1969). See also *Oatis v. Crown Zellerbach Corp.* 398 F.2d 496, 498 (C.A.La. 1968).

Much like NRED arbitration wherein no class certification has been jurisdictionally permitted, prior to 1977, there was no administrative procedure specifically designed to address Title VII class discrimination claims commenced by aggrieved individuals. See *Griffin v. Carlin*, 755 F.2d 1516, 1530 (11th Cir.1985); *James v. Rumsfeld*, 580 F.2d 224, 227–28 (6th Cir.1978). Because no procedural mechanism had been set up to address cases where large numbers of people had been injured through a common core of facts and law, and administrative exhaustion was

a prerequisite to district court action, multiple courts logically ruled, "... an individual plaintiff could file a class claim provided that the class claim could reasonably be expected to grow out of the issues presented in the individual claim and all administrative remedies for the individual claim had been exhausted." *Lewis v. Smith* 731 F.2d 1535, 1540 (C.A.Fla.,1984). In 1977, in response to judicial criticism that no administrative mechanism existed through which an individual could assert class claims in the context of his own individual discrimination claims, see generally *Barrett v. United States Civil Serv. Comm'n*, 69 F.R.D. 544, 549–52 (D.D.C.1975), the Civil Service Commission promulgated specific class administrative remedies, 29 C.F.R. §§ 1613.601–.643. See *Gulley v. Orr* 905 F.2d 1383, 1384 (C.A.10 (Okl.),1990).

Simply put, in this case, if the unnamed members of the putative class have the same interest as Petitioner in having their Super Priority Lien amounts determined (under the same statute and the same mortgagee protection provision of Real Party in Interest' CC&R's), the requirement of exhaustion of administrative remedies by members of the class is rationally defeated. NRED has already addressed the disputed issue and the Real Party in Interest has already argued its case. As numerous courts have already determined, parading thousands of similar claimants with thousands of similar claims through an administrative arbitration process with the same respondent regarding the same wrongs wherein the same law would be applied simply defies logic. It would serve no useful purpose and would add nothing useful to the debate by arguing the same facts and the same law with the same respondent thousands of times. Here, not only did Petitioner exhaust its own individual claims under NRS 38.310 (which is undisputed), but it also brought class action claims before NRED as a class representative. (1 App. 114-170).

Real Party in Interest as the Defendant association, and NRED as the administrative agency have both had an opportunity to address the merits of the Super

Priority Lien dispute and have both articulated their positions, respectively.[7] Moreover, Petitioner submitted its NRED action as a class action suit. Thus, the putative class need not submit to duplicative, repetitive filings with NRED to proceed with formation and class certification in this case below.

In short, regarding the CC&R based claims, the District Court's ruling that hundreds of class members need to submit thousands of identical NRED arbitrations regarding the very same claim, based upon the very same law and the very same facts and the very same CC&R provisions is legally inaccurate and a practical impossibility. It is not required by law, nor supported by the legislative history that gave birth to the ADR program. As numerous courts around the country have concluded, the better approach is to require only the named class representative plaintiff to exhaust administrative remedies, as Petitioner did in this case.

C. IN THIS CASE, BECAUSE IT HAS BEEN DETERMINED THAT NRED HAS NO JURISDICTION TO HEAR CLASS-WIDE LITIGATION, CLASS MEMBERS EXHAUSTION OF NRED'S ADMINISTRATIVE REMEDIES IN NOT REQUIRED

In ADR 11-35, in response to Petitioner's motion to certify the arbitration as a class arbitration (1 App. 171-189), Arbitrator Richard Prato, Esq., ruled that he did not have jurisdiction to certify a class, denied the motion on jurisdictional grounds and ruled that class actions were excluded from NRED's mandatory ADR program. (1 App. 204-205). Consistently, Judge Valerie Adair issued a Writ of Prohibition on jurisdictional grounds against NRED stating that NRED is prohibited, "... from hearing or acting upon any request to certify the matter as a class action." (1 App. 219-223).

Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies. *State, Nevada*

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[7] In fact, NRED has just published an Advisory Opinion which supports Petitioner substantive arguments that NRS 116.3116(2) calls for a cap on the Super Priority Lien (6 App. 1342-1361).

Dept. of Taxation v. Scotsman Mfg. Co., 109 Nev. 252, 254, 849 P.2d 317, 319 (1993). However, where the administrative agency lacks jurisdiction to hear the matter, the Nevada Supreme Court has held that administrative remedies need not be exhausted:

> "Where one has not enjoyed a fair opportunity to exhaust the administrative process, or where resort to administrative procedures would be futile, exhaustion of administrative remedies is not required. [cite omitted]. Additionally, the doctrine of exhaustion of remedies does not require one to initiate and participate in proceedings **where an administrative agency clearly lacks jurisdiction, or which are vain and futile**." *Engelmann v. Westergard* 98 Nev. 348, 353, 647 P.2d 385, 389 (Nev., 1982)

In the present case, it is undisputed that both Arbitrator Prato, through his Order, and Judge Adair, through her Writ of Prohibition to NRED, ruled that NRED arbitrators do not have the *jurisdiction* to hear or act upon any request to certify matters as class actions. A number of other NRED arbitrators have also so ruled.[8] Therefore, due to precedent laid down by the Supreme Court in *Engelmann v. Westergard* 98 Nev. 348, 353, 647 P.2d 385, 389 (Nev., 1982), the doctrine of exhaustion of remedies does not require the class to initiate and participate in administrative proceedings prior to bringing a district court class action lawsuit.

California courts have recognized that where an administrative agency lacks jurisdiction to hear class-wide relief, exhaustion of administrative remedies is unnecessary. In *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 179 Cal.Rptr. 287, four named plaintiffs filed a petition for writ of mandate to compel the administrator of their pension plan (PERS) to include the value of certain fringe benefits in its calculation of plaintiffs' pension benefits. (126 Cal.App.3d at p. 930, 179 Cal.Rptr. 287.) None of the named plaintiffs sought an administrative hearing

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[8] To date, the following arbitrators have ruled that they do not have jurisdiction to hear class-wide arbitrations: Richard Prato (1 App. 210-213 and 217-218), Leonard Gang (1 App. 214-216), Lansford Levitt (1 App. 224-225), Dee Newel (1 App. 226-230).

with PERS before instituting the action. The trial court denied plaintiffs' motion for class certification and dismissed the action because plaintiffs had failed to exhaust their administrative remedies. (*Id.* at p. 931, 179 Cal.Rptr. 287.) The Court of Appeal reversed holding that "... plaintiffs in a class action need not exhaust their administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief." (*Id.* at p. 935, 179 Cal.Rptr. 287.). The California court noted:

> The absence of an adequate administrative remedy becomes even clearer when we consider that the Administrative Procedure Act (*936 Gov.Code, s 11500, et seq.) has no provisions for pretrial proceedings in which prompt and early determination of class membership may be made. Nor are there any provisions for notice to the absent class members informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be made which will be binding upon the entire class. [cite omitted]. Hence, the administrative hearing procedure established by the Legislature for claims of rights arising from the Public Employees' Retirement Law is constitutionally inadequate for class action hearings, thus defeating respondent's contention that appellants must seek administrative relief as a class. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 935-36, 179 Cal. Rptr. 287, 293-94 (Ct. App. 1981)

Similarly, the fact that NRS 38.300 *et.seq.*, has no provisions concerning class arbitration was prominently argued by Real Party in Interest in its successful effort to convince Arbitrator Prato that NRED had no jurisdiction to hear class-wide matters. Real Party in Interest argued:

> No statutory authority under the ADR program statutes exists, either explicitly or implicitly, for any class actions to be maintained by any claimant... (1 App. 192)

> There are no rules, precedent or guidelines to govern evaluation, certification or management of class actions. Without this requisite authority, neither this arbitrator nor any arbitrator in the ADR program, can authorize the prosecution of any claims by or through a class action mechanism. (1 App. 192).

> As with non-binding arbitrations through NRED, there is no way to integrate NRCP 23 with the statutorily limited framework of the district court non-binding arbitration program.... Because the ADR program statutes do not provide for class actions, there is no way to graft NRCP 23 onto the non-binding arbitration process without significant risks of prejudicing the rights of potential class members and significant confusion as to shaping and defining class membership and the rights thereof. Beyond the question of authority or jurisdiction, the level of management necessary to conduct and administer a class action in non-binding arbitration is beyond the scope of the rules and procedures set forth in the ADR program statutes. (1 App. 199-200)

Thus, as the California courts have decided, where there is no administrative procedure to address class action matters, class members need not exhaust their administrative remedies prior to instituting judicial proceedings. This is so because the administrative remedies available to the plaintiffs do not provide for class relief.

Numerous courts have ruled similarly to Nevada's Supreme Court. For example, "... an aggrieved party is not required to exhaust administrative remedies where the [Administrative Agency]... lacks jurisdiction. *Gutierrez v. Laredo Indep. Sch. Dist.*, 139 S.W.3d 363, 366 (Tex. App. 2004); "... where the administrative agency lacks jurisdiction, a trial court may intercede before administrative remedies are exhausted." *Georgia Dept. of Cmty. Health v. Georgia Soc. of Ambulatory Surgery Centers*, 290 Ga. 628, 630, 724 S.E.2d 386, 390 (2012); "... the exhaustion of administrative remedies has not been required where... seeking administrative review would be futile or... where an administrative agency has no power to proceed because it lacks jurisdiction...." *Miller v. Illinois Dept. of Pub. Aid*, 69 Ill. App. 3d 477, 480, 387 N.E.2d 810, 813 (1979). See also *Indiana Dept. of Envtl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 844 (Ind. 2003).

While the Nevada case of *Englemann* is perfectly on point, courts from around the country join in jurisprudence that if the agency lacks jurisdiction, exhaustion of administrative remedies is simply not required. Therefore, the District Court may hear the class-wide CC&R based claims of the class members as the exhaustion of

administrative remedies for the proposed class was not required because the administrative agency clearly lacked jurisdiction or was otherwise jurisdictionally inadequate for class action hearings.

D. THE LEGISLATIVE HISTORY OF THE NRED ADR PROGRAM CLEARLY EVIDENCES THAT THOUSANDS OF INDIVIDUAL CLASS MEMBERS NEED NOT INDIVIDUALLY ARBITRATE EACH AND EVERY CLAIM

Assembly Bill 152 was introduced in 1995 by Assemblyman Michael A Schneider as a form of individual dispute resolution between a homeowner and his HOA. In reviewing the legislative history, there is no mention of adjudicating, on a class-wide basis, the rights of first mortgagees and their successors in interest upon acquisition of a property at foreclosure (1 App. 1-113). Nor is there any discussion which would indicate that each one of thousands of class members should have to individually arbitrate their identical claims in NRED first, before being permitted to be a member of a class of similarly aggrieved plaintiffs in District Court. In fact, just the contrary exists in the legislative history. As every new bill requires an evaluation of economic impact, the Fiscal Note annexed to the AB 152 testimony outlines an administrative investment of a computer and hardware software of less than $4,300, (1 App. 10), and contemplation of only 350 cases per year being referred to the NRED ADR program. (1 App. 8-9). In fact, in the case against Real Party in Interest below, if each class member would have to individually arbitrate each claim in NRED, the total number of claims in this single case alone would be between 5 and 6 times larger than the entire ADR program as originally contemplated. Clearly, the legislature did not intend that the ADR program would accommodate thousands of individual, identical claims concerning the rights of first mortgagees and their successors at foreclosure, brought by hundreds of similarly aggrieved class members against a single association. More likely, as numerous courts from around the country have ruled, a single class representative plaintiff would arbitrate a claim through NRED, then be permitted to represent the class in District Court. With a budget of $4,300 and anticipated number of claims at 350 per year being, there is little question

the legislature never contemplated in its NRS 38 paradigm thousands of the exact same action being filed all at the same time.

E. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED WHERE FUTILE

Not only did the legislature not design nor intend NRED's ADR program to impose an onerous effect on classes of homeowners to vindicate rights, but the legislature did not promote a requirement that each claimant must individually exhaust administrative remedies before seeking class relief from the District Court. Among the many exceptions to the exhaustion of administrative remedies doctrine are (i) there is good reason or just cause for not enforcing it, (ii) overriding public interest calls for a prompt judicial decision, (iii) where administrative expertise is unnecessary, and most importantly, (iv) the exhaustion of administrative remedies would serve no useful purpose and would be futile. 73 C.J.S. Public Administrative Law and Procedure, Sec. 89. "Justice Delayed is Justice Denied."

The District Court's Order regarding the CC&R Based Claims would require every single one of the thousands of claims of the hundreds of class members be first arbitrated before an assigned NRED arbitrator before Petitioner would have the ability to file on a class-wide basis in District Court. If the District Court is correct that every single one of the almost roughly 1,800 identical claims would have to go through NRED arbitration, how could a class action suit ever exist in the District Court? There are only about 12 NRED arbitrators.[9] NRS 38.330(5) only affords arbitration claimants 30 days to file a "*de novo*" District Court action at the conclusion of arbitration. If arbitrations are to occur on work days, almost 100 arbitration hearings per day would have to be held for inclusion in the 30 window. Not only is this position absurd and makes class-wide litigation an impossibility in

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[9] Ara Shirinian, Eleissa Lavelle, Dee Newel, Leonard Gang, Richard Prato, William Turner, Steve McMorris, Steve Wenzel, Persi Mishel, Alvin Aphelburg, Lansford Levitt, E. Paul Richitt.

District Court, but if it was the legislature's intention to require every single claim to be first arbitrated or mediated before getting class certified in District Court, why leave only a 30 window for every class member to conclude all arbitrations? Such a paradigm is simply futile and nullifies the expeditious and cost saving reasons why class actions exist under Rule 23. Again, as the Nevada Supreme Court has held, "... where resort to administrative procedures would be futile, exhaustion of administrative remedies is not required." *Engelmann v. Westergard* 98 Nev. 348, 353, 647 P.2d 385, 389 (Nev., 1982). Given the lack of administrative resources and the incredibly short time within which *de novo* actions can be filed, exhaustion of administrative remedies is clearly futile (or at the very least, inadequate).

Futility of administrative remedies has been addressed in the class action context by the United States Supreme Court. In the case of the exhaustion of U.S. Department of Education administrative remedies, the U.S. Supreme Court has ruled:

> It is true that judicial review is normally not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. [cite omitted]. (**"[E]xhaustion ... should not be required ... in cases where such exhaustion would be futile either as a legal or practical matter"**). *Honig v. Doe* 484 U.S. 305, 326-327, 108 S.Ct. 592, 606 (U.S.Cal.,1988)

Further, as noted by the federal courts, an administrative process is futile "if the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter." *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986). In the present case, Arbitrator Prato has already denied the class relief requested and has declared that he lacks jurisdiction over the matter (1 R.App. 204-205). Applying federal jurisprudence, the Real Parties in Interest could have immediately proceeded to District Court. Further, "... an administrative process is futile when it either cannot provide the relief requested or when the agency has decided as a general matter and before the merits of a particular claim are heard that it will not grant relief. *Alabama Dept. of Rehab.*

Services v. U.S. Dept. of Veterans Affairs, 165 F. Supp. 2d 1262, 1271 (M.D. Ala. 2001). Again, in this case, NRED cannot provide the class relief requested, and the Arbitrator in this matter has decided that NRED will not provide class relief.

Further, where the administrative proceeding is merely inadequate, i.e., where the remedy is"not lawfully and reasonably sufficient," administrative remedies need not be exhausted. The D.C. Circuit Court held that both futility and inadequacy were exceptions to the exhaustion doctrine and defined the terms as follows:

> Resort to the administrative process is futile if the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter. The administrative process is inadequate where the agency has expressed a willingness to act, but the relief it will provide through its action will not be sufficient to right the wrong. *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986)

In the present case, resort to the administrative process is futile (NRED will almost certainly deny class relief either because it has a preconceived position on, or lacks jurisdiction over, the matter) and the administrative process is inadequate to arbitrate thousands of claims of hundreds of different claimants all within the same 30 day window to allow *de novo* review. Thus, both futility and inadequacy of administrative remedies exist. The District Court, therefore, has can and must hear this matter on a class-wide basis.

F. PURSUANT TO NRS 38.310, THE CLASS ACTION WAS SUBMITTED TO NRED'S ADR PROGRAM

Contained in NRS 38.310 is one fundamental directive: A civil action based upon a claim relating to the interpretation, application or enforcement of CC&RS cannot be maintained in District Court unless the action is first "submitted to mediation or arbitration...." The key term is "submitted." As this Court has held, "We 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' [cite omitted].... Thus, our inquiry begins with the statutory text and ends there, if the text is unambiguous." *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 132 (Nev. 2012). Therefore, because the class-wide claims have been

submitted to NRED arbitration, NRS 38.310 has been complied with and the District Court may hear the claims of the class members. Indeed, in reading the plain language of NRS 38.310, the statute does not state that a party needs to "prevail" in every claim submitted to arbitration, or even that each claim needs to be "fully adjudicated on its merits" in arbitration. The only requirement under NRS 38.310 is that the claim itself be "submitted." For example, if an action is submitted to NRED arbitration which has 6 claims, but 3 are dismissed by the arbitrator and 3 are fully adjudicated, a party still has the right under NRS 38.330(5) to bring all 6 claims before the district court in a "*de novo*" action. To conclude otherwise would be granting a binding effect to a non-binding determination made by an arbitrator.

If the proposition is accurate (contrary to the plain language of NRS 38.310) that something more than merely "submitting" the claim to NRED is necessary for the District Court to hear a claim, then there could never be a non-binding arbitration for any claim that an NRED arbitrator dismissed. Instead, all dismissed claims would not have been "fully adjudicated,"[10] serving as a litigation bar to any relief before the Nevada judiciary. Consequently, in the case of a claimant who submitted his claims to non-binding arbitration and all such claims were dismissed by an arbitrator prior to a ruling on the merits, then this claimant would never have the right to commence a civil action to challenge the arbitrator's non-binding decision because the claims were not heard on the merits. Similarly, if a claimant "submits" his claim to arbitration, but the homeowners' association does not answer the ADR complaint and default is entered, that same claimant would lack any right to commence a civil action in District Court, since after all, his claims were not fully adjudicated on their merits.

Although full adjudication on the merits is clearly not required under NRS 38.310, the dismissed class claims are deemed to have been "arbitrated" just as any dismissed claims in a court of law are "adjudicated". It cannot be said that when a

---

[10] The phrase "fully adjudicated" appears nowhere in NRS 38.310.

judge dismisses a class claim in District Court, that the plaintiff cannot then appeal such a determination to the Supreme Court. Likewise, it cannot be said that when an NRED arbitrator dismisses class claims, that the claimant cannot then bring the dismissed class claims to District Court for *de novo* review. Thus, the plain language of NRS 38.310 has been complied with as all claims had been submitted to the ADR program.

G. NRS 38.255 Excludes Class Actions From Mandatory Arbitration

In ADR 11-35, Real Party in Interest argued, and the Arbitrator ruled,[11] that NRS 38.255(3) excluded class actions from being adjudicated in the NRED ADR program. Therefore, pursuant to Real Party in Interest's own application of NRS 38.255(3)(b), and the District Court's acceptance of the exclusion (3 App. 620) this particular class action may be brought to District Court without the necessity of NRED arbitration.

For the reasons cited above, Petitioner respectfully request this Honorable Court granted the requested relief.

DATED this 8th day of February, 2013.

ADAMS LAW GROUP, LTD.

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
Attorneys for Petitioner

[11] Arbitrator Prato ruled, "NRS 38.255(3) specifically excludes class action cases. Therefore, without ruling on the merits of the class action suit, the motion to certify this as a class action arbitration is denied." (1 App. 204-205).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Writ of Mandamus ("this Petition") complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using WordPerfect 14-point Times New Roman.

2. I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in a brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of February, 2013.

ADAMS LAW GROUP, LTD.

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Tel: (702) 838-7200
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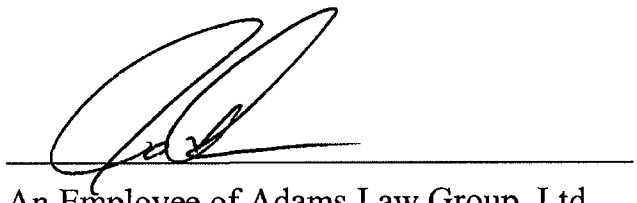
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 8th day of February, 2013, I served a true and correct copy of the PETITION FOR WRIT OF MANDAMUS and by hand delivery to the following:

Tamara Beatty Peterson, Esq.
Brownstein Hyatt Farber Schreck, LLP
100 N. City Parkway, Suite 1600
Las Vegas, NV 89106
Attorneys for Real Party in Interest

Honorable Susan Scann
Department 29
Eighth Judicial District Court
200 Lewis Ave.
Las Vegas, NV 89155



An Employee of Adams Law Group, Ltd.

EXHIBIT "7"

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE SUSAN SCANN,
Respondents,
and
PREM DEFERRED TRUST; ELSINORE, LLC; MONTESA, LLC; KING FUTTS PFM, LLC; AND HIGHER GROUND, LLC, ON BEHALF OF THEMSELVES AND AS REPRESENTATIVES OF THE CLASS HEREIN DENIED,
Real Parties in Interest.

No. 61940

PREM DEFERRED TRUST, ON BEHALF OF ITSELF AND AS REPRESENTATIVES OF THE CLASS AS HEREIN DEFINED,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE,
Respondents,
and
SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,
Real Party in Interest.

No. 62587

ORDER GRANTING MOTION TO CONSOLIDATE PETITIONS

Real parties in interest in Docket No. 61940, Prem Deferred Trust; Elsinore, LLC; King Futts PFM, LLC; and Higher Ground, LLC

13-10732

have filed a motion to consolidate the writ petition filed in that docket with the writ petition filed in Docket No. 62587. The motion argues that the writ petitions arise from the same district court proceedings and challenge the same district court order, and that the writs should be consolidated to avoid unnecessary costs and promote judicial economy. Southern Highland Community Association, petitioner in Docket No. 61940 and real party in interest in Docket No. 62587, has filed a notice of nonopposition to the motion. Having considered the motion, we grant it and hereby consolidate the writ petitions filed in Docket Nos. 61940 and 62587.

It is so ORDERED.

Pickering, C.J.

cc: Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Adams Law Group

EXHIBIT "1"

ORD
JOHN B. LEACH, ESQ.
Nevada Bar No. 1225
TRACY A. GALLEGOS, ESQ.
Nevada Bar No. 9023
SANTORO, DRIGGS, WALCH,
KEARNEY, JOHNSON & THOMPSON
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Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912

Attorneys for Spring Mountain Ranch Master Association

FILED
Dec 22 8 33 AM '06
Shirley A. Parraguirre
CLERK

9

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 20, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty O. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John B. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issues, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

02638-08/127791_2

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,263.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall issue [illegible] [illegible] of [illegible] LLP, on behalf of the Intervenor, Recontrust Company, N.A.

Dated this 20 day of December, 2006

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

JOHN E. LEACH, ESQ.
Nevada Bar No. 1225
TRACY A. GALLEGOS, ESQ.
Nevada Bar No. 9023
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Defendant Spring Mountain Ranch Master Association

Approved as to Form and Content:

THE COOPER CASTLE LAW FIRM

Anita KH McFarland, Esq.
Marty O. Baker, Esq.
820 S. Valley View Blvd.
Las Vegas, NV 89107

Attorneys for Korbel Family Trust

CERTIFIED COPY
DOCUMENT ATTACHED IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE
2007 MAR 13 P 3:13
CLERK OF THE COURT

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON
400 SOUTH FOURTH STREET, THIRD FLOOR, LAS VEGAS, NEVADA 89101
(702) 791-0308 • FAX (702) 791-1912

REGISTER OF ACTIONS
CASE NO. 06A523959

Korbel Family Living Trust vs Spring Mountain Ranch Master Assn, Bay Capital Corp

Case Type: Title to Property
Subtype: Liens
Date Filed: 06/27/2006
Location: Department 16
Conversion Case Number: A523959

PARTY INFORMATION

		Lead Attorneys
Conversion Extended Connection Type	No Convert Value @ 06A523959 Removed: 04/24/2006 Converted From Blackstone	
Defendant	Bay Capital Corp	
Defendant	Spring Mountain Ranch Master Assn	John Eric Leach *Retained* ** Confidential Phone Number **
Intervenor	Recontrust Company	Jeremy T. Bergstrom *Retained* ** Confidential Phone Number **
Plaintiff	Korbel Family Living Trust	Anita K. Holden-McFarland *Retained* ** Confidential Phone Number **

EVENTS & ORDERS OF THE COURT

11/20/2006 **Hearing (9:00 AM) (Judicial Officer Glass, Jackie)**
ARGUMENT/ PLTF'S MTN FOR PRELIMINARY INJUNCTION /S Court Clerk: Sandra Jeter Reporter/Recorder: Francesca Haak Heard By: Jackie Glass

Minutes
11/20/2006 9:00 AM
- Arguments by counsel regarding who is going to pay what and what are common expenses as outlined in NRS 116. COURT ORDERED, the Association can collect the superpriority lien including up to six months of late fees, collection fees and attorney's fees; however anything after foreclosure is not included - only what was before - and counsel is to make sure everyone has notice. COURT FURTHER ORDERED, the previously interpled funds are to be RELEASED. Mr. Leach to prepare the Order and submit to Mr. Baker for approval as to form and content.

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS

CASE No. 06A523959

Korbel Family Living Trust vs Spring Mountain Ranch Master Assn, Bay Capital Corp	§	Case Type:	Title to Property
	§	Subtype:	Liens
	§	Date Filed:	06/27/2006
	§	Location:	Department 16
	§	Conversion Case Number:	A523959
	§		

PARTY INFORMATION

		Lead Attorneys
Defendant	Bay Capital Corp	
Defendant	Spring Mountain Ranch Master Assn	John Eric Leach *Retained* 7027910308(W)
Intervenor	Recontrust Company	Jeremy T. Bergstrom *Retained* 702-369-5960(W)
Plaintiff	Korbel Family Living Trust	Anita K. Holden-McFarland *Retained* 702-435-4175(W)

EVENTS & ORDERS OF THE COURT

09/18/2006 All Pending Motions (9:00 AM) (Judicial Officer Glass, Jackie)
ALL PENDING MOTIONS 9/18/06 Court Clerk: Sandra Jeter Reporter/Recorder: Rachelle Hamilton Heard By: Jackie Glass

Minutes
09/18/2006 9:00 AM
- APPEARANCES CONTINUED: Steven Yarmy, Esq., present representing the Intervenor. INTERVENOR RECONSTRUST CO'S MOTION TO INTERVENE: MOTION TO INTERPLEAD EXCESS PROCEEDS...PLTFS' MOTION FOR PRELIMINARY INJUNCTION Mr. Yarmy stated he wishes to interplead the excess funds. Mr. Leach advised he has no objection to the interpleader; however, he does object to the amount of legal fees Mr. Yarmy requested. Further advised, deft. agreed to the preliminary injunction and has provided Plif. with an accounting; however, there is a legal dispute over the interpretation of NRS 116. Brief argument by Mr. Yarmy in support of his request for attorney's fees. COURT ORDERED, Motion to Interplead Funds, GRANTED. FURTHER, Mr. Yarmy to prepare the Order, attach a detailed billing and leave a blank for the amount of attorney's fees. Mr. Yarmy moved to be relieved as a stake holder. SO ORDERED. Matter trailed for Ms. McFarland's presence. Matter recalled. Ms. McFarland present and stated she told Mr. Yarmy not to file an interpleader because she would make sure he gets his fees and costs. Court informed Ms. McFarland regarding the status of Mr. Yarmy's request for fees. Mr. Leach stated deft. has stipulated to the entry of the Preliminary Injunction and requested that if a bond is required, that it be diminimus. Further, the parties have reached an agreement with everything except the interpretation of the one statute and could probably stipulate to the facts. Colloquy. Ms. McFarland requested the Court elaborate on its decision reference the legal issue stating it keeps coming up over and over again. COURT ORDERED, counsel are to prepare a stipulation of the facts and matter CONTINUED and SET for ARGUMENT. 10/16/06 9:00 AM ARGUMENT

Parties Present
Return to Register of Actions

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Attorneys for certain Respondents

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY REAL ESTATE DIVISION

HIGHER GROUND, LLC, et al. Claimants, vs. ADAGIO HOMEOWNERS' ASSOCIATION, et al. Respondent.	NRED No. 11-90 **ORDER**

On December 30, 2011, Claimants Higher Ground, LLC, *et al.*, by and through their attorneys of record, Adams Law Group, Ltd., and Puoy K. Premsrirut, Inc., filed their Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS 116.3116 ("Motion"). On January 17, 2012, Respondents Adagio Homeowners' Association, *et al.*, by and through their attorneys of record, Leach Johnson Song & Gruchow and Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP., filed their Opposition to Claimants' Motion for Summary Judgment on Claim for

Declaratory Relief Regarding the Interpretation of NRS 116.3116. On January 25, 2012, Claimants filed their Reply to Opposition to Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS 116.3116.

The hearing on the Motion was held March 7, 2012, Arbitrator Leonard Gang presiding. Claimants appeared by and through their counsel, James R. Adams and Puoy K. Premsrirut, the Respondents appeared by and through their counsel, Sean L. Anderson and Don Springmeyer. The Arbitrator, having considered all of the pleadings and papers on file and considering the oral argument of counsel, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Claimants either own, or have previously owned, properties within various common-interest communities in Nevada. Claim Form 11-90 at ¶¶ 18-19.

2. Because the properties at issue in this action are common-interest communities, the Nevada Uniform Common-Interest Ownership Act, NRS Chapter 116 (the "Act") governs the issues presented.

3. Pursuant to the Act, a common-interest community has a lien (the "Lien") against a unit for any construction penalty imposed against the unit's owner, any assessment levied against the unit, or any fine imposed against the unit's owner from the time that the construction penalty, assessment or fine becomes due. NRS 116.3116(1).

4. A common-interest community's recordation of its Declaration of Covenants, Conditions and Restrictions (the "Declaration") constitutes record notice and perfection of the Lien – no further notice of a claim of lien is required. NRS 116.3116(4).

5. Pursuant to NRS 116.3116, the Lien for delinquent assessments is superior in priority to all other liens and encumbrances against a unit except:

(a) a lien or encumbrance recorded prior to the recordation of the Declaration;

(b) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

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(c) liens for real estate taxes and certain other governmental assessments or encumbrances.

6. Pursuant to NRS 116.3116(2), the Lien is also superior in priority to a first recorded security interest "to the extent of the assessments of common expenses based on the periodic budget adopted by the association pursuant to NRS § 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

7. The total amount entitled to priority over the first recorded security interest is referred to herein as the Super Priority Lien.

8. A justiciable controversy exists in this matter as to the interpretation of NRS § 116.3116. Specifically, a dispute has arisen between the parties regarding:

(a) the calculation of the Super Priority Lien; and

(b) whether a civil action must be initiated to enforce the Super Priority Lien.

9. The parties agree that interest, late fees and the costs of collection of delinquent assessments by a third party all constitute "assessments" that may be included in the Super Priority Lien under NRS § 116.3116.

10. Claimants assert that while interest, late fees and the costs may be included in the Super Priority Lien, the total amount that may be charged is "capped" in the amount of the "monthly assessment" multiplied by 9 or 6, depending upon the operative time period. Under Claimants' theory, all interest, late fees and costs of collection which exceed this "cap" may not be recovered as part of the Super Priority Lien.

11. Respondents assert that interest, late fees and the costs of collection all constitute "assessments" that may be included in the Super Priority Lien Amount in addition to the 9 months or 6 months of assessments.

12. The Arbitrator, having considered the voluminous briefs, exhibits and other evidence submitted by the parties, as well as the extensive oral argument presented by counsel, finds and concludes that the Super Priority Lien is not "capped" or limited to 9 times or 6 times the monthly assessment.

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The Arbitrator further finds and concludes that the Super Priority Lien includes 9 months or 6 months of assessments in addition to all interest, late fees and the costs of collecting and enforcing the Lien, which pursuant to NRS § 116.310313 and R119-09 may include reasonable legal fees and costs.

13. For purposes of calculating Super Priority Liens arising after the adoption by the Commission for Common-Interest Communities and Condominium Hotels of Regulation R199-09, effective May 5, 2011, the costs of collection may not exceed a total of $1,950, plus the costs and fees set forth in subsections 3 and 4 set forth in Regulation R119-09.

14. The Arbitrator further finds and concludes that a common-interest community is not required to file a civil action in order to collect the Super Priority Lien.

ORDER

1. IT IS HEREBY ADJUDGED ORDERED AND DECREED that the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS § 116.3116 is denied.

2. IT IS FURTHER DECLARED AND ORDERED that the Super Priority Lien pursuant to NRS § 116.3116 includes interest, late fees and costs of collection, which are in addition to, and not capped by, the applicable period of common expense assessments.

3. IT IS FURTHER ORDERED that Respondents' Super Priority Lien includes 9 months or 6 months of assessments in addition to interest, late fees and the costs of collecting and enforcing the Lien, which pursuant to NRS § 116.310313 and R119-09 may include reasonalbe legal fees and costs.

4. IT IS FURTHER ORDERED that NRS § 116.3116 does not require Respondents to commence a "civil action" to enforce their Super Priority Lien.

IT IS SO ORDERED this 29 day of March, 2012

Leonard A. Berg
ARBITRATOR

LEACH JOHNSON SONG & GRUCHOW
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Submitted by:

LEACH JOHNSON SONG & GRUCHOW

By: /s/ Sean L. Anderson

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Ara Shirinian Mediation
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Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Montessa, LLC, on behalf of itself and as representative of the class herein defined, Claimants, vs. Spring Mountain Ranch Master Association et. al., Respondents	NRED Control No.: 12-24 **NON-BINDING ARBITRATION AWARD**

Pursuant to the stipulation of the parties made during an August 23, 2012 conference held between all parties and the Arbitrator, it was agreed that this matter be decided upon the pleadings and record on file in this case. This case was extensively briefed by all sides. The Arbitrator rules that all parties participated in good faith in this matter.

Having considered the extensive pleadings submitted by all of the parties to this matter, and the argument of counsel, the Arbitrator finds as follows:

1. Class Action Motion

Claimant has filed a class action motion to certify this matter as a class action, with Montessa, LLC serving as class representative of approximately 50 claimants, including entities

such as Federal National Mortgage Insurance Association, GMAC Mortgage, HSBC Bank, Bank of New York, Aurora Loan Services, US Bank, JP Morgan Chase, Wells Fargo Bank, and Bank of America, among others, all of whose claims allegedly run into the tens of thousands of dollars *each*, and whose claims collectively and individually dwarf the amount sought herein by the Claimant[1]. The Arbitrator rules that the Claimant is simply not similarly situation to the class as defined by him in the pleadings. The Claimant has also failed to provide any evidence whatsoever on its adequacy to represent these national companies with large claimed damages, or that the claims these institutions could make are so small as to deter the claimants from filing their own actions.[2]

The motion for certification is DENIED. Because the Arbitrator finds that no evidence was presented to him to support a contention that Montessa, LLC is an adequate class representative to represent in this case the interests of entities such as Federal National Mortgage Insurance Association, GMAC Mortgage, HSBC Bank, Bank of New York, Aurora Loan Services, US Bank, JP Morgan Chase, Wells Fargo Bank, and Bank of America, he makes no ruling on whether he has jurisdiction as an Arbitrator to certify a class action.

2. The Claims of Montessa, LLC

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[1] Montessa appears to have claims on 2 properties, while FNMA may have claims upon 48 properties, US Bank upon 79 properties, Wells Fargo Bank upon 35 properties, etc. It appears the alleged claims of the national banking institutions run into the hundreds of thousands each, while Claimants damages appear to be less than $15,000.

[2] For example, Bank of America has filed a separate Nevada Department of Real Estate action involving its claims against more than a dozen homeowners associations. Many if not most of the identified potential class members have the financial wherewithal and incentive to do the same, if they feel these claims are valid.

The Claimant seeks a refund of collection costs charged to it by via the vehicle of a "priority" lien. The Respondent homeowners association denies the assertions of the Claimant and asserts that the proper amounts were charged upon the priority liens at issue.

In a departure from traditional lien property law, and to *expand* the rights of homeowners associations, Nevada has adopted the Uniform Common Interest Ownership Act. This act is codified in NRS 116. The instant matter involves the interpretation of NRS 116. As is relevant herein, NRS 116.3116 generally provides that, upon a foreclosure, an association's lien to a new owner of property for moneys due the association by a prior owner is superior to all other liens, including those filed earlier, such as the first mortgagee's interest. It is the *nature and extent* of this "priority" lien which is the subject of this suit.

The Arbitrator appreciates that there has been differing decisions made by different judges and arbitrators regarding the interpretation of NRS 116.3116. The Arbitrator also appreciates the fact that the issues raised in this matter will no doubt be ultimately heard by the Nevada Supreme Court. However, as of this date the Nevada Supreme Court has not published a decision interpreting NRS 116.3116. Thus, this action is being reviewed by this Arbitrator as a case of first impression.

It is not disputed that interest, late fees, and third party costs of collection are considered a part of the assessments under NRS 116.3116, and are subject to inclusion into a HOA priority lien. Claimant argues nevertheless that 116.3116 1(C) limits the priority lien to a gross figure not to exceed an amount equal to 9 months of *normal homeowners assessments or monthly dues*. The Arbitrator disagrees.

NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." The plain reading of the *entirety* of this statute and the *entirety* of Chapter 116 indicates that what is meant by the words "would have become due" was to allow homeowners associations a priority lien to the extent of, and in a gross amount equal to, what these associations would have been able to be awarded for a nine month period had lien priority not been an issue. This gross amount would include all association dues in arrears, as well as all

other costs and fees the association might be entitled to. For example, in a non-foreclosure setting, if a property owner was delinquent for 9 months in paying his $200 per month hypothetical homeowner's dues, there could not be a dispute that the homeowners association could sue for, obtain a lien for, and be awarded the sum of $1,800, *plus* all costs associated with collection. In this example, let us assume that collection costs and other charges equal $2,000. In this hypothetical, the homeowners association would be awarded the total sum of $3,800.

Again, NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." In our example there can be no dispute that had action been taken prior to foreclosure, what "would have become due" to the homeowners association by the hypothetical owner would be $3,800. Thus, using the figures in our hypothetical noted above, in a foreclosure setting, the hypothetical homeowners association would be limited to a priority lien in the sum of $3,800, or an amount equal to what "***would have become due*** ... in the 9 months immediately preceding institution of the lien." This is obviously greater than a mere 9 times multiple of the normal HOA dues suggested by the Claimant.

The lien limitation set forth in NRS 116.3116 requires the trier of fact to look-back and to the limit a lien to what "would have become due" had an action been filed at the end of a nine month period. That amount would include delinquent homeowners' dues, attorneys' fees, interest, penalties, interest and all other charges which a homeowners association legally could seek in a non-foreclosure setting. While the 9 month limitation is a cap, it is cap which includes collection costs and fees, because those costs "would have become due" had a matter been filed.

In the instant cases the evidence shows that the homeowner association obtained liens for, and collected from the Claimant, an amount equal to nine months of association dues, plus collection costs. This is exactly the amount the homeowners associations are entitled to under the law.

Based upon the foregoing, and the lack of any compelling or probative evidence to suggest that the priority liens collected upon were not proper in type or amount, non-binding arbitration award is herewith granted in **favor of the Respondent** and against the Claimant. The

Arbitrator further rules that Montessa, LLC has now exhausted its administrative remedies and may proceed individually as a claimant in the Clark County District Court should it, or the Respondent, wish to de nova this award. The Arbitrator makes no ruling as to whether the other purported class members have exhausted their administrative remedies.

Dated: August 31, 2012

Ara H. Shirinian

Arbitrator

Proof Of Service By Mail

I, Ara Shirinian, do hereby declare that I am employed in the County of Clark, State of Nevada. I am over the age of 18 years old and not a party to the within action. My business address is 10651 Capesthorne Way, Las Vegas, Nevada 89135. On the date below, I caused to be mailed by first class United States mail, postage pre-paid, the foregoing document(s): Arbitration Award to all parties in this action addressed as follows:

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I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct and that this declaration was made in Las Vegas on the below date.

DATED: 8/31/12

ARA SHIRINIAN

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Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Bank of America, N. A.,

Claimant,

vs.

Stonefield Homeowners Association, et. al.

Respondents

NRED Control No.: 12-58

NON-BINDING ARBITRATION AWARD

On or about June 13, 2012 the Arbitrator in this action ruled this matter would be decided upon the briefing of the parties, without hearing, unless objection to this procedure was made by a party. With no party objecting to the matter being decided upon the briefs of the parties, and the hearing being waived by the parties, this arbitration award follows. The Arbitrator rules that all parties participated in good faith in this matter.

Having considered the extensive pleadings submitted by the parties to this matter, the Arbitrator finds as follows:

1. Claims Presented

This arbitration involves two primary claims for relief. Firstly, the Claimant seeks a declaration establishing whether it has a right to pay-off or redeem a Homeowners Association

("HOA") super-priority lien before it forecloses under a senior deed of trust. Secondly, the Claimant seeks a declaration establishing that a HOA's super-priority lien does not include attorneys' fees and costs when such costs increase the amount of the lien to a sum greater than nine months of monthly assessments. These requests for declaration are ruled upon below in reverse order.

2. Assessments Enforceable Under NRS 116.3116 Include all Reasonable Collection Costs and Fees Relating to the Nine Month Period

In a departure from traditional lien property law, and to *expand* the rights of homeowners associations, Nevada has adopted the Uniform Common Interest Ownership Act. This act is codified in NRS 116. The instant matter involves the interpretation of NRS 116. As is relevant herein, NRS 116.3116 generally provides that, upon a foreclosure, an association's lien to a new owner of property for moneys due the association by a prior owner is superior to all other liens, including those filed earlier, such as the first mortgagee's interest. It is the *nature and extent* of this "priority" lien which is the subject of this suit.

The Arbitrator appreciates that there has been differing decisions made by different administrative bodies, judges and arbitrators regarding the interpretation of NRS 116.3116. See CCIC Opinion No.2010-11; Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Clark County District Court Case No.: 06-AO523959-C; Elkhorn Community Assoc. v. MERS, Clark County District Court No. A607051; JP Morgan v. Countrywide Home Loans, Clark County District Court Case No. A562678. See differing opinions found in the November 18, 2010 advisory opinion of the Nevada Financial Institution Division, and by the Court in Wingbrook Capital v. Peppertree HOA, Clark County District Court Case No. A-11-636948-B. The Arbitrator also appreciates the fact that the issues raised in this matter will ultimately be heard by the Nevada Supreme Court. However, as of this date, the Nevada Supreme Court has not published a decision interpreting NRS 116.3116. Thus, this action is being reviewed by this Arbitrator as a case of first impression.

It is not disputed that interest, late fees, and third party costs of collection are considered a part of the assessments under NRS 116.3116, and are subject to inclusion into a HOA priority lien. Claimant argues nevertheless that 116.3116 1.(C) limits the priority lien to a gross figure not to exceed an amount equal to 9 months of *normal homeowners assessments or monthly dues.* The Arbitrator disagrees.

NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." The plain reading of the *entirety* of this statute and the *entirety* of Chapter 116 indicates that what is meant by the words "would have become due" was to allow homeowners associations a priority lien to the extent of, and in a gross amount equal to, what these associations would have been able to be awarded for a nine month period had lien priority not been an issue. This gross amount would include all association dues in arrears, as well as all other costs and fees the association might be entitled to. For example, in a *non-foreclosure setting*, if a property owner was delinquent for 9 months in paying his $200 per month hypothetical homeowner's dues, there could not be a dispute that the homeowners association could sue for, obtain a lien for, and be awarded the sum of $1,800, *plus* all costs associated with collection. In this example, let us assume that collection costs and other charges equal $2,000. In this hypothetical, the homeowners association could obtain a lien for, and be awarded the total sum of $3,800.

Again, NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." In the hypothetical noted above had action been taken prior to foreclosure, what "would have become due" to the homeowners association by the home owner would be $3,800. Thus, using the figures in our example, in a foreclosure setting, the homeowners association would be limited to a priority lien in the sum of $3,800, or an amount equal to what "***would have become due*** ... in the 9 months immediately preceding institution of the lien."

The lien limitation set forth in NRS 116.3116 requires the trier of fact to look-back and to the limit a lien to what "would have become due" had an action been filed at the end of a nine month period. That amount would include delinquent homeowners' dues, attorneys' fees, interest, penalties, interest and all other charges which a homeowners association legally could seek in a non-foreclosure setting. While the 9 month limitation is a cap, it is cap which includes collection costs and fees, because those costs "would have become due" had a matter been filed outside foreclosure. See Hudson House Condo. V. Brooks, 611 A.2d 862 (Conn. 1992) in support. [1] The Claimant's request for relief in this regard is denied.

3. Absent Foreclosure of a Lien Respondents Are Not Obligated to Resolve Lien Disputes

All parties to this matter seem to agree that a super-priority lien attaches or is "triggered" when the first deed of trust holder forecloses upon its deed of trust. The Claimant nevertheless seeks a declaration establishing that it has an absolute right to pay-off or redeem a Homeowners Association ("HOA") super-priority lien before it is triggered or attaches, or before it forecloses under a senior deed of trust. Claimant argues that the respondent homeowners associations must, in effect, pre-determine the likely amount of the super-priority lien, and do so before collection costs and other charges are incurred, so that entities such as the Claimant can avoid the imposition of these fees and costs.[2]

---

[1] The Respondents make several additional arguments in support of the proposition that the super priority lien includes costs of collection. The merits of those additional arguments are not ruled upon herein.

[2] The Respondents have set forth many reasons why it would be difficult, if not impossible, to determine exact lien amounts prior to foreclosure, so that an appropriate demand can be made upon a pending or potential super-priority lien. The Respondents also point out the several pitfalls of accepting a lien pay-off prior to attachment of the lien. The Arbitrator finds the Respondents arguments in this regard to be persuasive. However, these arguments are not necessary to support the Arbitrator's decision herein.

While the Claimant certainly has the *right* to *negotiate a settlement* with homeowners associations regarding liens prior to foreclosure, there is nothing in the law which requires or sets forth an *obligation* of homeowners associations to either negotiate with the Claimant, or to enter into a settlement or resolution. There is simply no provision in the law which requires Respondents to pre-determine likely lien amounts before those liens are triggered or attach. There is simply no provision in the law which requires Respondents to then accept that amount in lieu of going forward with the procedures now followed by the Respondents. The Claimant's request for relief in this regard is denied.

4. Conclusion

Based upon the foregoing, non-binding arbitration award is herewith granted in **favor of the Respondents**, and each of them, and against the Claimant on all claims for relief.

Dated: September 18, 2012

Ara H. Shirinian

Arbitrator

Proof Of Service By Mail

I, Ara Shirinian, do hereby declare that I am employed in the County of Clark, State of Nevada. I am over the age of 18 years old and not a party to the within action. My business address is 10651 Capesthorne Way, Las Vegas, Nevada 89135. On the date below, I caused to be mailed by first class United States mail, postage pre-paid, the foregoing document(s): Arbitration Award to all parties in this action addressed as follows:

See attached list

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct and that this declaration was made in Las Vegas on the below date.

DATED: 9/6/12

ARA SHIRINIAN

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Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Dan B. Yaffe/Philadelphia Freedom Corporation, Claimants, vs. Spanish Trail Homeowners Association and National Association Services, Respondents	NRED Control No.: 09-35 **NON-BINDING ARBITRATION AWARD**

On March 2, 2009 an arbitration hearing was held before Arbitrator Ara Shirinian at the offices of Leach Johnson Song & Gruchow, 5495 South Rainbow, Suite 202, Las Vegas, NV 89101. Present were the Arbitrator, Dan Yaffe on behalf of the Claimants, Nicole Guralny on behalf of the Respondents, and two representatives of the Respondents. The Arbitrator herewith rules that all parties participated in good faith in this Arbitration.

Having considered the pre-hearing statements of the Claimant & Respondent, the exhibits offered for consideration, the arguments on behalf of the parties, and based upon the

evidence presented at the arbitration hearing, the Arbitrator **finds for the Respondents**, and each of them.

This arbitration deals with the construction and interpretation of NRS 116.3116. Claimants claim that, upon a home in which they took ownership in foreclosure in May of 2008, they were obligated to the Respondents *for HOA fees only* for the prior six months, or the sum "approximately $4,500" less than what the Respondents charged for, and received. The Respondents[1] argue that their calculations of moneys due are correct, and they were entitled to receive pay-off amounts, for both the master and sub association, inclusive of late fees, interest, collection costs, and other costs incurred. The Arbitrator agrees with the Respondents. NRS 3116(1) makes clear that in addition to delinquent HOA fees for six months, the Respondents are also entitled to receive "...penalties, fees, charges, late charges, fines, and interest..." incurred during this six month period. See also Hudson House Condo. Assoc. v. Brooks, 223 Conn. 610 (1992).

A careful examination of Respondents Exhibits C & D to its arbitration brief indicates no excess charges upon this paid assessment. $10,200 was charged the Claimants by the Respondents, and paid for by the Claimants, under protest. The Arbitrator finds these charges to be reasonable and allowable. Therefore, as stated and based upon the above, a **Non-Binding Arbitration Award is herewith issued in favor of Respondents, and each of them**, against Claimants, and each of them, on all claims. All parties are to bear their own attorneys' fees and costs.

Dated: March 2, 2009

Ara H. Shirinian
Arbitrator

[1] One of the Respondents, National Association Services, as a debt collector, is not a proper party Respondent herein. Nevertheless, the Arbitrator rules that no party, including, without limitation, non-named Links at Spanish Trail, is liable to the Claimants for overpaid Association fees or assessments.

Proof Of Service By Mail

I, Ara Shirinian, do hereby declare that I am employed in the County of Clark, State of Nevada. I am over the age of 18 years old and not a party to the within action. My business address is 10651 Capesthorne Way, Las Vegas, Nevada 89135. On the date below, I caused to be mailed by first class United States mail, postage pre-paid, the foregoing document(s): Arbitration Award to all parties in this action addressed as follows:

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Nicole Guralny
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I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct and that this declaration was made in Las Vegas on the below date.

DATED: 5/2/07

ARA SHIRINIAN

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STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY REAL ESTATE DIVISION

HIGHER GROUND, LLC, et al. Claimants, vs. ADAGIO HOMEOWNERS' ASSOCIATION, et al. Respondent.	NRED No. 11-90 **ORDER**

On December 30, 2011, Claimants Higher Ground, LLC, *et al.*, by and through their attorneys of record, Adams Law Group, Ltd., and Puoy K. Premsrirut, Inc., filed their Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS 116.3116 ("Motion"). On January 17, 2012, Respondents Adagio Homeowners' Association, *et al.*, by and through their attorneys of record, Leach Johnson Song & Gruchow and Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP., filed their Opposition to Claimants' Motion for Summary Judgment on Claim for

Declaratory Relief Regarding the Interpretation of NRS 116.3116. On January 25, 2012, Claimants filed their Reply to Opposition to Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS 116.3116.

The hearing on the Motion was held March 7, 2012, Arbitrator Leonard Gang presiding. Claimants appeared by and through their counsel, James R. Adams and Puoy K. Premsrirut, the Respondents appeared by and through their counsel, Sean L. Anderson and Don Springmeyer. The Arbitrator, having considered all of the pleadings and papers on file and considering the oral argument of counsel, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Claimants either own, or have previously owned, properties within various common-interest communities in Nevada. Claim Form 11-90 at ¶¶ 18-19.

2. Because the properties at issue in this action are common-interest communities, the Nevada Uniform Common-Interest Ownership Act, NRS Chapter 116 (the "Act") governs the issues presented.

3. Pursuant to the Act, a common-interest community has a lien (the "Lien") against a unit for any construction penalty imposed against the unit's owner, any assessment levied against the unit, or any fine imposed against the unit's owner from the time that the construction penalty, assessment or fine becomes due. NRS 116.3116(1).

4. A common-interest community's recordation of its Declaration of Covenants, Conditions and Restrictions (the "Declaration") constitutes record notice and perfection of the Lien – no further notice of a claim of lien is required. NRS 116.3116(4).

5. Pursuant to NRS 116.3116, the Lien for delinquent assessments is superior in priority to all other liens and encumbrances against a unit except:

(a) a lien or encumbrance recorded prior to the recordation of the Declaration;

(b) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

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(c) liens for real estate taxes and certain other governmental assessments or encumbrances.

6. Pursuant to NRS 116.3116(2), the Lien is also superior in priority to a first recorded security interest "to the extent of the assessments of common expenses based on the periodic budget adopted by the association pursuant to NRS § 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

7. The total amount entitled to priority over the first recorded security interest is referred to herein as the Super Priority Lien.

8. A justiciable controversy exists in this matter as to the interpretation of NRS § 116.3116. Specifically, a dispute has arisen between the parties regarding:

(a) the calculation of the Super Priority Lien; and

(b) whether a civil action must be initiated to enforce the Super Priority Lien.

9. The parties agree that interest, late fees and the costs of collection of delinquent assessments by a third party all constitute "assessments" that may be included in the Super Priority Lien under NRS § 116.3116.

10. Claimants assert that while interest, late fees and the costs may be included in the Super Priority Lien, the total amount that may be charged is "capped" in the amount of the "monthly assessment" multiplied by 9 or 6, depending upon the operative time period. Under Claimants' theory, all interest, late fees and costs of collection which exceed this "cap" may not be recovered as part of the Super Priority Lien.

11. Respondents assert that interest, late fees and the costs of collection all constitute "assessments" that may be included in the Super Priority Lien Amount in addition to the 9 months or 6 months of assessments.

12. The Arbitrator, having considered the voluminous briefs, exhibits and other evidence submitted by the parties, as well as the extensive oral argument presented by counsel, finds and concludes that the Super Priority Lien is not "capped" or limited to 9 times or 6 times the monthly assessment.

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The Arbitrator further finds and concludes that the Super Priority Lien includes 9 months or 6 months of assessments in addition to all interest, late fees and the costs of collecting and enforcing the Lien, which pursuant to NRS § 116.310313 and R119-09 may include reasonable legal fees and costs.

13. For purposes of calculating Super Priority Liens arising after the adoption by the Commission for Common-Interest Communities and Condominium Hotels of Regulation R199-09, effective May 5, 2011, the costs of collection may not exceed a total of $1,950, plus the costs and fees set forth in subsections 3 and 4 set forth in Regulation R119-09.

14. The Arbitrator further finds and concludes that a common-interest community is not required to file a civil action in order to collect the Super Priority Lien.

ORDER

1. IT IS HEREBY ADJUDGED ORDERED AND DECREED that the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief Regarding NRS § 116.3116 is denied.

2. IT IS FURTHER DECLARED AND ORDERED that the Super Priority Lien pursuant to NRS § 116.3116 includes interest, late fees and costs of collection, which are in addition to, and not capped by, the applicable period of common expense assessments.

3. IT IS FURTHER ORDERED that Respondents' Super Priority Lien includes 9 months or 6 months of assessments in addition to interest, late fees and the costs of collecting and enforcing the Lien, which pursuant to NRS § 116.310313 and R119-09 may include reasonalbe legal fees and costs.

4. IT IS FURTHER ORDERED that NRS § 116.3116 does not require Respondents to commence a "civil action" to enforce their Super Priority Lien.

IT IS SO ORDERED this 29 day of March, 2012

Leonard Gang
ARBITRATOR

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Submitted by:

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Arbitrator

STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

HIGHER GROUND, LLC, A Nevada limited liability company; RRR HOMES, LLC, a Nevada limited liability company; TRIPLE BRANDED CORD, LLC, Nevada limited liability company; EQUISOURCE, LLC, a Nevada limited liability company; EQUISOURCE HOLDING, LLC, a Nevada limited liability company; APPLETON PROPERTIES, LLC, a Nevada limited liability company; CBRIS, LLC, a Nevada limited liability company; MEGA, LLC, a Nevada limited liability company; SOUTHERN Nevada ACQUISITIONS, LLC, a Nevada limited liability company, VESTEDSPEC, INC., a Nevada corporation; CUSTOM ESTATES, LLC, a Nevada limited liability company; KINGFUTT'S PFM LLC, a Nevada limited liability company; THORNTON & ASSOCIATES, LLC, a Nevada limited liability company; WINGBROOK CAPITAL LLC, a Nevada limited liability company; ELSINORE, LLC, a Nevada limited liability company; MONTESA, LLC, a Nevada limited liability company; EKNV, LLC, a a Nevada limited liability company; on behalf of themselves and as representatives of the class herein defined, Claimants,	NRED Control # 10-87

v.

NEVADA ASSOCIATION SERVICES, INC, a Nevada corporation; RMI MANAGEMENT, LLC, dba RED ROCK FINANCIAL SERVICES, a Nevada limited liability company; HOMEOWNER ASSOCIATION SERVICES, INC., a Nevada Corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company; HAMPTON & HAMPTON, a professional corporation; ANGIUS & TERRY COLLECTIONS, LLC, a Nevada limited liability company; SILVER STATE TRUSTEE SERVICES, LLC, a Nevada limited liability company,

Respondents.

ORDER GRANTING IN PART AND DENYING IN PART CLAIMANTS' MOTION FOR SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF.

This matter came before the undersigned arbitrator pursuant to NRS 38.231(2) on the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief, by and through their attorney James R. Adams, Esq., of Adams Law Group, LTD. Respondents, Nevada Association Services, Inc. ("NAS"), RMI Management, LLC. ("RMI"), and Angius & Terry Collections, LLC ("Angius & Terry"), by and through their attorney, Patrick J. Reilly, Esq., of Holland & Hart, LLP., Robert Massi, Esq., of Robert Massi & Associates representing Respondents Hampton & Hampton, a professional corporation; Robert J. Walsh, Esq., of Walsh & Friedman, LTD, who was representing Respondent Silver State Trustee Services, LLC[1]; Kaleb Anderson, Esq., of

[1] Mr. Scott R. Cook, Esq. of Gordon & Rees, LLP., is Respondent Silver State Trustee Services' current attorney.

Lipson, Neilson, Cole, Seltzer, Garin, P.C., representing Respondent Homeowners Association Services; Ryan M. Kerbow, Esq., of Alessi & Koenig, LLC, representing Respondent Alessi & Koenig, LLC., opposed the Claimants' above-titled motion.

In the subtitle of their opposition to the above-titled motion, Respondents NAS, RMI and RMI noted: "COUNTERMOTION FOR SUMMARY JUDGMENT." However, there is no countermotion attached to their opposition. Therefore, this arbitrator finds that there is no countermotion properly brought before him to rule on.

1. Scope of this order.

The Claimants are requesting this arbitrator to interpret NRS 116.3116. The Claimants are requesting the following under the Declaratory Relief in their Amended Complaint:

1. After the foreclosure by a first mortgage lender (first recorded deed of trust holder) of a unit located within homeowners' association (HOA), pursuant to NRS 116.3116, the amount of HOA 's super priority lien[2] is limited to an amount equaling 9 times the monthly assessment (plus repair costs pursuant to NRS 116.310312); and

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[2]"Super priority lien" means an HOA's lien for unpaid assessments as defined by NRS 116.3116(2), which remains senior or superior to the interest of first security interest holder's deed of trust on the unit located within the community subject to an HOA's governing documents.

2. Pursuant to NRS 116.3116, a super priority lien does not exist, if an HOA fails to file a complaint with the court to enforce its lien.

Motion for Summary Judgment (MSJ), p.5.

Respondents NAS, RMI and RMI contend that the Claimants have failed to support their allegations "with affidavits or other admissible evidence." Opposition to MSJ, p.4. This arbitrator finds that the Claimants are requesting this arbitrator's interpretation of NRS 116.3116 and not to determine any factual issues regarding liability, if any, of the Respondents. Therefore, the Claimants' MSJ is properly before this arbitrator and there is no need for any affidavits or any other admissible evidence.

Respondents Hampton & Hampton contend that in order to determine the scope of an HOA's authority to impose a lien, the propriety of the lien, the amount of super priority lien, and the CC&Rs of the HOA must be examined. Opposition, p.6. Thus, they argue that due to the Claimants' failure "to make any factual inquiry" and their failure to present any evidence of an HOA's budget, the Claimants are not entitled to summary judgment. Id. As it was noted above, the Claimants' MSJ involves their request for this arbitrator's interpretation of NRS 116.3116. Therefore, the Claimants' MSJ is properly before this arbitrator and there is no need to present any CC&Rs or the budget of any HOA for purposes of this motion.

The Amended Complaint shows as part of their declaratory relief, the Claimants' are requesting the return of the amounts that they have allegedly

paid to the Respondents due to the Respondents' alleged violation of NRS 116.3116. In their Reply to Oppositions, the Claimants are seeking through their MSJ "statement of law, i.e., a ruling on liability." Reply, p.4.

The scope of this arbitrator's order regarding the Claimants' MSJ is limited to his interpretation of NRS 116.3116. The issues of whether the Respondents violated NRS 116.3116, whether the Claimants have met the elements of their claims (such as unjust enrichment) against the Respondents, the Respondents' defenses, if any, and the Claimants' damages, if any, will be decided on a case-by-case basis.

2. Whether the conditions exist for declaratory relief to be available.

NRS 30.030 provides in relevant part: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

NRS 30.040(1) provides in relevant part: "Any person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under ... statute obtain a declaration of rights, status or other legal relations thereunder."

In Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948), the Nevada Supreme Court held that the following conditions must exist for declaratory relief be available:

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory

relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

In this case, there exists a justiciable controversy related to the proper interpretation of NRS 116.3116. The Claimants' and the Respondents' interests are adverse because the Claimants are seeking to recover from the Respondents the amounts the Claimants allegedly paid for the HOAs' liens. The exhibits attached to the Claimants' Reply to Opposition to Request for Class Certification and the Claimants' Opposition to Amended Motion to Dismiss Re: Substantive Claims show that some of the Claimants have legal interest in the controversy. The exhibits show that some of the Respondents made demands upon some of the Claimants for payment on the liens on the properties that the Claimants had purchased in foreclosure action held by the first mortgage security holder. The issue in this controversy is ripe for judicial determination.

Based on the above, this arbitrator finds that the conditions exist for declaratory relief to be available.

3. Whether pursuant to NRS 116.3116, costs and fees related to unpaid assessments[3] may be included to the super priority lien amount.

There is no Nevada Supreme Court decision addressing this issue.

NRS 116.3116 provides, in pertinent part:

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[3] By "costs and fees related to unpaid assessments," this arbitrator is referring to the following: (1) Interest authorized by NRS 116.3115; (2) late fees or charges authorized by the declaration pursuant to NRS 116.3102(1)(k); (3) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n); and (4) the "costs of collecting" as defined under NRS 116.310313.

1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, **any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section.** If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments** for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration **during the 9 months immediately preceding institution of an action to enforce the lien**...,

(Emphasis added).

"Fees" are not defined in NRS 116.3116. However, NRS 116.310313(1) provides in part: "An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313(3)(a) defines "Costs of collecting" as ... any fee, charge or cost, by whatever name, including. without limitation, any collection fee..." NRS 116.310313 (3)(b) defines "Obligation" as: "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents."

Based on the above, this arbitrator finds that the term "fees" in NRS 116.3116(1) includes costs of collecting on past due assessments.

Based on the clear language of NRS 116.3116 (1) an HOA's costs and fees

related to unpaid assessments must be considered as part of the term "assessment" for purposes of NRS 116.3116. Further, an HOA's lien for assessments under NRS 116.3116 is part of the super priority, which means the HOA has a lien senior to a first recorded deed of trust "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien. NRS 116.3116 (2)(c). "Common expenses" is defined as all of those "expenditures made by, or financial liabilities of, the association, together with any allocations to reserves." NRS 116.019.

Based on the plain language of NRS 116.3116(1) stating penalties, fees, charges, late charges, fines, and interest "are enforceable as assessments under the section," this arbitrator finds an HOA's costs and fees related to unpaid assessments may be included to the super priority lien amount; however, the total amount may not exceed the numerical cap provided under NRS 116.3116 (2). See below.

4. Whether under NRS 116.3116 the amount of an HOA 's super priority lien together with costs and fees related to unpaid assessments are limited to an amount equaling 9 times the monthly assessment (plus repair costs pursuant to NRS 116.310312).

There is no Nevada Supreme Court decision addressing this issue.

"Where the language of a statute is unambiguous, this court will not look

beyond the statute itself when ascertaining its meaning." Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995). "Where a statute is clear on its face, court may not go beyond the language of the statute in determining the legislature's intent." Diaz v. Eight Judicial Dist. Court ex rel. County of Clark 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000).

NRS 116.3116 (2) clearly provides in part: "The lien is also prior to all security interests described in paragraph (b) **to the extent** ..." (Emphasis added.)

The words "to the extent" clearly show that the statute imposes a numerical limit on an HOA's super priority lien. The language of the statute clearly shows that the limit is not temporal, but it is numerical. Thus, super priority lien is comprised of the following:

1. Repair costs incurred by an HOA pursuant to NRS 116.310312; and
2. Assessments for common expenses that is based on an HOA's adopted periodic budget pursuant to NRS 116.3115, which would have become due in the absence of acceleration during the 9 months immediately preceding institution of accept action to enforce the liens.

As noted above, costs and fees related to unpaid assessments may be included to an HOA's super priority lien amount; however, they may not be added on top of the super priority lien amount. In other words, they may not be added to super priority lien amount to exceed the limit on the super priority lien amount (i.e., the limit of 9 times the monthly assessment amount).

This arbitrator finds the language of NRS 116.3116 to be plain and clear. The statute provides that penalties, fees (collection costs), charges, late charges, fines, and interest are enforceable as assessments. NRS 116.3116(1). NRS 116.3116(2) provides for a cap of 9 months on assessments for super priority lien purposes. Therefore, costs and fees related to unpaid assessments are subject to the 9-month cap. There is no language in NRS 116.3116 that excludes costs and fees related to unpaid assessments from the 9-month cap, nor is there any language stating "plus" costs and fees related to unpaid assessments (i.e., super priority lien "plus" costs and fees related to unpaid assessments). Thus, the cap on the amount of super priority lien applies to these fees and costs because of clear and plain wording of the statute.

There are several states such as Colorado, Minnesota, New Jersey, Vermont, Alaska, and Delaware, whose super priority lien statutes are substantially similar to Nevada's super priority lien statute (i.e., NRS 116.3116). None of the courts of these states have interpreted their statute to mean that costs and fees related to unpaid assessments may be added to super priority lien amount even though such addition would increase super priority lien amount above the cap provided under their statute.

In First Atlantic Mortg., LLC v. Sunstone North Homeowners Ass'n, 121 P. 3d 254, 255-256 (Colo. App., 2005), the Colorado Court of Appeals held:

> Thus, although the maximum amount of super priority lien is identified by reference to monthly assessments, **the lien itself may comprise debts other than delinquent monthly assessments**. (Emphasis added.)

The Court further held:

> The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" **merely limits the maximum amount of all fees or charges for common facility use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.** Id. (Emphasis added.)

In BA Mortg., LLC v. Quail Greek Condominium Ass'n, Inc., 192 P.3d 447, 451 (Colo. App. 2008), the Colorado Court of Appeals held:

> The association then has a super-priority lien over the lender's otherwise senior deed of trust in the event of a foreclosure commenced by the association or the lender, which lien is limited to delinquent assessments accruing within six months of the initiation of foreclosure proceeding. §38-33.3-31(2)(b)(1). Further, the association's super-priority lien includes interest, charges, late charges, fines, and attorney fees **so long as the total does not exceed the limit.** (Emphasis added.)

In First Atlantic, the court cited the following law review article regarding this issue: James Winokur "Meaner Lienor Community Association: The Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act, 27 Wake Forest L. Rev. Rev.353. He states:

> In its most heralded break with traditional law, UCIOA [Uniform Common Interest Ownership Act] grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien." **Any excess of total assessment defaults, in addition to other lienable fines or costs over the six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit but senior to other mortgages and encumbrances not recorded before the declaration.** Thus, although

> the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens, which are hereinafter referred to as the "Prioritized Lien" and "Less-Prioritized Lien."
>
> A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less- Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. **The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien.** So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include-in addition to the three months of arrearages-the other fees, charges, costs, etc. enforceable as assessments under UCIOA.. However,, for any assessments or other charges to be included within the Prioritized Lien , there must have been a properly adopted periodic budget promulgated "at least annually" by the association from which the appropriate six months a8 ceiling cab be computed. Id. 367. (Emphasis added.)

In Hudson House Condo. Ass'n. Inc. v. Brooks, 223 Conn. 610, 616, 611 A.2d 862, 865 (1992), the Supreme Court of Connecticut held:

> While the plaintiff may disagree with the equities of limiting the §47-258(b) priority to six months of common expense assessments, this is a matter not for the judiciary but rather for the legislature that enacted the statute. We conclude that the trial court correctly determined that HHCA's priority debt was limited to the common expense assessments that accrued in the six months immediately preceding the commencement of the foreclosure.

Respondents NAS, RMI and RMI argue that the Hudson House supports their interpretation of NRS 116.3116 in that attorney's fees and costs incurred by an HOA to enforce its lien are part of super priority lien and do not come "on

top of" super priority lien. P.20 of their Opposition. Further, they argue that Hudson House did not impose a numerical cap and "it merely stated the association was limited to costs and charges over the relevant period..." Id. Respondents Hampton & Hampton also rely on the Hudson House by arguing "the Supreme Court of Connecticut unanimously rejected an argument by the holder of a first security interest that 'because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien." P.12 of their Opposition. Respondents Alessi & Koenig, LLC also rely on Hudson House and argue: "... that reasonable fees and costs are included within the super priority lien in addition to six months of common assessments." P. 8 of their opposition.

As noted above, this arbitrator finds that NRS 116.3116(2) imposes a cap of 9 months on the super priority lien amount. The Supreme Court of Connecticut in Hudson House affirmed the trial court's decision to limit the HOA's super priority lien to six-months of assessments despite the HOA's contention that the super priority lien statute authorized more than 6-months of assessments because of the use of the word "assessments" in the statute rather than the word "assessment." Further, as noted above, this arbitrator finds that collection costs and fess (including attorney's fees and cost) may be included to the super priority lien amount, but it may not exceed the cap of 9-months.

Regarding the issue of collection costs and fees as part of super priority lien, Hudson House is distinguishable because the HOA obtained a judgment against the homeowner and the first mortgage lender by instituting a judicial foreclosure. Thus, the Supreme Court of Connecticut held that pursuant to another provision of Connecticut law (Section 47-258(g))[4], when an HOA obtains a judgment, only then can an HOA obtain both six months of assessments plus attorneys' fees and costs. Thus, Hudson House is distinguishable from the instant case because the Respondents' have not alleged that they have obtained a judgment against the homeowners or the first deed of trust holders by instituting a judicial foreclosure.

The court in Hudson House further held:

> Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized **such foreclosure proceedings** without including the costs of collection in the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows. We conclude that § 47-258 authorizes the inclusion of attorney's fees and costs in the sums entitled to a priority. (Emphasis added.)

Id. at 866.

By "such foreclosure proceedings," the court clearly is referring to judicial foreclosure proceeding that the HOA instituted, which, as noted above,

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[4] Section 47-258(g) provides that a "judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(7) has the identical language.

is distinguishable from the instant case. Although in Connecticut non-judicial foreclosure is not available for an HOA to enforce its lien, this arbitrator does not find Hudson House ruling persuasive to support the Respondents' argument regarding adding costs and fees related to unpaid assessments to super priority lien that may exceed the 9-month cap. As noted above, Hudson House ruling deals with different facts (i.e., the HOA obtained a judgment against the homeowner and his lender) than the instant case.

As the court in Hudson House noted in a footnote, the Connecticut Legislature amended its super priority lien statute by adding the following subsection to : "(B) the association's costs and attorney's fees in enforcing its lien." However, it became effective on July 5, 1991, and the court in Hudson House could not use as a basis of its decision because the association filed its judicial foreclosure on January 8, 1991. As it will be noted below, Nevada did not amend its super priority lien statute to add such amendment.

At the July 2008 annual conference of the National Conference of Commissioners on Uniform State Laws, the above-referred Connecticut's costs and fees amendment was incorporated into the Uniform Law Commissioners' 2008 revised version of the UCIOA, which provide for super priority lien to consist of both six months of assessments and attorney's fees and costs.[5]

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[5] It provides: "A lien under this section is also prior to all security interests described in subsection (b)(2) clause (ii) above to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a0 which would have become due in the absence of acceleration during the six months immediately preceding

In 2009, the Nevada Legislature had the opportunity to adopt the newly revised UCIOA, but it chose not to. In March 2009, Mr. Michael Buckley, who is the current Chairman of the Nevada Common Interest Community Commission, and the law firm of Holland & Hart introduced a new legislative amendment to the Nevada's super priority lien statute (NRS 116.3116) in the Seventy Fifth Session of the Assembly Committee on Judiciary. The new legislative amendment they were proposing has the same wording of the 2008 Amendment to the UCIOA amendment, which this arbitrator noted above (i.e., adding "and reasonable attorney's fees and cost incurred by the association incurred in foreclosing the association's lien.").[6] However, the Nevada Legislature did not amend NRS 116.3116 to include what Mr. Buckley and the law firm of Holland and Hart were proposing. Instead, the Legislature revised (effective date of October 1, 2009) NRS 116.3116 to increase the cap on super priority lien amount to 9 times the association's monthly assessments, up from

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institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.** (Emphasis added.)

[6] The transcripts of the Session show that Mr. Buckley stated in part:

> "What I am saying is that, with the existing law [NRS 116.3116], there is a difference of opinion whether the six-month priority can include the association's costs. The proposal [the new amendment that he and the law Firm of Holland & Hart are proposing] that we sent to the sponsor and that was adopted by the 2008 uniform commissioners [the UCOA Amendment] would clarify that the association can recover, as part of the priority their (sic) costs in attorney's fees. Right now, there is a question whether they can or not."

6 times, and also added unit repair costs under NRS 116.310312 to the super priority lien.

The Respondents also rely of on an unfinished, unpublished draft of an advisory opinion by Mr. Buckley in support of their interpretation of NRS 116.3116.[7] Mr. Buckley finds the Colorado case of First Atlantic "very helpful" regarding whether an HOA may collect as part of its super priority lien costs and fees related to unpaid assessments. As this arbitrator noted above, an HOA may recover as part of its super priority lien costs and fees related to unpaid assessments; however, the total super priority lien amount may not exceed an amount equal to 9 times the monthly assessments (i.e., 9-month cap). The draft of the Advisory Opinion mentions the State of Connecticut Amendment and the UCIOA amendment as rejection of the argument that super priority lien is a finite number. However, as noted above, Nevada has not amended its statute. Therefore, this arbitrator is not persuaded with the Respondents' argument that this draft of the advisory opinion shows the 9 months of assessments is only temporal rather than numerical cap. Further, there is no mention in this draft of advisory opinion that: (1) super priority lien amount can exceed the 9-month cap plus repair costs; or (2) costs and fees related to unpaid assessments can be added "on top of" the super priority lien amount.

[7] It is a 13-page "Advisory Opinion No. 2010."

Thus, this arbitrator finds the draft of the Advisory opinion does not support the Respondents' interpretation of NRS 116.3116.

The Respondents also rely of a Nevada Real Estate Division publication AB 204, which interprets amended to NRS 116.3116 as "allows HOA's to have a super priority lien for 9 months of unpaid assessments and related costs (increased from 6 months)." It is not clear who wrote this interpretation of the Nevada's super priority lien. However, based on the above, this arbitrator finds such interpretation inconsistent with the plain and clear language of NRS 116.3116 and the out of state court decisions of those states whose statute is substantially similar to the Nevada's super priority lien statute.

The Respondents also rely on Korbel Family Trust v. Spring Mountain Ranch Master Ass'n. Eight Judicial District Court Case No. A-06-523959-C (the 3-page decision is dated December 20, 2006). In the decision, the district court judge allowed 6 months of assessments for common expenses, late fees, interest, "costs of collection" and transfer fee for conveyance. This arbitrator finds the decision unpersuasive for the following reasons:

1. The decision does not contain any legal analysis of the statute (NRS 116.3116) or out of state cases and other legal authorities such as Law Review Articles.

2. The decision does not show the reason for the judge's decision in allowing the HOA to recover the above-referred fees and charges.

3. It is inconsistent with the plain and clear language of NRS 116.3116 and the decisions of all of out-of-state cases who have substantially similar statute.

5. Whether filing a complaint with the court to enforce an HOA's statutory lien is condition precedent to existence of HOA's super priority lien.

There is no Nevada Supreme Court decision addressing this issue.

The language of NRS 116.3116(2) uses the words "institution of an action to enforce the lien." NRS 116.3116(5) provides: "A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due." However, neither NRS 116 nor NAC 116 defines "action" or "proceeding."

In other sections of NRS 116, the phrase "civil action" is used. For example, NRS 116.31088(1) provides in part: "The Association shall provide written notice to each unit's owner of a meeting at which the commencement of a **civil action** is to be considered ..." It further states: "The provisions of this subsection do not apply to a **civil action** that is commenced: (a) To enforce the payment of an assessment;..." (Emphasis added.) NRS 116. 4117(1) provides in relevant part: [I]f a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a **civil action** for

damages or other appropriate relief." (Emphasis added.)

NRS 38.310(1) (a) provides: "No **civil action** based upon a claim relating to: The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association;" (Emphasis added.)

NRS 116.3116 (2)(c) uses the word "action," it does not use the words "civil action." "When the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). "It is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005).

The Claimants rely on cases such as Trustees of MacIntosh Condominium Ass'n v. F.D.I.C., 908 F. Supp., 58 (1995), and Benson v. Zoning Bd. of Appeals of Town of Westport, 89 Conn. App. 324, 873 A.2d 1017 (Conn. App., 2005) regarding their argument that filing a civil action in court is a condition precedent for existence of an HOA's super priority lien. This arbitrator finds that these cases are distinguishable from the instant case because in states such as Massachusetts and Connecticut, the only way that an HOA can enforce its lien is to institute a judicial foreclosure, whereas in

Nevada, pursuant to NRS 116.31162 to 116.31168, an HOA may institute non-judicial foreclosure for enforcement of its lien.

The Claimants also rely on the language of NRS 116.31088(1) and argue that because the statute uses the words "civil action" "to enforce the payment of an assessment," the only way to enforce a lien under NRS 116.3116 is to file a civil action with the court. This arbitrator is not persuaded with their argument. There is no language in NRS 116.31088 or NRS 116.3116 that provides the only way for an HOA to enforce its lien is to file an action with the court.

The Claimants also rely on NRCP 2, which provides: "There shall be one form of action to be known as "civil action." And NRCP 3, which provides: "A civil action is commenced by filing a complaint with the court." Thus, the Claimants argue that in order for an HOA's super priority lien to exist, the HOA must file a civil action with the court. The Claimants are requesting this arbitrator to read into the statute a word that does not exist (i.e., "civil" immediately preceding the word "action.") The guidelines that the Nevada Supreme Court has set in its decisions regarding statutory construction would not permit this arbitrator to read words in the statute that do not exist. S. Nev. Homebuilders.

The Claimants also argue that the wording of NRS 116.3116(7) shows that the only way to enforce a lien for purposes of achieving super priority lien is to file an action with the court. NRS 116.3116(7) provides: "A judgment or

decree in **any action** brought under this section must include costs and reasonable fees for the prevailing party." (Emphasis added.) This arbitrator is not persuaded by the Claimants' argument. There is no language in Subsection (7) that sets a condition for existence of an HOA's super priority lien by filing an action in court. It merely states that the prevailing party who obtains a judgment for **any action** under this section is entitled to costs and fees. There is no reference in Subsection (7) that the only way to enforce a lien is to file an action in civil court.

Based on the above, this arbitrator finds that filing a civil action is not a condition precedent for an HOA's super priority lien to exist. An HOA may enforce its lien by instituting a non-judicial foreclosure pursuant to NRS 116.31162 to 116.31168 and maintain its super priority lien without filing a civil action in court. An HOA may file an action with the Real Estate Division pursuant to NRS 38.310(1) (a) to enforce its lien and maintain its super priority lien.

Dated the 28 day of October 2010.

Persi J. Mishel, Esq., Arbitrator
2340 Flower Spring St.
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(702) 255-7029

CERTIFICATE OF MAILING

I hereby certify that a copy of the forgoing Order Granting in Part and Denying in Part Motion for Summary Judgment on Claim of Declaratory Relief placed in the United States mail, with proper postage affixed thereto, addressed as follows, on this 28 day of October 2010:

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DISTRICT COURT

CLARK COUNTY, NEVADA

WINGBROOK CAPITAL, LLC., Plaintiff, vs. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, INCLUSIVE Defendants.	Case No. A-11-636948-B Dept. No. XI **ORDER**

This matter came before the Court on May 24, 2011 at 9:00 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Kurt Bonds, Esq., of Alverson, Taylor, Mortensen & Sanders appeared on behalf of the Defendant. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

WHEREAS the Parties have engaged in and have concluded a Nevada Real Estate Division mediation (ADR #11-25) wherein the Parties mediated a dispute over the sum of $13,190.33; and

mediation (ADR #11-25) wherein the Parties mediated a dispute over the sum of $13,190.33; and

WHEREAS the subject of the mediation was whether NRS 116.3116 permitted Defendant to charge to Plaintiff $14,037.83, or whether some lesser amount was due pursuant to NRS 116.3116; and

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Defendant claims it has a right pursuant to NRS 116.3116 to charge and retain proceeds in the amount $14,037.83 from Plaintiff and Plaintiff, a purchaser of a home at foreclosure which is located within the Defendant homeowners' association, contests this charge and claims that Defendant exceeded the limits of NRS 116.3116 and overcharged it for the super priority lien; and

WHEREAS there exists in this case a controversy in which a claim of right is asserted by Plaintiff against Defendant who has an interest in contesting it; and

WHEREAS Plaintiff and Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116 (including whether Defendant charged too much for the super priority lien); and

WHEREAS Plaintiff has a legal interest in the controversy as it was Plaintiff's money which had been demanded and transferred to Defendant and it was Plaintiff's property that had been the subject of a homeowners' association lien by Defendant; and

WHEREAS the issue of the meaning, application and interpretation of NRS 116.3116 is ripe for determination in this case as the present controversy is real, it exists now, and it affects the Parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS 116.3116 would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

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WHEREAS, pursuant to NRS 30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by NRS 116.3116 and they may, therefore, have determined by this Court any question of construction or validity arising under NRS 116.3116 and obtain a declaration of rights, status or other legal relations thereunder;

THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. NRS 116.3116 is a statute which creates for the benefit of Nevada homeowners' associations a lien against a homeowner's unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due (the "Statutory Lien"). The homeowners' associations' Statutory Lien is noticed and perfected by the recording of the associations' declaration and, pursuant to NRS 116.3116(4), no further recordation of any claim of lien for assessment is required.

2. Pursuant to NRS 116.3116(2), the homeowners' association's Statutory Lien is junior to a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent ("First Security Interest") except for a portion of the homeowners' association's Statutory Lien which remains prior to the First Security Interest (the "Super Priority Lien").

3. Homeowners' associations, therefore, have a Super Priority Lien which has priority over the First Security Interest on a homeowners' unit. However, the Super Priority Lien amount is not without limits and NRS 116.3116 provides that the amount of the Super Priority Lien (i.e., that amount of a homeowners' associations' Statutory Lien which retains priority status over the First Security Interest) is limited "to the extent" of those assessments for common expenses based upon the associations' periodic budget that would have become due in the 9 month period immediately preceding an

associations' institution of an action to enforce its Statutory Lien and "to the extent of" external repair costs pursuant to NRS 116.310312:

of" external repair costs pursuant to NRS 116.310312:

4. The words "to the extent of" contained in NRS 116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

5. Therefore, after the foreclosure by a First Security Interest holder of a unit located within a homeowners' association, pursuant to NRS 116.3116 the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien (the "Assessment Cap Figure") plus external repair costs pursuant to NRS 116.310312.

6. While assessments, penalties, fees, charges, late charges, fines and interest may be included within the Assessment Cap Figure, in no event can the total amount of the Assessment Cap Figure exceed an amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien.

7. The Super Priority Lien equals the Assessment Cap Figure plus external repair costs pursuant to NRS 116.310312.

8. After providing a homeowner with notice and hearing, NRS 116.310312 permits a homeowners' association to enter the grounds of a homeowners' unit and maintain the exterior of the unit in accordance with the standards set forth in the association's governing documents. Pursuant to NRS 116.310312(2)(b), a homeowners' association may also remove or abate a public nuisance on the exterior of a unit. The association may order that the costs of such maintenance or abatement, including interest, inspection fees, notification fees and collection costs for such maintenance

or abatement to be charged against the unit ("Exterior Repair Costs"). NRS 116.310312(9)(a) provides that "Exterior" of the unit includes, without limitation, all landscaping outside of a unit and the exterior of all property exclusively owned by the unit owner.

9. Therefore, the Super Priority Lien consists solely and exclusively of the Assessment Cap Figure and the Exterior Repair Costs. No other costs, fees, fines, penalties, assessments, charges, late charges, or interest or any other costs may be included within the Super Priority Lien.

10. Pursuant to NRS 116.3116, the maximum amount of the Assessment Cap Figure portion of Defendant's Super Priority Lien cannot exceed $1,552.50 which equals 9 times the Defendant's monthly assessments. As Defendant has assessed against Plaintiff $1,552.50 for past due assessments incurred prior to Plaintiff's ownership of the property, the additional late fees of $135.00 and accrued interest on the Assessment Cap Figure are impermissible and cannot be included in the Assessment Cap Figure as the addition of those costs exceed the Assessment Cap Figure of $1,552.50 and violates NRS 116.3116.

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11. The External Repair Costs portion of the Super Priority Lien shall be determined by this Court at a later date when the Court is provided with all necessary evidence to this Court at a later date when the Court is provided with all necessary evidence to make that determination.

IT IS SO ORDERED.

June 2, 2011

DISTRICT COURT JUDGE Date

BK

Submitted by:

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Case No. NRED 10-49

BEFORE THE NEVADA REAL ESTATE COMMISSION

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Claimant,

v.

THE FOOTHILLS at WINGFIELD HOMEOWNER'S ASSOCIATION; ALESSI TRUSTEE CORPORATION, a Nevada corporation; ALESSI & KOENIG, LLC, a Nevada limited-liability company;

Respondents

ARBITRATOR'S DECISION and AWARD

HOLLAND & HART LLP
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RENO, NV 89511

The Arbitrator in this matter, the Honorable Steven McMorris, hereby renders the following decision in the non-binding arbitration conducted pursuant to the rules of the Nevada Real Estate Commission.

RECITALS

A. On June 7, 2010, the above named parties, by and through their respective counsel, participated in an arbitration hearing before the undersigned arbitrator. Claimant Wells Fargo Bank, National Association ("Wells Fargo") was represented by Alex Flangas of the firm of Holland & Hart LLP, Respondent The Foothills at Wingfield HOA ("Foothills HOA" or "HOA") was represented by Ryan Herrick of the firm of Jones Vargas, and Respondents Alessi Trustee Corporation and Alessi & Koenig, LLC (collectively "Alessi") were represented by Ryan Kerbow and Tom Bayard.

B. The parties presented evidence and argument on the legal points, and the matter was concluded on June 7, 2010.

C. The parties stipulated to many of the facts in the case, including the following:

1. Wells Fargo is a national banking association, duly licensed and registered to conduct business in the State of Nevada.

2. The Foothills HOA is a community association organized and operating pursuant to the provisions of Chapter 116 of the Nevada Revised Statutes.

3. ATC is a Nevada corporation, in good standing with the Secretary of State of Nevada.

4. Alessi & Koenig is a Nevada limited-liability company, operating as a law firm, with its principal place of business in Las Vegas, Nevada.

5. This case involves the property development commonly known as The Foothills at Wingfield ("The Foothills") in the City of Sparks, Nevada.

6. The developer of The Foothills, "Reynen & Bardis (The Foothills), LLC, a Nevada limited-liability company" ("Reynen & Bardis"), signed a promissory note with Wells Fargo, as lender, which was secured by a Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing ("Deed of Trust") signed by Reynen & Bardis as "Trustor." The Deed of Trust was recorded in the official records of Washoe County on June 5, 2007. The Deed of Trust affected the 248 lots that are at issue in this arbitration (the "Lots").

7. At the time the Deed of Trust was recorded, Reynen & Bardis was not delinquent in the payment of the common assessments on the Lots developed by Reynen & Bardis.

8. Within days of recording the Deed of Trust, Reynen & Bardis transferred ownership of the property in The Foothills encumbered by the Deed of Trust to "Foothills Village Owner, LLC, a Delaware limited-liability company," who also executed an "Assumption and Modification Agreement and Addendum to Deed of Trust" (the "Assumption"), which was recorded on June 29, 2007. Under the Assumption, Foothills Village Owner, LLC, assumed all of the obligations of Reynen & Bardis for payment of assessments due on the Lots at The Foothills.

9. The Foothills property is subject to and governed by a recorded document entitled, "Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for the Foothills at Wingfield" (the "CC&Rs"), which document allows for

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the creation of The Foothills HOA and its Bylaws, and establishes the right of The Foothills HOA to create and enforce rules affecting the development.

10. Pursuant to Section 6.4 of the CC&Rs, a sum sufficient to pay common expenses and to establish reserves for The Foothills was charged against the homeowners of all lots located within The Foothills. The Foothills HOA established the amount of the common expense assessments on a yearly basis, consistent with The Foothills HOA's annual budget, and billed those amounts quarterly.

11. In 2008, The Foothills HOA's budgeted assessment for common expenses based on the periodic budget adopted by the Foothills HOA pursuant to NRS 116.3115 was $147.00 per lot assessed on a quarterly basis. This equates to the sum of $49 per month for each lot.

12. As the owner of several hundred lots located within The Foothills, Foothills Village Owner, LLC was obligated to pay the assessments made against all those lots to The Foothills HOA. However, in early 2008, Foothills Village Owner, LLC became delinquent in the payment of the assessments to The Foothills HOA.

13. Alessi had previously executed a Delinquent Assessment Collection Agreement (the "Collection Agreement") with The Foothills HOA on or about May 8, 2006.

14. As a result of the failure of payment of assessments by Foothills Owner, LLC, Alessi proceeded to mail, via certified mail, notices of delinquent assessments ("NDAs") to the owner of the Lots, Reynen & Bardis, during late July and early August, 2008, and caused copies of those NDAs to be recorded in the Official Records of Washoe County.

15. A portion of the assessed amount was attributable to "Collection and/or Attorney fees" and "collection costs, late fees, service charges and interest."

16. After mailing the NDAs to the owner of the Lots, Alessi continued to process and record Notices of Default ("NODs") for the Lots

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17. Reynen & Bardis (and Foothills Owner LLC) subsequently defaulted on the loan obligations to Wells Fargo, and Wells Fargo proceeded to foreclose on the Deed of Trust.

18. As a result of a foreclosure sale on December 17, 2008, Wells Fargo became the owner of the 248 lots located within The Foothills (previously identified as the "Lots").

19. Wells Fargo proceeded to calculate the total amount it determined was due to The Foothills HOA pursuant to NRS 116.3116(2) and Section 6.15 of the CC&Rs for the "super-priority" that the Foothills HOA had against the Lots, Wells Fargo calculated that super-priority amount by taking two quarters worth of assessments for any given Lot (i.e. $147 multiplied by 2, or 6 months of common assessments) for a total of $294, and multiplied that amount by the number of Lots subject to the Liens, 248. Thus, Wells Fargo calculated the amount of the super-priority lien of the Foothills HOA to be a total of $72,912.00 for all 248 lots combined.

20. Wells Fargo tendered that sum ($72,912) to the Foothills HOA on or about February 25, 2009, accompanied by a letter from James Follis, Vice President of the Real Estate Managed Assets Group at Wells Fargo.

21. Following the foreclosure by Wells Fargo, Alessi prepared and delivered via certified mail an additional Notice of Delinquent Assessment ("NDA") to Wells Fargo because Wells Fargo was the new owner of the Lots once the foreclosure was completed.

22. On or about June 18, 2009, David Alessi delivered to Alilda Ferraro at Wells Fargo a spreadsheet showing the "demand" of ATC, which demand listed assessments, interest, fees and expenses in a total sum exceeding $621,000.

23. About a month later, on or about July 21, 2009, Mr. Alessi sent a revised demand for payment to Alilda Ferraro at Wells Fargo. Pursuant to the revised demand, Mr. Alessi represented that his company was waiving certain fees and costs, but still claimed that the Lien on the Lots asserted on behalf of the Foothills HOA was

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$382,039.00, and that this sum would need to be paid in order to clear the HOA's liens from title on the Lots.

24. Through the date of the arbitration hearing the HOA liens are still recorded against the Lots and have not been released by the HOA or any of respondents.

NOW, THEREFORE, the undersigned arbitrator makes the following findings, conclusions, and AWARD:

A. Wells Fargo was a first security interest holder, as that status is identified in NRS 116.3116, as to the Lots. At the time that Wells Fargo obtained its secured position, there was no delinquency in the payment of common assessments by the prior owner of the property, Reynen & Bardis.

B. NRS 116.3116(2) establishes the extent or amount of the super-priority lien that the Foothills HOA and/or Alessi may assert against the Lots following the foreclosure by Wells Fargo.

C. Because the delinquent assessment was made in 2008 and the foreclosure by Wells Fargo was conducted in 2008 well prior to the modification of NRS 116.3116(2)in 2009, the 2007 version of that statute governs this matter. The 2007 version of the statute allowed a homeowners association to assert a super-priority lien to the extent of "the common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien."

D. The extent or amount of the super-priority lien that may be asserted against the Lots in this matter and which – by operation of statute – is granted a priority ahead of the Deed of Trust held by Wells Fargo is therefore equal to the sum total of six months of the common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115.

E. Thus, the total of the super-priority lien that could be asserted by the Foothills HOA and/or Alessi against the Lots was $72,912, which is the same amount that was tendered by Wells Fargo in February 2008.

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F. The tender by Wells Fargo was in the appropriate amount and should have resulted in a release of the HOA's lien on the Lots.

G. The Foothills HOA and/or Alessi are hereby ordered to accept the amount tendered by Wells Fargo, the sum of $72,912, as and for full payment of all sums necessary to satisfy the super-priority lien asserted by the HOA and/or Alessi against the Lots, and to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the date of this Decision.

H. If the check previously tendered by Wells Fargo is for any reason "stale" and cannot be negotiated, Wells Fargo is hereby ordered to tender a new check to the Foothills HOA for the sum of $72,912, and the Foothills HOA and Alessi are thereafter ordered to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the delivery by Wells Fargo of that check to the Foothills HOA.

Dated this 8th day of June, 2010.

Steven D. McMorris, Arbitrator

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Copies of this ARBITRATOR'S DECISION and AWARD served by mail this 23rd day of June, 2010, to: Alex J. Flangas, Esq., 5441 Kietzke Lane, Second Floor, Reno, NV 89511; Ryan M. Kerbow, Esq., 9500 W. Flamingo, Ste. 100, Las Vegas, NV 89147; Ryan W. Herrick, Esq., 100 W. Liberty St., 12th Floor, Reno, NV 89504.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ELKHORN COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation, Plaintiff, v. DANIEL VALENZUELA, an Individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), AS NOMINEE FOR MYLOR FINANCIAL, a Mississippi Corporation; MYLOR FINANCIAL, a Mississippi Corporation; SONEPCO FEDERAL CREDIT UNION, a Corporation; CATARINO GUTIERREZ, an Individual; MARIA GUTIERREZ, an Individual; JUANITA GUTIERREZ, an Individual; and DOES I through X, inclusive, Defendants.	CASE NO.: A-10-607051-C DEPT NO.: II **NOTICE OF ENTRY OF ORDER**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that an **ORDER GRANTING MOTION FOR DECLARATORY RELIEF** was entered in the above-referenced matter on June 1, 2011, a copy which is attached hereto with its accompanying Stipulation.

DATED this 6th day of June, 2011.

ANGIUS & TERRY LLP

By: _____
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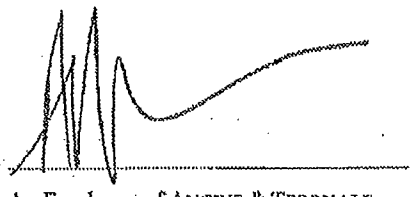
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June 2011, I served a true and correct copy of the foregoing a **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR DECLARATORY RELIEF** by placing the same in the U.S. Mail, addressed as follows:

Mortgage Electronic Systems ("MERS")
c/o Christina S. Bhirud, Esq.
Akerman Senterfitt LLP
400 South Fourth Street, Suite 450
Las Vegas, NV 89101



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DISTRICT COURT

CLARK COUNTY, NEVADA

ELKHORN COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation,

Plaintiff,

v.

DANIEL VALENZUELA, an Individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), AS NOMINEE FOR MYLOR FINANCIAL, a Mississippi Corporation; MYLOR FINANCIAL, a Mississippi Corporation; SONEPCO FEDERAL CREDIT UNION, a Corporation; CATARINO GUTIERREZ, an Individual; MARIA GUTIERREZ, an Individual; JUANITA GUTIERREZ, an Individual; and DOES 1 through X, inclusive,

Defendants.

CASE NO.: A-10-607051-C

DEPT NO.: II

ORDER GRANTING MOTION FOR DECLARATORY RELIEF

Plaintiff Elkhorn Community Association's ("Plaintiff" or "Association") Motion for Declaratory Relief came on for hearing on February 16, 2011, in Department 2 before the

Honorable Valorie J. Vega, Judge, presiding. The motion was heard on the Court's chambers calendar.

The matter was originally calendared for hearing on the Court's chambers calendar on January 5, 2011. On December 30, 2010, the Court received a motion from counsel for Defendant Mortgage Electronic Registration Systems, Inc. ("Defendant"), requesting permission to file a Sur-Reply to Plaintiff's original Reply on the grounds that Plaintiff's Reply raised new issues. The Court granted Defendant's motion, continued the hearing on this matter until January 26, 2011, and ordered Defendant's Sur-Reply to be filed by January 19, 2011. No Sur-Reply was filed by the January 19, 2011 deadline. The Court then received a Motion to Extend Time to File Sur-Reply from Defendant's counsel, claiming that he had never received the Court's Order granting Defendant permission to file a Sur-Reply, and requesting an extension to file. The Court granted the relief requested and continued the hearing to February 16, 2011 on the Court's chambers calendar.[1]

The Court now issues the following ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY RELIEF:

Question No. 1: Does the Association have the right to bring a judicial foreclosure action before a court of proper jurisdiction in Nevada to satisfy the Association's special priority portion of a lien for assessments authorized by NRS 116.3116 ("SPL")?

Answer to Question No. 1: Yes. The Court finds that the Association has the right to bring a judicial foreclosure action before a court of proper jurisdiction in Nevada to satisfy the SPL pursuant to NRS Chapters 40 and 116 and as authorized by the Association's governing

[1] Subsequent moving papers were filed by both parties after the Court granted relief on Defendant's Motion to Extend Time to File Sur-Reply. Plaintiff filed a short Opposition to Defendant's Sur-Reply, which Defendant moved to strike. Defendant's Motion to Strike was denied by the Court's minute order dated March 23, 2011.

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documents ("CC&Rs"), so long as the assessments at issue were for common expenses based on the periodic budget adopted by the Association pursuant to NRS 116.3116(2)(c).

Question No. 2: If the Association has the right to bring a judicial foreclosure action to satisfy its SPL in Nevada, are the non-attorney fees and costs of collection accrued by the Association to bring the judicial foreclosure action considered a component part of the Association's SPL?

Answer to Question No. 2: Yes. The Court finds that the non-attorney fees and costs of collection accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are a component part of the Association's SPL. Moreover, the Court concludes that attorney's fees accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are also considered to be a component part of the Association's SPL. Any attorney's fees considered to be part of the Association's SPL must be "reasonable" pursuant to the Association's governing documents, specifically Article 6, Section 6.1.

IT IS SO ORDERED that Plaintiff's Motion for Declaratory Relief is GRANTED.

DATED this 21st day of May, 2011.

By: _____
JUDGE VALORIE J. VEGA
DISTRICT COURT JUDGE

Respectfully Submitted by:

By: _____
Paul P. Terry, Jr. (NBN 7192)
William Paul Wright (NBN 7564)
Troy R. Dickerson (NBN 9381)
ANGIUS & TERRY LLP
1120 N. Town Center Drive, Suite 260
Las Vegas, NV. 89144
Attorneys for Plaintiff

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CLERK OF THE COURT

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Attorneys for Nevada Association Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

JP MORGAN CHASE BANK, N.A. a National Association, Plaintiff, vs. COUNTRYWIDE HOME LOANS, INC., a New York corporation; COUNTRYWIDE WAREHOUSE LENDING, INC., a California corporation; CITIMORTGAGE, INC., a New York corporation; NV MORTGAGE, INC., a Nevada corporation d/b/a SOMA FINANCIAL; SOMA FINANCIAL, INC., a Nevada corporation; NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; JOHNATHAN D. AMOS, an individual; MELISSA SMILEY a/k/a MELISSA AMOS, an individual, DOES 1 through 10, ROE CORPORATIONS 1 through 10, inclusive, Defendants. ALL RELATED CLAIMS.	CASE NO.: 08-A562678 DEPT.: XVI **ORDER AND JUDGMENT** **Date:** April 7, 2011 **Time:** 9:00 a.m.

Defendant Nevada Association Service, Inc.'s Motion for Determination of Priority Amount Including Attorney's Fees and Costs ("Motion") came on for rehearing on April 7, 2011. Debra L. Pieruschka, Esq. of Martin & Allison Ltd. appeared on behalf of Nevada Association Services, Inc. ("NAS"), Jason D. Smith, Esq. of Santoro, Driggs, Walch, Kearney, Holley & Thompson appeared on behalf of JP Morgan Chase Bank ("Chase"), and no other party or counsel having appeared at the

05-10-11

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rehearing of this matter. The Court having reviewed the moving papers, opposition papers and reply papers submitted by counsel and hearing oral argument, good cause appearing, the Court issued a decision on April 8, 2011, and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On August 27, 2010, this Court issued an order denying Chase's Motion for Summary Judgment and granting NAS's Countermotion for Summary Judgment in part, determining that NAS has a "super priority" position for no more than nine (9) months of assessments senior to Chase's equitable lien finding that:

a. The Property at issue in this matter is part of a common-interest ownership community. As such, NRS 116 governs the priority of NAS's lien over Chase's equitable lien.

b. NRS 116.3116(1) establishes NAS's statutory right to a lien for any assessments from the time they become due.

c. Pursuant to NRS 116.3116, recording of the Declaration by the Association constitutes record notice and perfection of the lien – no further recordation of any claim of lien is required.

d. NRS 116.3116(2) establishes the priority of NAS's liens against the Property. Specifically, NRS 116.3116(2) provides that NAS's lien is prior to all other liens and encumbrances except:

(1) a lien or encumbrance recorded prior to the recording of the Declaration of the association;

(2) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

(3) liens for real estate taxes and other governmental assessments.

e. NRS 116.3116(2) further provides NAS with a limited priority even over a first security interest recorded against the property for nine (9) months of assessments that would have become due immediately preceding institution of an action to enforce the lien.

f. Chase's equitable lien attached to the property on August 9, 2007 when its Deed of Trust was recorded against the property.

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2. The Court further directed NAS to submit further briefing to the Court to determine the extent and amount of NAS' "super priority" lien that it has against the subject property, including the issue of attorney's fees and costs.

3. After briefing by both parties, on September 16, 2010 this Court held oral arguments regarding the amount of NAS' "super priority" lien amount and granted NAS' Motion in part and denied it in part.

4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).

6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

7. As such, the Court granted NAS' Motion, in part, and awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $5,909.91 out of the $23,480.16 requested in delinquent assessments. The Court further awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $6,000.00 out of the $49,035.28 for reasonable attorney's fees and costs as part of its collection costs.

8. The Court, however, denied NAS the following requested portions of its "super priority" lien amount because it failed to provide adequate documentation to support the claim:

(a) $135.00 out of the total amount of $525.00 in late fees relating to the nine (9) months of delinquent assessments as permitted by NRS 116.3116;

(b) $1,352.00 for collection costs related to the nine (9) months of delinquent assessments as permitted by NRS 116.310313 and NRS 116.3116; and

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(c) $43,035.28 in legal fees as part of its collection costs related to the collection of the "super priority" amount as permitted by NRS 116.310313 and NRS 116.3116.

9. On October 28, 2010, NAS filed a Motion for Partial Reconsideration of the Court's October 4, 2010 Order denying NAS its full collection costs including attorney's fees and costs pursuant to NRS 116.3116.

10. After supplemental briefing by the parties, on February 17, 2011, the Court granted NAS' Motion for Partial Reconsideration.

11. On April 7, 2011, after further supplemental briefing by the parties, the Court entertained oral arguments by Counsel.

12. The Court concluded that NAS can recover as part of its "super priority" its costs associated with enforcement of the Association's assessment lien including late fees and collection costs pursuant to NRS 116.3116(1) and (2).

13. The Court found that NAS properly supported its claim for $135.00 in late fees relating to the nine (9) months of delinquent assessments, pursuant to NRS 116.3116(1).

14. The Court further found that NAS properly supported its claim for $1,352.00 in collection costs relating to the nine (9) months of delinquent assessments but disallowed $743.00 of the requested $1,352.00 because $743.00 related to costs incurred by NAS after the lawsuit was filed to enforce any past due obligation and are, thus, precluded by statute.

153. The Court further found that NAS properly supported its claim for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien, pursuant to NRS 116.3116(7).

16. NAS's documented attorney's fees in the amount of $47,400.00 meet the Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349 (1969) factors. That based on the qualities of the advocate, the character of the work to be done, the work actually performed by the lawyer, and the result obtained, the amount of attorney's fees and costs to be included as part of NAS' collection costs relating to its "super priority" lien amount are reasonable and necessary.

///

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ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NAS' Motion for Determination of NAS' Priority Amount Including Attorney's Fees and Cost is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that NAS's "super priority" lien amount totals **$55,689.19** comprised as follows:

(1) An award of $5,909.91 for nine (9) months of delinquent assessments, pursuant to NRS 116.3116;

(2) An award of $135.00 in late fees relating to the nine (9) of delinquent assessments, pursuant to NRS 116.3116;

(3) An award of $609.00 in collection costs, pursuant to NRS 116.310313 and NRS 116.3116;

(4) An award of for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien as collection costs, pursuant to NRS 116.3116(7), NRS 116.310313, and NRS 116.3116.

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IT IS FURTHER ORDERED ADJUDGED AND DECREED that NAS shall recover $55,689.19 plus statutory interest from Plaintiff JP Morgan Chase Bank, N.A., a National Association the judgment amount as follows:

1. $6,653.91 for delinquent assessments and partial collection costs; and

2. $49,035.28 for reasonable attorney's fees and costs comprised of $1,635.28 in costs and $47,400.00 in attorney's fees as part of NAS' collection costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the judgment will accrue interest in the manner permitted by Nevada law until the judgment has been satisfied.

IT IS SO ORDERED.

Dated this 11th day of May, 2011.

DISTRICT COURT JUDGE

Submitted by:

MARTIN & ALLISON LTD.

By
Debra L. Pieruschka (Bar No. 10185)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for Nevada Association Services, Inc.

Approved/Disapproved as to form and content:

SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON

By
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company,

Plaintiff,

vs.

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive,

Defendant.

Case No. A-11-647850-C
Dept No. 13

NOTICE OF ENTRY ORDER

PLEASE TAKE NOTICE that on the 20th day of July 2012, the attached

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Notice of Entry of Order to was entered in the above referenced matter.

Dated this 24 day of July, 2012.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Adams Law Group, Ltd., and that on this date, I served the following **NOTICE OF ENTRY OF ORDER** upon all parties to this action by:

X	Placing an original or true copy thereof in a sealed enveloped place for collection and mailing in the United States Mail, at Las Vegas, Nevada, postage paid, following the ordinary business practices;
	Hand Delivery
	Facsimile
	Overnight Delivery
	Certified Mail, Return Receipt Requested.

addressed as follows:

~~Kurk Bonds, Esq.~~
Alverson Taylor
Mortensen and Sanders
7401 W Charleston Blvd.
Las Vegas, NV 89117-1401

Dated the 25th day of July 2012.

Lori D Hansen
An employee of Adams Law Group, Ltd.

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DISTRICT COURT

CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company,

Plaintiff,

vs.

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive,

Defendant.

Case No: A-11-647850-C
Dept: No. 13

ORDER

THIS MATTER having come before the Court on June 11, 2012, for hearing on Plaintiff's Motion for Summary Judgment on Declaratory Relief and on Defendant's Counter-Motion for Summary Judgment. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Eric Hinckley, Esq., of Alverson, Taylor, Mortensen & Sanders and Patrick Reilly, Esq., of Holland & Hart appeared on behalf of the Defendant. The Court, having considered the papers submitted in connection with such item(s) and heard the arguments made on behalf of the parties and then taken the matter under advisement for further consideration, and for good cause appearing hereby rules:

ORD

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DISTRICT COURT

CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company, Plaintiff, vs. HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Defendant.	Case No: A-11-647850-C Dept: No. 13 ORDER

THIS MATTER having come before the Court on June 11, 2012, for hearing on Plaintiff's Motion for Summary Judgment on Declaratory Relief and on Defendant's Counter-Motion for Summary Judgment. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Eric Hinckley, Esq., of Alverson, Taylor, Mortensen & Sanders and Patrick Reilly, Esq., of Holland & Hart appeared on behalf of the Defendant. The Court, having considered the papers submitted in connection with such item(s) and heard the arguments made on behalf of the parties and then taken the matter under advisement for further consideration, and for good cause appearing hereby rules:

WHEREAS, on 7/6/2005, Defendant, a Nevada homeowners' association, recorded in the Clark County, Nevada, Recorder's Office, the Declaration of Covenants Conditions & Restrictions and Reservations of Easements for Horizon at Seven Hills Homeowners Association ("CC&RS"); and

WHEREAS, on 6/28/2010, Scott M. Ludwig purchased APN 177-35-610-137 (the "Unit") at a foreclosure auction of the prior owner's first mortgage lender ("6/28/2010 Foreclosure Auction"); and

WHEREAS, the Unit is located with Defendant homeowners' association; and

WHEREAS, on 7/14/2010, Scott M. Ludwig transferred the Unit by quit claim deed to Plaintiff ("Ikon Deed"); and

WHEREAS, on 9/30/2010 Defendant filed a Notice of Delinquent Assessment Lien against Plaintiff and the Unit for $6,050.14 ("Notice of Delinquent Assessment Lien"); and

WHEREAS, on 10/18/2010 Defendant sent Plaintiff a letter stating, "Per your request, the current balance for the above property is $6,287.94." (the "10/18/10 Collection Letter"); and

WHEREAS, pursuant to the spreadsheet of fees and costs attached to the 10/18/10 Collection Letter, Defendant's monthly assessments were $190.00; and

WHEREAS, the Unit, being located within Defendant homeowners' association, is subject to NRS 116 (Common Interest Ownership Uniform Act) and the CC&RS; and

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Plaintiff has asserted a claim of right against Defendant under NRS §116.3116 and Sections 7.8 and 7.9 of the Defendant's CC&RS and Defendant has an interest in contesting said claim, the present controversy is between persons or entities whose interests are adverse, both parties seeking declaratory relief have a legal interest in the controversy (i.e., a legally protectible interest), and the issue involved in the controversy (the meaning and application of NRS 116.3116 and of Sections 7.8 and 7.9 of the CC&RS) is ripe for judicial determination as between the parties. *Kress v. Corey 65 Nev. 1, 189 P.2d 352 (1948);* and

WHEREAS, Plaintiff and Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of Sections 7.8 and 7.9 of the CC&RS in that Plaintiff maintains that Sections 7.8 and 7.9 of the CC&RS call for a limit on Defendant's prioritized portion of its homeowners' association lien on Plaintiff's Unit to the extent of an amount equal to 6 months of assessments (i.e., "The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)") and further maintains that Sections 7.8 and 7.9 of the CC&RS do not violate the statutory lien limit as noted in NRS 116.3116(2) as the CC&RS call for a lesser amount for the prioritized portion of the lien than does NRS 116.3116(2). Conversely, Defendant maintains there are either two prioritized liens (one contractual and one statutory) and/or that Sections 7.8 and 7.9 of Defendant's CC&RS violate NRS 116.3116(2) in that Sections 7.8 and 7.9 call for a lesser amount for the prioritized portion of the lien than does NRS 116.3116(2) and, therefore, the prioritized portion of Defendant's lien must equal the greater amount as noted in NRS 116.3116(2); and

WHEREAS, Plaintiff has a legal interest in the controversy as it was Plaintiff's money which had been demanded by Defendant and it was Plaintiff's Unit that had been the subject of a homeowners' association assessment lien by Defendant; and

WHEREAS the issue of the meaning, application and interpretation of Sections 7.8 and 7.9 of the CC&RS in conjunction with NRS §116.3116 is ripe for determination in this case as the present controversy is real, it exists now, and it affects the parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of Sections 7.8 and 7.9 of the CC&RS in conjunction with NRS §116.3116 would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

WHEREAS, pursuant to NRS §30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by Sections 7.8 and 7.9 of the CC&RS and they may,

therefore, have determined by this Court any question of construction or validity arising under said Sections and obtain a declaration of rights, status or other legal relations thereunder; and

WHEREAS, regarding priority of homeowner association assessment liens, Section 7.8 and 7.9 of the CC&RS state the following:

> Section 7.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title, subject to the following. **The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)**. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.
>
> Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. **A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for:** (a) liens and encumbrances Recorded before the Declaration was Recorded; (b) **a first Mortgage Recorded before the delinquency of the assessment sought to be enforced (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)**, and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien. However, subject to foregoing provision of this Section 7.9, the sale or transfer of any Unit pursuant to judicial or non-judicial foreclosure of a First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any assessments which thereafter become due. **Where the Beneficiary of a First Mortgage of Record or other purchaser of a Unit obtains title pursuant to a judicial or nonjudicial foreclosure or "deed in lieu thereof," the Person who obtains title and his or her successors and assigns shall not be liable for the share of the Common Expenses or assessments by the Association chargeable to such Unit which became due prior to the**

> **acquisition of title to such Unit by such Person (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien). Such unpaid share of Common Expenses and assessments shall be deemed to become expenses collectible from all of the Units, including the Unit belonging to such Person and his or her successors and assigns.**

WHEREAS, the Court is persuaded that Plaintiff's position is correct relative to the component and ceiling issues contained in its Motion relating to Sections 7.8 and 7.9 of the CC&RS in that pursuant to said Sections, Defendant's prioritized portion of its lien may include assessments and "... interest, costs, and attorneys' fees..." but, pursuant to Sections 7.8 and 7.9 of the CC&RS, is only prior to the first mortgage holder, "... to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien...."

THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. Defendant's Counter-Motion for Summary Judgment is DENIED and Plaintiff's Motion for Partial Summary Judgment on Declaratory Relief is GRANTED IN PART to the extent that it seeks the following declarations:

> Defendant, in contravention of Nevada Revised Statutes §116.3116, has unlawfully demanded from Plaintiff amounts in excess of the Super Priority Lien to which it has no legal entitlement.
>
> Pursuant to Sections 7.8 and 7.9 of the Defendant's CC&RS, Defendant's lien was junior to the first security interest of the Unit's first mortgage lender except for a certain, limited and specified portion of the lien as defined in Sections 7.8 and 7.9 of the CC&RS (i.e., an amount equal to 6 months of assessments,) and
>
> Defendant, in contravention of Sections 7.8 and 7.9 of the Defendant's CC&RS has improperly demanded monies from Plaintiff in order to satisfy Defendant's claimed liens or demands which exceeded a figure equaling 6 months of assessments, thereby violating the CC&RS.

2. NRS 116.3116(1) states what can be the subject of a homeowners' association's general assessment lien on a unit and NRS 116.3116(2) states what the statutory limits are to the prioritized portion of the assessment lien, i.e., that portion of a homeowners' association's

lien which, after the foreclosure of a unit's first trust deed holder, is superior to the first trust deed as a matter of law (See Order entered January 19, 2012).

3. A homeowners' association's lien against a unit located within its association is contractually created, perfected and noticed by the recording of the CC&RS (See NRS 116.3116(4).

4. To the extent that provisions of CC&RS call for a lesser amount for the prioritized portion of the assessment lien than does NRS 116.3116(2), the lesser amount shall be utilized as the prioritized portion of the lien.

5. NRS 116.1206 states:

> NRS 116.1206 Provisions of governing documents in violation of chapter deemed to conform with chapter by operation of law; procedure for certain amendments to governing documents.
>
> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.
>
> (b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

6. Defendant maintains that NRS 116.3116(2) and Sections 7.8 and 7.9 are conceptually separate and, in effect, create two separate liens. The Court disagrees. There is but a single lien which is created, perfected and noticed by the recording of the CC&RS (See NRS 116.3116(4)).

7. The Court further disagrees with Defendant's position that the provisions of NRS 116.1206 are to the effect that lesser amounts for the prioritized portion of the Defendant's lien which is called for by the CC&RS (Sections 7.8 and 7.9) are automatically elevated to the limits provided for by NRS 116.3116(2) if such lesser amounts are inconsistent with what is permitted by NRS 116.3116(2). The Court disagrees because the language of subsection (1) of NRS 116.1206 refers to any provision in the CC&RS that " ... **violates** the provisions of

this chapter ...." The Court determines that the language in Defendant's CC&RS (Section 7.8 and 7.9) which calls for a lesser amount for the prioritized portion of the lien than does NRS 116.3116(2) does not "violate" the statutory prioritized lien limit as provided for in NRS 116.3116(2) because the amounts called for in the CC&RS do not exceed the limit called for by NRS 116.3116(2), but in fact are within the limit. Thus, the amount of the prioritized portion of a homeowners' association's lien as called for in CC&RS does not need to rise to the maximum level as noted in NRS 116.3116(2), as a lesser amount as called for in the CC&RS does not "violate" NRS 116.3116(2).

8. While the Court has ruled that interest, costs and other fees may be included in the prioritized portion of the lien as long as the prioritized portion of the lien does not exceed an amount ~~equal to 6 months of assessments as noted in Section 7.8 and 7.9 of the CC&RS, at this time;~~ however, the Court is not extending its declaratory relief ruling to the specific monetary amounts referenced in Plaintiff's Motion for Summary Judgment at pages 9 and 10. Nor is the Court at this time addressing issues of attorneys' fees and costs awardable under NRS 18.010(2), NRS 18.005, or NRS 116.3116(7) without regard to super priority.

IT IS SO ORDERED.

7/19/12

DISTRICT COURT JUDGE Date

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GEORGE TAPIA,

Plaintiff(s),

v.

NEVADA ASSOCIATION SERVICES, INC.,

Defendant(s).

2:12-CV-1000 JCM (VCF)

ORDER

Presently before the court is the matter of *Tapia v. Nevada Association Services, Inc.* (case no. 2:12-cv-01000-JCM-VCF).

I. Preliminary matter

On November 28, 2012, defendant Nevada Association Services, Inc. filed a suggestion of death providing notice to the court of the death of plaintiff George Tapia pursuant to Fed. R. Civ. P. 25(a). Upon service of the notice, Mr. Tapia's successor or representative have ninety (90) to make a motion for substitution. However, defendant failed to comply with the requirements of Rule 25(a)(1).

"[T]he rules requires two affirmative steps in order to trigger the running of the 90 day period. First, a party must formally suggest the death of the party upon the record." *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994) (citations omitted). Defendant complied with this requirement. (*See* doc. # 11). "Second, the suggesting party must serve other parties and nonparty

successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute." *Barlow*, 39 F.3d at 233. "[N]on-party successors or representatives of the deceased party must be served the suggestion of death in the manner provided by Rule 4 for the service of a summons." *Id.* Defendant did not comply with this requirement.

The 90-day period was not triggered against Mr. Tapia's estate because the appropriate representative of the estate was not served a suggestion of death in a manner provided by Fed. R. Civ. P. 4.[1] The court cannot dismiss the action on this basis.

Defendant is ordered to comply with requirements of Rule 25(a)(1) and effectuate service of not only the notice of death as provided for in Rule 4, but also this order to apprise Mr. Tapia's estate of the status of this case.

Further, there is a pending motion for summary judgment to which neither Mr. Tapia nor his estate had an opportunity to respond. Even though no opposition has been filed, the court will address the merits of the pending motion because it is clear from the evidence submitted that no genuine issue of material fact exists.

II. Factual background

Mr. Tapia owned real property located 10421 Pacific Sageview Lane, Las Vegas, Nevada 89144. This property is within the Pacific Vintage Owners Association (the association). Defendant is a collection agency authorized by the association to pursue collections and foreclosures on their behalf. (Doc. # 8-1, Ex. A-1).

After Mr. Tapia became delinquent in payments of assessments owed to the association, the association turned the account over to defendant for collection. (*Id.*, Decl. ¶11). On April 2, 2009, defendant sent Mr. Tapia an initial collection notice. (*Id.*, Ex. A-2). Over the course of three years, Mr. Tapia entered into various payment arrangements with defendant. (*Id.*, Ex. A-3). After continual

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[1] The court notes that included in the suggestion of death notice, defendant provided Mr. Tapia's obituary in the Las Vegas Review Journal. (*See* doc. # 11, ex. B). This obituary contains an email address. This contact may lead defendant to information to properly effectuate service compliant with Rule 4.

breaches, defendant initiated foreclosure proceedings. (*Id.*, Dec. ¶14). On March 25, 2012, defendant sent Mr. Tapia a foreclosure notice. (*Id.*, Ex. A-4)

Pro se plaintiff Mr. Tapia brought the instant action alleging that defendant violated the Fair Debt Collection and Practices Act (FDCPA). Mr. Tapia seems to have alleged that defendant violated the FDCPA by (1) attempting to collect fees that are not expressly authorized under 15 U.S.C. § 1692f(1); and (2) by sending a May 12, 2012, collection letter which did not contain disclosures required by 15 U.S.C. § 1692g. (Doc. # 1).

III. Legal standard

A court cannot grant a summary judgment motion merely because it is unopposed, even where its local rules might permit it. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949-50 (9th Cir. 1993); *see also Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003) (a district court cannot grant a motion for summary judgment based merely on the fact that the opposing party failed to file an opposition). Even without an opposition, the court must apply standards consistent with Fed.R.Civ.P. 56, determining if the moving party's motion demonstrates that there is no genuine issue of material fact and judgment is appropriate as a matter of law. *Id.* at 950. *See also Clarendon Am. Ins. Co. v. Jai Thai Enterprises, LLC*, 625 F. Supp. 2d 1099, 1103 (W.D. Wash. 2009).[2]

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.

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[2] "[S]mmary judgment cannot be granted by default, even if there is a complete failure to respond to the motion." Fed.R.Civ.P. 56, 2010 cmt. to subdivision (e).The Court may only grant summary judgment if "the motion and supporting materials ... show that the movant is entitled to it." Fed.R.Civ.P. 56(e).

In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

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

Summary judgment is appropriate when the contract terms are clear and unambiguous. *See United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988); *see also Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985). Interpretation of the contract, including whether it is ambiguous, is a matter of law. *Beck Park Apts. v. United States Dep't of Housing*, 695 F.2d 366, 369 (9th Cir. 1982). In Nevada, a contract provision "is ambiguous if it is reasonably susceptible to more than one interpretation." *See Magrave v. Doormat Properties, Inc.*, 110 Nev. 824, 827 (1994).

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IV. Discussion

A. Attempting to collect fees that are not expressly authorized under 15 U.S.C. § 1692f(1)

Mr. Tapia argued that defendant violated 15 U.S.C. § 1692f(1) by seeking to collect fees that are not expressly authorized by agreement or law. (Doc. # 1, ¶ 24).

Defendant argues that it is expressly authorized to proceed with collections and foreclosures, including collection costs. Defendant asserts that its power to do so is authorized by statute, by contract, and by the community's Covenants, Conditions, and Restrictions (CC&Rs).

I. NRS Chapter 116

NRS 116.31021(1)(k) permits a homeowners association to impose charges for late payments of assessments pursuant to NRS 116.3115. A homeowners association has the power to place a lien upon real property for assessments or fines charged to unit owners from the time the assessment or fine becomes due. NRS 116.3116(1). The assessment includes "any penalties, fees, charges, late charges, fines, and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 . . . ." *Id.* Further, NRS 116.310313(1) permits a homeowners association to charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. *Id.*

NRS 116.3102(1)© permits a homeowners association to "hire and discharge managing agents and other employees, agents and independent contractors." *Id.* An agency relationship exists where a homeowners association hires a collection agency to collect a homeowner's alleged assessment and where the association possessed the contractual right to direct the collection agency to record a lien. *Hamm v. Arrowcreek Homeowners' Ass'n*, 183 P.3d 895, 902 (Nev. 2008). Further, NRS 116.310313(2) expressly permits a homeowners association's collection agency to charge collection costs. *Id.*

The court finds that these provisions of NRS chapter 116 permit collection agencies, such as defendant, to charge and recover collection costs as a homeowners association's agent. Here, defendant, as an agent of the association, is authorized to take actions within that agency relationship. Thus, the actions that Mr. Tapia alleged to be violative of the FDCPA, are not. The fees

defendant seeks to collect are authorized pursuant to NRS chapter 116.

ii. Consent and Authorization agreement

The association executed a Consent and Authorization agreement which specifically appoints defendant as its agent for all acts required to collect delinquent assessment liens, including collection costs. (Doc. # 8-1, Ex. A-1). The contract specifically states:

> [The Association] hereby appoints [NRS] as the Association's agent for the purposes of collecting delinquent assessments, and/or fines, from Association homeowners. NAS is given full power and authority to act on behalf of and in the name of the Association to do all things in which NSA deems appropriate to effect the collection of a delinquency. This process may include, but is not limited to, sending demand letters, recording of a Delinquent Assessment Lien and if necessary proceeding with a non-judicial foreclosure . . . . The Association also permits NAS to charge collection fees and costs as provided under applicable State and Federal law, and the Association's governing documents.

(Doc. # 8-1, Ex. A-1).

The court finds that this agreement provides defendant with contractual authority to obtain collection costs in relation to obtaining delinquent amounts due on a homeowner's account.

iii. CC&Rs

The CC&Rs state that:

> The full annual and special assessments, together with interest, costs, and reasonable attorney's fees, where applicable, shall be a charge on the Unit and shall be a continuing lien upon the Unit against which each such assessment is made.

(Doc. # 8-1, Ex. A-5, § 4.1©).

The court finds that this provision in the CC&Rs, in conjunction with NRS chapter 116 and the Consent and Authorization agreement, provides defendant with express authorization to obtain collection costs in its pursuit of unpaid assessments in the foreclosure process.

Defendant has submitted properly authenticated evidence negating the essential elements of Mr. Tapia's § 1692f(1) claim. *See Celotex Corp.*, 477 U.S. at 323; *see Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002) (articulating the standard for authentication of evidence on a motion for summary judgment). Since defendant has met its initial burden, the burden shifts to plaintiff to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586. However, there is no evidence that Mr. Tapia could present to establish that a genuine issue of

material fact exists.

Thus, the court finds that summary judgment in favor of defendant appropriate. As such, Mr. Tapia's 15 U.S.C. 1692f(1) claim against defendant fails as a matter of law.

B. Sending a collection letter which did not contain disclosures required by 15 U.S.C. §§ 1692g and 1692e

Title15 U.S.C. § 1692g(a) states:

> (a) Notice of debt; contents
> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g.

Title 15 U.S.C. § 1692e states, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* This section also lists conduct that is violative of the section.

Mr. Tapia argued that defendant's May 25, 2012, letter violated the FDCPA by not containing disclosures required by 15 U.S.C. § 1692g. (Doc. # 1, ¶¶ 21-23, 40). Mr. Tapia also argued that defendant's overshadowing in the May 25, 2012, letter was misleading in violation of 15 U.S.C. § 1692e. (Doc. # 1, ¶ 40).

Defendant argues that the March 25, 2012, letter was not its initial communication with Mr. Tapia. Instead, that letter is a foreclosure notice sent three years after defendant's initial communication with Mr. Tapia. Therefore, the foreclosure notice need not comply with the 15

U.S.C. § 1692g requirements. Further, defendant asserts that the April 2, 2009, letter, its initial collection notice to Mr. Tapia, contained disclosures as required under 15 U.S.C. § 1692g.

Additionally, defendant argues that Mr. Tapia did not describe how the foreclosure notice overshadowed Mr. Tapia's right to dispute the debt. Thus, defendant argues that Mr. Tapia's § 1692g and § 1692e claims fail as a matter of law.

The court agrees. Mr. Tapia's challenge fails on its face. Mr. Tapia not taking issue with defendant's initial communication with him. Instead, Mr. Tapia takes issue with a foreclosure notice sent nearly three years after the initial communication was sent. Thus, the March 25, 2012, foreclosure notice is not capable of violating § 1692g as this section does not apply to this type of communication.

To the extent that Mr. Tapia challenged the initial communication with him on April 2, 2009, the court also reviewed this letter. The court finds, however, that this letter is compliant with the requirements of § 1692g. The letter discloses the amount of the debt, names the creditor, and explains plaintiff's right to dispute the debt.

A consumer has 30 days from the date of receipt of the initial communication to dispute the debt. 15 U.S.C. § 1692g. Here, Mr. Tapia did not timely dispute the debt. Thus, Mr. Tapia's statutory right had long since expired by the time defendant sent the March 25, 2012, foreclosure notice.

Mr. Tapia's § 1692e claim also fails. Mr. Tapia appears to base this claim on the fact that the March 25, 2012, letter "overshadowed or contradicted," *Swanson v. S. Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988), his right to dispute the debt. This right, however, expired 30 days after defendant sent its April 2, 2009, letter. Thus, the March 25, 2012, foreclosure notice cannot overshadow an already-expired right.

Defendant has submitted properly authenticated evidence negating essential elements of the Mr. Tapia's § 1692g and § 1692e claims. *See Celotex Corp.*, 477 U.S. at 323; *see Orr*, 285 F.3d 764. Since defendant has met its initial burden, the burden shifts to plaintiff to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586. However, there is no evidence that Mr. Tapia could present to establish that a genuine issue of material fact exists.

Thus, the court finds that summary judgment in favor of defendant appropriate. As such, Mr. Tapia's 15 U.S.C. §§ 1692g and 1692e claims against defendant fail as a matter of law.

V. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Nevada Association Services, Inc.'s motion for summary judgment (doc. # 8) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendant shall comply with requirements of Rule 25(a)(1) and effectuate service of the notice of death (doc. # 11) and this order upon Mr. Tapia's estate as provided for in Rule 4 to appraise his estate of the status of this case.

IT IS FURTHER ORDERED that this case shall remain open for 90 days from proof of service on the docket to provide Mr. Tapia's estate an opportunity to file a motion for substitution and a motion to reconsider this order, if his estate chooses to do so.[3]

DATED March 15, 2013.

James C. Mahan

UNITED STATES DISTRICT JUDGE

[3] The time in which to file an appeal will not start to run until the case has been closed.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NICHOLAS OTOMO, an individual; TIMOTHY MCCRIGHT, an individual, on behalf of themselves and all those similarly situated, Plaintiffs, v. NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; and DAVID STONE, an individual, Defendants.	2:10-CV-2199 JCM (GWF)

ORDER

Presently before the court is plaintiffs' motion for class certification. (Doc. #72). Defendants filed an opposition (doc. #77), to which the plaintiffs replied (doc. #81).[1]

I. Background

On December 29, 2010, plaintiffs filed their first amended complaint. (Doc. #6). The complaint named two defendants: Nevada Association Services, Inc. ("NAS") and David Stone. (*Id.*). NAS is a collection agency that pursues past due assessments and charges from delinquent homeowners on behalf of Nevada homeowners' associations ("HOA(s)"). (Doc. #77, 2:19-20).

[1] Plaintiffs also submitted a supplemental exhibit (doc. # 82) to which defendants replied (doc. # 83). This exhibit is a copy of an agreement in *Jones Ebel v. Nevada Association Services, Inc.*, case # 2:11-cv-00963-KJD-NJK, in which defendant NAS admitted that the members of subclass A are appropriate for class action treatment. The court, however, does not find that agreement persuasive here for two reasons: (1) in *Jones Ebel*, plaintiffs only challenge NAS's initial collection notice, whereas here plaintiffs challenge defendants conduct based on five separate occasions; and (2) in *Jones Ebel*, plaintiffs challenge the content of the letter, whereas here plaintiffs challenge NAS's right to collect assessments on behalf of HOAs.

Stone is the President of NAS. (*Id.* Ex. E, 2:8). Defendants employ a multi-step process to satisfy the debt and associated collection fees. Plaintiffs challenge NAS's business practice, arguing that NAS is not authorized to collect fees directly from the consumer and that by sending letters asking for the collection of those fees, NAS violates the consumers' rights under federal and state law.

The amended complaint alleges five causes of action against NAS: (1) violation of the Fair Debt Collection Practices Act ("FDCPA"); (2) violation of the Nevada Deceptive Trade Practices Act; (3) declaratory relief; (4) injunctive relief; and (5) negligence. (*See id.*). Claims one, three, and four respectively also name Stone. (*See id.*).

In plaintiffs' motion for class certification there are five proposed subclasses. (*See* Doc. #72). All five groups are divided based upon their correspondence with NAS. (*See generally* Doc. #72). Subclass A includes approximately 45,366 individuals who received an "initial demand letter." (*Id.* at 11-12). Subclass B includes approximately 35,966 individuals who received a "secondary demand letter." (*Id.* at 12). Subclass E includes the "at least 5,481 property owners," who received a "payment plan letter" followed by a "breach letter." (*Id.*). Subclass F includes approximately 31,513 individuals who received "foreclosure letters." (*Id.*). Lastly, Subclass H includes approximately 5,053 individuals who received notices of foreclosure sale. (*Id.* at 12-13).

The named plaintiffs, Nicholas Otomo and Timothy McCright, were both behind on their HOA payments which prompted NAS to contact them. (Doc. #77, 7). Over the span of approximately 21 months McCright received all the above listed correspondence. (*Id.*). Similarly, Otomo received all the correspondence except for the notice of foreclosure sale. (*Id.*).

II. Legal Standard

A party seeking class certification bears the burden of demonstrating that all four prerequisites of Rule 23(a) and at least one criterion of Rule 23(b) are met. *Conn. Ret. Plans & Trust Funds v. Amgen. Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011). Subclasses are to be treated as their own class under Rule 23. Fed.R.Civ.P. 23(c)(5). The four prerequisites to class certification under Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

A class action "may [ ] be certified [only] if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. Sw. v. Falcon,* 102 S.Ct. 2364, 2372 (1982). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Id.* at 160. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

After satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate either: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; or (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. Fed. R. Civ. P. 23(b)(1–3).

The decision to grant or deny a motion for class certification is committed to the trial court's broad discretion. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010)

III. Discussion

Plaintiffs argue that each subclass meets the requirements of Rule 23(a) and qualifies as a class under all three categories of Rule 23(b). (*See* Doc. #72). Defendants contend those assertions on all points except numerosity. (*See* Doc. #77). The court will address each requirement in turn.

. . .

A. Fed. R. Civ. P. 23(a)

i. Numerosity

Numerosity, the first prerequisite of class certification, requires that the class be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). While there is no fixed number that satisfies the numerosity requirement, as a general matter, a class greater than forty often satisfies the requirement, while one less than twenty-one does not. *See Californians for Disability Rights, Inc. v. California Dept. of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008).

Here, numerosity is clearly met by all five subclass es. To illustrate, subclass H, the smallest proposed subclass, has over approximately 5,000 individuals (doc. #72, 12), an amount which surpasses the bounds of a practical joinder.

ii. Commonality

Commonality, the second prerequisite of class certification, requires that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). The requirements of Rule 23(a)(2) have "been construed permissively," and just one common question of law or fact will satisfy the rule. *See Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 981 (9th Cir. 2011). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). Thus, for purposes of Rule 23(a)(2), a perfect identity of facts and law is not required; relatively "minimal" commonality will do. *Id.* at 1019–20.

Plaintiff argues that all five subclasses are adequate on numerous grounds of both fact and law. (*See* doc. #72, 14-18). Defendant only contests Rule 23(a)(2) by blankly stating that plaintiffs "fail to meet the requirements of . . . (a)(2)(commonality)." (Doc. #77, 11:7-8).

The court finds that Rule 23(a)(2) is satisfied by plaintiffs. Stated simply, each subclass has a common question of whether members of the putative subclasses received the same correspondence from NAS, which is enough commonality to meet Rule 23(a)(2).

iii. Typicality

Typicality, the third prerequisite of class certification, requires that "the claims or defenses

of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Admittedly, the '[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157 n.13. However, typicality, like adequacy, is directed to ensuring that plaintiffs are proper parties to proceed with the suit. "The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). The typicality requirement demands that a named plaintiff's claims be "reasonably co-extensive with those of absent class members," although "they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "The purpose of the typicality requirement is to assure that the interests of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508.

Plaintiffs argue that McCright and Otomo's claims are typical of subclasses A, B, E, and F because each received an the requisite communication from NAS containing misleading statements. (Doc. # 72, 20:11-18). Plaintiffs also argue that McCright's claims are typical of subclass H because he received a notice of foreclosure sale from NAS containing misleading statements. (Doc. # 72, 20:18-20).

Defendants challenge the typicality of McCright's claims because he did not live in the property at the time he received communication from NAS–thus, the debt does not quality as consumer "debt" pursuant to the FDCPA. Defendants also challenge the typicality of McCright's claims for subclasses A, B, E, and F as being time barred by the FDCPA statute of limitations.[2] Defendant contests both plaintiffs' claims' typicality because some putative class members have submitted claims to arbitration and mediation pursuant to NRS 38.310–which plaintiffs have not.[3]

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[2] The statute of limitations for FDCPA actions is one year. 15 U.S.C. § 1692k.

[3] Under *Hamm v. Arrowcreek Homeowners Ass'n*, 183 P.3d 895 (Nev. 2008) and NRS 38.300, NRS 38.310's mediation or arbitration prerequisites are inapplicable if there is an immediate threat of irreparable harm or if the action relates to the title of the residential property. Here, some of the subclasses sufficiently implicate the title of residential property or involve an immediate threat of irreparable harm such that this limitation on commencement of a civil action does not apply. However, other subclasses do not fall within an exception and thus would be required to pursue mediation or arbitration before seeking relief in this court. Because this analysis goes to the merits of the named plaintiffs' claims and because the instant motion is denied on other grounds, the court does not find reason to set forth its analysis of

Defendants concede that Otomo's claims are within the statute of limitations and do not challenge his typicality on any basis other than NRS 38.310.[4] Thus, the court finds that Otomo's claims are typical of subclasses A, B, E, and F.

Defendants do not challenge whether McCright received communication under subclass H within the statute of limitations. Thus, the court turns the whether McCright incurred a "debt" as defined by the FDCPA. In order for McCright's FDCPA claim to be typical of subclass H, he must be a "consumer" within the meaning of the statute. That is, McCright should not be subject to individualized defenses as to whether he incurred a consumer "debt". "Debt" under the FDCPA consists of any obligations arising from a transaction "primarily for personal, family, or household purposes . . . ." 15 U.S.C. § 1692a(5).

Here, the court is only concerned with the typicality of McCright's FDCPA claim as to subclass H. The court finds that there is insufficient evidence before it to make a determination of whether McCright was living in the residence at the time he received the notice of foreclosure sale. The court has only plaintiffs' counsel's assertion that McCright "was living in the residence at the time he received the Notice of Foreclosure Sale . . ." (doc. # 81, 16:3-4), without any citation to the record. *See U.S. v. Dunkel*, 927 F.2d 955 (7th Cir.1991)("Judges are not like pigs, hunting for truffles buried in briefs."). Plaintiffs are required to lay out the evidence and pinpoint the exact portions that support their argument. While the court would normally find that such an insufficiency in evidence would warrant a hearing to obtain more information–the court's denial of class certification under the Rule 23(b) makes this exercise unnecessary. On this basis, the court finds that McCright's claims are not typical of subclass H.[5]

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exhaustion here. Therefore, the court's finding as to typicality omits analysis as to the impact of NRS 38.310 on plaintiffs' claims in a putative class action.

[4] Addressed *supra* fn.2.

[5] The court acknowledges the parties' arguments as to when the FDCPA debt was incurred and its relevance to McCright's claims' typicality. As previously mentioned in footnote 2, because this analysis goes to the merits of the named plaintiffs' claims and because the instant motion is denied on other grounds, the court does not find reason to set forth its analysis as to when the debt must be incurred to qualify as a "debt" within the meaning of FDCPA.

iv. Adequate Representation

An adequate representative is one who will "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Due process requires that absent class members have an adequate representative. *See Hansberry v. Lee*, 61 S.Ct. 115, 120 (1940). A representative is adequate where: (1) there is no conflict of interest between the representative and her counsel and absent class members; and (2) the representative and her counsel will "pursue the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 120 (internal citations and quotations omitted). In practice, courts have interpreted this test to encompass a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Brown v. Ticor Title Ins.*, 982 F.2d 386, 390 (9th Cir. 1992) (quoting *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982)).

a. Class counsel's adequacy

To be adequate, plaintiffs' counsel must be qualified, experienced, and generally able to conduct the proposed litigation. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Defendants argue that class counsel are inadequate because of a conflict of interest (*i.e.*, financial stake in the outcome of the litigation) and previous disciplinary action. (Doc. # 77, 14). The court finds the alleged financial stake to be too tangential to draw an interference of impropriety. Further, any previous disciplinary action is not sufficiently related to lead this court to believe that counsel cannot adequately represent plaintiffs here.[6]

b. Class representatives' adequacy

Defendants challenge both plaintiffs' adequacy on the same grounds defendants challenge plaintiffs' claims' typicality. Plaintiffs argue that named plaintiffs "have a mutual interest in

[6] Defendants argue that counsel has been sanctioned for failure to bring actions under chapter 38 before the Nevada Real Estate Division in accordance with NRS 38.310. However, given the unique nature of class actions, the court does not find that this previous sanction to have any bearing on counsel's ability to represent the putative class here.

establishing liability and obtaining relief because they suffered the same type of harm–namely, they were the recipients of false and misleading debt collection letters or notices by Defendant debt collectors." (Doc. # 72, 21:14-16). Plaintiffs also argue that there is no conflict of interest or antagonism between named plaintiffs and the putative subclasses they seek to represent.

Although the court has already found that McCright's claims are not typical of subclass H and therefore need not address whether he would adequately represent this subclass, the court takes this opportunity to identify a problem with this plaintiff's adequate representation.[7]

Plaintiffs are "the masters of their complaint"; and here plaintiffs have failed to carefully craft a class definition to include one of its proposed named plaintiffs–McCright. McCright does not appear to have "owned and resided in" the residential property at all times he received correspondence from NAS. *See Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2250-51 (1997) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Thus, regardless if McCright's claims are the very same claims the proposed subclass seeks to bring–the question of whether McCright lived in the subject property during the time of the offending correspondence is relevant to whether this plaintiff can adequately represent the putative class members of subclass H. *See* § 21.222, Definition of Class, MANUAL FOR COMPLEX LITIGATION FOURTH, 270 (2004).

Simply put, a named plaintiff's non-inclusion in a class definition drafted by plaintiffs is of concern to the court. This demonstrates a possible conflict of interest between named plaintiff and absent class members of subclass H. *See Hanlon*, 150 F.3d at 120. While the court acknowledges this infirmity, defendants do not argue and the court finds neither a conflict of interest between plaintiffs and their counsel nor an inability to "pursue the action vigorously on behalf of the class." *Id.*

On this basis, the court finds that Otomo can adequately represent subclasses A, B, E, and F; and that McCright cannot adequately represent subclass H.

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[7] The specific example is illustrative of internal inconsistency and procedural incoherency the court finds to be "too cumbersome" in order to certify the requested subclasses. (*See* doc. # 55, 42:10-11).

B. Fed. R. Civ. P. 23(b)

Again, in order to be certified as a class, in addition to satisfying the four requirements of 23(a), plaintiff must also satisfy either FRCP 23(b)(1), (2), or (3). Fed.R.Civ.P. 23.

I. Fed. R. Civ. P. 23(b)(1)

A class action is certifiable under Fed. R. Civ. P. 23(b)(1) if prosecution of separate actions would create a risk of either:

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Id.

Plaintiffs seemingly argue under Fed. R. Civ. P. 23(b)(1)(A), that this litigation, if not a class, poses too great a risk of inconsistent or varying adjudications "with respect to individual members of the class." (Doc. #72, 23-24). Defendant counters that certification under Rule 23(b)(1) is improper because plaintiffs are seeking "primarily monetary relief." (Doc. #77, 3). Although plaintiffs seem to focus on 23(b)(1)(A), 23(b)(1)(B) will also be considered below.

Rule 23(b)(1)(A) exists to prevent the "'defendant by reason of the legal relations involved,'" to not be faced with, as a practical matter, two different courses of conduct. *Zinser v. Accufix Research Institute, Inc.,* 253 F.3d 1180, 1194 (9th Cir. 2001) (quoting *La Mar v. H & B Novelty & Loan Co.,* 489 F.2d 461, 466 (9th Cir. 1973)). The phrase "incompatible standards of conduct" pertains to the situation where "different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct." *Zinser,* 253 F.3d at 1193 (quoting 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1773 at 431 (2d ed. 1986) (footnote omitted). Certification under Rule 23(b)(1)(A) requires more "than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts." *Zinser,* 253 F.3d at 1193 (quoting FEDERAL PRACTICE AND

PROCEDURE § 1773 at 429). Finally, certification under Rule 23(b)(1)(A) is not appropriate in an action for damages. *Id.*

Certification is available under Rule 23(b)(1)(B) when the case involves a "'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution." *Zinser*, 253 F.3d at 1197 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999)).

This court finds that certification under Rule 23(b)(1)(A) would be inappropriate since each subclasses' monetary claims are preeminent. This is evidenced by plaintiffs seeking certification of subclasses defined by conduct defendants have already perpetrated upon putative members. (*See* doc. #72, 11-12). Thus, monetary relief is the main source of relief plaintiffs' seek. While declaratory relief is plead as the third cause of action (doc. #6, 47), its presence cannot reasonably be believed to make the monetary claims incidental. The fourth cause of action, injunctive relief, is only targeted at sub-class H.[8] The injunctive relief is primarily targeted at enjoining defendant from moving forward with the foreclosure of sub-class H member's homes. (*Id.* at 52). However, as plaintiff has pointed out, these foreclosures only occur .00017 percent of the time. (Doc. #72, 7:26). Therefore, even for subclass H, the only subclass named under both the third and fourth causes of action (*see* doc. #6), monetary relief is the preeminent relief sought. This court cannot certify any of the subclasses under Rule 23(b)(1)(A) since the claims under each subclass are primarily seek monetary damages, and therefore, do not pose enough risk of creating incompatible standards of conduct for defendants.

Additionally, this court finds that certification under Rule 23(b)(1)(B) would be inappropriate since plaintiffs' recovery is not limited by a capped fund. Like the plaintiff in *Zinser*, who failed to show that "assets potentially available to claimants are so limited that separate actions 'inescapably will alter' the right of other claimants"; here, plaintiffs have not show that separate actions would inescapably alter the rights of plaintiffs. 253 F.3d at 1197 (quoting Fed.R.Civ.P. 23(b)(1)(B)).

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[8] The amended complaint also seeks injunctive relief as to subclasses D and G (doc. 6, 51); however, the motion for class certification does not seek certification as to these subclasses. (*See* doc. #72).

ii. Fed. R. Civ. P. 23(b)(2)

The second Rule 23(b) category provides that a class action is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2); *Zinser* 253 F.3d at 1195 ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.").

Plaintiffs argue that Rule 23(b)(2) is appropriate since a "fundamental issue in this case is whether Defendants have a separate and independent right to charge collection fees directly to the homeowners if there is no privity of contract between the Defendants and the homeowners and where the HOAS have not actually incurred any collection cost from the Defendants." (Doc. #72, 24: 7-10). Defendants oppose plaintiffs' argument by analogizing the facts here to the recent Supreme Court case *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which certification under Rule 23(b)(2) was denied. (Doc. #77, 17-18). Plaintiffs contend that defendants' use of *Dukes* is misconstrued. (Doc. # 81, 23).

Dukes held that Rule 23(b)(2) cannot be used to certify a class, "where . . . the monetary relief is not incidental to the injunctive or declaratory relief." 131 S.Ct. at 2557. The Court avoided making a decision as to the "broader question" of whether or not 23(b)(2) could be used only for purely injunctive or declaratory claims. *Id.* However, the Court did decide that when a class' monetary claims involve individualized relief, even if incidental ("like the backpay at issue"), it cannot be certified under 23(b)(2). *Id.* at 2557, 2561. Thus, defendant's characterization and use of *Dukes* was correct. (*See* doc. #77, 17-18).

As discussed earlier the court finds that the focus of each subclass is monetary damages not injunctive or declaratory relief. Thus, each subclass fails certification under Rule 23(b)(2) since their monetary claims are more than incidental.

iii. Fed. R. Civ. P. 23(b)(3)

"To qualify for certification under Rule 23(b)(3), a class must meet two requirements." *Amchem Products*, 117 S. Ct. 2231, 2245-46. First, "common questions must 'predominate over any

questions affecting only individual members.'" *Hanlon*, 150 F.3d at 1022 (quoting Fed.R.Civ.P. 23(b)(3)). Second, "class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* (quoting Fed.R.Civ.P. 23(b)(3)).

a. Predominance

"The predominance inquiry of Rule 23(b)(3) asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The focus is on the relationship between the common and individual issues." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011). The predominance analysis of Rule 23(b)(3) is not identical to or synonymous with the commonality analysis in Rule 23(a)(2). "In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022. "Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding." *Amchem*, 117 S. Ct. 2231, 2250. "The party seeking class certification, bears the burden of showing that common questions of law or fact predominate." *Zinser,* 253 F.3d at 1188 (citing *Hanon,* 976 F.2d at 508).

Plaintiffs commit most of their Rule 23(b)(3) arguments to why the class is the superior method in this instance. (*See* doc. #72 25-27). Plaintiffs do, however, set forth eight main points as to why common questions of law and fact predominate. (Doc. #72, 25-26, 14-18 (latter span of pages summarizing each subclass' common questions of law and fact). Defendants raises\ at least seven issues as to why common questions of law and fact do not predominate. (Doc. #77, 19-22). Below the court analyzes those arguments the court finds most persuasive.

First, defendants point out potential statute of limitations problems. (Doc. #77, 20); 15 U.S.C.A. §1692k(d). In response, plaintiffs' reply actually reiterates the potential problems the one year FDCPA statute of limitation could create. (*See* doc. #81, 27). Each subclass would, in essence, break into two distinct groups: (1) group that would have claims under FDCPA and all the other actions; and (2) a group that would not have a claim under the FDCPA because the putative class members are barred by the statute of limitations.

. . .

Second, defendants claim that this court would have to conduct individual investigations as to whether each claimant under the FDCPA has the proper type of "debt" for bringing a claim. As previously discussed, the FDCPA is clear that it only applies to transactions "primarily for personal, family, or household purposes . . ." 15 U.S.C. §1692(a)(5); *see also Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992). Further, *Bloom* makes it clear that discovering the true purpose of a transaction is paramount in determining whether or not it was a transaction for business purposes or personal purposes. *See* 972 F.2d at 1068-69. *Bloom* went as far to say that a case-by-case analysis is required in order to determine whether a transaction is actually for business or personal purposes. *Id.* (citing *Thorns v. Sundance Properties,* 726 F.2d 1417, 1419 (9th Cir. 1984). Plaintiffs argue that subclasses' definitions solves this problem.[9] (Doc. #81, 27:11). However, owning or residing in the property, whether past or present, does not answer the question as to whether the home was initially purchased for personal or business purposes. One could have easily purchased the home as an investment property, then lived in the home, and now currently rent it out again. This hypothetical putative class member would require individual investigation to determine the nature of the transaction meet and would likely fail to have a claim under the FDCPA.

Third, defendants argue that intent is an individualized issue, and defendants' intent to foreclose would have to be analyzed on a person-by-person basis.[10] (Doc. #77, 22). Plaintiffs argue that intent is not an obstacle as the low foreclosure rate by defendants is telling of their true intent. Plaintiffs cites to the Fourth Circuit case *United States v. Nat'l Fin. Services, Inc.*, as a guidepost. (Doc. #81, 27-28); 98 F.3d 131 (4th Cir. 1996) (affirming civil penalties for violations under the FDCPA). While this court at this stage declines to issue an opinion as to the merits of the intent to foreclose by defendant, it does recognize the differences between the facts before it and those presented in *Nat'l Fin. Services*.

. . .

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[9] For example, plaintiffs argue that subclass A says "all natural persons who *own and reside in, or owned and resided in homes located in HOAS . . .*" (Doc. #72, 11) (emphasis added).

[10] This consideration would apply to sub-classes F and H. (Doc. #72, 16:26, 17:21).

In *Nat'l Fin. Services*, the court's finding that defendants were liable under the FDCPA, due to a lack of intent to follow through on threats of litigation appeared to be based on four factors. *See* 98 F.3d at 131. First, defendant National Financial Services had no internal procedure for filing a lawsuit. *Id.* at 136. Second, the evidence and testimony showed that defendant Frank Lanocha had no intention of filing a lawsuit. *Id.* at 137. Third, defendant Lanocha had not filed one lawsuit during the time period in question,[11] and exercised no judgment in regards to each threatening letter. *Id.* at 138. Lanocha did not see the letters, sign the letters, or know the identities of their recipients. *Id.* Lastly, while not as explicit, following through on the threats of litigation would result in lawsuits seeking an average of a $20 debt. *Id.* at 132. This, financially speaking, seemed impractical. *Id.* at 136.

Here, none of these factors are clearly shown by plaintiffs. Defendants have foreclosed before, thus defendants presumably have an internal procedure for foreclosure. The evidence here is not as strong as in *Nat'l Fin. Services* that there was no intention to follow through on the threatened action. While defendants foreclosing on property was rare, it was not as rare as *Nat'l Fin. Services* defendants bringing a lawsuit. Finally, foreclosure, on its face, seems more financially practical, and thus likely, than suing over a $20 debt.

These three concerns coupled with some of the earlier mentioned issues, like exhaustion of administrative remedies, *supra* III.A.iii.n.2, are enough for the court to find that common questions of law and fact do not predominate over individual questions. *See* Fed.R.Civ.P. 23(b)(3). Too much individualized investigation of both questions of law and fact exist. Therefore, the court finds that all five subclasses lack the cohesiveness to warrant adjudication by representation. *See Stearns*, 655 F.3d at 1019.[12]

. . .

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[11] Prior to the time period in the lawsuit, defendant Lanocha had sued merely 15 people out of millions of sent letters. *Nat'l Fin. Services*, 98 F.3d at 138.

[12] The court notes that upon initial impression it felt that class treatment here would "too cumbersome," "the questions . . . too diverse," and that "everybody [would] have a different story." (Doc. #52, 42). After considering this motion and the evidence properly before the court, the court finds that its initial impression of the circumstances presented here to be correct.

b. Superiority

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d 1023 (citing FEDERAL PRACTICE AND PROCEDURE § 1779). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "A class action is the superior method for managing litigation if no realistic alternative exists." *Id.*

"In determining superiority, courts must consider the four factors of Rule 23(b)(3). A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190. Those four factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action

While some of the above listed factors weigh in favor of class certification, the likely difficulties in managing the class action outweigh. This court finds that due to the lack of predominance of common issues of fact and law, the five proposed subclasses are not the superior method to adjudicate plaintiffs' claims.

IV. Conclusion

In conclusion, this court finds it appropriate to deny plaintiff's motion for class certification as to all five subclasses.

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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for class certification (doc. #72) be, and the same hereby is, DENIED.

DATED March 25, 2013.

James C. Mahan

UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

vs.

IKON HOLDINGS, LLC,

Respondent.

Supreme Court Case No.: 63178

District Court Case No. A-11-647850-B

MOTION TO CONSOLIDATE OR, ALTERNATIVELY, FOR CONCURRENT HEARINGS

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Appellant Horizons at Seven Hills Homeowners Association ("Horizons"), by and through its counsel of record, the law firm of Holland & Hart, LLP, hereby seeks to consolidate this appeal with the following matters already pending before the Nevada Supreme Court:

1. *Nevada Ass'n Servs., Inc. v. District Ct.*, NSC Case No. 62748 (the "NAS Writ Petition"); and

2. *Southern Highlands Community Ass'n v. District Ct.*, NSC Case No. 61940 (the "Southern Highlands Writ Petition); and

3. *Prem Deferred Trust v. District Ct.*, NSC Case No. 62587 (the "Prem Writ Petition").

In the alternative, Horizons respectfully requests that the matters at least be heard and decided concurrently, given their subject matter relationship to one another.

DATED this 24th day of May, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case concerns a dispute over the interpretation and enforcement of "super-priority liens" created by NRS 116.3116(2) and various covenants, conditions, and restrictions ("CC&Rs") of applicable common interest communities. Since at least 1991, common interest associations have held statutory liens on unpaid assessments that enjoy a priority superior to even the first

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deed of trust holder in the event of a foreclosure by the first deed of trust. For nearly twenty years, this "super-priority lien" was universally understood (and indeed enforced as such by courts) to mean that, in the event of a foreclosure by the holder of a first deed of trust, the association held a surviving residual lien on the equivalent of nine months[1] of unpaid assessments, ***plus*** reasonable "costs of collecting" as provided by NRS 116.310313. Since approximately 2009, with the explosion of foreclosures in the State of Nevada, certain real estate "flippers" who purchase real property at these foreclosure sales have taken the position that the "super-priority lien" in NRS 116.3116(2) is capped at "nine times monthly assessments" and in certain cases "six times monthly assessments," and no more.

As there is presently no Nevada Supreme Court opinion defining NRS 116.3116(2), common interest associations, investors, lenders, and government agencies have been paralyzed by numerous Nevada Real Estate Division (the "NRED") arbitrations and district court disputes concerning the amount of the residual lien that exists after a foreclosure by the first deed of trust holder. In the last six months, this Supreme Court has requested briefing in three writ petition proceedings related to the super-priority lien, namely *Southern Highlands*, *Prem Deferred Trust*, and *Nevada Ass'n Servs.*, Case Nos. 61940, 62587, and 62748 (collectively the "Super-Priority Writs").

The Southern Highlands Writ Petition involves a district court decision denying a motion to dismiss for failure to comply with NRS 38.310. The NAS Writ Petition involves the identical issue and, additionally, whether the Voluntary Payment Doctrine bars "refunds" of alleged overpayments by unit owners. The Prem Writ Petition involves dismissal of class action claims based upon alleged violations of Covenants, Conditions & Restrictions ("CC&Rs") for a common interest community.

[1] NRS 116.3116 originally provided for a super-priority lien period of six (6) months. It was extended to nine (9) months as a result of a statutory amendment enacted by the Nevada Legislature in 2009.

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All of these matters involve key legal issues pertaining to super-priority liens that have been enforced by common-interest communities—pursuant to CC&Rs and NRS Chapter 116—over the years.

While the various parties disagree on the merits of the legal issues contained in these various matters, all parties agree heartily that the absence of direction from a binding final decision has contributed considerable havoc in the Nevada real estate market and in the court system. There are conflicting decisions from various district court judges and NRED arbitrators. ***See*** various decisions collectively attached hereto as **Exhibit "1"**. Remarkably, ***there are two conflicting advisory opinions from within the state government***. ***See*** **Exhibit "2"** and **Exhibit "3"**. Currently, NAS is aware of the following pending matters that are impacted by this litigation:

- *Bank of America vs. Allure HOA, et. al.*, District Court A67023
- *Higher Ground vs. Adagio HOA, et. al.*, NRED 11-90
- *Prem Deferred vs. Painted Desert,* District Court A671484
- *Quantum Homes vs. Green Valley Ranch*, District Court A668064
- *Vintage Canyon Trust vs. Vintage Valley at the Estates at S. Highlands*, NRED 12-86
- *United States vs. Wells Fargo, et. al.*, Federal Court 2:11-cv-00535-RCJ-NJK
- *Bank of America vs. Allure HOA, et. al.*, District Court A670230
- *Prem Deferred Trust vs. Aliante Master Association*, District Court A651107
- *Prem Deferred Trust vs. Silverado Place HOA*, NRED 12-32 and District Court Case A667796
- *Metroplex Realty vs. Canyon Willow Tropicana HOA, et. al.*, NRED 12-120
- *Higher Ground vs. Adagio HOA, et. al.*, NRED 11-90

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- *United States vs. Wells Fargo, et. al.*, Federal Court 2:11-cv-00535-RCJ-NJK

It is believed that there are other matters involving other common interest communities of which Horizons is not aware.

Presently, there is no guidance for judges, arbitrators, common interest associations, investors, lenders, or even lawyers as to how they should conduct themselves in these matters. Indeed, the current state of affairs is a "poster child" for the strains imposed upon both the business community and court system by the absence of an intermediate appellate court. Horizons submits that consolidation of these matters—or at least a concurrent hearing and decision—will finally settle the following questions:

- Whether a common interest association must file a lawsuit to maintain a super-priority lien;
- Whether NRS 116.3116 limits common interest associations to a maximum numerical cap of "nine times monthly assessments" when enforcing a super-priority lien, or whether associations are also able to recover their reasonable collection fees and costs;
- Whether common interest associations are retsricted to a lesser super-priority lien amount when there is a conflict between the CC&Rs and NRS 116.3116;
- Whether a class action may be maintained by unit owners when members of the class have not complied with NRS 38.310;[2] and
- Whether the Voluntary Payment Doctrine bars as a matter of law claims for money damages for alleged "overpayments" of super-priority lien amounts that were paid in the past without complaint

[2] One issue that will not be addressed by these various matters is whether it is even appropriate to certify a class under NRCP 23 in cases such as these. However, said issue would be effectively rendered moot if this were to enforce the Voluntary Payment Doctrine as to claims of "overpayments" to common interest communities.

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or dispute, with the lawsuit often being filed years after those payments were made.

Indeed, numerous pending district court actions and NRED arbitrations can be resolved with answers to the foregoing questions. Associations and their collection agencies will know exactly how much they can demand after a foreclosure upon the first deed of trust. Lenders and investors will know what their obligations are. Litigants and their counsel will know whether damage claims are even actionable, much less whether they can be litigated as a class. In contrast, piecemeal adjudication of these questions will merely lead to more confusion, and perpetuate the present environment of uncertainty in the real estate and lending industry.

II. ARGUMENT

This Court has broad discretion to consolidate appellate matters. Indeed, the consent of the parties is not even required. *See* NRAP 3(b)(2). Specifically, Rule 3(b)(2) of the Nevada Rules of Appellate Procedure states:

> **(b) Joint or Consolidated Appeals.**
>
> . . .
>
> (2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party.

NRAP 3(b)(2). This Court may look to judicial economy to determine whether matters should be consolidated. *See, e.g.,* General Supply & Services, Inc. v. Burke & Assocs., 2012 WL 1595101 (May 5, 2012) (unpublished). While Rule 3 does not address the propriety of consolidating appeals with extraordinary writ petitions, the undersigned is unaware of any rule precluding such consideration, especially where joint consideration will resolve dozens of district court actions and NRED arbitrations. *See* NRAP 1(c) ("These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court.").

The Southern Highlands Writ Petition concerns a district court's ruling that it has jurisdiction over class action claims concerning the "interpretation and

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enforcement of NRS 116.3116(2)" despite claims not being arbitrated pursuant to NRS Chapter 38 and the district court's certification of a class consisting of member that had not previously arbitrated or mediated pursuant to NRS Chapter 38. *See* Document 12-33307, Southern Highlands Petition for Writ of Prohibition or Alternatively, Mandamus attached hereto as **Exhibit "4"**. The NAS Writ Petition involves the exact same issue, and additionally seeks that the district court be directed to apply black letter law involving the Voluntary Payment Doctrine. *See* Document 13-06904, NAS Petition for Writ of Prohibition or Alternatively, Mandamus attached hereto as **Exhibit "5"**. The Prem Writ Petition involves dismissal of class action claims based upon alleged violations of CC&Rs for a common interest community. *See* Document 13-04194, Prem Writ Petition attached hereto as **Exhibit "6"**.[3] Meanwhile, this appeal involves the substantive interpretation of NRS 116.3116 and related CC&Rs, and the Consolidated Appeals involve the finality of an interim order by a NRED arbitrator in a similar super-priority lien case. In many of these matters, as the Court will no doubt notice, counsel are the same, are intimately familiar with the pending legal issues, and are uniquely qualified to address these questions before the Court.

The foregoing cases all relate to the interpretation of NRS 116.3116 and NRS Chapter 38, and more specifically, defenses or claims related to the interpretation of NRS 116.3116. Therefore, because all of these cases relate to, and arise from, the interpretation of the "super-priority lien" and NRS Chapter 38, this Court should either consolidate the various matters or, at a minimum, hear and decide these matters concurrently to avoid piecemeal (and potentially contradictory) decisions and results. Indeed, a consolidated review of these matters should settle the various super-priority lien questions once and for all; review is particularly warranted because it will promote judicial efficiency and

[3] This Court has already consolidated the Southern Highlands Writ Petition and the Prem Writ Petition. *See* **Exhibit "7"**. It recently declined to consolidate the NAS Writ Petition in Supreme Court Case No. 62748.

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economy on the issues, and will unclog the various court actions and NRED arbitrations that are currently floundering.

While the parties disagree vigorously on the substantive issues, it is in the interest of all parties that these matters be heard together, before the parties expend significant time, money, and resources to matters that may be resolved with answers from this Court as to but a few legal issues. As a result, it is anticipated that consolidation, or at least the setting of coordinated hearings, will not be opposed by any party.

III. CONCLUSION

Because the interests of judicial efficiency would be best served by addressing the super-priority lien writ petitions together, NAS respectfully asks the Court to grant its request to consolidate the aforementioned matters.

DATED this 24th day of May, 2013.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b), I hereby certify that on the 24th day of May, 2013, I served a true and correct copy of the foregoing **MOTION TO CONSOLIDATE OR, ALTERNATIVELY, FOR CONCURRENT HEARINGS** by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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