(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).[6] 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 C

EXHIBIT C

LAW OFFICE

Brown, Brown & Premsrirut

AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

JAY H. BROWN, ESQ.
DAVID T. BROWN, ESQ.
PUOY K. PREMSRIRUT, ESQ.

520 SOUTH FOURTH STREET
LAS VEGAS, NEVADA 89101-6520

TELEPHONE (702) 384-5563
FACSIMILE (702) 385-1752
EMAIL: puoy@brownlawlv.com

March 19, 2010

Via Facsimile and U.S. Mail
The Commission for Common Interest Community
c/o Legal Administrative Officer
State of Nevada, Department of Business & Industry
Real Estate Division
2501 E. Sahara Avenue, Suite 102
Las Vegas, Nevada 89104
Fax: (702) 486-4067

Re:

Dear Chairman Buckley and Members of the Commission:

I am writing to request the Commission's formal opinion on a particular matter, as it relates to the submission of "super-priority lien" disputes for alternative dispute resolution before the Commission for Common Interest Community (the "CCIC").

During economic times where residential foreclosures have multiplied exponentially, the number of buy-sell transactions post-foreclosure sale have also resulted. In these subsequent transactions, Homeowner's Associations ("HOAs") and their representative collection agencies ("CAs") issue payoff demands purporting to represent the amount of the "Super-Priority Lien". NRS 116.3116(2)(c) gives HOA's and CA's an operative lien on the property in an amount that is 9xs (formerly 6xs) the amount of monthly budgeted assessments.

There are differing positions as to what is permissible under this statute. As practiced by the HOAs and CAs, the super-priority lien amount may include all assessments, collection fees, legal fees, notice charges, delinquency costs and virtually anything that is associated with the HOA balance, for the preceding 9 months. On the other hand, the subsequent purchasers at foreclosure, who desire to transfer the property to a new buyer, take the position that the super-priority lien amount may only be 9xs the amount of the monthly assessment as budgeted by the HOA.

In order to transfer the property and obtain title clear from the super-priority lien, homeowners have succumbed to paying the HOA/ CA's interpretation of the amount without first having this dispute heard. As a result, several lawsuits have been filed in the Eighth Judicial

LAW OFFICE
Brown, Brown & Premsirut
AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

District Court, Clark County, seeking relief based on interpretation of NRS 116.3116(2). Admittedly, I represent one such Plaintiff.

The disposition of these lawsuits has reached a point which I believe must be brought to the attention of the Commission. Per to NRS 38.310,

> "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** [by filing a written claim with the Real Estate Division NRS 38.320] pursuant to the provisions of NRS 38.300 to 38.360, inclusive. . .

See NRS 38.310; see also NRS 38.300 et seq. (Exhibit "1").

In perusing the website and informational materials from the Real Estate Division, and the Office of the Ombudsman's Alternative Dispute Resolution ("ADR") program that was created in response to this statutory requirement, the subject matter of the claims required for submission to ADR and the actual services offered do not appear to encompass the super-priority lien dispute and statutory interpretation.

Specifically, the Ombudsman specifically assists with claims and disputes regarding:

1. The interpretation, application and/or enforcement of governing documents of a common-interest community (CIC); or
2. The procedures used to increase, decrease or add assessments.

I have enclosed a copy of the ADR pamphlet cover, stating the above. (Exhibit "2").

It is the position of my client, as well as many homeowners that have purchased common interest residential properties, that the above described ADR process does not encompass the mediation or the arbitration of what may or may not be included in a super-priority lien as a matter of law. Notwithstanding this position, and whether my client is right or wrong, the pending litigations involve thousands of individual files disputing the HOA | CA's super-priority lien practice. These lawsuits are currently the subject of various Motions to Dismiss as filed by Defendant CA's, utilizing the above NRS 38.310 as grounds for dismissal.

If the Court ultimately dismisses these lawsuits, the CCIC and ADR will be inundated with thousands of claims that all seek a judicial determination on what may be included under the super-priority lien statute.

LAW OFFICE
Brown, Brown & Premsrirut
AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

While we believe that interpretation of NRS 116.3116(c)(2) falls outside the jurisdiction of the CCIC and ADR, we seek feedback and guidance as to the CCIC's position on this matter. The practical effect, if these lawsuits are dismissed, will result in the CCIC being charged with what is tantamount to a statutory interpretation, and the *ad hoc* adjudication and processing of thousands of super-priority lien claims. The fight between the HOAs | CAs and the subsequent homeowners transferring title will be had in some forum; we are merely looking for guidance as to whether the CCIC is the required battleground.

Thank you in advance for your consideration and assistance. Your prompt attention and feedback is truly appreciated.

Very truly yours,

BROWN BROWN & PREMSRIRUT

Puoy K. Premsrirut, Esq.

PKP:ks
Encl: a/s
Cc: Prem Deferred Trust

EXHIBIT "1"

1. The Supreme Court may authorize the use of settlement conferences and other alternative methods of resolving disputes, including, without limitation, mediation and a short trial, that are available in the county in which a district court is located:

(a) In lieu of submitting an action to nonbinding arbitration pursuant to NRS 38.250; or

(b) During or following such nonbinding arbitration if the parties agree that the use of any such alternative methods of resolving disputes would assist in the resolution of the dispute.

2. If the Supreme Court authorizes the use of an alternative method of resolving disputes pursuant to subsection 1, the Supreme Court shall adopt rules and procedures to govern the use of any such method.

3. As used in this section, "short trial" has the meaning ascribed to it in NRS 38.250.

(Added to NRS by 1991, 1344, A 1999, 1380; 2005, 393)

NRS 38.259 Certain written findings concerning arbitration required; admissibility of such findings at trial anew before jury; instructions to jury.

1. If an action is submitted to arbitration in accordance with the provisions of NRS 38.250 to 38.259, inclusive, the arbitrator or panel of arbitrators shall, in addition to any other written findings of fact or conclusions of law, make written findings in accordance with this subsection concerning each cause of action. The written findings must be in substantially the following form, with "panel of arbitrators" being substituted for "arbitrator" when appropriate:

> Based upon the evidence presented at the arbitration hearing concerning the cause of action for ....., the arbitrator finds in favor of .....(name of the party) and .....("awards damages in the amount of $....." or "does not award any damages on that cause of action").

2. If an action is submitted to arbitration in accordance with the provisions of NRS 38.250 to 38.259, inclusive, and, after arbitration, a party requests a trial anew before a jury:

(a) The written findings made by the arbitrator or the panel of arbitrators pursuant to subsection 1 must be admitted at trial. The testimony of the arbitrator or arbitrators, whenever taken, must not be admitted at trial, and the arbitrator or arbitrators must not be deposed or called to testify concerning the arbitration. Any other evidence concerning the arbitration must not be admitted at trial, unless the admission of such evidence is required by the Constitution of this State or the Constitution of the United States.

(b) The court shall give the following instruction to the jury concerning the action, substituting "panel of arbitrators" for "arbitrator" when appropriate:

> During the course of this trial, certain evidence was admitted concerning the findings of an arbitrator. On the cause of action for ....., the arbitrator found in favor of .....(name of the party) and .....("awarded damages in the amount of $....." or "did not award any damages on that cause of action"). The findings of the arbitrator may be given the same weight as other evidence or may be disregarded. However, you must not give those findings undue weight because they were made by an arbitrator, and you must not use the findings of the arbitrator as a substitute for your independent judgment. You must weigh all the evidence that was presented at trial and arrive at a conclusion based upon your own determination of the cause of action.

3. The court shall give a separate instruction pursuant to paragraph (b) of subsection 2 for each such cause of action that is tried before a jury.

(Added to NRS by 1995, 851)

MEDIATION AND ARBITRATION OF CLAIMS RELATING TO RESIDENTIAL PROPERTY WITHIN COMMON-INTEREST COMMUNITY

NRS 38.300 Definitions. As used in NRS 38.300 to 38.360, inclusive, unless the context otherwise requires:

1. "Assessments" means:

(a) Any charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions, including any late charges, interest and costs of collecting the charges; and

(b) Any penalties, fines, fees and other charges which may be imposed by an association pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 or subsections 10, 11 and 12 of NRS 116B.420.

2. "Association" has the meaning ascribed to it in NRS 116.011 or 116B.030.

3. "Civil action" includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.

4. "Division" means the Real Estate Division of the Department of Business and Industry.

5. "Residential property" includes, but is not limited to, real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS. The term does not include commercial property if no portion thereof contains property which is used for residential purposes.

(Added to NRS by 1995, 1416; A 2003, 2251, 2274; 2007, 2277)

NRS 38.310 Limitations on commencement of certain civil actions.

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, and, if the civil action concerns real estate within a planned community

subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

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

(Added to NRS by 1995, 1417; A 1997, 526; 2007, 2278)

NRS 38.320 Submission of claim for mediation or arbitration; contents of claim; fees; service of claim; written answer.

1. Any civil action described in NRS 38.310 must be submitted for mediation or arbitration by filing a written claim with the Division. The claim must include:

(a) The complete names, addresses and telephone numbers of all parties to the claim;

(b) A specific statement of the nature of the claim;

(c) A statement of whether the person wishes to have the claim submitted to a mediator or to an arbitrator and, if the person wishes to have the claim submitted to an arbitrator, whether the person agrees to binding arbitration; and

(d) Such other information as the Division may require.

2. The written claim must be accompanied by a reasonable fee as determined by the Division.

3. Upon the filing of the written claim, the claimant shall serve a copy of the claim in the manner prescribed in Rule 4 of the Nevada Rules of Civil Procedure for the service of a summons and complaint. The claim so served must be accompanied by a statement explaining the procedures for mediation and arbitration set forth in NRS 38.300 to 38.360, inclusive.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the written claim was served shall, within 30 days after the date of service, file a written answer with the Division. The answer must be accompanied by a reasonable fee as determined by the Division.

(Added to NRS by 1995, 1417)

NRS 38.330 Procedure for mediation or arbitration of claim; payment of costs and fees upon failure to obtain a more favorable award or judgment in court.

1. If all parties named in a written claim filed pursuant to NRS 38.320 agree to have the claim submitted for mediation, the parties shall reduce the agreement to writing and shall select a mediator from the list of mediators maintained by the Division pursuant to NRS 38.340. Any mediator selected must be available within the geographic area. If the parties fail to agree upon a mediator, the Division shall appoint a mediator from the list of mediators maintained by the Division. Any mediator appointed must be available within the geographic area. Unless otherwise provided by an agreement of the parties, mediation must be completed within 60 days after the parties agree to mediation. Any agreement obtained through mediation conducted pursuant to this section must, within 20 days after the conclusion of mediation, be reduced to writing by the mediator and a copy thereof provided to each party. The agreement may be enforced as any other written agreement. Except as otherwise provided in this section, the parties are responsible for all costs of mediation conducted pursuant to this section.

2. If all the parties named in the claim do not agree to mediation, the parties shall select an arbitrator from the list of arbitrators maintained by the Division pursuant to NRS 38.340. Any arbitrator selected must be available within the geographic area. If the parties fail to agree upon an arbitrator, the Division shall appoint an arbitrator from the list maintained by the Division. Any arbitrator appointed must be available within the geographic area. Upon appointing an arbitrator, the Division shall provide the name of the arbitrator to each party. An arbitrator shall, not later than 5 days after the arbitrator's selection or appointment pursuant to this subsection, provide to the parties an informational statement relating to the arbitration of a claim pursuant to this section. The written informational statement:

(a) Must be written in plain English;

(b) Must explain the procedures and applicable law relating to the arbitration of a claim conducted pursuant to this section, including, without limitation, the procedures, timelines and applicable law relating to confirmation of an award pursuant to NRS 38.239, vacation of an award pursuant to NRS 38.241, judgment on an award pursuant to NRS 38.243, and any applicable statute or court rule governing the award of attorney's fees or costs to any party; and

(c) Must be accompanied by a separate form acknowledging that the party has received and read the informational statement, which must be returned to the arbitrator by the party not later than 10 days after receipt of the informational statement.

3. The Division may provide for the payment of the fees for a mediator or an arbitrator selected or appointed pursuant to this section from the Account for Common-Interest Communities and Condominium Hotels created by NRS 116.630, to the extent that:

(a) The Commission for Common-Interest Communities and Condominium Hotels approves the payment; and

(b) There is money available in the account for this purpose.

4. Except as otherwise provided in this section and except where inconsistent with the provisions of NRS 38.300 to 38.360, inclusive, the arbitration of a claim pursuant to this section must be conducted in accordance with the provisions of NRS 38.231, 38.232, 38.233, 38.236 to 38.239, inclusive, 38.242 and 38.243. At any time during the arbitration of 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, the arbitrator may issue an order prohibiting the action upon which the claim is based. An award must be made within 30 days after the conclusion of arbitration, unless a shorter period is agreed upon by the parties to the arbitration.

5. If all the parties have agreed to nonbinding arbitration, any party to the nonbinding arbitration may, within 30 days after a decision and award have been served upon the parties, commence a civil action in the proper court concerning the claim which was submitted for arbitration. Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360, inclusive. If such an action is not commenced within that period, any party to the arbitration may, within 1 year after the service of the award, apply to the proper court for a confirmation of the award pursuant to NRS 38.239.

6. If all the parties agree in writing to binding arbitration, the arbitration must be conducted in accordance with the provisions of this chapter. An award procured pursuant to such binding arbitration may be vacated and a rehearing granted

upon application of a party pursuant to the provisions of NRS 38.241.

7. If, after the conclusion of binding arbitration, a party:

(a) Applies to have an award vacated and a rehearing granted pursuant to NRS 38.241; or

(b) Commences a civil action based upon any claim which was the subject of arbitration,

the party shall, if the party fails to obtain a more favorable award or judgment than that which was obtained in the initial binding arbitration, pay all costs and reasonable attorney's fees incurred by the opposing party after the application for a rehearing was made or after the complaint in the civil action was filed.

8. Upon request by a party, the Division shall provide a statement to the party indicating the amount of the fees for a mediator or an arbitrator selected or appointed pursuant to this section.

9. As used in this section, "geographic area" means an area within 150 miles from any residential property or association which is the subject of a written claim submitted pursuant to NRS 38.320.

(Added to NRS by 1995, 1418; A 1999, 3016; 2001, 1283; 2003, 35, 39, 2251; 2007, 2278; 2009, 2904)

NRS 38.340 Duties of Division: Maintenance of list of mediators and arbitrators; establishment of explanatory document. For the purposes of NRS 38.300 to 38.360, inclusive, the Division shall establish and maintain:

1. A list of mediators and arbitrators who are available for mediation and arbitration of claims. The list must include mediators and arbitrators who, as determined by the Division, have received training and experience in mediation or arbitration and in the resolution of disputes concerning associations, including, without limitation, the interpretation, application and enforcement of covenants, conditions and restrictions pertaining to residential property and the articles of incorporation, bylaws, rules and regulations of an association. In establishing and maintaining the list, the Division may use lists of qualified persons maintained by any organization which provides mediation or arbitration services. Before including a mediator or arbitrator on a list established and maintained pursuant to this section, the Division may require the mediator or arbitrator to present proof satisfactory to the Division that the mediator or arbitrator has received the training and experience required for mediators or arbitrators pursuant to this section.

2. A document which contains a written explanation of the procedures for mediating and arbitrating claims pursuant to NRS 38.300 to 38.360, inclusive.

(Added to NRS by 1995, 1419)

NRS 38.350 Statute of limitations tolled. Any statute of limitations applicable to a claim described in NRS 38.310 is tolled from the time the claim is submitted for mediation or arbitration pursuant to NRS 38.320 until the conclusion of mediation or arbitration of the claim and the period for vacating the award has expired.

(Added to NRS by 1995, 1419)

NRS 38.360 Administration of provisions by Division; regulations; fees.

1. The Division shall administer the provisions of NRS 38.300 to 38.360, inclusive, and may adopt such regulations as are necessary to carry out those provisions.

2. All fees collected by the Division pursuant to the provisions of NRS 38.300 to 38.360, inclusive, must be accounted for separately and may only be used by the Division to administer the provisions of NRS 38.300 to 38.360, inclusive.

(Added to NRS by 1995, 1419)

EXHIBIT "2"

Serving the respondent

After the claimant files the complaint, the Ombudsman's Office will mail instructions to the claimant explaining how to proceed. The claimant is required to serve a claim package to the respondent. The claim package must include Form 523, which is an overview of the ADR process, Form 521, Alternative Dispute Resolution/Residential Planned Communities Respondent Answer form, and a copy of the complaint as filed. Service must be in accordance with the Nevada Rules of Civil Procedure, Rule 4. The claimant is responsible for submitting to the Ombudsman's Office, within 10 days of serving the respondent, a notarized affidavit of service as proof of service.

Responding to a claim

Per statute, respondents must file a response with the Ombudsman's Office within 30 days after service of the complaint.

To respond to a complaint filed through the ADR program, start by reading Form 523, which provides an overview of the ADR process. Then fill out and submit Form 521. Both forms are available from the Ombudsman's Office, or online at http://www.red.state.nv.us.

State of Nevada
Department of Business and Industry
Real Estate Division
Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels
2501 East Sahara Avenue Suite 202
Las Vegas, Nevada 89104-4137

Statewide toll free: 877-829-9907
Telephone: 702-486-4480
Facsimile: 702-486-4520
www.red.state.nv.us
CICOmbudsman@red.state.nv.us

ALTERNATIVE DISPUTE RESOLUTION

Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels

Disagreement in your association? ADR may be able to help ...

The Office of the Ombudsman's Alternative Dispute Resolution (ADR) program assists homeowners, residents, and boards with claims involving disputes regarding:

1. the interpretation, application and/or enforcement of governing documents of a common-interest community (CIC); or
2. the procedures used to increase, decrease or add assessments.

NRS 38 (Mediation and Arbitration) requires such disputes to proceed through the ADR process, before anyone involved can start a civil lawsuit. The parties to a matter in the ADR process may represent themselves or hire an attorney to represent them. An attorney is not required.

Revision date: 10-27-09

The Ombudsman's Office is available to assist persons seeking to file a claim using the ADR process.

ADR IS NOT REQUIRED in matters where health and safety violations are in dispute.

How to file an ADR complaint

To file a complaint using the ADR program, start by obtaining and reading Residential Common-Interest Alternative Dispute Resolution, Form 523, which provides an overview of the ADR process. Then fill out and submit Alternative Dispute Resolution/ Residential Planned Communities Claim, Form 520. Both forms are available from the Ombudsman's Office, or online at http://www.red.state.nv.us.

To file a complaint, you will need to:

- Submit Form 520, completed accurately.
- Submit a $500 filing fee, by check or money order made out to "HRCD," for each case.
- Provide a brief statement explaining the issue in dispute.
- Provide a complete copy of the association's Covenants, Conditions and Restrictions (CC&Rs).

Please mail or drop off your complaint to the Ombudsman's Office at the address on the back of this brochure.

The person who files a complaint is called the claimant. The person with whom they have a dispute is called the respondent.

Mediation, binding arbitration, or nonbinding arbitration

You must state the particular ADR process that you would like to pursue. However, to go through mediation or binding arbitration both the claimant and respondent must agree on that process. If the parties can't agree, the matter will default to nonbinding arbitration.

In mediation, both parties meet with an approved mediator, who promotes reconciliation, agreement or compromise. If mediation is successful, the parties sign a written agreement that is enforceable among the parties.

In nonbinding arbitration, each side has an opportunity to present evidence to an arbitrator. At the conclusion of arbitration, the arbitrator will provide a decision called an "award".

In binding arbitration each side is provided the same opportunities as in nonbinding arbitration. The difference between binding and nonbinding arbitration is that the award of the arbitrator is final.

Is court an option?

If either party fails to abide by the mediation agreement or arbitrator's award, the other party may file for a Confirmation of Award from a court of law.

In nonbinding arbitration either party that completed the arbitration process may file in civil court, within a specified time, if he/she desires.

In binding arbitration, there are very limited circumstances under which a matter can be reviewed by court.

Costs

In addition to the filing fee, each party needs to be aware of other expenses.

If the claimant uses a process server, he or she will likely be charged a fee. In addition, a mediator or arbitrator typically charges $150 per hour. The arbitrator is usually paid equally by both sides. However, the arbitrator may decide to require one party to pay the total amount, or apportion payment between the parties in a different percentage.

Financial assistance

A subsidy towards the cost of binding arbitration may be available through the Ombudsman's Office. If there are multiple parties, only one person per side on each claim may receive subsidy. If approved, a subsidy may provide as much as 50 percent of the cost of the binding arbitration or $500, whichever is less. Payment is made directly to the arbitrator. A unit owner may receive one subsidy per the state's fiscal year. An association may receive one subsidy per fiscal year against each unit.

EXHIBIT D

EXHIBIT D

STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion Concerning the Conduct of **Michael Buckley, Esq.**, Chairman, Commission on Common Interest Communities and Condominium Hotels, State of Nevada,

Subject.

/

Request for Opinion No. **11-49C**

PANEL DETERMINATION
NRS 281A.440(5); NAC 281A.440

Facts and Jurisdiction

The Nevada Commission on Ethics received an Ethics Request for Opinion (RFO) regarding the conduct of Michael Buckley, Esq., Chairman, Commission on Common Interest Communities and Condominium Hotels (CCICCH), a public officer, alleging certain violations of the Ethics in Government Law set forth in NRS 281A. Commission staff presented the Investigatory Panel with the allegations in the Request for Opinion that Buckley violated:

1) NRS 281A.020 by failing to avoid conflicts between his private interests and those of the general public whom he served.
2) NRS 281A.420(1) and (3) by failing to properly disclose a conflict of interest and undertake the abstention analysis before participating in the December 6, 2010 CCICCH meeting in which regulations related to imposing a cap on the total costs that may be passed on to a common interest or condominium owner in a foreclosure.

At the time of the alleged conduct, Mr. Buckley, as Chairman of the CCICCH, was a public officer as defined in NRS 281A.160. The Commission has jurisdiction over the conduct of public officers pursuant to NRS 281A.280. Therefore, the Commission has jurisdiction in this matter.

The allegations center on Buckley's conduct related to the disclosure of a pecuniary interest in his law firm and the abstention analysis he must undertake when a matter that affects his pecuniary interest comes before the CCICCH. The RFO alleges

that Buckley violated several provisions of the Nevada Ethics in Government Law, including NRS 281A.420(1) by failing to disclose a conflict of interest with one of his law firm's clients, RMI Management LLC ("RMI") and its subsidiary Red Rock Financial Services ("Red Rock Financial")[1] and violated NRS 281A.420(3) as well by failing to abstain from acting on a matter in which a conflict of interest existed.

The RFO specifically alleges that, during Agenda Item No. 5 of the December 7, 2010 CCICCH meeting, Buckley failed to disclose his pecuniary interest as a shareholder in his law firm, which received fees from its client, RMI, and undertake the abstention analysis before voting to adopt CCICCH Regulation R199-09 which imposed a cap on the costs passed through to a homeowner by association managers and collection agencies in a foreclosure.

The investigation showed that Buckley's firm, Jones Vargas, had been engaged to represent RMI in the 2011 Legislative Session and advocated to protect the interests of Common-Interest Community managers. Buckley was uninvolved in any such lobbying efforts during the legislative session. However, as a person intensely involved in the development and application of Chapter 116 of NRS, the Common-Interest Communities laws, he was aware of his firm's participation in the issue.

Panel Proceeding

On July 28, 2011, pursuant to NRS 281A.440(5), an Investigatory Panel consisting of Commissioners George M. Keele, Esq. and James Shaw reviewed the following: 1) Ethics Request for Opinion; 2) Subject's response to the Ethics Request for Opinion, 3) The Executive Director's Report and Recommendation.

The Panel found that insufficient credible evidence was present to support a reasonable belief that the Commission should hear this matter and render an opinion regarding any violation of NRS 281A.420(1) and (3) because no evidence was presented or discovered of any effect on Mr. Buckley's pecuniary interest in Jones Vargas by the adoption of a regulation imposing a cap on fees assessed to a homeowner in a common-interest community assessment-related foreclosure. No credible evidence was presented that the pecuniary interest of a shareholder in a law firm that lobbied on behalf of an association management company in one Nevada Legislative session would be affected by the regulation.

---

[1] RMI Management, LLC is an association management firm that provides services to homeowner and condominium associations. Its subsidiary, Red Rock Financial Services, offers collection services to community associations.

Further, the Panel determined that insufficient credible evidence was presented to conclude that placing a cap on the pass-through of collection-related fees to homeowners in common-interest community foreclosures would have a material effect on the independence of judgment of a reasonable shareholder in a law firm whose limited engagement client works in common-interest community management, even if that client engaged in activities related to foreclosing against homeowners whose assessments are delinquent, when that shareholder sits as a member of the CCICCH and considers whether to adopt, modify or reject the proposed regulation.

Based on these findings, the Panel dismissed the RFO in its entirety.

Dated: October 4, 2011

Caren Jenkins, Esq.
Executive Director

CERTIFICATE OF MAILING

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I deposited for mailing, via U.S. Postal Service, through the State of Nevada mailroom, a true and correct copy of the **PANEL DETERMINATION IN REQUEST FOR OPINION NO. 11-49C,** addressed as follows:

Jonathan Friedrich
2405 Windjammer Way
Las Vegas, NV 89107

Cert. No. 7010 0780 0001 0973 5112

Michael Buckley, Esq.
2501 East Sahara Avenue
Las Vegas, NV 89104-4137

First Class Mail

DATED: October 4, 2011

Valerie Carter
Valerie Carter, Nevada Commission on Ethics

STATE OF NEVADA
BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion Concerning the Conduct of **Michael Buckley, Esq.**, Chairman, Commission on Common Interest Communities and Condominium Hotels , State of Nevada,

Subject.

/

Request for Opinion No. **11-49C**

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION

The Executive Director bases the following report and recommendation on the staff's consideration and investigation of the Third-Party Request for Opinion ("RFO") filed regarding the conduct of Michael Buckley, Esq., a public officer, and on his written response to the RFO, attached as an exhibit to this Report and Recommendation, and the other materials attached hereto. The Executive Director provides her Report and Recommendation and its exhibits for the consideration of the two-commissioner investigatory panel ("Panel"), pursuant to the requirements of NRS 281A.240.

Facts:

The main party is Michael Buckley, Esq., who is a shareholder in the Jones Vargas law firm and currently serves as Chairman of the Commission on Common Interest Communities and Condominium Hotels (CCICCH). As an appointee to the CCICCH, Buckley is a public officer within the meaning of NRS 281A.160.

Allegations:

The allegations center on Buckley's conduct related to the disclosure of a pecuniary interest in his law firm and the abstention analysis he must undertake when a matter that affects his pecuniary interest comes before the CCICCH. The RFO alleges that Buckley violated several provisions of the Nevada Ethics in Government Law, including NRS 281A.420(1) by failing to disclose a conflict of interest with one of his law firm's clients, RMI Management LLC ("RMI") and its subsidiary Red Rock Financial Services ("Red Rock Financial")[1] (Exhibit 5) and NRS 281A.420(3) by failing to abstain from acting on a matter in which a conflict of interest existed. (RFO, Tab A, p. 1). In

[1] RMI Management, LLC is an association management firm that provides services to homeowner and condominium associations. Its subsidiary, Red Rock Financial Services, offers collection services to community associations.

particular, it alleges that, during Agenda Item No. 5 of the December 7, 2010 CCICCH meeting (RFO, Tab A, p. 7 of 10), Buckley failed to disclose his pecuniary interest as a shareholder in his law firm, which received fees from its client, RMI, and undertake the abstention analysis before voting to adopt CCICCH Regulation R199-09 (RFO, Tab A, p. 1 of 10) which imposed a cap on the costs passed through to a homeowner by association managers and collection agencies in a foreclosure.

Buckley's firm, Jones Vargas, had been engaged to represent RMI in the 2011 Legislative Session and advocated to protect the interests of Common-Interest Community managers. Buckley was uninvolved in any such lobbying efforts during the legislative session. However, as a person intensely involved in the development and application of Chapter 116 of NRS, the Common-Interest Communities laws, he was aware of his firm's participation in the issue.

At the December 7, 2010 CCICCH meeting, at Agenda Item No. 5, Buckley voted to adopt regulation R199-09 without disclosing his affiliation with his firm or undertaking an abstention analysis on the record to inform the public of the effect of his action or inaction on his pecuniary interest, if any. (RFO, Tab A, p. 1 of 10).

Relevant Nevada Revised Statutes (NRS):

NRS 281A.420 Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions.

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. . . .

* * * * *

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

Analysis and Recommendation:

> **NAC 281A.435 Basis for finding by panel; unanimous finding required for determination that no just and sufficient cause exists.** (NRS 281A.290)
>
> 1. A finding by a panel as to whether **just and sufficient cause** exists for the Commission to render an opinion on an ethics RFO **must be based on credible evidence.**
> 2. A finding by a panel that no just and sufficient cause exists for the Commission to render an opinion on an ethics RFO must be unanimous.
> 3. As used in this section, **"credible evidence" means the minimal level of any reliable and competent form of proof** provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, **that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion.** The term does not include a newspaper article or other media report if the article or report is offered by itself.

I recommend that the Panel find that **insufficient credible evidence** is present to support a reasonable belief that the Commission should hear this matter and render an opinion regarding Michael Buckley's alleged violation of NRS 281A.420(1) and (3) because no evidence was presented or discovered of any effect on Mr. Buckley's pecuniary interest in Jones Vargas by the adoption of a regulation imposing a cap on fees assessed to a homeowner in a common-interest community assessment-related foreclosure. No credible evidence was presented that the pecuniary interest of a shareholder in a law firm that lobbied on behalf of an association management company in one Nevada Legislative session would be affected by the regulation.

Further, **insufficient credible evidence** was presented to conclude that placing a cap on the pass-through of collection-related fees to homeowners in common-interest community foreclosures would have a material effect on the independence of judgment of a reasonable shareholder in a law firm whose limited engagement client works in common-interest community management, even if that client engaged in activities related to foreclosing against homeowners whose assessments are delinquent, when that shareholder sits as a member of the CCICCH and considers whether to adopt, modify or reject the proposed regulation.

Therefore, I recommend that the Investigatory Panel **dismiss** this RFO in its entirety. I respectfully provide my recommendation to this honorable panel.

Caren Jenkins Date: 9/21/11

Caren Jenkins, Esq.
Executive Director

EXHIBIT E

EXHIBIT E

2785 E. Desert Inn Road, Suite 180
Las Vegas, Nevada 89121
(702) 486-4120

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS DIVISION

1179 Fairview Drive, Ste 201
Carson City, Nevada 89701
(775) 687-5022

In Re:

The Petition of Prem Investment, LLC, a Nevada limited liability company; Rutt Premsrirut, Manager, for an application for Advisory Opinion and Declaratory Order pursuant to NAC 232.040,

Petitioner.

ORDER WITHDRAWING DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE DATED NOVEMBER 18, 2010

ORDER WITHDRAWING DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE DATED NOVEMBER 18, 2010

WHEREAS, On November 18, 2010, the Commissioner of the Financial Institutions Division, State of Nevada Department of Business and Industry issued a Declaratory Order and Advisory Opinion Regarding Collection Agency Fees From Homeowners Association Liens Following Foreclosure;

WHEREAS, the Declaratory Order and Advisory Opinion was the subject of litigation which resulted in the Order of Affirmance by the Nevada Supreme Court, Case No. 57470, *State of Nevada v. Nevada Association Services, et al.*, dated May 23, 2012, held that the Financial Institutions Division did not have jurisdiction to issue the Declaratory Order and Advisory Opinion;

Now, therefor,

.....

.....

.....

.....

IT IS HEREBY ORDERED that the Declaratory Order and Advisory Opinion regarding Collection Agency Fees From Homeowners Association Liens Following Foreclosure issued on November 18, 2010 is WITHDRAWN and the Financial Institutions Division shall not enforce any of the provisions of that Declaratory Order.

DATED this 5th day of July, 2012.

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY,
FINANCIAL INSTITUTIONS DIVISION

By: _____
GEORGE E. BURNS,
Commissioner

EXHIBIT F

EXHIBIT F

LEACH JOHNSON SONG & GRUCHOW
SEAN L. ANDERSON
Nevada Bar No. 7259
Email: Sanderson@leachjohnson.com
RYAN W. REED
Nevada Bar No. 11695
Email: Rreed@leachjohnson.com
8945 W. Russell Road, Suite #330
Las Vegas, Nevada 89148
Telephone: (702) 538-9074
Facsimile: (702) 538-9113
Attorneys for certain Respondents

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN LLP
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
GREGORY P. KERR, ESQ.
Nevada State Bar No. 10383
3556 East Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
Email: DSpringmeyer@wrslawyers.com
Email: GKerr@wrslaywers.com
Telephone: (702) 341-5200
Facsimile: (702) 341-5300
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

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

(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.

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

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 Chang
ARBITRATOR

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

Submitted by:

LEACH JOHNSON SONG & GRUCHOW

By: /s/ Sean L. Anderson
Sean L. Anderson
Nevada Bar No. 7259
Ryan W. Reed
Nevada Bar No. 11695
8945 West Russell Road, Suite 300
Las Vegas, Nevada 89148
Attorneys for certain Respondents HOAs

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

EXHIBIT G

EXHIBIT G

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION

Peter McAllester, as Guardian ad Litem for Amber McAllester
Claimant,

Case No. NRED #12-19

vs.

ARBITRATION DECISION AND AWARD

Silver State Condominium Owners' Association, Inc.,
Respondent,

and

Silver State Condominium Owner's Association, Inc.
Third Party Claimant

vs.

Alessi & Koenig, LLC and Alessi Trust Corporation,
Third Party Respondents.
_____/

This is an non-binding arbitration proceeding filed pursuant to NRS 38.300 *et seq*. Claimant Amber McAllester("Claimant")[1] alleges

[1] During this proceeding Peter McAllester was appointed as guardian ad litem to represent his minor daughter's interests.

through her guardian ad litem, her father Peter McAllester, that after she purchased a condominium located at 1518 Irene Way in Sparks, Nevada, her new homeowners' association, Respondent Silver State Condominium Owners Association, Inc. ("Silver State" or "Association"), acting through its collection agent Alessi and Koenig, LLC and/or Alessi Trust Corporation[2], impermissibly demanded that she pay excessive sums to gain a release of the Association's "super priority lien" and other claims against her new property.

Background

On November 2, 2010, Ms Amber McAllester, a minor, with the assistance of her father Peter McAllester, purchased a residential property located at 1518 Irene Way, Sparks, Nevada. Title to the property was vested in her name alone. On November 30, 2010, Ms McAllester wrote to the Association requesting a statement of her account setting forth the amount(s) necessary to bring her new property's account current. On December 7, 2010, A&K, acting as the collection agent for Silver State, demanded the sum of $4,813.00 from the Claimant to bring all amounts owed the Association current. On January 6, 2011, Ms McAllester wrote the Association protesting the demand and suggesting that the parties seek the intervention of the Nevada Real Estate Division ("NRED") Ombudsman's office. She also enclosed a check for $438.00 ($219.00 X 2) to pay the

[2] Third Party Respondents Alessi & Koenig, LLC and Alessi Trust Corporation are referred to collectively in this Decision as "A&K".

property's regular monthly assessments for December, 2010 and January, 2011. The record reflects that, since that time, she has continued to pay the ongoing monthly Association assessments on a current and regular basis. On January 10, 2011, A&K responded to Ms McAllester's protest letter defending, with a single exception (reducing the "Pre NOD" charge from $150.00 to $90.00), each and every one of the charges making up the December 7, 2010 demand and suggesting that Ms McAllester had not yet exhausted all reasonable informal means of compromise. On January 21, 2011, Ms McAllester responded in writing to the A&K correspondence. In her letter, Ms McAllester suggested that A&K file an arbitration action through the NRED arbitration/mediation program, and also gave more detail regarding the charges that she was disputing. Specifically, she stated that she did not object to the Association's claim for nine (9) months delinquent monthly Association dues ($219.00 X 9 = $1,971.00), nor did she object to the $150.00 ". . . *HOA transfer fee.*" She did indicate she was objecting to other charges, including but not limited to the "*Management Document Processing Fee*", the "*RPIR-GI Report Fee*", the "*Management Audit Fee*", the "*Monitoring Foreclosure Fee*" and ". . . *other creative fees* [in the A&K demand letter]." On February 10, 2011, Ms McAllester paid the $150.00 HOA transfer fee. On February 16, 2011, the Association Board of Directors sent a letter to Ms McAllester requesting that

she attend an executive session of the Board on March 2, 2011 to discuss her concerns. On February 17, 2011, A&K sent a revised demand letter to Ms McAllester, reducing the Association's demand to $3,955.00 (indicating a reduction of $255.00 in collection fees). Reviewing the February 17, 2011 demand letter, it appears A&K removed the following charges: the "*Pre NOD*"-$150.00, the "*Monitoring Foreclosure Fee*"-$100.00, and reduced the "*Notice of Default*" charge from $400.00 to $395.00(apparently in anticipation of pending regulatory limitations on such fees). Ms McAllester's father did attend the March 2, 2011 executive session, but no progress was made. On March 8, 2011, A&K sent Ms McAllester a second revised demand letter further reducing the Association's demand to $3,805.00 (via the elimination of all late charges imposed prior to November 2, 2010, the sum of $150.00). In a related event, effective May 5, 2011, the Commission for Common Interest Communities (the "Commission") adopted a schedule of fees and costs (NAC 116.470) recoverable in connection with the collection of past due obligations of common interest community members. On May 14, 2011, A&K sent Ms McAllester a certified letter enclosing an partially completed "Notice of Delinquent Assessment(Lien)" demanding payment of a lien in the amount of $4,105.00. The Notice was fully executed on May 28, 2011 and recorded on June 8, 2011. On June 30, 2011, A&K sent Ms McAllester a "Pre-Notice of Default" letter demanding payment in the amount of $4,195.00. On August 16,

2011, A&K recorded a "Notice of Default and Election to Sell Under Homeowners Lien" (an "NOD") which set forth the amount due and owing as of July 21, 2011 as $5,100.00. On May 8, 2012 apparently solely for the purposes of this arbitration (no recipient address is shown), A&K prepared a demand letter reflecting the component parts of the claim for $5.100.00. The May 8, 2012 demand adds to the March 8, 2011 demand of $3,805.00 the following *additional* sums: $250.00-second "*Notice of Delinquent Assessment Lien*", $395.00-second "*Notice of Default*" (NOD), $90.00-"*Pre NOD*", $200.00-for "*Notary, Recording, Copies, Mailing and PACER*" charges, $85.00-second "*RPIR-GI Report*", and $275.00- additional "*Title Research (10 day Mailings per NRS 116.31163)*. Thus, the Association demand presented in this arbitration is $5,100.00. Aside from the $150.00 "transfer fee" and regular monthly assessment payments starting in December, 2010, the record reflects that Ms McAllester has failed to pay any part of the Association's demand. A portion of the disputed $5,100.00 is what is known as a "super priority" lien pursuant to NRS 116.3116(2) and a portion is not. The resolution of the Association's demand and Ms McAllester's objections will be addressed below.

On September 6, 2011, Mr. McAllester and his daughter, Ms McAllester, filed this arbitration proceeding alleging several NRS Chapter 116 violations, including that the Association and had

improperly included in its demands for payment sums not permitted to be recovered by the Association as a part of a NRS 116.3116(2)(c) super priority lien or otherwise.

On February 8, 2012, Silver State filed a third party claim against its collection agent A&K (and a related entity Alessi Trust Corporation). As noted earlier, both respondent entities will be referred to collectively in this Decision as "A&K". Silver State alleges in its claim that it believes A&K acted properly in asserting the lien and claims described above, but, if violations are found in the actions taken by A&K on the Association's behalf, that Silver State is entitled to indemnification by A&K both under contract and under a theory of implied indemnity. A&K 's response denies any violations of Nevada law in the collection process and further denies that Silver State is entitled to indemnification either via the parties contract or under a theory of implied indemnity.

It is important to understand that underlying the argument over the actual amounts due (or not due) the Association lies a much bigger issue-that being a more general interpretation of NRS 116.3116 *vis a vis* the super priority lien (e.*g.* its timing and the amounts to be included). Because these issues arise today in literally thousands of real property sales in Nevada, both home buyers (often an investor in recent times) and common interest

communities have very substantial interests in these issues. In this case, for example, the Ms McAllester understandably wants to limit the amounts she must pay to gain clear title to the Irene Way property (and potentially other investment properties). The Association, on the other hand, very much wants to limit the losses it suffers when an Association member fails to pay assessments because those losses must be spread among the remaining Association members unless it is to result in a loss of the ability of the Association to fulfill its community responsibilities. Also juxtaposed against a property purchaser's interests, is the profit motivated interests of the collection agent, in this case, A&K. While the amounts in any one home sale may seem relatively small, the collective impact on the participants, both direct and indirect, can be, and in many cases is, quite substantial. No better evidence of the import of these issues exists than the numerous opinions, orders and court decisions offered by the parties in this case.

Because this case largely involves legal issues, in an effort to hold down costs, the parties have agreed to waive their right to an evidentiary hearing and this matter has been submitted for decision based on each party's respective brief and presented materials. In addition, because the undersigned has previously addressed the "super priority" association lien issue in a similar context, the parties will not be charged for research and writing

already done with respect to that issue.[3] Instead, arbitration expenses will be limited to the effort required to address the unique aspects of the present parties' disputes.

The parties to this proceeding do not dispute that, by law, Silver State was and is entitled to assert a super priority lien under NRS Chapter 116.3116. The question remains, however, what form that lien must take and what other fees and charges may be imposed on Ms McAllester and her property as a part of the collection process. These issues are the source of the parties' dispute in this proceeding and have troubled many parties, agencies and courts in prior cases.

THE SUPER PRIORITY LIEN

Association Assessments and Liens

Pursuant to NRS 116.3102(1), an association may [*a*]*dopt . . . budgets for revenues, expenditures and reserves and collect* ***assessments*** *for common* ***expenses*** *from the unit's owners.*" (Emphasis added).

"**Common expenses**" are defined by NRS 116.019 as ". . . *expenditures made by, or financial liabilities of, the association . . .*"

[3] The undersigned was assigned four (4) arbitrations presenting "*super priority lien*" issues at nearly the same time and, in the interests of equity, the ten (10) hours of initial research accomplished on the lien issue has been divided equally between those cases.

"**Assessments**" have been defined as the imposition of a pecuniary payment upon persons or property. Black's Law Dictionary, 6th ed. Although the term is not defined in NRS Chapter 116, NRS Chapter 38.330(1)(a section generally applicable to this proceeding), in relevant part, defines an "**assessment**" as " . . . ***any charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions***, *including any late charges, interest and costs of collecting the charges; and any penalties, fines, fees and other charges which may be imposed by an association pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 . . .*" (Emphasis added).

NRS 116.3116(1) provides that an **association has a lien on a unit for** ". . . ***any assessment levied against that unit or any fines imposed against that unit's owner from the time the construction penalty, assessment or fine becomes due***." NRS 116.3116(1) also provides that "[u]*nless the declaration provides otherwise, 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.*" Because NRS 116.3116 deals specifically with liens against units for assessments, this sentence is clearly addressing what NRS 116.3102 fines and charges may be included in an NRS 116.3116(1) lien. *accord*

Ikon Holdings, LLC v. Horizons at Seven Hills HOA, Case No. A-11-647850-C (Dist. Ct., Clark County, January 1, 2012, page 3. The language is not a limitation on the scope of NRS 116.3116 liens, but is an inclusionary rule that provides, unless prohibited by the declaration, such financial liabilities " . . . *are enforceable as assessments under this section.*" NRS 116.3116(1).

A review of the Silver State Declaration reveals that the Association Board of Directors is granted broad authority to require a unit owner to pay ". . .*his proportionate share of the expenses of administration, maintenance, and repair of the Common Elements, taxes and insurance, and of any other expenses provided for* [in the Declaration]." Declaration, Article VIII(A). That authority also includes all assessment powers granted the Association by state law (today generally NRS Chapter 116))[1] and specifically the right to assess annual common expenses (Article VIII, *supra*) and individual assessments including late payment penalties (Silver State Rules and Regulations, Rule 8.2(A)), collection costs, and attorney's fees (Article IX(B), Rule 8.2(B), and Assessment Collection Policy 5 and 8. Nowhere in the Declaration are the broad assessment powers noted above limited.[4] Thus, Silver State, through its governing documents

[1] The Silver State Declaration contains a provision stating that in the case of a foreclosure the lender, and any purchaser at a foreclosure sale, will be relieved of any and all liability with regard to pre-foreclosure association liens against the property. This provision is in direct conflict with NRS 116.3116 and is void and without effect by operation of law. See NRS 116.1104 and NRS 115.1206.

and by law, possesses broad authority to assess a unit and/or its owner for any or all of the items set forth in NRS Chapter 116, including but not limited to, NRS 116.3115, NRS 116.310313 and NAC 116.470.

As noted above, NRS 116.3116 provides specific authority for association liens against units. Subject to certain listed exceptions, association liens are today generally given priority over all other liens and encumbrances on the property. NRS 116.3116(2).

One exception to the aforementioned first priority for association assessment liens rule relates to any first security interest on the unit (often represented by a "holder of a note and a first deed of trust"). NRS 116.3116(2)(b). The exception provides that an association's assessment lien is *not* higher in priority than:

> *A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . .* NRS 116.3116(2)(b).

The statute also provides, however, that the foregoing exception is also subject to its own limitation:

> ***The lien is also prior to all security interests described in paragraph (b)*** [a first mortgage and 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, ...*** *Id.*

(Emphasis added).

The NRS 116.3116(2) lien is commonly known as an association "*super priority lien*". By asserting such a first priority lien, an association, in effect, is able to "*step ahead*" of the holder of a note and first deed of trust (or its successor in interest) and assert a claim in a foreclosure sale or similar setting that must be paid before the lender or a third party purchaser may acquire clear title to the unit. The super priority lien provision provides for a nine (9) month "*look back*" period allowing the association to collect assessments

> *". . . 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 . . . .*

Claimants' allege that, even if not waived or prohibited in the first place, the Silver State "super priority lien" (the "SPL") is capped at total of the nine (9) months assessments based upon the association's periodic budget. Claimants' Brief, page 3. As noted earlier, Claimants use monthly dues of $219.00 X 9 to reach a total SPL of $1,971.00. In this case, the parties do not discuss in any detail the starting date of the nine (9) month "look back" period.

Thus the first issue to be determined is the appropriate start date of the NRS 116.3116(2)(c) super priority lien "look back" period.

NRS 116.3116(b)(2) "Look Back" Period

NRS 116.3116(2)(c) provides that the SPL lien period extends back in time for ". . . ***9 months immediately preceding institution of an action to enforce the lien.***" (Emphasis added).

In the present case, the prior owner of the Irene Way condominium failed to pay monthly and other assessments for many months. Pursuant to Article VIII(A) of the Declaration, regular monthly assessments are due on the first of each month and delinquent if not paid within fifteen (15) days (Association Rule 8.22(A)). The Association, via the lien provisions of NRS 116.3116, automatically obtained a lien on the Irene Way condominium each and every time an Association assessment became due. NRS 116.3116(4). No affirmative action by the Association was required (or (based on the record) occurred). *Id.* Under Nevada law, if proceedings to enforce such a liens are not initiated within three (3) years of the full amount of each assessment becoming due, the lien is automatically extinguished. NRS 116.3116(5).

Some parties in arbitrations have taken the position that a "civil action" had to have been filed by the association to trigger the nine (9) month "look back" period which, in turn, establishes chronological parameters of its NRS 116.3116(2) lien. Indeed, NRS

Chapter 116 does contemplate the option of a formal legal proceeding to enforce the payment of assessments. NRS 38.310(1)(a), NRS 116.3102(1)(d), NRS 116.116.31088(1)(a), and NRS 116.4117(2)(a)(3). However, because Nevada also permits non-judicial foreclosures by associations, a stringent requirement of a lawsuit would effectively deny an association a statutory right. NRS 116.31162. Even beyond that problem, in many, and probably most, recent Nevada home foreclosure events, the association neither files a lawsuit nor attempts a non-judicial foreclosure. Instead, the home mortgage lender (the "first security interest" identified in NRS 116.3116(2)(b)) forecloses and the association submits its demand for payment in escrow or directly to the new owner, be it the lender or a third party purchaser. If the "*formal civil legal action*" theory were to be adopted, an association would effectively be denied the benefits of an SPL in non-litigation scenarios.

Within the framework of NRS Chapter 116, the term "civil action" is used more than once to signify a judicial proceeding. *See* NRS 116.31088, NRS 116.4117 and NAC 116.630. The terms "litigation" and "lawsuit" are also used in NRS Chapter 116 to refer to judicial proceedings. NRS 116.3102(d) and NRS 116.310313(a).

In NRS 116.3116(2)(c), the legislature did not elect to use the term "civil action", instead using the term "action", arguably with intent to differentiate. It should be noted that NRS 116.3116(7)

also uses the term "action", but in a context more clearly referring to formal court proceedings.

Several Nevada rules of statutory construction are relevant to this discussion: Among them that "*[g]enerally, 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 and Casinos, Inc. V. Nevada State Labor Commission, 117 Nev. 835, 34 P.3d 546(2001); when interpreting statutory provisions, when possible, it is the duty of the court "*to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.*" Southern Nevada Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171(2005)(citations omitted). "*The goal of statutory interpretation is to effectuate the legislature's intent.*" Savage v. Dist. Ct., 125 Nev. , 200 P.3d 77, 82 (2009). "*When an ambiguous statute is construed, it should be given meaning that is consistent with what the legislature intended, based on reason and public policy.*" McGrath v. State of Nevada *et al*, 123 Nev. 120, 123, 159 P.3d 239(2007) It is the duty of the court to interpret the provisions of a statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd

results. Southern Nevada Homebuilders Ass'n, *supra, citing* Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134 (2001)(citation omitted). When interpreting an ambiguous statute the import of the statutory language used may be ascertained by examining the background and spirit in which the law was enacted. Public Employees' Benefits Program v. State of Nevada, 124 Nev. 138, 147, 179 P.3d 542 (2008), *citing* McKay, *supra* at 650-651. Banegas v. SIIS, 117 Nev. 222, 225, 19 P.3d 245(2001)(When a statute can be given more than one reasonable interpretation it is ambiguous).

The only interpretation of the term "*action*" which is consistent with the language and the clear legislative intent of all of the provisions of NRS Chapter 116 is a meaning that results in statutory harmony and avoids an unreasonable result. Any reasonable interpretation must also recognize the reality of what may occur in Nevada in the lien enforcement process. The undersigned has found no Nevada caselaw directly addressing this issue, and little, if any, discussion in the additional research materials reviewed for this Decision.

Nevada's lack of any actual definition of the several terms noted above and their varying and seemingly random use in NRS Chapter 116, leads to one inescapable conclusion. The use of the terms "civil action" and "action", as well as other more or less synonymous terms in NRS Chapter 116, leads to significant ambiguity. It is clear that the terms, even potentially the same term, may

appear with different meanings in different provisions of the statute.

There are several Nevada District court cases which have dealt with the scope of a NRS 116.3116 "super priority" lien and, by doing so, at least indirectly addressed the "look back" period issue. A Nevada District Court has recently ruled that "[a] . . . *foreclosure in effect constitutes an action within the meaning of NRS 116.3116(2)(c).*" *See* Ikon, *supra* . In Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Dist. Ct. Case No. 06-A-523959-C, the court included in the association's super priority lien, six (6) months of assessments for common expenses, and six (6) months late fees and interest relating to the unpaid assessments. The court also awarded the association its costs of collection, including legal fees and costs that had accrued "*prior to the date of foreclosure of the first deed of trust.*" In JPMorgan Chase Bank N.A. v. Countrywide Home Loans, Inc., *et al*, Dist. Ct. Case No. A562678, citing NRS 116.310313 and NRS 116.3116(2), the court determined that an association can recover "*as a part of its "super priority" lien collection costs associated with enforcement of its assessment lien.*" In addition to the delinquent monthly assessments falling within the nine (9) month priority period, the District Court awarded the association late fees, and collection costs related to the aforementioned nine (9) months of unpaid assessments.

The court denied the association the portion of its requested costs of collection that were incurred ". . . *after the lawsuit was filed*". Pursuant to NRS 116.3116(7), the court also awarded the association its reasonable attorney's fees and costs ". . . *incurred in defending and protecting its statutory right to an assessment lien.*"

Using these Nevada decisions, a sensible definition of the NRS 116.3116(2) "look back" period becomes possible.

For example, as discussed above, a Nevada association can file a formal legal proceeding to collect unpaid assessments. See NRS 38.310(1)(a), NRS Chapter 40, NRS 116.3102(1)(d), NRS 116.116.31088(1)(a), and NRS 116.4117(2)(a)(3). A legal proceeding, initiated by the association to enforce its SPL, would clearly establish the starting date of the "look back" period. This conclusion is buttressed by the cited cases and by the attorney's fee and cost recovery provision in NRS 116.310313((3)(a) which excludes from recoverable (under that statute) costs of collection of past due assessments, attorney's fees and costs ". . . *awarded by a court*". It is also consistent with the language of NRS 116.3116(7) which provides that a ". . . *judgment or decree . . . brought under this section must include costs and reasonable attorney's fees for the prevailing party.*" Alternatively, if an association availed itself of its right to foreclose its NRS

116.3116(2) SPL by foreclosure sale, the date of foreclosure would also establish the starting date of the nine (9) month "look back" period. *See* Kobel and Ikon, *supra*.

Looking at possible lender ("*first security interest*") actions, the filing of a legal proceeding pursuant to NRS Chapter 40 and having the potential to extinguish any part of the association's SPL, could set the date marking the beginning of the SPL "look back" period. Similarly, a nonjudicial foreclosure by a lender would also serve to set the date. *accord* Kobel and Ikon, *supra*.

In the present case, there was a non-judicial foreclosure by the lender. Following the reasoning of the Korbel and Ikon courts, and the implication of the above cited statutory sections, the "look back" period in the present case began on the date of foreclosure- April 22, 2011. This is a "reasonable" interpretation of NRS 116.3116(2) and one which comports with the intent of the Nevada legislature to fairly balance the interests of the involved parties.

Super Priority Lien Limits[5]

In Nevada, since 2006, in a very troubled national and state economy, real estate property values have fallen dramatically, in many cases losing 50% or more of their peak value. This unfortunate occurrence has been coupled with many Nevadans losing their jobs or

[5] The parties do not dispute that exterior maintenance and related costs incurred by an association under the provisions of NRS 116.310312 are includable as additional amounts in a SPL. In that no such sums are at issue in the present case, this potential element of an SPL will not be further addressed.

being reduced to fewer hours or lower wages. As a result, the occurrence of foreclosures (and foreclosure related sales) has very greatly increased. Along with that increase in such sales has come a renewed interest in the issue of super priority liens. Lenders and buyers of residential properties, often times investors, are particularly interested in limiting the amounts they must pay to associations to obtain clear title to their property(ies). Associations, on the other hand, are facing serious budget shortfalls due to association members failure to pay dues and assessments as their homes are lost to foreclosure. The confluence of these often opposing interests has resulted in significant numbers of legal disputes, including the present arbitration proceeding.

The parties in this case agree that an NRS 116.3116(2) SPL may include other assessments levied by the association during the nine (9) month "*look back*" period. *See e.g.* Claimant's Brief, pages 4-5, Silver State's Brief, page 5, and A&K Brief, page 3. Where they adamantly differ, however, is whether such additional collection costs may be recovered in addition to the nine months of regular monthly assessments, or may only be recovered up to an amount that, when added to the actual "*look back*" assessment arrearage, equals the sum represented by the total of the nine (9) months of delinquent dues (in other words, a "*cap*" on the total amount of the SPL). It is this dispute, analyzed at length in many of the

numerous opinions, cases and articles provided by the parties, that has vexed property owners, associations, administrative agencies, courts, and legal experts for years and has more recently arisen as a "*hot button*" issue in Nevada.

The dispute arises out of the provisions of NRS 116.3116(2)(c) which in relevant part state that the SPL is limited:

> "*. . . 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).

The parties' respective interpretations of the meaning of the highlighted phrase are diametrically opposed. The Supreme Court of the State of Nevada has never considered the issue. Claimants argue that the correct interpretation of the phrase is that of a fixed monetary limit or cap on the total amount of an SPL that may be asserted by an association. Silver State, on the other hand, takes the position that the language used in NRS 116.3116 clearly indicates that, in addition to the nine (9) months of overdue assessments, the costs of collecting those arrearages are also recoverable. Respondent's Brief, pages 2-6. Each party is represented by a very capable attorney and each offers a reasonable analysis and authority in support of their position. "*Where a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous.*" McKay v. Bd. of Supervisors of Carson City, Nevada, 102 Nev. 644, 649, 730 P.2d 438 (1986), *citing* Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957 (1983). The undersigned has carefully read and considered all of the materials presented by the parties. After that careful review, it is inescapable that the phrase in question can be fairly interpreted in different ways and that, as a result, it is ambiguous.[6]

As noted earlier, it is the goal of statutory interpretation to effectuate the legislature's intent. Savage, *supra*. When an ambiguous statute is construed, it should be given meaning consistent with what the legislature intended, based on reason and public policy. McGrath, *supra*. It is the duty of a court, by examining the background and spirit in which the law was adopted, to interpret a statutory scheme "harmoniously" with the purpose of the statute. Southern Nevada Homebuilders Ass'n and Public Employees' Benefits Program, *supra*.

---

[6] It should be noted that today both Connecticut's (originally the same as Nevada's statute, but amended during the pendency of the 1992 Hudgens House case) and Colorado's (already different when First Atlantic Mort., LLC v. Sunstone North HO, 121 P.3d 254 (2005) was decided) super priority lien amount definitions are significantly different than Nevada's statute. Each, in relevant part defines the super priority common assessments as ". . . *to the extent of . . . an amount equal to the common expense assessments based on the periodic budget adopted by the association . . .*". (Emphasis added). *See Conn. Ge. Statute 47-258 and C.R.S. 38-333.3-316.* This language is somewhat more precise than the comparable Nevada language " . . . *to the extent of the common assessments . . .*" . The Connecticut statute also includes in the SPL a specific right to a priority recovery of " *the association's costs and attorney's fees in enforcing its lien.*" *Id.*

Nevada adopted the Uniform Common Interest Ownership Act (UCIOA) in 1991 (A.B. 221- 66th Session) (Effective January 1, 1992) as NRS Chapter 116. The "*super priority*" lien created by NRS 116.3116 is a legislative effort to balance the financial interests of the several parties involved in a financed residential common interest community property facing foreclosure.

One involved party is the association itself. As discussed earlier, in a foreclosure setting, the provisions of NRS 116.3116 allow an association to step ahead of a first security interest holder (or successor in interest) and require of the new owner payment of at least a portion of assessments originally the responsibility of the prior owner. The rationale behind this rule lies in the nature of common interest communities. Such organizations bear responsibility to furnish association members with all of the benefits of collective ownership and governance. Modern associations often are responsible, not only for the day to day operations of the community, but the short and long term care and upkeep of millions of dollars of commonly owned and/or maintained assets and improvements. To provide these services, associations establish and collect regular and special assessments from each member. The success (and popularity) of any association is directly dependant on its ability to maximize the benefits it provides, while at the same time minimizing the cost of its services. Any time a member fails to pay an assessment, that burden

is effectively transferred to the association and the remaining members. If sufficient owners fail to pay assessments, the association can literally lose its ability to function. Dues increases or special assessments may become necessary. Those additional burdens can lead to yet more failures to pay. In short, the viability of any common interest community is dependant on universal or near universal participation of its members, financial and otherwise.

Lenders, on the other hand, are, quite appropriately, interested in maximizing their return (or minimizing losses) when a foreclosure happens. While no doubt having some interest in preserving the involved association (and protecting property values), a lender's interest in the association is understandably weighted toward its own financial position. When, as occurs in many foreclosure cases these days in Nevada, the lender never takes title to the property, but oversees a sale to a new owner, its interest in the association's problems may be minimal.

Buyers and investors, when buying such properties, may have quite limited interest in the long term viability of the community. Even in the case of the buyer who intends to keep the property, paying past assessments is at the very least viewed an additional unwelcome amount to be paid to gain entry into the community. In the case of the investor, who perhaps intends to resell or "*flip*" the property in as short a time as possible, not only is this an

additional purchase cost, but it adds absolutely no direct value to his or her investment.

When an independent collection agency such as A&K is involved, and has its own profit motivations, yet another interest arises that may well be at times adverse to some, if not all, of the other involved parties.

The foregoing factors weigh heavily in interpreting NRS 116.3116. As the cases cited in this Decision direct, in construing the statute, its provisions should be given meaning that is consistent with the remainder of NRS Chapter 116, legislative intent, reason, and public policy.

It is highly unlikely that, in 1991, as it adopted the UCIOA, the Nevada legislature contemplated even the possibility of the economic and real estate disaster that has recently befallen Nevada. What cannot be denied is that it was recognized that common interest communities were a significant participant in many Nevadan's lives and that adoption of the UCIOA was intended to be of benefit to them.

More recently, in 2009, the provisions of NRS 116.3116 and even the super priority lien were raised before the legislature. Via Assembly Bill 204, Clark County Assemblywoman Ellen Spiegel offered legislative amendments that would have extended the super priority lien period from six (6) months to two (2) years. Minutes of the Assm. Comm. On Judiciary, March 6, 2009, 75th Sess. at 34. The

stated objectives of the amendment were to preserve property values, help common interest communities mitigate the adverse effects of the foreclosure crisis, help homeowners avoid special assessments resulting from revenue shortfalls, and prevent cost-shifting from common interest communities to local governments. *Id.* Ultimately, the bill was modified to extend the super priority lien period from six (6) months to nine (9) months. NRS 116.3116(2)(b). There is little else in the record to clarify the basis for that more minimal amendment of the super priority lien period.

As A.B. 204 was being considered, the issue of the scope of the super priority lien was raised. In testimony given on March 6, 2009, Common Interest Community Commissioner Michael Buckley mentioned the super priority lien, pointing out to the Committee members that the UCIOA had been amended in 2008 to specifically add to the scope of the super priority lien an association's "*cost[s] of collection and attorney's fees*". March 6, 2009 Minutes, *supra* at 44-45. He also stated that there exists in Nevada a question as to whether such expenses can be added to an association's super priority lien and he recommended that A.B. 204 be amended to clarify that issue. *Id.* He also referred the Committee to a letter that had been authored by Ms Karen D. Dennison, Esq., the Vice Chair of the Real Property Section of the State Bar of Nevada which raised similar issues. *Id.*, Exhibit "W". Unfortunately, it does not

appear that the subject was further addressed nor resolved by the 2009 Legislature. Since 2009, as evidenced by this case, the controversy over the scope of the NRS NRS116.3116(2) super priority lien has continued unabated.

When interpreting a statute, the legislative history and the legislator's statements can be persuasive. *See* Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n, 126 Nev. Adv. Op. 7, 225 P.2d 1265 (2010). In this case, however, as noted, little help can be found in Nevada's legislative history. In such cases, one must turn to reason and public policy to determine what the legislature intended. *Id.*

During the 2009 legislative session, Assembly Bill 350 was introduced and, in part, later became law. Of interest to this discussion is Section 1.5 of that bill, now found in NRS Chapter 116 as NRS 116.310313. That new statutory provision specifically provided that an association may charge a unit owner ". . . *reasonable fees to cover the costs of collecting any past due obligation.*" NRS 116.310313. It also directed the Commission for Common-Interest Communities (the "Commission") to adopt regulations establishing ". . . *the amount of the fees that an association may charge . . .*" *Id.* The statute defines the terms "*obligation*" and "*costs of collecting*" very broadly. *Id.* The new statute was clearly intended to broaden the scope of expenses recoverable by

associations as it sought to recover any past due obligation of a unit owner, including ". . . *assessments, fines, construction penalties, fees, charges, and interest . . .*" levied pursuant to any provision of an association's governing documents or NRS Chapter 116. *See generally* NRS 116.310313.

Effective May 5, 2011, the Commission adopted, as a part of the Nevada Administrative Code (NAC), a regulation setting an overall fee limit of $1,950.00[7], and individual limits on a wide variety of individual fees and charges, that might be recovered from a unit owner in connection with the collection of a past due obligation. *See* NRS 116.310313 and NAC 116.470.

In considering both the 2009 adoption of NRS 116.310313 and NAC 116.470, there is no doubt that, in the current troubled economic times, the Nevada legislature has continued its efforts to balance the interests of homeowners, associations, lenders and investors. No mean task on any level.

Taking into account Nevada's 1991 adoption of the UCIOA granting associations broad assessment and enforcement powers and the Nevada Legislature's more recent efforts to ensure associations are able to collect both delinquent assessments and the costs of collection from unit owners, reason would dictate that it has been

[7] Pursuant to Sections 3 and 4 of the Regulation, certain association or third party agent "hard costs", including but not limited to, "reasonable" management fees not exceeding $200 and "reasonable" attorney's fees and costs are allowed to be recovered in addition to the basic $1,950.00 limit.

and is the public policy of the State of Nevada, in foreclosure and similar circumstances, while continuing, to the extent appropriate, to protect other stakeholders' interests, to ensure that common interest communities continue to be able to recover sufficient delinquent assessments and costs of collection to perform their statutory and other governing document duties.

In considering its state's version of the UCIOA (in 1992, in relevant part, identical to Nevada's statute), the Supreme Court of Connecticut stated that in construing the statute it would assume that the legislature intended a "*reasonable and rational result*". Hudson House Condominium Association v. Michael B. Brooks et al, 611 A.2d 862, 866 (1992)(citations omitted). In setting out its rational for its holding the Connecticut court said the following:

> *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 the only 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 priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.*

Using this rational, the Connecticut court allowed the association to include as a part of its super priority lien its costs of collection including: interest, appraisal fees, a title examination fee, and attorney's fees and costs. *Id.* at 863-866, fn 3.

Claimant argues that the Hudson House decision referred to a "*six month*" limitation on association "*super priority*" liens. See Claimant's Brief, page 11. Claimant ignores, however, that the Connecticut Supreme Court viewed that state's "*super priority lien*" statute as providing for a broad range of recoverable costs of collection which it determined were specifically *not* limited in an amount equal to six months of monthly association assessments.

In Hudson House, as a part of the association's super priority lien, the trial court awarded not only six (6) months of monthly dues, but also interest on those assessments. Hudson House, at 864. The trial court, however, while also awarding the association costs including attorney's fees, an appraisal fee, and a title examination fee, refused to include those sums in the super priority lien. *Id.* On appeal, the association sought to have included, as a part of its super priority lien, the foregoing costs, plus ". . . *other costs of collection.*" *Id.* at 866. The Supreme Court of Connecticut agreed with the association. The Connecticut court held (1) that the association's collection costs that had accrued in the six months preceding the commencement of the foreclosure action were entitled to super priority treatment *and* (2) that the association's attorney's fees and costs incurred leading up to and during the judicial foreclosure action were also entitled to the same priority treatment. *Id.*

Some critics also argue that, because the Hudson House case involved a judicial foreclosure action (Connecticut did not provide for an alternative non-judicial foreclosure process), the holding of the Supreme Court of Connecticut cannot be looked to for guidance in interpreting Nevada's super priority lien provisions. This too inappropriately attempts to limit the reasoning underlying the court's interpretation of Connecticut's super priority lien statute. The reasoning underlying the court's opinion remains unchanged whether viewed in the context of a judicial foreclosure action or assertion of the super priority lien in the context of the present case, a non-judicial foreclosure proceeding. The Hudson House decision remains good law today and helpful in considering the meaning of Nevada's statute.

One significant difference does exist between the Connecticut and Nevada statutory schemes. In 1992, Connecticut law did not provide for a non-judicial foreclose option. For that reason, the Hudson House court's inclusion of all of the association's attorney's fees and costs in its super priority lien (pursuant to its version of NRS 116.3116(7)) is not necessarily determinative of that issue in Nevada.

A recent advisory opinion issued by the Commission for Common Interest Communities and Condominium Hotels (the "Commission") addressed whether or not, under NRS 116.3116, an association may collect as a part of its super priority lien, its costs and fees

incurred in collecting association assessments. Advisory Opinion No. 2010-01 (Adopted December 8, 2010). Referencing several sources of authority, including NRS 116.310313, the Commission answered that question in the affirmative. *Id.* at 12-14. The Commission concluded that, in addition to the nine (9) months of unpaid regular periodic assessments, an association in Nevada is entitled to include in its NRS 116.3116 super priority lien the following amounts: (1) interest permitted by NRS 116.3115, (2) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (3) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (4)the association's *"costs of collecting"* authorized by NRS 116.310313.

Pursuant to the terms of regulations specifically authorized by NRS 116.310313(1) and adopted effective May 5, 2011, recoverable ". . . *costs of collecting any past obligation of a unit's owner* . . ." specifically include "[r]*easonable attorney's fees and actual costs* . . ." NAC 116.470(1) and(4)(b). Courts generally give "*great deference*" to an agency's interpretation of a statute that the agency is responsible for enforcing. State of Nevada, Division of Insurance v. State Farm Mutual Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482 (2000)(Citations omitted).

The undersigned believes that today, the statutes, regulations, agency opinions and cases discussed in this Decision generally

express the proper approach to be taken in this case.[8] Moreover, the conclusions set forth below are in keeping with rules already accepted by various federal and local lenders. Respondent's Brief, Exhibit 30, page 12, *citing* New Comment No. 8 to UCIOA 3-116(2008).

DECISION AND AWARD

Pursuant to the provisions of NRS Chapter 38, jurisdiction exists over the parties and the subject matter of this arbitration proceeding.

Respondent Silver State Condominium Association is the prevailing party in this case. On the primary issues to be determined - that being the appropriate scope of an NRS 116.3116(2) "super priority" lien and the validity of other sums demanded by A&K and/or Silver State, Respondent Silver State's position has been for the most part vindicated. Nonetheless, in this case, there are some monetary adjustments to be made in the component amounts making up the Association demand and lien.

In this case the Silver State NRS 116.3116(2)(c) super priority lien "look back" period was triggered by the November 2, 2010 Irene Way property non-judicial foreclosure sale.

[8] The scope of this Decision is limited to the claims and issues raised in this proceeding. Additional possible "super priority" lien issues, including but not limited to, those related to construction penalties (NRS 116.310305) or fines (NRS 116.31031) have not been addressed. *See* NRS 116.3116(1).

As a part of its NRS 116.3116(2) "super priority" lien, Silver State Condominium Association was entitled to assert and collect the following from Ms McAllester:

(1) A sum equal to the unpaid 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 nine (9) months immediately preceding the November 2, 2010 non-judicial foreclosure sale, *and in relation to those assessments*:

(2) Interest permitted by NRS 116.3115(3),

(3) Subject to the provisions of the Declaration, late fees or charges in accordance with NRS 116.3102(1)(k),

(4) Subject to the provisions of the Declaration, fees or charges for preparing statements of unpaid assessments in accordance with NRS 116.3102(1)(n), and

5) Reasonable fees or charges to cover the costs of collecting the past due obligation as authorized by NRS 116.310313 and NAC 116.470. Declaration Article IX(B), Rule 8.2(B), Assessment Collection Policy Rule 5 and 8 and NAC 116.470(1) and (4), specifically authorize the Association to recover its reasonable attorney's fees and costs in a non-judicial foreclosure setting ". .

. for any legal services which do not include activities described . . . " in NAC 116.470(2).[9]

Applying the above rules, the May 8, 2012 Silver State "super priority" demand, insofar as it included nine (9) months of unpaid monthly assessments (the "Assessments") due and owing as of the date of the non-judicial foreclosure sale (the "Sale"), and, *in relation to those Assessments*: the recoverable costs of collecting the past due obligation(s), was appropriate and lawfully made under Nevada law.

Total Association Demand

As discussed earlier, the total amount in dispute in this case is $5,100.00[10] made up of the $2,190.00 in Regular Monthly Assessments[11] and the following additional amounts: (1) $135.00, Notice of Intent to Lien; (2) $500.00 Notices of Delinquent Assessment(2 each); (3) $790.00 Notices of Default(2 each); (4)

[9] The recovery of attorney's fees and costs in a litigation setting are controlled by the Declaration Article IX(B), Rule 8.2(B), Assessment Collection Policy 5 and 8, and applicable Nevada law , including but not limited to NRS 38.238, NRS 116.3116(7) and NRS 116.4117. *comp* NRS 116.310313(3)("Costs of Collecting" does not include costs incurred or awarded in a litigation setting).

[10] The figures used are taken from the A&K demand letters dated March 8, 2011 and May 8, 2012. It should be noted that in A&K's December, 2010 and March, 2011 charge No. 9 ($150.00) was termed a "Management Document Processing & Transfer Fee", but in the May 12, 2012 "briefing" demand was called a "Management Account Setup Fee".

[11] A&K has waived all late fees. *See* May 8, 2011 demand letter. It should be noted that A&K had apparently been applying a late charge on assessments after ten (10) days whereas the "Assessment Collection Policy" produced in this case by the Association (while undated and unsigned) stands unchallenged and clearly calls for a fifteen (15) day grace period.

$90.00, Pre NOD, (5) $450.00, Notary, Recording, Copies, Mailings, and PACER (2 each); (6) $170.00, RPIR-GI Reports (2 each); (7) $550.00, Title Research (1-Day Mailings per NRS 116.31163)(2 each); (8) $75.00, Management Company Audit Report; and a (9)$150.00 Management Account Setup Fee.

Association Costs of Collecting

Of the foregoing assessments and charges, the following would generally qualify as super priority lien amounts or other recoverable costs of collection under Nevada law.[12] The recoverable assessments and collection costs include: nine (9) months regular monthly assessments(March 1, 2010 through November 1, 2010)($219.00 X 9 = $1,971.00)(NRS 116.3116(2)(c) *and in relation to the assessments*: (1) Notice of Intent to Lien (*unknown date*)($135.00);(NRS 116.310313, NAC 116.470(2)(a); (2) Notices of Delinquent Assessment(2 each)(May 25, 2010 and June 8, 2011)($500.00)(NRS 116.310313, NAC 116.470(2)(b); (3) Notices of Default(2 each)(August 31, 2010 and August 16, 2011)(790.00)(NRS 116.310313, NAC 116.470(2)(d); (4) Pre-NOD (*unknown date*)($90.00)(NRS 116.310313, NAC 116.470(2)(c)); (5) Notary, Recording, Copies, Mailings and PACER reports(2 each)(April 16, 2010

[12] It should noted that **all** of the identified costs of collection were incurred in an effort to collect the nine months of "pre-foreclosure sale" unpaid "super priority" assessments. The current owner, Ms McAllester always was and is current as to "post foreclosure sale" Association dues and assessments.

and *unknown date*) ($450.00(based on the Affidavit of A&K employee Mary Indalecio) (NRS 116.310313, NAC 116.470(3); (6) RPIR-GI Reports (2 each) (July 23, 2010 and July 15, 2011) ($170.00) (NRS 116.310313, NAC 116.470(3); (7) Title Research (10 day Mailings per NRS 116.31163) (Trustee's Sale Guarantee) (2 each) (*unknown dates*) ($550.00) (NRS 116.310313, NAC 116.470(3); (8) Management Audit Fee (*unknown date*) ($75.00) (NRS 116.310313, NAC 116.470(4)(a).[13]

A&K, acting solely as Silver States' collection agent (*See* March 25, 2009 Retainer Agreement), has consistently demanded of Ms McAllester the payment of ten (10) months "pre-foreclosure sale" regular monthly assessments ("February 2, 2010 through November 2, 2010" ($219.00 X 10 = $2190.00) (*See* March 8, 2011 and May 8, 2012 demand letters). The foreclosure sale in this case occurred on November 2, 2010. The November, 2010 assessment was due on November 1, 2010 and was thus the responsibility of the prior owner. *See* Association Rule 8.2(A). Thus the proper super priority lien amount for pre-sale monthly assessments was for March through November, 2010 ($219.00 X 9 = $1,971.00). A&K was clearly using the wrong dates and time frame for its demand. Ms McAllester properly refused

[13] Although it appears each of the foregoing amounts is recoverable under Nevada law, the record is not sufficiently complete (missing document copies, dates etc.) to allow for the complete identification of all of the various costs of collection and other charges sought to be recovered or complained of by the parties. For this reason it must be left to the parties to adjust the various amounts due (or not) using this Decision as a guideline.

to pay the 10th arrearage month claimed, however, her refusal to pay the remaining nine (9) months assessments claimed, while admitting that they are recoverable as part of a super priority lien claim (*See* Claimant's Brief, Page 3), is simply without excuse.[14]

Certain of the claimed costs of collection appear twice. Items 2, 3, 4, 5 and 6 above, reflect the same or similar charges totaling approximately $2,460.00. Facially the total of these claimed "costs of collection" alone would appear to exceed the $1,950.00 limitation contained in NAC 116.470(1). They do not. First, items 2, 3, 4, 5 and 6 reflect collection efforts involving two different owners-pre and post foreclosure sale. Thus, the various actions undertaken by A&K, as to *each* owner, were clearly necessary and involved neither duplicative nor unnecessary charges. *See* NRS 116.310313(1) ("An *association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation.*" (Emphasis added)). Looked at another way, if Ms McAllester had elected to pay the amounts demanded by the Association at the time she purchased the Irene Way property, the duplicative charges would never have occurred. Each of the fees or charges, insofar as they related to a different owner must be viewed separately and, except as noted in

[14] Ms McAllester acknowledged as early as January 21, 2011 the Association's right to collect from her nine (9) months of "pre-foreclosure sale" monthly assessment arrearages. Letter dated January 21, 2011.

this Decision, the total charges as to each owner were within the overall $1950.00 limit imposed by NAC 116.470.

Claimant specifically challenges the necessity (and legality) of the recordation of the two notices of delinquent assessment liens (item 2) and their $500.00 cost, arguing that, under Nevada law, the recordation of the Association's Declaration constituted both notice and perfection of any subsequent lien for assessment(s) against a unit owner. Claimant's Brief, page 3. Ms McAllester also argues that the pre-foreclosure notice of delinquent assessment required to be mailed to an owner pursuant to NRS 116.31162(1)(a) is intended to allow the unit owner a thirty (30) day window to clear any delinquency before any public record is made of the issue. *See* September 3, 2011 Claim Form. Silver State challenges Claimant's position noting that NAC 116.470(2)(b) lists such a recording as a recoverable cost, that an association assessment lien is a creature of statute (NRS 116.3116(1)), and that the recordation of the notice serves as "record" notice of the lien. Respondent A&K also argues that while NRS 116.31162 contains the actions an association *must* take before it forecloses on a property, that section does not *prohibit* additional actions by an association. Further A&K argues, there is nothing in the law that indicates any privacy intent or rule within the statutory scheme.

The undersigned is not persuaded by Claimant's arguments. The Association Declaration and Assessment Collection Policy each specifically require the preparation and recordation of a notice of lien assessment. Declaration, Article IX(A)(2), Assessment Collection Policy, Rule 6. The Declaration also requires written notice of such liens be given the ". . . *first Mortgagees of such unit.*" *Id.*, Article XV(B). Moreover, NRS 116.31162(1)(a) clearly requires written notice to the unit owner of the delinquency and lien before a foreclosure can occur. The recordation and service of a notice of lien assessment satisfies each of these requirements and also has the salutary effect of giving record notice to all other potentially interested parties of the Association's lien and claim.

Having reviewed all of the records in this case very carefully, it appears that, except as noted in this Decision, all of the sums claimed by A&K and the Association were recoverable from Ms McAllester under Nevada law and were appropriately included in the A&K demand letters.

NRS 116.3116(8)

Ms McAllester also offers a letter supporting her claim that, pursuant to the provisions of NRS 116.3116(8), on November 30, 2010, she sent a letter to the Association requesting a statement in recordable form setting forth the "minimum" amount necessary to bring her account into good standing. She further alleges that the

Association never responded to her request in willful violation of that statute. A&K counters that on December 7, 2010 it responded to Ms McAllester's request in the form of a demand letter (produced in this case) setting forth all of the sums claimed by the Association. As to the statutory requirement of "recordable form", A&K argues that it is unclear what is meant by that phrase and, in any case, Ms McAllester has failed to demonstrate any actual harm the result of A&K's means of response.

Ms McAllester is correct that the A&K response was not in recordable form. However, A&K is correct that she has not demonstrated any resulting harm to her interests. The violation was technical in nature and Ms McAllester did receive actual notice and detail regarding the Association's claim within the ten (10) day time frame contemplated by the statute (via A&K's December 7, 2010 facsimile demand letter). It should also be noted that, indirectly, Ms McAllester seems to be arguing on this issue for the preparation of a document much, if not exactly like, the two recorded notices of delinquent assessment which she (on a separate issue) also argues were unnecessary and were inappropriately prepared and recorded by A&K. In any case, while A&K's failure to prepare a serve a statement of account in recordable form was a technical violation of the statute, the undersigned can perceive no actual harm to Ms McAllester's interests the result of that failure.

/ / / /

Association Transfer fee and Management Company Fees

As noted earlier, on February 10, 2011, Ms McAllester paid a $150.00 HOA transfer fee. This was a "new owner" fee and not part of the "super priority" lien. A&K indicates this fee was ultimately paid to the Association management company. A&K Brief, page 4-5. A&K also indicates the Silver State management company charges a total of $300.00 to set up a "new owner" account.[15] *Id.* Within the documents produced in this case, is a recorded Association document (Washoe County Doc # 2152293, November 10, 1997) which establishes $100.00 as the transfer fee to be charged a new owner (that sum to be split equally between the Association and its management company). There is nothing in the record to indicate that this policy does not remain in full force and effect. As a result, Ms McAllester is entitled to a $50.00 credit against the sums owned the Association or its management company for any "new owner" transfer fee. In that the parties do not specifically address the Association's demand for an additional $150.00 as and for what is now being called a "Management Account Set Up Fee", little can be done to address this "new owner" charge. It is troubling that A&K

[15] In its Brief (page 4-5), A&K indicates the Association management company charges a total of $300.00 to set up new owner account, that it applied $150.00 toward the "HOA Set Up Fee" and that $150.00 is still due and owing as a "Management Document Processing & Transfer Fee". The A&K demand letters, however, list the Association claim as one for a "Management Account Setup Fee" of $150.00. In that Ms McAllester's February 10, 2011 payment was recorded as payment of a "Transfer Fee" in both ledgers produced in this case and it will be treated as such in this Decision.

appears to have altered the nomenclature with which it refers to this charge as it was preparing its brief for this arbitration. At a minimum, before requiring Ms McAllester to pay this additional sum, the A&K and the Association must produce to Ms McAllester record proof that the fee limits noted above have been changed and that payment of such higher charge(s) have been required of all new owners prior to November 2, 2012. In the absence of such proof, these charges, to the extent such they exceed $100.00, may not be recovered from Ms McAllester by the A&K, Association or its management company.

Conclusion

In summary, the $5,100.00 A&K demand is made up of the following components: $2,190.00 representing ten (10) months of pre-foreclosure sale Association monthly assessments. Of that sum, $1,971.00 is recoverable from Ms McAllester pursuant to NRS 116.3116(2)(c); $1,515.00 representing fees charged by A&K as a part of its collection efforts. That sum is recoverable from Ms McAllester pursuant to NRS 116.310313 and NAC 116.470(2)(maximum allowed by regulation is $1,950.00); $1,245.00 representing "hard costs" incurred as a part of the A&K collection efforts. That sum is recoverable pursuant to NAC 116.470(3); and $150.00 representing an alleged unpaid (non-super priority lien) charge due the Silver State management company. This sum is only recoverable if supported by the proof required in this Decision.

Thus Respondent Silver State has, for the most part, been vindicated in its position that A&K, acting as its collections agent, acted in an appropriate manner. While there were minor variations (or mistakes made) by A&K in performing its duties, no real basis exists for an award of damages to Ms McAllester at this time. As the situation developed, A&K made a number of downward adjustments to its demands. To the extent there remains a need to further balance the "equities", such will be considered in the context of the motion for attorney's fees discussed below.

In this proceeding, the Ms McAllester requests an award in her favor. Her primary requests for relief are based on a theory (rejected in this Decision) that the total amount of the Silver State "*super priority lien*" must be limited to an amount equal to nine (9) months regular monthly association assessments, an argument that A&K's re-recording of several documents following the change in ownership were unnecessary, and that A&K and the Association failed to timely provide a NRS 116.3116(8) statement (in recordable form) setting forth the amount of unpaid assessments and other costs of collection. For the foregoing reasons, except as noted in this Decision, each of Claimant's requests for relief is denied its entirety.

Third Party Claim for Indemnification

In this case, Respondent and Third Party Claimant Silver State Condominium Owners Association ("Silver State" or "Association") has

asserted a third party claim against Alessi & Koenig, LLC and Alessi Trust Corporation (collectively "A&K") based on theories of contractual and implied indemnity. A&K disputes the existence of any contractual or legal basis for such a claim.

The undersigned has carefully reviewed the March 25, 2009 "Retainer Agreement" (the "Agreement") offered by Silver State as the basis of its contractual indemnity claim.[16] By virtue of a "checked box", the parties' contract is strictly limited to A&K providing ". . . *Non Judicial Foreclosure and Collection of Delinquent Assessment Services only*". Silver State cites Section 8 of the Agreement as provide the requisite "*indemnification*" agreement:

> *Acknowledgment of Alessi & Koenig as entity responsible for performing collection work. To the extent that trustee and/or collection services were performed for Client* [Silver State] *by the Alessi Trust Corporation on any of Client's files, Client acknowledges and consents to all further work being performed by Alessi & Koenig.*

It appears that the foregoing section refers only to the parties 2009 agreement and a clarification that henceforth Alessi & Koenig (and not the Alessi Trust Corporation) will be performing all collection work on behalf of Silver State. There is no actual indemnification agreement or language in that section nor in the remainder of the Agreement.

[16] Although the agreement was not signed by A&K, both parties refer to its content and both implicitly acquiesce to its validity.

Silver State has also alleged a claim for *implied indemnity* against A&K. If successful, a claim for implied indemnity transfers the ". . . *entire loss from the defendant tort-feasor to another* [defendant] *who should bear it instead.*" Reid v. Royal Ins. Co., 80 Nev. 137, 141, 137 P.2d 45, 47. With regard to the Silver State implied indemnity claim, A&K correctly points out that a prerequisite to such a claim is a finding that the third party defendant (in this case A&K) is liable for damages to the plaintiff (in this case Ms McAllester) on the underlying claim. *See* Rodriguez v. The Primadonna Company, LLC, 216 P.3d 793, 800-803 (2009). No such finding has been made in this case. In fact, Ms McAllester filed no claim against A&K. Specifically, as pointed out by Silver State in its Brief at page 5, A&K is to receive all recoverable costs of collection. Of the various sums discussed above, only the nine (9) months of delinquent assessments ($1,971.00), when paid, will accrue to the benefit of Silver State. The remaining sums all go to A&K or ultimately to third parties (as hard costs of collection or management fees). Under the dictates of the law (and this Decision), A&K will be entitled to collect from Ms McAllester, and for its own benefit, items 1, 2, 3, and 4 ($1,515.00). The remainder of the costs of collection reflect payments to third parties or other hard costs of collection. Thus, no basis exits for

a claim of implied indemnity.[17] Although a theory of implied indemnity does not fit the facts of this case, the issues of arbitration expenses, attorney's fees and costs, and how they will be allocated, remain to be determined.

Arbitration Expenses, Attorney's Fees and Costs

On the primary issues of this arbitration, Silver State is the prevailing party and, pursuant to its governing documents (Article IX(B), Rule 8.2(B), and Assessment Collection Policy(s) 5 and 8, and Nevada law, including, but not limited to NRS 38.238, and NRS 116.4117, is entitled to recover its *reasonable* attorney's fees and costs of suit. Given the circumstances and after considering the May 18, 2012 Affidavit and Statement submitted by counsel for Silver State, the Association shall have the opportunity to file a detailed motion supporting its request for arbitration expenses, attorney's fees and costs.[18] The Motion shall be supported with appropriate affidavits and exhibits, and shall be filed and served within fifteen (15) judicial days (days the Nevada courts are open) of the date of this Decision. Ms McAllester and A&K shall each have ten (10) judicial days following receipt of the motion within which to file their respective oppositions, if any. The issue of arbitration

[17] Similarly no claim for contribution exists because Silver State is not liable to Ms McAllester for damages.

[18] Counsel should note the requirements of Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31 (1969).

expenses, attorney's fees and costs will then stand submitted for decision. Any order issued with respect to such issues shall become a part of this Arbitration Decision and Award as if set forth in full at this point.

NO CERTIFICATION AUTHORIZATION

This arbitration proceeding is not complete until such time as a final order regarding the issue of arbitration expenses, attorney's fees and costs is entered and all arbitration expenses are paid. Until such time, no certificate of completion certifying that the parties have complied with each, every and all of the requirements of NRS 38.300-360 shall be issued.

DATED this 15th day of June, 2012.

BY: _____
STEVE E. WENZEL, Arbitrator
301 Flint Street
Reno, Nevada 89501

CERTIFICATE OF MAILING

I, STEVE E. WENZEL, Esq., on this date deposited for mailing a true copy of the within document entitled **ARBITRATION DECISION AND AWARD** addressed to:

Amber McAllester
Peter McAllester, Guardian ad Litem
c/o James R. Adams, Esq.
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117

Sheila Van Duyne Romero, Esq.
Wolfe, Ripkin, Shapiro, Schulman
& Rabkin, LLP
5594-B Longley Lane
Reno, Nevada 89511

Ryan Kerbow, Esq.
Alessi & Koenig, LLC
Alessi Trust Corporation
9500 W. Flamingo Road, Suite 100
Las Vegas, Nevada 89147

Anne Moore, Program Officer
Office of the Ombudsman
State of Nevada
Department of Business and Industry
Real Estate Division
2501 E. Sahara Avenue, Suite 202
Las Vegas, Nevada 89104

DATED: June 15th, 2012

EXHIBIT H

EXHIBIT H

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION

Peter McAllester, as Guardian ad Litem for Ashley McAllester and Krista McAllester
Claimants,

vs.

Baker Place Condominium Association,
Respondent.
_____/

Case No. NRED #12-27

ARBITRATION DECISION AND AWARD

This is an non-binding arbitration proceeding filed pursuant to NRS 38.300 *et seq.* Claimants Ashley McAllester and Krista McAllester ("Claimants")[1] allege that, after they purchased a condominium located at 4245 Baker Lane, in Reno, Nevada, their new homeowners' association, Respondent Baker Place Condominium Association ("Baker Place", "Association"), impermissibly required them to pay excessive sums to gain a release of the Association's "super priority lien" asserted pursuant to NRS 116.3116.

Background

At a foreclosure sale held on April 22, 2011, Peter McAllester and his daughters purchased a residential property located at 4245 Baker Lane in Reno, Nevada. On May 10, 2011, title to the property

[1] During this proceeding Peter McAllester was appointed as guardian ad litem to represent his two minor daughters' interests.

was vested in Ashley and Krista McAllester as joint tenants. Following the sale of the property and in exchange of correspondence, the Association demanded the sum of $6,061.67 from the Claimants to bring all amounts owed the Association current. The demand included both super priority and post-sale assessments. Specifically, the following amounts were included in the demand: (1) delinquent monthly assessments ((July, 2010 through December, 2010 at a rate of $392 per month) and (January, 2011 through March, 2011 at a rate of $352 per month)) in the amount of $3,408.00, (2) post-sale monthly assessments for April and May, 2011 in the amount of $704.00, (3) late fees of $110.00, (4) interest on the outstanding balance of $396.17, (5) costs of collection incurred within the nine months preceding the foreclosure in the amount of $523.50, (6) attorney's fees and lien release fees incurred after the McAllesters' purchase of the property in the amount of $465.00, (7) statement and package fees in the amount of $105.00, (8) transfer fees in the amount of $250.00, and (9) buy-in fees in the amount of $100.00. As of June, 2011, the total sum sought from the McAllesters was $6071.67.

An Association summary submitted in this arbitration indicates the super priority lien portion of the demand asserted by the Association was $4,437.67 (Items No. 1, 3, 4, and 5). See Respondent's Ledger, February 15, 2012 Brief, Exhibit 2. The Association lists the remaining demand items (a total of $1,624.00)

as post-foreclosure sale assessments. *Id.* The Association ledger also indicates that of the over $9,000.00 owed the Association by the previous owner(s), as of the date of the foreclosure sale, the sum of $4,290.28 was written off as uncollectible.

On or about June 9, 2011, to clear their property of any liens, and under protest, the McAllesters paid the sum of $6,061.67.

On August 20, 2011, the McAllesters sent a letter to counsel for the Association challenging four (4) separate charges they believed to have been impermissibly included in the super priority lien portion of the Association's demand. The challenged costs included: late fees of $110.00, interest amounting to $396.17, attorney's fees of $708.50[2], and additional attorney's fees of $280.00.

On August 31, 2011, counsel for Baker Place responded, defending each and every one of the costs that had been assessed against the McAllesters' property.

A close examination of the parties' respective exhibits and arguments reveals that the disputed Association lien amounts total $1,494.67. According to the various records available that sum is made up of the following pre-foreclosure amounts: $110.00 in late

---

[2] Although labeled "attorney's fees" in a prior Association letter (5/19/2011) and the McAllester letter, the sum of $708.50 appears to actually be comprised of pre-foreclosure collection costs in the amount of $523.50 and post sale attorney's fees of $185.00. *See* Respondent's February 15, 2012 Brief, page 2, and Respondent's Exhibit 2 (Ledger). It should also be noted that contrary to the contention of the Claimants, the Association dues were not level throughout the super priority period, but varied as noted above.

fees (July 2010 to April, 2011 at $10.00 per month), $396.17 in interest (July 2010 to April, 2011), collection costs of $523.50 "incurred within 9 mos. preceding foreclosure", and post-foreclosure costs (including attorney's fees) of $465.00.[3] *See* Claimants' August 20, 2011 letter (Claimants' Brief Exhibit 7) and Respondent's Brief Exhibit 2.

Thereafter, McAllesters filed this arbitration proceeding alleging that the Association improperly included in its demands for payment sums not permitted to be recovered by the Association as a part of a NRS 116.3116(2)(c) super priority lien. Late in the case, the McAllesters raised a related issue, that being whether or not the lender protection provisions of Section 27 of the Association's Declaration resulted in the complete waiver of any pre-foreclosure sale liens or claims by the Association, including but not limited to an NRS Chapter 116 super priority lien.

It is important to understand that underlying the argument over the actual amounts due (or not due) the Association lies a much bigger issue-that being a more general interpretation of NRS 116.3116 *vis a vis* the super priority lien (*e.g.* its timing and the amounts to be included). Because these issues arise today in literally thousands of real property sales in Nevada, both home buyers (often an investor in recent times) and common interest

---

[3] $280.00 (5/17/2011 Legal fees -demand letter) plus $185.00 (6/9/2011 Legal fees - lien release) = $465.00.

communities have very substantial interests in these issues. In this case, for example, the McAllesters understandably want to limit the amounts they must pay to gain clear title to the Baker Lane property (and potentially other investment properties). The Association, on the other hand, very much wants to limit the losses it suffers when an Association member fails to pay assessments because those losses must be spread among the remaining Association members unless it is to result in a loss of the ability of the Association to fulfill its community responsibilities. While the amounts in any one home sale may seem small, the collective impact on the participants, both direct and indirect, can be, and in many cases are, quite substantial. No better evidence of the import of these issues exists than the numerous opinions, orders and court decisions offered by both parties in this case.

Because this case largely involves legal issues, in an effort to hold down costs, the parties have agreed to waive their right to an evidentiary hearing and this matter has been submitted for decision based on each party's respective brief and presented materials.

Lien Waiver Under the Baker Place Declaration

In their Brief, Claimants raise the issue of the impact of Declaration Section 27 ("Section 27") on the Association's super priority lien. In relevant part, Section 27 provides that the sale or transfer of any Association condominium due to foreclosure or a

sale under a deed of trust ". . . *shall extinguish any lien of an assessment which became a lien prior to such sale of transfer.*"[4] Claimants argue that this provision clearly obviates most of the Association's claims and therefore they should be reimbursed the sum of $5,709.67 ($6,061.67-$352.00(June, 2011 (post-purchase) monthly assessment)). *See* Claimants' Brief, page 2, fn. 1.[5]

Claimants' assertion that the extremely "lender friendly" provisions of the Baker Place Declaration provide for waiver of all Association liens in a foreclosure setting would be true except for certain other applicable provisions of NRS Chapter 116 aimed at providing uniformity in common interest community law.

NRS 116.1104 provides that the provisions of Chapter 116 cannot be varied, waived or evaded by agreement or otherwise unless specifically allowed by the Chapter.

In addition, NRS 116.1206 provides that any provision contained in an association governing document (including the Baker Place Declaration) that violates the provisions of the Chapter shall be deemed to conform to the statutory provisions (even in the absence of actual amendment of the document).

---

[4] Although not mentioned by the Claimants, Sections 15 and 23 of the Declaration contain very similar provisions.

[5] It appears the Claimant's did make one post-purchase monthly dues payment of $352.00 before the $6061.67 demand was made in May, 2011 and thus no claim was asserted for the "paid" month.

NRS 116.3116 provides for broad lien rights for associations without the potential for limitation in a common interest community's governing documents. Morever, the Baker Place Declaration itself provides the Association with broad affirmative lien rights. To the extent that Declaration Sections 15, 23 and 27 purport to prohibit or waive any and all Association NRS Chapter 116.3116 lien rights *vis a vis* a holder of a note and first deed of trust or its successor in interest, those sections are in direct conflict with the cited provisions and intent of NRS 116.3116. By law, where there is a conflict between the Association's Declaration sections and the provisions of NRS Chapter 116.3116, including but not limited to, those portions addressing the issue of super priority liens, the NRS Chapter 116 provisions prevail. Any and all conflicting language or provisions in the Declaration are a nullity and without any effect whatsoever. That being the case, by law, Baker Place was and is entitled to assert a super priority lien under NRS Chapter 116.3116. The question remains, however, what form that lien must take. It is this issue that is the main source of the parties' dispute in this proceeding and has troubled so many parties, agencies and courts in prior cases.

THE SUPER PRIORITY LIEN

The parties do not generally dispute the applicability of NRS Chapter 116 (Nevada's version of the Uniform Common-Interest Ownership Act). NRS 116.001. The Baker Place Declaration was

recorded in 1978, well before the passage of NRS Chapter 116. Although the Declaration states that the powers of the Baker Place Board of Directors arise from general law and NRS Chapters 78 and 81 (Declaration Section ("Section" 12) that is no longer true following the 1991 adoption of NRS Chapter 116 which greatly limited the application of those statutory sections to common interest communities. *See* NRS 116.11085 and NRS 116.1201(4). Baker Place is a common-interest community as defined by NRS Chapter 116 and is subject to its provisions. NRS 116.027, NRS 116.021, NRS 116.1201, *See* Declaration Section 1(h) and 5.

Association Assessments and Liens

Pursuant to NRS 116.3102(1), an association may [a]*dopt . . . budgets for revenues, expenditures and reserves and collect assessments for common expenses from the unit's owners.*" (Emphasis added.

"**Common expenses**" are defined by NRS 116.019 as ". . . *expenditures made by, or financial liabilities of, the association . . .*"

"**Assessments**" have been defined as the imposition of a pecuniary payment upon persons or property. Black's Law Dictionary, 6th ed. Although the term is not defined in NRS Chapter 116, NRS Chapter 38.330(1)(a section generally applicable to this proceeding), in relevant part, defines an "**assessment**" as " . . .

any charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions, including any late charges, interest and costs of collecting the charges; and any penalties, fines, fees and other charges which may be imposed by an association pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 . . ." (Emphasis added).

NRS 116.3116(1) provides that an association has a lien on a unit for "*. . . any assessment levied against that unit or any fines imposed against that unit's owner from the time the construction penalty, assessment or fine becomes due.*" NRS 116.3116(1) also provides that "[u]*nless the declaration provides otherwise, 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.*" Because NRS 116.3116 deals specifically with liens against units for assessments, this sentence is clearly addressing what NRS 116.3102 fines and charges may be included in an NRS 116.3116(1) lien. *accord* Ikon Holdings, LLC v. Horizons at Seven Hills HOA, Case No. A-11-647850-C (Dist. Ct., Clark County, January 1, 2012, page 3. The language is not a limitation on the scope of NRS 116.3116 liens, but is an inclusionary rule that provides, unless prohibited by the

declaration, such financial liabilities " . . . *are enforceable as assessments under this section.*" NRS 116.3116(1).

A review of the Baker Place Declaration reveals that the Association Board of Directors is granted broad authority to require a unit owner to pay ". . . *all Common Expenses assessed against* [a unit owner] *and all other assessments made against* [a unit owner]". Section 14. That authority includes all assessment powers granted the Association by state law(Section 12(today generally NRS Chapter 116))) and specifically the right to assess annual common expenses (Section 13) and individual assessments including late payment penalties, collection costs, and attorney's fees (Section 14). Nowhere in the Declaration are the broad assessment powers noted above limited. Thus, Baker Place, through its Declaration and by law, possesses broad authority to assess a unit and/or its owner for any or all of the items set forth in NRS Chapter 116, including but not limited to, NRS 116.3116 and NRS 116.310313.

As noted above, NRS 116.3116 provides specific authority for association liens against units. Subject to certain listed exceptions, association liens are today generally given priority over all other liens and encumbrances on the property. NRS 116.3116(2).

One exception to the aforementioned first priority for association assessment liens rule relates to any first security

interest on the unit (often represented by a "holder of a note and a first deed of trust"). NRS 116.3116(2)(b). The exception provides that an association's assessment lien is ***not*** higher in priority than:

> *A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . .* NRS 116.3116(2)(b).

The statute also provides, however, that the foregoing exception is also subject to its own limitation:

> ***The lien is also prior to all security interests described in paragraph (b)*** [a first mortgage and 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, ...*** *Id.*

(Emphasis added).

The NRS 116.3116(2) lien is commonly known as an association "*super priority lien*". By asserting such a first priority lien, an association, in effect, is able to "*step ahead*" of the holder of a note and first deed of trust (or its successor in interest) and assert a claim in a foreclosure sale or similar setting that must be paid before the lender or a third party purchaser may acquire clear title to the unit. The super priority lien provision provides for a nine (9) month "*look back*" period allowing the association to collect assessments

> ". . . *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 . . .

Claimants' allege that, even if not waived or prohibited in the first place, the Baker Place "super priority lien" (the "SPL") is capped at total of the nine (9) months assessments based upon the association's periodic budget. Claimants' Brief, page 1, fn. 1, pages 4 and 7. As noted earlier, Claimants use monthly dues of $352 X 9 to reach a total SPL of $3,168.00. As pointed out by the Association, however, if one accepts (1) that the "look back" period began in March, 2012(the month preceding Claimants' purchase of the property) and that the SPL is limited to the preceding nine (9) months dues, the Baker Place SPL would be comprised of $392.00 X 6 (7/2010 - 12/2010) plus $352.00 X 3 (1/2011 - 3/2011), the total SPL would be $3,408.00. *See* Respondent's Brief, Exhibit 3. Unfortunately, the parties do not even agree on the date the "look back" period commenced. In their Brief, at page 7-8, the Claimants indicate their belief that the "look back" period begins only on the filing of a "civil action". By contrast, Respondent's Brief states that the SPL period begins as of the date of the "foreclosure sale". Respondent's Brief, pages 2-3. Neither party discusses the issue in any detail. Without a specific starting date, the "look back" period, in cases (like the present scenario) where the monthly dues have changed in the months leading up to the foreclosure sale, the

amount comprising the monthly assessments portion of an SPL cannot be accurately determined. Thus the first issue to be determined is the appropriate start date of the NRS 116.3116(2)(c) super priority lien "look back" period.

NRS 116.3116(b)(2) "Look Back" Period

NRS 116.3116(2)(c) provides that the SPL lien period extends back in time for ". . . ***9 months immediately preceding institution of an action to enforce the lien.***" (Emphasis added).

In the present case, the prior owner of the Baker Lane condominium failed to pay monthly and other assessments for many months. Pursuant to Section 14 of the Declaration, regular monthly assessments were due on the first of each month and delinquent if not paid within fifteen (15) days. The Association, via the lien provisions of NRS 116.3116, automatically obtained a lien on the Baker Place condominium each and every time an Association assessment became due. NRS 116.3116(4). No affirmative action by the Association was required (or (based on the record) occurred). *Id.* Under Nevada law, if proceedings to enforce such a liens are not initiated within three (3) years of the full amount of each assessment becoming due, the lien is automatically extinguished. NRS 116.3116(5).

As noted earlier, the McAllesters take the position that a "civil action" had to have been filed by the Association to trigger

the nine (9) month "look back" period which, in turn, would have established the parameters of its NRS 116.3116(2) lien. Indeed, NRS Chapter 116 does contemplate the option of a formal legal proceeding to enforce the payment of assessments. NRS 38.310(1)(a), NRS 116.3102(1)(d), NRS 116.116.31088(1)(a), and NRS 116.4117(2)(a)(3). However, because Nevada also permits non-judicial foreclosures by associations, a stringent requirement of a lawsuit would effectively deny an association a statutory right. NRS 116.31162. Even beyond that problem, in many, and probably most, recent Nevada home foreclosure events, the association neither files a lawsuit nor attempts a non-judicial foreclosure. Instead, the home mortgage lender (the "first security interest" identified in NRS 116.3116(2)(b)) forecloses and the association submits its demand for payment in escrow or directly to the new owner, be it the lender or a third party purchaser. If adopted, Claimants' position would effectively deny an association the benefits of an SPL in each of these non-litigation scenarios.

As pointed out by Respondent, within the framework of NRS Chapter 116, the term "civil action" is used more than once to signify a judicial proceeding. See NRS 116.31088, NRS 116.4117 and NAC 116.630. The terms "litigation" and "lawsuit" are also used in NRS Chapter 116 to refer to judicial proceedings. NRS 116.3102(d) and NRS 116.310313(a).

Respondent is also correct pointing out that, in NRS 116.3116(2)(c), the legislature did not elect to use the term "civil action", instead using the term "action", arguably with intent to differentiate. It should be noted that NRS 116.3116(7) also uses the term "action", but in a context more clearly referring to formal court proceedings.

In its Brief, Respondent points out several Nevada rules of statutory construction: Among them that "*[g]enerally, 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 and Casinos, Inc. V. Nevada State Labor Commission, 117 Nev. 835, 34 P.3d 546(2001); when interpreting statutory provisions, when possible, it is the duty of the court "*to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.*" Southern Nevada Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171(2005)(citations omitted). "*The goal of statutory interpretation is to effectuate the legislature's intent.*" Savage v. Dist. Ct., 125 Nev. , 200 P.3d 77, 82 (2009). "*When an ambiguous statute is construed, it should be given meaning that is consistent with what the legislature intended, based on reason and public policy.*" McGrath v. State of

Nevada et al, 123 Nev. 120, 123, 159 P.3d 239(2007) It is the duty of the court to interpret the provisions of a statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results. Southern Nevada Homebuilders Ass'n, *supra, citing* Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134 (2001)(citation omitted). When interpreting an ambiguous statute the import of the statutory language used may be ascertained by examining the background and spirit in which the law was enacted. Public Employees' Benefits Program v. State of Nevada, 124 Nev. 138, 147, 179 P.3d 542 (2008), *citing* McKay, *supra* at 650-651. Banegas v. SIIS, 117 Nev. 222, 225, 19 P.3d 245(2001)(When a statute can be given more than one reasonable interpretation it is ambiguous).

The only interpretation of the term "*action*" which is consistent with the language and the clear legislative intent of all of the provisions of NRS Chapter 116 is a meaning that results in statutory harmony and avoids an unreasonable result. Any reasonable interpretation must also recognize the reality of what may occur in Nevada in the lien enforcement process. The undersigned has found no Nevada caselaw directly addressing this issue, and little, if any, discussion in the additional research materials reviewed for this Decision.

Nevada's lack of any actual definition of the several terms noted above and their varying and seemingly random use in NRS Chapter 116, leads to one inescapable conclusion. The use of the terms "civil action" and "action", as well as other more or less synonymous terms in NRS Chapter 116, leads to significant ambiguity. It is clear that the terms, even potentially the same term, may appear with different meanings in different provisions of the statute.

There are several Nevada District court cases which have dealt with the scope of a NRS 116.3116 "super priority" lien and, by doing so, at least indirectly addressed the "look back" period issue. A Nevada District Court has recently ruled that "[a] . . . *foreclosure in effect constitutes an action within the meaning of NRS 116.3116(2)(c)*." *See* Ikon, *supra* . In Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Dist. Ct. Case No. 06-A-523959-C, the court included in the association's super priority lien, six(6) months of assessments for common expenses, and six (6) months late fees and interest relating to the unpaid assessments. The court also awarded the association its costs of collection, including legal fees and costs that had accrued "*prior to the date of foreclosure of the first deed of trust.*" In JPMorgan Chase Bank N.A. v. Countrywide Home Loans, Inc., *et al*, Dist. Ct. Case No. A562678, citing NRS 116.310313 and NRS 116.3116(2), the court

determined that an association can recover "*as a part of its "super priority" lien collection costs associated with enforcement of its assessment lien.*" In addition to the delinquent monthly assessments falling within the nine (9) month priority period, the District Court awarded the association late fees, and collection costs related to the aforementioned nine (9) months of unpaid assessments. The court denied the association the portion of its requested costs of collection that were incurred "*. . . after the lawsuit was filed*". Pursuant to NRS 116.3116(7), the court also awarded the association its reasonable attorney's fees and costs "*. . . incurred in defending and protecting its statutory right to an assessment lien.*"

Using these Nevada decisions, a sensible definition of the NRS 116.3116(2) "look back" period becomes possible.

For example, as discussed above, a Nevada association can file a formal legal proceeding to collect unpaid assessments. See NRS 38.310(1)(a), NRS Chapter 40, NRS 116.3102(1)(d), NRS 116.116.31088(1)(a), and NRS 116.4117(2)(a)(3). A legal proceeding, initiated by the association to enforce its SPL, would clearly establish the starting date of the "look back" period. This conclusion is buttressed by the cited cases and by the attorney's fee and cost recovery provision in NRS 116.310313((3)(a) which excludes from recoverable (under that statute) costs of collection

of past due assessments, attorney's fees and costs ". . . *awarded by a court*". It is also consistent with the language of NRS 116.3116(7) which provides that a ". . . *judgment or decree . . . brought under this section must include costs and reasonable attorney's fees for the prevailing party.*" Alternatively, if an association availed itself of its right to foreclose its NRS 116.3116(2) SPL by foreclosure sale, the date of foreclosure would also establish the starting date of the nine (9) month "look back" period. *See* Kobel and Ikon, *supra*.

Looking at possible lender ("*first security interest*") actions, the filing of a legal proceeding pursuant to NRS Chapter 40 and having the potential to extinguish any part of the association's SPL, could set the date marking the beginning of the SPL "look back" period. Similarly, a nonjudicial foreclosure by a lender would also serve to set the date. *accord* Kobel and Ikon, *supra*.

In the present case, there was a non-judicial foreclosure by the lender. Following the reasoning of the Korbel and Ikon courts, and the implication of the above cited statutory sections, the "look back" period in the present case began on the date of foreclosure- April 22, 2011. This is a "reasonable" interpretation of NRS 116.3116(2) and one which comports with the intent of the Nevada legislature to fairly balance the interests of the involved parties.

Super Priority Lien Limits[6]

In Nevada, since 2006, in a very troubled national and state economy, real estate property values have fallen dramatically, in many cases losing 50% or more of their peak value. This unfortunate occurrence has been coupled with many Nevadans losing their jobs or being reduced to fewer hours or lower wages. As a result, the occurrence of foreclosures (and foreclosure related sales) has very greatly increased. Along with that increase in such sales has come a renewed interest in the issue of super priority liens. Lenders and buyers of residential properties, often times investors, are particularly interested in limiting the amounts they must pay to associations to obtain clear title to their property(ies). Associations, on the other hand, are facing serious budget shortfalls due to association members failure to pay dues and assessments as their homes are lost to foreclosure. The confluence of these opposing interests has resulted in significant numbers of legal disputes, including the present arbitration proceeding.

The parties in this case agree that an NRS 116.3116(2) SPL may include other assessments levied by the association during the nine (9) month "*look back*" period. Where they adamantly differ, however, is whether such additional assessments may be recovered in addition

---

[6] The parties do not dispute that exterior maintenance and related costs incurred by an association under the provisions of NRS 116.310312 are includable as additional amounts in a SPL. In that no such sums are at issue in the present case, this potential element of an SPL will not be further addressed.

to the nine months of regular monthly assessments, or may only be recovered up to an amount that, when added to the actual "*look back*" assessment arrearage, equals the sum represented by the total of the nine (9) months of delinquent dues (in other words, a "*cap*" on the total amount of the SPL). It is this dispute, analyzed at length in many of the numerous opinions, cases and articles provided by the parties, that has vexed property owners, associations, administrative agencies, courts, and legal experts for years and has more recently arisen as a "*hot button*" issue in Nevada.

The dispute arises out of the provisions of NRS 116.3116(2)(c) which in relevant part state that the SPL is limited:

> ". . . ***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).

The parties' respective interpretations of the meaning of the highlighted phrase are diametrically opposed. The Supreme Court of the State of Nevada has never considered the issue. Claimants argue that the correct interpretation of the phrase is that of a fixed monetary limit or cap on the total amount of an SPL that may be asserted by an association. Respondent, on the other hand, takes the position that the phrase merely serves to establish the temporal parameters of the "*look back*" period. Each party is represented by a very capable attorney and each offers a reasonable analysis and

authority in support of their position. "*Where a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous.*" McKay v. Bd. of Supervisors of Carson City, Nevada, 102 Nev. 644, 649, 730 P.2d 438 (1986), *citing* Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957 (1983). The undersigned has carefully read and considered all of the materials presented by the parties. After that careful review, it is inescapable that the phrase in question can be fairly interpreted in different ways and that, as a result, it is ambiguous.[7]

As noted earlier, it is the goal of statutory interpretation to effectuate the legislature's intent. Savage, *supra*. When an ambiguous statute is construed, it should be given meaning consistent with what the legislature intended, based on reason and public policy. McGrath, *supra*. It is the duty of a court, by examining the background and spirit in which the law was adopted, to interpret a statutory scheme "harmoniously" with the purpose of the statute. Southern Nevada Homebuilders Ass'n and Public Employees' Benefits Program, *supra*.

---

[7] It should be noted that today both Connecticut's (originally the same as Nevada's statute, but amended during the pendency of the 1992 Hudson House case) and Colorado's (already different when First Atlantic Mort., LLC v. Sunstone North HO, 121 P.3d 254 (2005) was decided) super priority lien amount definitions are significantly different than Nevada's statute. Each, in relevant part defines the super priority common assessments as "*. . . to the extent of . . . an amount equal to the common expense assessments based on the periodic budget adopted by the association . . .*". (Emphasis added). *See Conn. Ge. Statute 47-258 and C.R.S. 38-333.3-316.* This language is somewhat more precise than the comparable Nevada language "*. . . to the extent of the common assessments . . .*". The Connecticut statute also includes in the SPL a specific right to a priority recovery of "*the association's costs and attorney's fees in enforcing its lien.*" *Id.*

Nevada adopted the Uniform Common Interest Ownership Act (UCIOA) in 1991 (A.B. 221- 66th Session) (Effective January 1, 1992) as NRS Chapter 116. The "*super priority*" lien created by NRS 116.3116 is a legislative effort to balance the financial interests of the several parties involved in a financed residential common interest community property facing foreclosure.

One involved party is the association itself. As discussed earlier, in a foreclosure setting, the provisions of NRS 116.3116 allow an association to step ahead of a first security interest holder (or successor in interest) and require of the new owner payment of at least a portion of assessments originally the responsibility of the prior owner. The rationale behind this rule lies in the nature of common interest communities. Such organizations bear responsibility to furnish association members with all of the benefits of collective ownership and governance. Modern associations often are responsible, not only for the day to day operations of the community, but the short and long term care and upkeep of millions of dollars of commonly owned and/or maintained assets and improvements. To provide these services, associations establish and collect regular and special assessments from each member. The success (and popularity) of any association is directly dependant on its ability to maximize the benefits it provides, while at the same time minimizing the costs of its services. Any time a member fails to pay an assessment, that burden

is effectively transferred to the association and the remaining members. If sufficient owners fail to pay assessments, the association can literally lose its ability to function. Dues increases or special assessments may become necessary. Those additional burdens can lead to yet more failures to pay. In short, the viability of any common interest community is dependant on universal or near universal participation of its members, financial and otherwise.

Lenders, on the other hand, are, quite appropriately, interested in maximizing their return (or minimizing losses) when a foreclosure happens. While no doubt having some interest in preserving the involved association (and protecting property values), their interest in the association is understandably weighted toward its own financial position. When, as occurs in many cases these days in Nevada, the lender never takes title to the property, but oversees a sale to a new owner, its interest in the association's problems may be minimal.

Buyers and investors, when buying such properties, may have quite limited interest in the long term viability of the community. Even in the case of the buyer who intends to keep the property, paying past assessments is at the very least viewed an additional unwelcome amount to be paid to gain entry into the community. In the case of the investor, who perhaps intends to resell or "*flip*" the property in as short a time as possible, not only is this an

additional purchase cost, but it adds absolutely no direct value to his or her investment.

The foregoing factors weigh heavily in interpreting NRS 116.3116. As the cases cited in this Decision direct, in construing the statute, its provisions should be given meaning that is consistent with the remainder of NRS Chapter 116, legislative intent, reason, and public policy.

It is highly unlikely that, in 1991, as it adopted the UCIOA, the Nevada legislature contemplated even the possibility of the economic and real estate disaster that has recently befallen Nevada. What cannot be denied is that it was recognized that common interest communities were a significant participant in many Nevadan's lives and that adoption of the UCIOA was intended to be of benefit to them.

More recently, in 2009, the provisions of NRS 116.3116 and even the super priority lien were raised before the legislature. Via Assembly Bill 204, Clark County Assemblywoman Ellen Spiegel offered legislative amendments that would have extended the super priority lien period from six (6) months to two (2) years. Minutes of the Assm. Comm. On Judiciary, March 6, 2009, 75th Sess. at 34. The stated objectives of the amendment were to preserve property values, help common interest communities mitigate the adverse effects of the foreclosure crisis, help homeowners avoid special assessments resulting from revenue shortfalls, and prevent cost-shifting from

common interest communities to local governments. *Id.* Ultimately, the bill was modified to extend the super priority lien period from six (6) months to nine (9) months. NRS 116.3116(2)(b). There is little else in the record to clarify the basis for that more minimal amendment of the super priority lien period.

As A.B. 204 was being considered, the issue of the scope of the super priority lien was raised. In testimony given on March 6, 2009, Common Interest Community Commissioner Michael Buckley mentioned the super priority lien, pointing out to the Committee members that the UCIOA had been amended in 2008 to specifically add to the scope of the super priority lien an association's "*cost*[s] *of collection and attorney's fees*". March 6, 2009 Minutes, *supra* at 44-45. He also stated that there exists in Nevada a question as to whether such expenses can be added to an association's super priority lien and he recommended that A.B. 204 be amended to clarify that issue. *Id.* He also referred the Committee to a letter that had been authored by Ms Karen D. Dennison, Esq., the Vice Chair of the Real Property Section of the State Bar of Nevada which raised similar issues. *Id.*, Exhibit "W". Unfortunately, it does not appear that the subject was further addressed nor resolved by the 2009 Legislature. Since 2009, as evidenced by this case, the controversy over the scope of the NRS NRS116.3116(2) super priority lien has continued unabated.

When interpreting a statute, the legislative history and the legislator's statements can be persuasive. *See* Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n, 126 Nev. Adv. Op. 7, 225 P.2d 1265 (2010). In this case, however, as noted, little help can be found in Nevada's legislative history. In such cases, one must turn to reason and public policy to determine what the legislature intended. *Id.*

During the 2009 legislative session, Assembly Bill 350 was introduced and, in part, later became law. Of interest to this discussion is Section 1.5 of that bill, now found in NRS Chapter 116 as NRS 116.310313. That new statutory provision specifically provided that an association may charge a unit owner ". . . *reasonable fees to cover the costs of collecting any past due obligation.*" NRS 116.310313. It also directed the Commission for Common-Interest Communities (the "Commission") to adopt regulations establishing ". . . *the amount of the fees that an association may charge . . .*" *Id.* The statute defines the terms "*obligation*" and "*costs of collecting*" very broadly. *Id.* The new statute was clearly intended to broaden the scope of expenses recoverable by associations as it sought to recover any past due obligation of a unit owner, including ". . . *assessments, fines, construction penalties, fees, charges, and interest . . .*" levied pursuant to any

provision of an association's governing documents or NRS Chapter 116. *See generally* NRS 116.310313.

On May 5, 2011, the Commission adopted, as a part of the Nevada Administrative Code (NAC), a regulation setting an overall fee limit of $1,950.00[8], and individual limits on a wide variety of individual fees and charges, that might be recovered from a unit owner in connection with a notice of delinquent assessment setting forth any assessment or other charges due an association under the terms of NRS 116.3116(1). NAC 116.470.

In considering both the 2009 adoption of NRS 116.310313 and NAC 116.470, there is no doubt that, in the current troubled economic times, the Nevada legislature has continued its efforts to balance the interests of homeowners, associations, lenders and investors. No mean task on any level.

Taking into account Nevada's 1991 adoption of the UCIOA granting associations broad assessment and enforcement powers and the Nevada Legislature's more recent efforts to ensure associations are able to collect both delinquent assessments and the costs of collection from unit owners, reason would dictate that it has been and is the public policy of the State of Nevada, in foreclosure and similar circumstances, while continuing, to the extent appropriate,

---

[8] Pursuant to Sections 3 and 4 of the Regulation, certain association or third party agent "hard costs", including but not limited to, "reasonable" management fees not exceeding $200 and "reasonable" attorney's fees and costs are allowed to be recovered in addition to the basic $1,950.00 limit.

to protect other stakeholders' interests, to ensure that common interest communities continue to be able to recover sufficient delinquent assessments and costs of collection to perform their statutory and other governing document duties.

In considering its state's version of the UCIOA (in 1992, in relevant part, identical to Nevada's statute), the Supreme Court of Connecticut stated that in construing the statute it would assume that the legislature intended a "*reasonable and rational result*". Hudson House Condominium Association v. Michael B. Brooks *et al*, 611 A.2d 862, 866 (1992)(citations omitted). In setting out its rational for its holding the Connecticut court said the following:

> *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 the only 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 priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.*

Using this rational, the Connecticut court allowed the association to include as a part of its super priority lien its costs of collection including: interest, appraisal fees, a title examination fee, and attorney's fees and costs. *Id.* at 863-866, fn 3.

Claimants criticize the Hudson House decision on the basis that after entry of the trial court's strict judgment of foreclosure, but

prior to the issuance of the supreme court's decision, the Connecticut legislature amended its association lien statutes to specifically include attorney's fees and costs in the super priority lien. Claimant argues that this change renders the Connecticut law and the Hudson House case inapplicable to the present situation. This misapprehends the Hudson House holding. As pointed out in the Supreme Court of Connecticut's decision, the court considered the broader priority claim valid under existing law and the statutory change merely clarification that attorney's fees and costs were appropriately a part of the super priority lien. *Id.* at fn 4.

In Hudson House, as a part of the association's super priority lien, the trial court awarded not only six (6) months of monthly dues, but also interest on those assessments. Hudson House, at 864. The trial court, however, while also awarding the association costs including attorney's fees, an appraisal fee, and a title examination fee, refused to include those sums in the super priority lien. *Id.* On appeal, the association sought to have included, as a part of its super priority lien, the foregoing costs, plus ". . . *other costs of collection.*" *Id.* at 866. The Supreme Court of Connecticut agreed with the association. The Connecticut court held (1) that the association's collection costs that had accrued in the six months preceding the commencement of the foreclosure action were entitled to super priority treatment *and* (2) that the association's

attorney's fees and costs incurred leading up to and during the judicial foreclosure action were also entitled to the same priority treatment. *Id.*

Some critics (including Claimants) also argue that, because the Hudson House case involved a judicial foreclosure action (Connecticut did not provide for an alternative non-judicial foreclosure process), the holding of the Supreme Court of Connecticut cannot be looked to for guidance in interpreting Nevada's super priority lien provisions. This too inappropriately attempts to limit the reasoning underlying the court's interpretation of Connecticut's super priority lien statute. The reasoning underlying the court's opinion remains unchanged whether viewed in the context of a judicial foreclosure action or assertion of the super priority lien in the context of the present case, a non-judicial foreclosure proceeding. The Hudson House decision remains good law today and helpful in considering the meaning of Nevada's statute.

One significant difference does exist between the Connecticut and Nevada statutory schemes. In 1992, Connecticut law did not provide for a non-judicial foreclose option. For that reason, the Hudson House court's inclusion of *all* of the association's attorney's fees and costs in its super priority lien (pursuant to its version of NRS 116.3116(7)) is not necessarily determinative of that issue in Nevada.

A recent advisory opinion issued by the Commission for Common Interest Communities and Condominium Hotels (the "Commission") addressed whether or not, under NRS 116.3116, an association may collect as a part of its super priority lien, its costs and fees incurred in collecting association assessments. Advisory Opinion No. 2010-01 (Adopted December 8, 2010). Referencing several sources of authority, including NRS 116.310313, the Commission answered that question in the affirmative. *Id.* at 12-14. The Commission concluded that an association in Nevada is entitled to include in its NRS 116.3116 super priority lien the following collection costs incurred during the nine (9) month "*look back*" priority period: (1) interest permitted by NRS 116.3115, (2) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (3) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (4)the association's "*costs of collecting*" authorized by NRS 116.310313.

Pursuant to the terms of regulations specifically authorized by NRS 116.310313(1) and adopted effective May 5, 2011, recoverable ". . . *costs of collecting any past obligation of a unit's owner* . . ." specifically include "[*r*]*easonable attorney's fees and actual costs* . . ." NAC 116.470(1) and(4)(b). Courts generally give "*great deference*" to an agency's interpretation of a statute that the agency is responsible for enforcing. State of Nevada, Division of

Insurance v. State Farm Mutual Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482 (2000)(Citations omitted).

The undersigned believes that today, the statutes, regulations, agency opinions and cases discussed in this Decision generally express the proper approach to be taken in this case.[9] Moreover, the conclusions set forth below are in keeping with rules already accepted by various federal and local lenders. Respondent's Brief, Exhibit 30, page 12, *citing* New Comment No. 8 to UCIOA 3-116(2008).

DECISION AND AWARD

Respondent Baker Place Condominium Association is the prevailing party in this case. On the primary issue to be determined - that being the appropriate scope of an NRS 116.3116(2) "super priority" lien, Respondent's position has been vindicated. Although there may well some monetary adjustments to be made in the component amounts making up the lien, such adjustments were not a focus of Claimants' case and were not part of their request for relief.

In this case the Baker Place NRS 116.3116(2)(c) super priority lien "look back" period was triggered by the April 22, 2011 Baker Lane property non-judicial foreclosure sale.

---

[9] The scope of this Decision is limited to the claims and issues raised in this proceeding. Additional possible "super priority" lien issues, including but not limited to, those related to construction penalties (NRS 116.310305) or fines (NRS 116.31031) have not been addressed. *See* NRS 116.3116(1).

As a part of its NRS 116.3116(2) "super priority" lien, Baker Place Condominium Association was entitled to assert and collect the following from the McAllesters:

(1) A sum equal to the unpaid 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 nine (9) months immediately preceding the April 22, 2011 non-judicial foreclosure sale, *and in relation to those assessments*:

(2) Interest permitted by NRS 116.3115(3),

(3) Subject to the provisions of the Declaration, late fees or charges in accordance with NRS 116.3102(1)(k),

(4) Subject to the provisions of the Declaration, fees or charges for preparing statements of unpaid assessments in accordance with NRS 116.3102(1)(n), and

5) Reasonable fees or charges to cover the costs of collecting the past due obligation as authorized by NRS 116.310313 and NAC 116.470. Declaration Section 14 and NAC 116.470(1) and (4), specifically authorize the Association to recover its reasonable attorney's fees and costs in a non-judicial foreclosure setting ". . . *for any legal services which do not include activities described* . . . " in NAC 116.470(2).[10]

---

[10] The recovery of attorney's fees and costs in a litigation setting would be controlled by the Declaration Section 14), and applicable Nevada law , including but not limited to NRS 38.238, NRS 116.3116(7) and NRS 116.4117. *Comp*

Applying the above rules, the May 19, 2011 Baker Place "super priority" demand letter, insofar as it included nine (9) months of unpaid monthly assessments (the "Assessments") due and owing as of the date of the non-judicial foreclosure sale (the "Sale"), and, *in relation to those assessments*: (a) pre-Sale interest, (b) pre-Sale late fees or charges, (c) pre-Sale fees or charges for preparing statements of unpaid assessments, (d) pre-Sale collection costs, and post-Sale collection costs, including reasonable attorney's fees and costs, was appropriate and lawfully made under Nevada law.

As discussed earlier, the total amount in dispute in this case is $1494.67 made up of the following amounts: $110.00 in late fees (July 2010 to April, 2011 at $10.00 per month), $396.17 in interest (July 2010 to April, 2011), collection costs of $523.50 "incurred within 9 mos. preceding foreclosure", and post-foreclosure collection costs ($280.00 (5/17/2011 Legal Fees-demand letter) plus $185.00 (6/9/2011 Legal fees-lien release) = $465.00) (See Claimants' Brief, Exhibit 7 and Respondent's Brief Exhibit 2. The foregoing *categories* of assessments were recoverable from the McAllesters under Nevada law and were appropriately included in the Association's "super priority lien" demand.[11]

NRS 116.310313(3)("Costs of Collecting" does not include costs incurred or awarded in a litigation setting)

[11] The findings set forth in this Decision may result in some variation in the total amount due the Association and the following estimates are based on available (partial) information *only* and are not an actual award, *e..g.* Nine months assessments (August-December, 2010(5 X $392.00) plus Jan-April, 2011(4 X $352.00) = $3368.00; Notice of Intent to Lien Letter $150.00 per NAC 116.470(2)(a)(rather than 5/17/2011 charge of $280.00); and Release of Notice of

The May 19, 2011 demand of $5,709.67 also included some post-foreclosure sale assessments which are not challenged by Claimants (Statement and package fees of $105.00, Transfer fees of $250.00 and Buy-in fees of $100.00. See Claimant's Brief, Claimant's Brief, Exhibit 3, and Respondent's Brief Exhibit 3. Before the Association demand was paid, an additional monthly assessment of $352.00 became due. The Association's total demand at that point (including both pre-Sale "super priority" lien amounts and post-Sale charges) was $6,061.67. That demand has been paid in full by Claimants.

In this proceeding, the McAllesters request an award of $5,709.67, plus attorney's fees and costs. Their request for relief is based on a theory (rejected in this Decision) that certain provisions of the Declaration obviated the Baker Place liens in their entirety. Those requests are denied their entirety. Claimants shall take nothing by way of their claims.

Attorney's Fees and Costs

Baker Place is the prevailing party in this case and, pursuant to its governing documents (Section 14), and Nevada law, including, but not limited to NRS 38.238, and NRS 116.4117, is entitled to recover its reasonable attorney's fees and costs of suit. Given the circumstances and after considering the February 15, 2012 Affidavit

---

Lien $30.00 per NAC 116.470(1)(l)(Rather than 6/9/2011 charge of $185.00) Neither party requested such a recalculation and the record does not contain all the information that would be necessary to do so. As a result, adjustments based on this Decision are left to the parties.

and Statement submitted by counsel for Baker Place and the Brunzell factors[12], Respondent Baker Place Condominium Association is awarded the following sums from and against Claimant Peter McAllester, as Guardian ad Litem for Ashley McAllester and Krista McAllester:

Attorney's Fees:	$ 13,754.75
Costs:	$ 275.23
	$ 14,029.98

The parties involved in this proceeding are both knowledgeable and represented by accomplished counsel. Based on all of the circumstances the foregoing award is reasonable and appropriate.

Arbitration Expenses

Pursuant to the authority cited above, Respondent Baker Place Condominium Association is also awarded the following additional sum from and against Claimant Peter McAllester, as Guardian ad Litem for Ashley McAllester and Krista McAllester:

Arbitration Expenses $3,833.48.

Again, the parties involved in this proceeding are both knowledgeable and represented by accomplished counsel. Based on all of the circumstances the foregoing award is reasonable and appropriate.

/ / / /

/ / / /

---

[12] Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31 (1969).

POST-ARBITRATION DEADLINES

The parties are cautioned that NRS Chapter 38 contains a number of post-arbitration deadlines and restrictions that, if not met, may result in the loss of important rights and options. The parties should promptly review all applicable statutory sections and, if necessary, seek legal advice as to the most prudent course of action. Among the more important deadlines contained in NRS Chapter 38 are the following:

> *. . . [A]ny party to the nonbinding arbitration may, **within 30 days** after a decision and award have been served upon the parties, commence a civil action in the proper court concerning the claim which was submitted for arbitration. Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360, inclusive. If such an action is not commenced within that period, any party to the arbitration may, **within 1 year** after the service of the award, apply to the proper court for a confirmation of the award pursuant to NRS 38.239.*
> NRS 38.330(5) (emphasis added).

CERTIFICATION AUTHORIZATION

The Nevada Real Estate Division may issue a certificate of completion certifying that the costs of this arbitration have been paid and that the parties have complied with each, every and all of the requirements of NRS 38.300-360.

DATED this 20th day of April, 2012.

BY: _____
STEVE E. WENZEL, Arbitrator
301 Flint Street
Reno, Nevada 89501

CERTIFICATE OF MAILING

I, STEVE E. WENZEL, Esq., on this date deposited for mailing a true copy of the within document entitled **ARBITRATION DECISION AND AWARD** addressed to:

Ms Ashley McAllester
Ms Krista McAllester
Peter McAllester, Guardian ad Litem
c/o James R. Adams, Esq.
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117

Baker Place Condominium Association
c/o Gayle A. Kern, Esq.
Kern & Associates, Ltd
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511

Anne Moore, Program Officer
Office of the Ombudsman
State of Nevada
Department of Business and Industry
Real Estate Division
2501 E. Sahara Avenue, Suite 202
Las Vegas, Nevada 89104

DATED: April 23rd, 2012

EXHIBIT I

DEC
Kurt R. Bonds, Esq.
Nevada Bar No. 6228
Eric W. Hinckley, Esq.
Nevada Bar No. 12398
Alverson, Taylor, Mortensen
& Sanders
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Tel: (702) 384-7000
Fax: (702) 385-7000
Email: kbonds@alversontaylor.com
ehinckley@alversontaylor.com

Patrick J. Reilly, Esq.
Nevada Bar No. 6103
Nicole E. Lovelock, Esq.
Nevada Bar No. 11187
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
Fax: (702) 669-4650
Email: preilly@hollandhart.com
nelovelock@hollandhart.com

Attorneys for Defendants
Horizons At Seven Hills Homeowners Association

Holland & Hart LL
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

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,

Defendants.

Case No. : A-11-647850-B
Dept. No.: XIII

DECLARATION OF PATRICK J. REILLY AUTHENTICATING EXHIBITS TO REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON CLAIM FOR DECLARATORY RELIEF

I, Patrick J. Reilly, Esq., declare as follows:

1. I am a partner with the law firm of Holland & Hart, LLP, attorneys for Horizons

at Seven Hills Homeowners Association in the above-captioned matter. I make this declaration in support of the Reply Memorandum by Horizons at Seven Hills Homeowners Association in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief filed herein. If called as a witness, I could and would competently testify to the facts set forth below, as I know each to be true based upon my review of the files and records maintained by Holland & Hart in the regular course of its representation of Horizons at Seven Hills Homeowners Association;

2. Exhibit A to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy the June 21, 2012 Order Granting Motion for Publication in *State of Nevada v. Nevada Associations Services, Inc.* ;

3. Exhibit B to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the December 8, 2010 CCICCH Advisory Opinion;

4. Exhibit C to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and corrcct copy of Puoy Premsrirut, Esq.'s March 19, 2010 request for formal opinion;

5. Exhibit D to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the CCICCH Panel Determination;

6. Exhibit E to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the Order Withdrawing the Declaratory Order of the Nevada Financial Institutions Division;

7. Exhibit F to Horizons at Seven Hills Homeowners Association's Reply

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the decision rendered in ***Higher Ground, LLC v. Adagio Homeowners' Association, et al.***, Nevada Real Estate Division Case No. 11-90 (Mar. 28, 2012);

8. Exhibit G to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the decision rendered in ***McAllester v. Silver State Condominium Owners' Association, Inc.***, Nevada Real Estate Division Case No. 12-19 (June 15, 2012);

9. Exhibit H to Horizons at Seven Hills Homeowners Association's Reply Memorandum in Support of Motion to For Reconsideration of Order Granting Summary Judgment on Claim for Declaratory Relief is a true and correct copy of the decision rendered in ***McAllester v. Baker Place Condominium Association***, Nevada Real Estate Division Case No. 12-27 (April 20, 2012);

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

DATED July 9, 2012.

Patrick J. Reilly, Esq.
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Howard Hughes Properties

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

A-11-647850-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	COURT MINUTES	July 12, 2012

A-11-647850-B Ikon Holdings LLC, Plaintiff(s)
vs.
Horizon at Seven Hills Homeowners Association, Defendant(s)

July 12, 2012 3:00 AM **Motion For Reconsideration**

HEARD BY: Denton, Mark R. COURTROOM: RJC Courtroom 12A

COURT CLERK: Linda Denman

JOURNAL ENTRIES

- MINUTE ORDER

Pursuant to EDCR 2.23(c), the Court DENIES Defendant s Motion For C Reconsideration Of Order Granting Summary Judgment On Claim Of Declaratory Relief, without oral argument. The Court ORDERS such motion removed from its Civil Law and Motion Calendar of July 16, 2012.

Plaintiffs' counsel to submit a proposed order consistent with the foregoing.

IT IS SO ORDERED.

Attorneys/Parties:
Patrick J. Reilly, Esq.
Nicole E. Lovelock, Esq.
(HOLLAND & HART LLP)
Fax: 702-669-4650

James R. Adams, Esq.
Assly Sayyar, Esq.
(ADAMS LAW GROUP, LTD.)
Fax: 702-838-3636

Puoy K. Premsrirut, Esq.
(PUOY K. PREMSRIRUT, ESQ. INC.)

A-11-647850-B

Fax: 702-385-1752

Kurt Bonds, Esq.
Eric Hinckley, Esq.
(ALVERSON TAYLOR MORTENSEN & SANDERS)
Fax: 702-385-7000

Electronically Filed
07/25/2012 01:55:22 PM

CLERK OF THE COURT

NEOJ
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Avenue Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawgroup.com
assly@adamslawgroup.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

ADAMS LAW GROUP, LTD.
8010 W. SAHARA AVE. STE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

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

/ / /

/ / /

/ / /

/ / /

Notice of Entry of Order to was entered in the above referenced matter.

Dated this 24 day of July, 2012.

ADAMS LAW GROUP, LTD
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Ave. Ste. 260
Las Vegas, NV 89117

ADAMS LAW GROUP, LTD.
8010 W. SAHARA AVENUE, SUITE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

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 26th day of July 2012.

An employee of Adams Law Group, Ltd.

ADAMS LAW GROUP, LTD.
8010 W. SAHARA AVE. SUITE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

ORD
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave. Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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

ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave. Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
~~(702) 385-1752 Fax~~
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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(2) without regard to super-priority.

IT IS SO ORDERED.

7/19/12

DISTRICT COURT JUDGE Date

Submitted by:

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ADAMS LAW GROUP, LTD.
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
Tel: 702-838-7200
Fax: 702-838-3600
james@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax

ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

Not Approved
Patrick Reilly, Esq.
Holland and Hart
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134
preilly@hollandhart.com
Attorney for Defendant

Eric Hinckley, Esq.
Alverson Taylor Mortensen and Sanders
7401 W. Charleston Blvd.
Las Vegas, NV 89117-1401
Office: 702.384.7000
Fax: 702.385.7000
Ehinckley@AlversonTaylor.com
Attorney for Defendant

Electronically Filed
07/27/2012 12:03:32 PM

CLERK OF THE COURT

NEOJ
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Avenue Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawgroup.com
assly@adamslawgroup.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

ADAMS LAW GP LTD.
8010 W. SAHARA AV. SUITE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

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 24th day of July 2012, the attached

/ / /

/ / /

/ / /

/ / /

Notice of Entry of Order to was entered in the above referenced matter.

Dated this 27 day of July, 2012.

ADAMS LAW GROUP, LTD
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Ave. Ste. 260
Las Vegas, NV 89117

ADAMS LAW GROUP, LTD.
8010 W. SAHARA AVENUE, SUITE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

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 27th day of July 2012.

Toni Arnold
An employee of Adams Law Group, Ltd.

ADAMS LAW GROUP, LTD.
8010 W. SAHARA AV. SUITE 260
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

ORD
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave. Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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-B Dept: No. 13 ORDER

This matter came before the Court on 7/12/2012, in chambers, on Defendant s Motion For Reconsideration Of Order Granting Summary Judgment On Claim Of Declaratory Relief. The Court, having reviewed the briefs and papers in this matter, for good cause hereby orders, adjudges and decrees:

That for the reasons particularly stated in Plaintiff's Opposition to Motion to Reconsideration, and pursuant to EDCR 2.23(c), the Court DENIES Defendant s Motion For Reconsideration Of Order Granting Summary Judgment On Claim Of Declaratory Relief, without oral argument.

ORD

ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave. Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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-B Dept: No. 13 ORDER

This matter came before the Court on 7/12/2012, in chambers, on Defendant s Motion For Reconsideration Of Order Granting Summary Judgment On Claim Of Declaratory Relief. The Court, having reviewed the briefs and papers in this matter, for good cause hereby orders, adjudges and decrees:

That for the reasons particularly stated in Plaintiff's Opposition to Motion to Reconsideration, and pursuant to EDCR 2.23(c), the Court DENIES Defendant s Motion For Reconsideration Of Order Granting Summary Judgment On Claim Of Declaratory Relief, without oral argument.

The Court further ORDERS such motion removed from its Civil Law and Motion Calendar of July 16, 2012.

IT IS SO ORDERED.

7/23/18

DISTRICT COURT JUDGE Date

PM

Submitted by:

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
ADAMS LAW GROUP, LTD.
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
Tel: 702-838-7200
Fax: 702-838-3600
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

A-11-647850-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	COURT MINUTES	February 19, 2013

A-11-647850-B Ikon Holdings LLC, Plaintiff(s)
vs.
Horizon at Seven Hills Homeowners Association, Defendant(s)

February 19, 2013 **2:00 PM** **Calendar Call**

HEARD BY: Denton, Mark R. COURTROOM: RJC Courtroom 12A

COURT CLERK: Linda Denman

RECORDER: Cynthia Georgilas

PARTIES PRESENT:

Adams, James R.	Attorney for Plaintiff
Hinckley, Eric W.	Attorney for Defendant
Premsrirut, Puonyarat K.	Attorney for Plaintiff

JOURNAL ENTRIES

- At CALENDAR CALL, Counsel announced ready to proceed with Bench Trial. Due to a narrowing of the issues, Mr. Adams advised and opposing Counsel concurred that the trial should only take one-half (1/2) day. Colloquy on submitting matter on trial briefs. Court directed Counsel to file their pre-trial memorandums by close of business on Friday, March 8, 2013 and offered that if they would like a settlement conference, to see the Department's JEA.

3/12/2013 AT 9:00AM BENCH TRIAL

Electronically Filed
03/11/2013 01:44:05 PM

CLERK OF THE COURT

JPTM
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8681 W. Sahara Ave., Suite 280
Las Vegas, NV 89117
(702) 838-7200 Tel.
(702) 838-3636 Fax
Attorney for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
Attorneys for Plaintiff

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-B Dept: No. 13 **JOINT PRE TRIAL MEMORANDUM**

COMES NOW, Plaintiff IKON HOLDINGS, LLC., and Defendant HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, by and through their attorneys of record, and hereby submit their Joint Pre Trial Memorandum pursuant to EDCR 2.67.

I.

NATURE OF THE CASE

A. **PLAINTIFF'S VIEW:** Plaintiff brought suit alleging violation of NRS 116.3116(2) and

violation of covenants, conditions and restrictions by Defendant homeowners' association by allegedly over charging Plaintiff's incurred lien amounts pursuant to Defendant's statutory homeowners' association lien. Plaintiff prevailed in its Motion for Summary Judgment for Declaratory Relief on NRS 116.311(2). Plaintiff also prevailed on its Motion for Summary Judgment that CC&Rs do not violate or exceed the statutes and are more narrow. Defendant denies these allegations and raises affirmative defenses.

B. DEFENDANT'S VIEW:

Plaintiff brought suit alleging violation of NRS 116.3116(2) and breach of contract claims pursuant to alleged violation of covenants, conditions and restrictions by Defendant homeowners' association, by allegedly over charging Plaintiff lien amounts pursuant to Defendant's statutory homeowners' association lien. Defendant denies these allegations and raises affirmative defenses. Defendant prevailed on its Countermotion for Summary Judgment on the following causes of action: Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Violation of NRS 116.3116; Negligent Misrepresentation; and Breach of Fiduciary Duty.

II.

CLAIMS FOR RELIEF REMAINING

A. PLAINTIFF:

1. Injunctive Relief;
2. Declaratory Relief.

III.

AFFIRMATIVE DEFENSES

A. DEFENDANT:

1. The incident alleged in the Complaint, and the resulting damage, if any, to Plaintiff, was proximately caused or contributed to by the Plaintiff's own negligence, and such negligence was greater than the negligence, if any, of this Defendant.
2. Defendant alleges that the occurrence referred to in the Complaint, and all

injuries and damages, if any, resulting therefrom, were caused by the acts or omissions of a third party or parties over whom this Defendant has no control.

3. All risks and dangers involved in the factual situation described in the Complaint were open, obvious and known to Plaintiff, and said Plaintiff voluntarily assumed said risks and dangers.

4. Plaintiff s Complaint on file herein fails to state a claim against this Defendant upon which relief can be granted.

5. Defendant alleges that recovery of unlimited punitive or exemplary damages is barred because N.R.S. Chapter 42, as amended, denies this Defendant equal protection of the law under Article Four, Section Twenty of the Nevada Constitution, and the Fourteenth Amendment to the United States Constitution.

6. Defendant alleges that any award of punitive or exemplary damages in this action is barred as excessive, as the product of bias or passion and/or by proceedings lacking sufficient guidelines andlor the basic elements of fundamental fairness, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article One, Section Eight, of the Nevada Constitution.

7. Plaintiff has failed to plead any acts or omissions of Defendant sufficient to warrant consideration of exemplary or punitive damages.

8. Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendant's Answer, and therefore, Defendant reserves the right to amend its Answer to allege additional affirmative defenses if subsequent investigation warrants.

9. The Plaintiff failed to mitigate its damages and may not recover from Defendant herein.

10. The Plaintiff has unclean hands and is barred from recovery herein.

11. The Plaintiff is estopped from asserting a claim against Defendant herein.

12. The Plaintiff has waived any right to a claim against Defendant that may have

existed.

13. The Plaintiffs claims are barred pursuant to the Doctrine of Laches.

IV.

CLAIMS OR DEFENSES ABANDONED

A. PLAINTIFF:

None.

B. DEFENDANT:

None.

V.

PROPOSED AMENDMENTS TO THE PLEADINGS

A. PLAINTIFF:

None at this time.

B. DEFENDANT:

None at this time.

VI.

EXHIBITS

A. PLAINTIFF

1. Horizons at Seven Hills Declaration. Bates No. 1001-1049.
2. Hawley McIntosh Grant, Bargain and Sale Deed. Bates No. 1050-1055.
3. Hawley McIntosh Deed of Trust. Bates No. 1056-1086.
4. Hawley McIntosh Notice of Default. Bates No. 1087-1088.
5. Horizons at Seven Hills Notice of Default. Bates No. 1089-1090.
6. Trustee's Deed. Bates No. 1091-1095.
7. Quit Claim Deed. Bates No. 1096-1099.
8. Notice of Delinquent Assessment Lien. Bates No. 1100.
9. NAS Demand and Spreadsheet. Bates No. 1101-1103.
10. Horizons at Seven Hills Notice of Default. Bates No. 1104-1105.
11. NAS Spreadsheet, as of December 28, 2012.

12. Ikon Holdings, LLC's payment record.

B. DEFENDANT

1. Declaration of Covenants, Conditions & Restrictions and Reservation of Easements for Horizons at Seven Hills, dated July 6, 2005, bates stamped 1001-1049.
2. Grant, Bargain and Sale Deed from Goose Development, LLC to Hawley McIntosh, dated September 15, 2005, bates stamped 1050-1055.
3. Deed of Trust for Hawley McIntosh, dated September 15, 2005, bates stamped 1056-1086.
4. Notice of Default and Election to Sell Under Deed of Trust, dated June 3, 2009, bates stamped 1087-1088.
5. Notice of Default and Election to Sell Under Homeowners Association Lien, dated July 28, 2009, bates stamp 1089-1090.
6. Trustee's Deed Upon Sale to Scott Ludwig, dated July 6, 2010, bates stamped 1091-1095.
7. Quit Claim Deed from Scott Ludwig to Ikon Holdings, LLC, dated July 14, 2010, bates stamped 106-1099.
8. Notice of Delinquent Assessment Lien, dated September 28, 2010, bates stamped 1100.
9. NAS Demand and spreadsheet, dated October 18, 2010, bates stamped 1101-1103
10. Notice of Default and Election to Sell Under Homeowners Association Lien, dated November 16, 2010, bates stamped 1104-1105.
11. NAS Spreadsheet, as of December 28, 2012.
12. Ikon Holdings, LLC's payment record.
13. Consent and Authorization for Nevada Association Services, dated September 2, 2009.
14. Consent and Authorization for Nevada Association Services, dated October 8, 2007.

15. Clark County Assessor print out for the property located at 950 Seven Hills Drive #1411, dated May 12, 2009

16. Letter to Hawley McIntosh from Nevada Association Services, dated June 2, 2009.

17. Letter to Hawley McIntosh from Nevada Association Services, dated June 19, 2009.

18. Notice of Delinquent Assessment Lien for parcel number 177-35-610-137, dated June 15, 2009.

19. Facsimile coversheet to Nevada Association Services from Stacy Aune, dated June 15, 2009

20. Notice required by the Fair Debt Collection Practice Act, dated June 11, 2009

21. Servicemembers Civil Relief Act Notification, dated June 15, 2009

22. Letter to Hawley McIntosh from Nevada Association Services, dated July 10, 2009.

23. Horizons at Seven Hills Financial Transactions Report for Unit 1411, dated July 24, 2009.

24. Ten Day Letter for Homeowners from North American Title Company for Unit 1411.

25. Letter to Horizons at Seven Hills from Nevada Association Services, dated September 14, 2009.

26. Notice of Trustee's Sale for parcel number 177-35-610-137, dated September 4, 2009.

27. Email to Jennifer Peace from Angie Kluska, dated January 22, 2010.

28. Letter to Horizons at Seven Hills from Nevada Association Services, dated June 3, 2010.

29. Notice of Trustee's Sale for parcel number 177-35-610-137.

30. Clark County Assessor print out for the property located at 950 Seven Hills Drive #1411, dated August 2, 2010.

31. Nevada Association Services Request for Payment Plan form.

32. First American Title Insurance Company Report, dated November 23, 2010.

33. Letter to Horizons at Seven Hills from Nevada Association Services, dated July 1, 2009.

34. Letter to Ikon Holdings, LLC from Nevada Association Services, dated August 25, 2010.

35. Notice of Delinquent Assessment Lien for parcel #177-35-610-137, dated August 16, 2010.

36. Release of Notice Delinquent Assessment Lien for parcel #177-35-610-137, dated August 25, 2010.

37. Letter to 'Whom it may concern' from Konnel Peterson.

38. Letter to Ikon Holdings, LLC from Nevada Association Services, dated September 20, 2010.

39. Horizons at Seven Hills Financial Balance Sheet for account t0016551 with outstanding balance of $5,651.14.

40. Letter to Ikon Holdings, LLC from Nevada Association Services, dated October 14, 2010.

41. Letter to Ikon Holdings, LLC from Nevada Association Services, dated November 3, 2010.

42. Horizons at Seven Hills HOA Financial Transaction Report, dated May 25, 2011.

43. Horizons at Seven Hills HOA Ledger for account t0016551, dated May 7, 2009.

44. Horizons at Seven Hills HOA Ledger for account t0016551, dated June 30, 2009.

45. Current NAS spreadsheet.

VII.

LIMITATION OR EXCLUSION OF EVIDENCE

A. PLAINTIFF :

While Plaintiff assumes that many of the exhibits proposed by all parties will overlap and be the same, to the extent there are any proposed that are not duplicative, Plaintiff preserves all

relevant evidentiary objections until such time as Defendant can see the actual exhibits to be proffered. Plaintiff further preserves all relevant and applicable evidentiary objections to testimony that may be proffered at trial to written statements in lieu of testimony and/or witness testimony.

B. DEFENDANT:

While Defendant assumes that many of the exhibits proposed by all parties will overlap and be the same, to the extent there are any proposed that are not duplicative, Defendant preserve all relevant evidentiary objections until such time as Defendant can see the actual exhibits to be proffered. Defendant further preserves all relevant and applicable evidentiary objections to testimony that may be proffered at trial to written statements in lieu of testimony and/or witness testimony.

VIII.

WITNESSES

A. PLAINTIFF:

1. Person(s) Most Knowledgeable of IKON HOLDINGS, LLC, a Nevada limited liability company
c/o Adams Law Group, Ltd.
8330 W. Sahara Ave., Suite 290
Las Vegas, Nevada 89117

2. Konnel Peterson
c/o Adams Law Group, Ltd.
8330 W. Sahara Ave., Suite 290
Las Vegas, Nevada 89117

3. Person(s) Most Knowledgeable of HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION
c/o Kurt Bonds, Esq.
Alverson Taylor Mortensen and Sanders
7401 W. Charleston Blvd.
Las Vegas, NV 89117-1401
Office: 702.384.7000
Fax: 702.385.7000

B. DEFENDANT:

1. Jordan Betten
Horizons at Seven Hills HOA
c/o Kurt Bonds, Esq.
Alverson, Taylor, Mortensen & Sanders
7401 West Charleston Blvd.
Las Vegas, NV 89117

2. Gary Anadolian
Horizons at Seven Hills HOA
c/o Kurt Bonds, Esq.
Alverson, Taylor, Mortensen & Sanders
7401 West Charleston Blvd.
Las Vegas, NV 89117

3. Alma Curtis
Horizons at Seven Hills HOA
c/o Kurt Bonds, Esq.
Alverson, Taylor, Mortensen & Sanders
7401 West Charleston Blvd.
Las Vegas, NV 89117

4. Konnel Peterson
c/o James R. Adams, Esq.
Adams Law Group
8010 W. Sahara Ave., Suite 260
Las Vegas, NV 89117

5. Debbie Kluska
Nevada Association Services
6224 W. Desert Inn Road
Las Vegas, Nevada 89146

IX.

PRINCIPAL ISSUES OF CONTESTED LAW

A. PLAINTIFF:

The issue before this Court is that even though the Super Priority Lien can include many things like assessments, fines, fees, and collection costs, is there a cap on the Super Priority Lien, or is Super Priority Lien completely limitless. In other words, to what extent does the Super Priority Lien exist (is there a cap)? That after the foreclosure by a first mortgage lender of a unit located within a homeowners' association, pursuant to NRS 116.3116 the monetary limit of a homeowners' association's statutory lien on said unit which can survive extinguishment by the foreclosure auction is limited to only 9 times the monthly assessment amount plus external unit repair costs. In other words, the "super priority lien amount" is capped at a maximum amount equal to 9 times the monthly assessments (6 times prior to October 1, 2009) plus exterior unit repair costs; and that pursuant to NRS116.3116 a "super priority lien" does not exist in the absence of a homeowners' association's having filed a complaint with the court to enforce the lien, i.e., the institution of a civil action as defined by Nevada Rules of Civil Procedure 2 and 3. This honorable Court has already

ruled in favor of Plaintiff on this issue. Thus, the sole remaining issue remaining for the trier of fact is to ascertain damages, and award of attorneys fees.

B. DEFENDANTS:

Pursuant to the Court's decision, dated March 12, 2012, the first 5 causes of action were decided in favor of Defendant. The only remaining contested issue is a determination from the Court regarding the dollar amount of the Super Priority Lien.

IX.

TIME OF TRIAL

1 day.

X.

ALL OTHER MATTERS

None.

Dated this 11th day of March, 2013.

ADAMS LAW GROUP, LTD.

/s/ James Adams
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
8330 W. Sahara Ave., Suite 290
Las Vegas, Nevada 89117
(702) 838-7200 Tel.
(702) 838-3636 Fax
Attorneys for Plaintiff

Dated this 11th day of March, 2013.

ALVERSON,TAYLOR, MORTENSEN & SANDERS

/s/ Eric Hinckley
KURT BONDS, ESQ.
Nevada Bar No. 6228
ERIC HINCKLEY, ESQ.
Nevada Bar No. 12398
7401 W. Charleston Blvd.
Las Vegas, NV 89117
Attorneys for Defendant

Dated this 11th day of March, 2013.

PUOY K. PREMSRIRUT, ESQ., INC.

/s/ Puoy Premsrirut
PUOY K. PREMSRIRUT, ESQ., INC.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
Attorneys for Plaintiff

Dated this 11th day of March, 2013.

HOLLAND AND HART

/s/ Patrick Reilly
PATRICK REILLY, ESQ.
Nevada Bar No. 6103
9555 Hillwood Dr., Second Floor
Las Vegas, NV 89134
Attorneys for Defendant

IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

v.

IKON HOLDINGS, LLC, a Nevada limited liability company,

Respondent.

Supreme Court No. 63178

District Court Case No. A-11-647850-B

APPELLANT'S APPENDIX

VOLUME 9 OF 11

Patrick J. Reilly, Esq.
Nevada Bar No. 6103
Nicole E. Lovelock, Esq.
Nevada Bar No. 11187
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
(702) 669-4600

Kurt R. Bonds, Esq.
Nevada Bar No. 6228
ALVERSON, TAYLOR, MORTENSEN & SANDERS
7401 West Charleston Boulevard
Las Vegas, Nevada 89117
(702) 384-7000

Attorneys for Appellant
Horizons at Seven Hills Homeowners Association

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

6481389_1

Ex.	Pleading	Date	Vol.	Pages
2	Answer to Complaint	11/3/2011	I	0099-0105
16	Appendix of Exhibits to Defendant's Motion for Clarification or, in the alternative, for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	2/6/2012	V	1002-1172
7	Business Court Order	12/8/2011	IV	0781-0785
1	Complaint	9/6/2011	I	0001-0098
49	Correspondence dated 3/28/13 re: Proposed Final Judgment	4/10/2013	X	2114-2140
10	Court Minutes: Decision re: Plaintiff's Motion for Partial Summary Judgment & Defendant's Countermotion	12/16/2011	IV	0833-0834
9	Court Minutes: All Pending Motions	12/12/2011	IV	0831-0832
27	Court Minutes: All Pending Motions	3/12/2012	VII	1538-1539
34	Court Minutes: All Pending Motions	5/7/2012	VIII	1755
38	Court Minutes: All Pending Motions	6/11/2012	IX	1888
63	Court Minutes: All Pending Motions	6/3/2013	XI	2464
48	Court Minutes: Bench Trial	3/12/2013	X	2112-2113
46	Court Minutes: Calendar Call	2/19/2013	IX	2101
30	Court Minutes: Decision	3/28/2012	VII	1550
40	Court Minutes: Decision	6/22/2012	IX	1893
11	Court Minutes: Mandatory Rule 16 Conference	1/9/2012	IV	0835-0836
25	Court Minutes: Minute Order	3/7/2012	VII	1511-1512
64	Court Minutes: Minute Order – Decisions re: 6/3/13 Motion for Attorney Fees and Costs	6/28/2013	XI	2465
43	Court Minutes: Motion for Reconsideration	7/12/2012	IX	2081-2082
60	Court Minutes: Motion to Retax	5/28/2013	XI	2427
29	Decision	3/28/2012	VII	1547-

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

				1549
39	Decision	6/22/2012	IX	1889-1892
65	Decision	6/28/2013	XI	2466-2470
56	Defendant's Case Appeal Statement	5/8/2013	X	2328-2331
70	Defendant's Case Appeal Statement	9/5/2013	XI	2505-2508
15	Defendant's Motion for Clarification or, in the alternative, for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	2/6/2012	V	0975-1001
37	Defendant's Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	6/8/2012	VIII-IX	1774-1887
52	Defendant's Motion to Retax Costs	4/25/2013	X	2173-2186
69	Defendant's Notice of Appeal and Notice of Related Case	9/5/2013	XI	2485-2504
55	Defendant's Notice of Appeal and Notice of Related Cases	5/8/2013	X	2253-2327
57	Defendant's Notice of Filing Cost Bond on Appeal	5/10/2013	X	2332-2337
59	Defendant's Opposition to Motion for Attorney's Fees and Costs	5/24/2013	XI	2377-2426
5	Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Summary Judgment	11/30/2011	III-IV	0544-0756
18	Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion for Summary Judgment	2/14/2012	VI-VII	1181-1433
33	Defendant's Opposition to Plaintiff's Third Motion for Summary Judgment / Countermotion for Summary Judgment	4/25/2012	VIII	1668-1754
23	Defendant's Reply In Support of Motion for Clarification or, in the alternative, Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	3/6/2012	VII	1486-1507

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

42	Defendant's Reply in Support of Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	7/9/2012	IX	1952-2080
36	Defendant's Reply Memorandum in Support of Countermotion for Summary Judgment	6/4/2012	VIII	1766-1773
22	Defendant's Reply to Plaintiff's Opposition to Defendant's Counter-Motion for Summary Judgment	3/6/2012	VII	1477-1485
50	Final Judgment	4/11/2013	X	2141-2168
53	Final Judgment	5/1/2013	X	2187-2212
17	Joint Case Conference Report	2/10/2012	VI	1173-1180
47	Joint Pre-Trial Memorandum	3/11/2013	IX	2102-2111
68	Judgment	8/18/2013	XI	2481-2484
54	Motion for Attorney Fees and Costs	5/2/2013	X	2213-2252
66	Order Denying Motion to Retax Costs	7/3/2013	XI	2471-2475
32	Order Denying Plaintiff's Motion for Summary Judgment/Order Granting Defendant's Countermotion for Summary Judgment	4/16/2012	VIII	1661-1667
71	Order for Return of Monies on Deposit	9/9/2013	XI	2509-2510
28	Order re: Defendant's Motion for Clarification	3/16/2012	VII	1540-1546
45	Order re: Defendant's Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	7/24/2012	IX	2095-2100
67	Order re: Plaintiff's Motion for Attorney Fees and Costs and Defendant's Motion to Retax Costs	7/23/2013	XI	2476-2480
14	Order re: Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief	1/19/2012	V	0967-0974

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

	and Defendant's Counter Motion for Summary Judgment on Claim of Declaratory Relief			
44	Order re: Plaintiff's Motion for Summary Judgment on Declaratory Relief and Defendant's Counter-Motion for Summary Judgment	7/20/2012	IX	2083-2094
13	Order re: Rule 16 Conference	1/18/2012	V	0964-0966
24	Order Setting Civil Non-Jury Trial and Calendar Call	3/6/2012	VII	1508-1510
51	Plaintiff's Memorandum of Costs and Disbursements	4/16/2013	X	2169-2172
4	Plaintiff's Motion for Partial Summary Judgment on Issue of Declaratory Relief	11/7/2011	I-III	0108-0543
12	Plaintiff's Motion for Summary Judgment	1/16/2012	IV-V	0837-0963
31	Plaintiff's Motion for Summary Judgment on Issue of Declaratory Relief	3/30/2012	VII-VIII	1551-1660
19	Plaintiff's Opposition to Motion for Clarification or in the alternative for Reconsideration of Order Granting Summary Judgment	2/27/2012	VII	1434-1472
41	Plaintiff's Opposition to Motion for Reconsider [sic] of Order Granting Summary Judgment on Claim of Declaratory Relief	6/27/2012	IX	1894-1951
58	Plaintiff's Opposition to Motion to Retax Costs	5/23/2013	X-XI	2338-2376
62	Plaintiff's Reply to Opposition to Motion for Attorney Fees and Costs	5/29/2013	XI	2444-2463
35	Plaintiff's Reply to Opposition to Motion for Partial Summary Judgment on Issue of Declaratory Relief & Opposition to Counter Motion for Summary Judgment	5/18/2012	VIII	1756-1765
3	Plaintiff's Request to Transfer to Business Court	11/4/2011	I	0106-0107
61	Plaintiff's Supplement to Memorandum of Costs and Disbursements	5/29/2013	XI	2428-2443
26	Recorder's Transcript of Proceedings: Plaintiff's Motion for Summary	3/12/2012	VII	1513-1537

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

	Judgment/Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Countermotion for Summary Judgment			
6	Reply to Opposition to Motion for Partial Summary Judgment on Issue of Declaratory Relief & Opposition to Counter Motion for Summary Judgment	12/7/2011	III-IV	0757-0780
21	Scheduling Memo	2/28/2012	VII	1476
20	Scheduling Order	2/28/2012	VII	1473-1475
8	Transcript of Proceedings: Motions	12/12/2011	IV	0786-0830

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

165. In each instance, including but not limited to those as listed on the attached False Claim Spreadsheet, Plaintiff paid out to Defendant HOAS and the Debt Collectors, or reimbursed the MBS Trusts monies based upon Defendant HOAS' and the Debt Collectors' false claims.

166. For each claim submitted to Fannie Mae and Freddie Mac (as principals and as guarantor and master servicer of the mortgage loans of the MBS Trusts,) and submitted to HUD based upon Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts, Defendant HOAS and Debt Collectors knowingly caused a false claim to be presented to Plaintiff within the meaning of 31 U.S.C. § 3729(a)(l).

167. For each such false claim to Plaintiff for the Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts, Defendant HOAS and Debt Collectors knew, wilfully blinded themselves, and/or recklessly failed to discover that the Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts were false and ineligible for payment by Plaintiff.

168. Defendant HOAS and Debt Collectors therefore knew that the claim and statement was false or fraudulent within the meaning of 31 U.S.C. §3729(b), and caused the submission of that false claim within the meaning of § (a)(l) and the making of a false certification within the meaning of § (a)(2).

169. Further, Defendant HOAS, being the principal of their agents, the Debt Collectors, acted in concert with the Debt Collectors, and intended to accomplish the unlawful objective as described supra for the purpose of harming the Plaintiff. Therefore, Defendant HOAS and Debt Collectors violated 31 U.S.C. §3729(a)(1)(c).

170. Defendant HOAS and Debt Collectors are liable in this action for civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Plaintiff sustained because of the acts as described herein.

ADAMS LAW GROUP, LTD.
8329 W. SAHARA AVENUE, SUITE 290
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

ADAMS LAW GRG LTD.
8330 W. SAHARA AVENUE, SUITE 290
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

COUNT III: VIOLATIONS OF 31 U.S.C. § 3729

(False Claims of Insured Lenders)

171. Relators incorporate each and every paragraph of this complaint as though fully set forth herein.

172. Relators seek a recovery on behalf of the United States, for all false insurance claims submitted to the FHA or HUD for each property identified on the HUD REO Property Spreadsheet which said false insurance claims includes the Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts.

173. In each instance when the Insured Lender submitted such false insurance claims for properties located within Defendant HOAS, including but not limited to those identified on the HUD REO Property Spreadsheet, Plaintiff paid out to the Insured Lender insurance proceeds based upon the Insured Lenders' false insurance claims.

174. For each false insurance claim submitted to the FHA or HUD based upon Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts, the Insured Lenders knowingly caused a false claim to be presented to Plaintiff within the meaning of 31 U.S.C. § 3729(a)(l).

175. Because the Insured Lenders required and retained copies of the Defendant HOAS' CC&RS during the loan underwriting process and because the Insured Lenders are charged with knowledge of the law, the Insured Lenders knew or should have known that provisions of the CC&RS and the Nevada Revised Statutes do not permit the collection by the Defendant HOAS of the Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts.

176. Therefore, for each such false insurance claim submitted to Plaintiff for the Non-Incurred Collection Charges, Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts, the Insured Lenders knew, wilfully blinded themselves, and/or recklessly failed to discover that the Non-Incurred Collection Charges,

Fraudulent Lien Costs, Fraudulent Lien Release Costs, Excessive Super Priority Lien Amounts, and Excessive CC&R Amounts were false and ineligible for payment by Plaintiff.

177. The Insured Lenders therefore knew that the insurance claims were false or fraudulent within the meaning of 31 U.S.C. §3729(b), and caused the submission of the false claims within the meaning of § (a)(l) and the making of a false certification within the meaning of § (a)(2).

178. The Insured Lenders are liable in this action for civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Plaintiff sustained because of the acts as described herein.

WHEREFORE, the UNITED STATES of AMERICA on relation of JAMES R. ADAMS and PUOY K. PREMSRIRUT respectfully demand judgement against Defendant Seller/Servicers, Defendant HOAS, Defendant Debt Collectors and Defendant Insured Lenders awarding treble the damages to the government, a penalty of $10,000 for each false claim, all attorneys fees and costs incurred in pursuing this action and any and all other relief which the Court deems proper. Relators further respectfully demands that the Court award them 30% of any recovery to the government in this suit.

DATED this 29 day of July, 2011.

ADAMS LAW GROUP, LTD.

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8330 W. Sahara Ave. Suite 290
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys/Relators

ADAMS LAW GROUP, LTD.
8330 W. SAHARA AVENUE, SUITE 290
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

EXHIBIT "E"

DANIEL G. BOGDEN
United States Attorney

HOLLY A. VANCE
Assistant United States Attorney
100 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 784-5438
Facsimile: (775) 784-5181

JOHN WARSHAWSKY
Trial Attorney
U.S. Department of Justice
Commercial Litigation Branch
Civil Division, Fraud Section
601 D Street, Room 9132
Washington, D.C. 20004
Telephone: (202) 305-3829
Facsimile: (202) 305-7797

Attorneys for United States

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA *ex rel.* JAMES R. ADAMS, et al.,

Plaintiff,

vs.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. 2:11-cv-00535-RLH-RJJ

UNITED STATES' NOTICE OF ELECTION TO DECLINE INTERVENTION

UNDER SEAL

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the United States notifies the Court of its decision not to intervene in this action.

Although the United States declines to intervene, we respectfully refer the Court to 31 U.S.C. § 3730(b)(1), which allows the relators, James R. Adams and Puoy K. Premsrirut, to maintain the action in the name of the United States, provided, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and

their reasons for consenting." Id. Therefore, in the event either the relators or any or all of the defendants subsequently propose that this action be dismissed, settled, or otherwise discontinued, we respectfully request that this Court solicit the written consent of the United States before ruling or granting its approval.

Furthermore, pursuant to 31 U.S.C. § 3730(c)(3), the United States requests that all pleadings filed in this action be served upon the United States and that orders entered by the Court be sent to the undersigned Government's counsel. The United States reserves its right to order any deposition transcripts; subsequently to intervene in this action, for good cause, at a later date; and to seek the dismissal of the relators' action. The United States further requests that it be served with all notices of appeal.

Finally, the Government requests that the relators' Complaint, the relators' First Amended Complaint, this Notice, and the attached proposed Order be unsealed. The United States requests that all other documents on file in this action remain under seal and not be made public or served upon any of the defendants.

A proposed order accompanies this notice.

DATED this 10th day of April, 2012.

Respectfully submitted,

/s/ John Warshawsky

John Warshawsky (D.C. Bar No. 417170)[1]
Trial Attorney
U.S. Department of Justice

[1] John Warshawsky is a Trial Attorney with the U.S. Department of Justice, Civil Division, Fraud Section, which is primarily responsible for handling this matter. On June 3, 2011, this Court granted a motion to admit Mr. Warshawsky to practice before this Court for this matter. Order (June 3, 2011) (Dkt. No. 4) (under seal).

Commercial Litigation Branch
Civil Division
601 D Street, N.W., Room 9132
Washington, D.C. 20004
Telephone: (202) 305-3829
Facsimile: (202) 305-7797
E-mail: john.warshawsky@usdoj.gov

Certificate of Service

I hereby certify that on April 10, 2012, a copy of the foregoing "UNITED STATES' NOTICE OF ELECTION TO DECLINE INTERVENTION" was mailed, postage prepaid and first class, to the following:

James R. Adams, Esq.
8010 West Sahara Avenue, Suite 260
Las Vegas, Nevada 89117

Puoy K. Premsrirut, Esq.
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

/s/ John Warshawsky

EXHIBIT "F"

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA *ex rel.* JAMES R. ADAMS, et al.,

Plaintiff,

vs.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. 2:11-cv-00535-RLH-RJJ

[PROPOSED] ORDER

The United States having declined to intervene in this action, pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court rules as follows:

IT IS ORDERED that,

1. The seal in this case is lifted as to the following documents:

   a. Complaint;

   b. First Amended Complaint;

   c. United States' Notice of Election to Decline Intervention;

   d. This Order; and

   e. Except as subsequently ordered, all prospective pleadings and other documents filed in this case.

2. All other documents on file in this matter as of the date of this Order shall remain under seal and shall not be made public or served upon any of the defendants.

3. The seal be lifted as to all other matters occurring in this action after the date of this Order.

4. The parties shall serve all pleadings and motions filed in this action, including supporting memoranda, and notices of all appeals, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). Service shall be made upon the United States by mailing a copy of the

pleading or motion to the following counsel:

John Warshawsky
Trial Attorney
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
601 D Street, N.W., Room 9132
Washington, D.C. 20004
Telephone: (202) 305-3829
Facsimile: (202) 305-7797
E-mail: john.warshawsky@usdoj.gov

5. The United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time.

6. All orders of this Court shall be sent to the United States.

7. In the event either the relators or any or all of the defendants subsequently propose that this action be dismissed, settled, or otherwise discontinued, the Court will instruct the parties to solicit the written consent of the United States before ruling or granting its approval.

IT IS SO ORDERED,

This 23 day of April, 2012.

Peggy L. Hunt
U.S. District Judge

A-11-647850-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	COURT MINUTES	June 11, 2012

A-11-647850-B Ikon Holdings LLC, Plaintiff(s)
vs.
Horizon at Seven Hills Homeowners Association, Defendant(s)

June 11, 2012 9:00 AM All Pending Motions

HEARD BY: Denton, Mark R. COURTROOM: RJC Courtroom 12A

COURT CLERK: Linda Denman

RECORDER: Cynthia Georgilas

PARTIES PRESENT: James Adams, Esq., and Puonyarat Premsrirut, Esq., for Plaintiff
Patrick Reilly, Esq., and Eric Hinckley, Esq., for Defendant

JOURNAL ENTRIES

-

DEFENDANT'S OPPOSITION TO PLAINTIFF'S THIRD MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION FOR SUMMARY JUDGMENT..... PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DECLARATORY RELIEF

Counsel argued as to the different between statutory and contractual liens and how extinguishment of assessments versus non-assessments differ and whether or not a recent Nevada Supreme Court ruling has any impact on the issues in this case.

COURT ORDERED motions TAKEN UNDER ADVISEMENT.

Electronically Filed
06/22/2012 12:36:11 PM

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company, Plaintiff(s), vs. HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Defendant(s).	CASE NO. A647850-B DEPT. NO. XIII Date: June 11, 2012 Time: 9:00 a.m.

DECISION

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 Countermotion for Summary Judgment, and 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;

NOW, THEREFORE, the Court decides the submitted issues as follows:

Plaintiff's Motion.

The Court considers that the subject statutory and CC&R provisions are to be read together.

The statute states what can be the subject of assessment liens, NRS 116.3116(1), and the extent of their priority *vis-a-vis* senior encumbrancers, NRS 116.3116(2), but the

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

liens are actually contractually created and perfected by the CC&Rs, NRS 116.3116(4), and they do not have to go to the extent that would otherwise be permissible by the statute as to what is assessed. NRS 116.3116(1). Where not in conflict, the CC&Rs are still applicable, but priority does not exist beyond the statutory ceiling.

These things being said, the Court is persuaded that Plaintiff is entitled to the declaratory relief sought on both the component and ceiling issues. *See* Order entered January 19, 2012. Accordingly, Plaintiff's Motion is GRANTED IN PART to the extent that it seeks the declarations posited at pages 3 and 4 of the Motion, numbered paragraphs 1-3.

However, in making this ruling, the Court does not mean to say that what can be claimed by Defendant as part of the claimed superpriority cannot include interest from the time the subject assessments become due. Nor is the Court ruling at this time that proceedings brought to enforce the components and ceiling of the superpriority lien would not be amenable to an award of attorneys' fees and costs otherwise provided by statute insofar as such proceedings are limited to collecting the applicable components up to the ceiling. NRS 18.010(2); NRS 116.3116(7); NRS 18.020. For those reasons, the Court is not extending its declaratory relief at this juncture to the specific monetary amounts later referenced in the Motion at pages 9 and 10

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

because it is not clear whether some of the amounts contested by Plaintiff therein would represent these latter aspects.

Defendant's Countermotion.

Defendant essentially maintains that the statutory and CC&R provisions are conceptually separate and that the latter can create components that transcend the statutory superpriority. The Court disagrees.

Defendant also maintains that the provisions of NRS 116.1206 are to the effect that lesser assessments called for by the CC&Rs are automatically elevated if they are inconsistent with what is permitted by NRS 116.3116. The Court disagrees on this point as well, as the language of subsection 1 of the former statute refers to any provision in the CC&Rs that "...violates the provisions of this chapter...[,]" and the Court determines that such language is used in the sense of attempting to claim assessments that exceed what the statute permits.

The Countermotion is thus DENIED.

Conclusion.

Counsel for Plaintiff is directed to submit a proposed order consistent with the foregoing and which sets forth the factual and legal underpinnings of the same in accordance herewith and with counsel's briefing and argument. Such proposed order should be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

litigate any disapproval through correspondence directed to the Court or to counsel with copies to the Court, any such disapproval should be the subject of motion practice following entry of order.

This Decision sets forth the Court's intended disposition on the subject, but it anticipates further order of the Court to make such disposition effective as an order or judgment.

DATED this 22nd day of June, 2022.

MARK R. DENTON
DISTRICT JUDGE

CERTIFICATE

I hereby certify that on or about the date filed, this document was e-served or a copy of this document was placed in the attorney's folder in the Clerk's Office or mailed to:

ADAMS LAW GROUP
Attn: James R. Adams, Esq.

BROWN, BROWN & PREMSRIRUT
Attn: Puoy K. Premsrirut, Esq.

HOLLAND & HART
Attn: Patrick J. Reilly, Esq.

ALVERSON, TAYLOR, MORTENSEN & SANDERS
Attn: Eric Hinckley, Esq.

Lorraine Tashiro

LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

A-11-647850-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	COURT MINUTES	June 22, 2012

A-11-647850-B Ikon Holdings LLC, Plaintiff(s)
vs.
Horizon at Seven Hills Homeowners Association, Defendant(s)

June 22, 2012 12:36 AM Decision

HEARD BY: Denton, Mark R. COURTROOM: Chambers

COURT CLERK: Linda Denman

JOURNAL ENTRIES

- This matter came before the Court on June 11, 2012, for hearing on PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DECLARATORY RELIEF and DEFENDANT'S COUNTERMOTION FOR SUMMARY JUDGMENT. Counsel presented their case and submitted to the Court, which took the matter under advisement.

DECISION: After careful consideration of the papers submitted and hearing arguments, Court issued its Decision this 22nd day of June, 2012. COURT ORDERED Plaintiff's Motion GRANTED IN PART and Defendant's Countermotion DENIED. See Court's Decision for full context.

Counsel for Plaintiff is directed to submit a proposed order consistent with the foregoing and which sets forth the factual and legal underpinnings of the same in accordance herewith and with counsel's briefing and argument.

Electronically Filed
06/27/2012 04:59:31 PM

CLERK OF THE COURT

OPPS
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave. Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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-B
Dept: No. 13

OPPOSITION TO MOTION FOR RECONSIDER OF ORDER GRANTING SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF

COMES NOW the Plaintiff, IKON HOLDINGS, LLC, by and through its counsel, James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut Esq., Inc., and file this Opposition. This Opposition is made based upon the following Points and Authorities and all other pleadings and papers on file herein.

Dated this 25th day of June, 2012.

ADAMS LAW GROUP, LTD.

/s/ James R. Adams
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
Tel: 702-838-7200
Fax: 702-838-3600

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant's Motion for Reconsideration is nothing more than a thinly veiled attempt to seek a rehearing of determinations in which it disfavored the outcome. Per well established Nevada law, a motion for reconsideration is only afforded in very rare circumstances in which substantially different evidence is introduced, or the decision is clearly erroneous. In its Motion, Defendant raises no new evidence nor proffers any showing of clear error. Instead, Defendant lodges an identical argument that it previously made to this Court in it Opposition to Motion for Declaratory Relief (Ex. 1, "Opps to Dec Relief"). In an almost verbatim reincarnation of the argument made in Defendant's Opps to Dec Relief at 11:25 - 14:14, in its Motion for Reconsideration Defendant once again hurls at this Court the patently false statement, "... that the CCICCH has explicitly rejected the notion that there is a numerical maximum for the super priority lien." Both in its Opps to Dec Relief and in the present Motion for Reconsideration, Defendant fails to inform this Court that the only question answered in the CCICCH Advisory Opinion was the following:

> May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments? *(Page 1 of Ex. C of Defendant's Motion for Reconsideration AND Page 1 of Ex. 4 of Defendant's Opps to Dec Relief)*

As already exhaustively argued in the original set of briefs, the CCICCH's conclusion that collection costs can be included within the Super Priority Lien is not disputed. Indeed, that is the very position that the Plaintiff takes. However, the question which the CCICCH did not answer (which was posed

to this Court) was even though fines, fees, penalties, interest, and collection costs can be included within the Super Priority Lien, does NRS 116.3116(2) set a maximum limit on what amount the Super Priority Lien can be? In short, while the Super Priority Lien can consist of many different types of charges, is there a limit to the Lien, or is there no limit to the Lien? The CCICCH did not answer that question. This Court did. This Court, consistent with every appellate and supreme court in the country that has addressed this issue, (not to mention Judge Gonzalez,) has read the plain language of NRS 116.3116(2) and ruled that:

> ... the phrase contained in NRS §116.3116(2) which states, " ... 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..." means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments.... 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.... Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 times the homeowners' association's regular monthly assessment amount.... (Ex. 2, Order at 4:17-5:4).

As it did in its Opps to Dec Relief, Defendant again uses nothing but dicta from the CCICCH's Advisory Opinion to make grand and incorrect conclusions of what the CCICCH opined. Indeed, as pointed out in Plaintiff's Reply to Opps to Dec Relief (and as will be again pointed out below), there is significant dicta in the Advisory Opinion which resoundingly supports Plaintiff's position. The bottom line is that the CCICCH never answered the question posed to this Court. It answered a question nobody disputes.

By its Motion for Reconsideration, Defendant merely seeks a new ruling by rehashing the same unavailing arguments, violating both procedural and substantive tenets in doing so. Quite simply, this Court's decision was not clearly erroneous, but was supported by the plain language of the statute, by the legislative history of the Uniform Common Interest Ownership Act ("UCIOA"), by the legislative history of NRS 116.3116, by multiple published decisions from other states, by scholarly publications, by agency determinations, and by a very long Motion and Reply.

II

ARGUMENT AT LAW

A. MOTIONS FOR RECONSIDERATION ARE ONLY AUTHORIZED BY EDCR 2.24, ON SPECIFIC GROUNDS WHICH PROHIBIT DEFENDANT FROM MAKING THE SAME ARGUMENTS WITHOUT NEW EVIDENCE

Regarding rehearing of motions, EDCR 2.24 states:

> (a) No motions once heard and disposed of may be renewed in the same cause, or may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, and notice of such motion to the adverse parties.
>
> (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.
>
> (c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

To seek reconsideration, Defendant must first obtain leave of court. EDCR 2.24(a). However, Defendant fails to request leave of court and automatically assumes leave will be granted. Leave should not be granted as Defendant's Motion for Reconsideration is untimely by over 4 months and Defendant can provide no reason for this Court to permit a rehearing of matters already adjudicated.

Notice of entry of the Order granting Plaintiff's Motion for Summary Judgment of Declaratory Relief was dated January 20, 2012. A party seeking reconsideration "... must file a motion for such relief within 10 days after service of written notice of the order...." EDCR 2.24. However, it was not until several months later, on June 8, 2012, that Defendant filed its Motion for Reconsideration. As a pretext for the filing of the current Motion, and violating Supreme Court Rules, Defendant cited as legal authority an unpublished, Supreme Court ruling that had nothing whatsoever to do with the substance of NRS 116.3116(2).[1] The unpublished, Supreme Court ruling cited to by Defendant was

---

[1] An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

a simple jurisdictional ruling. As the Supreme Court noted, "This is an appeal from a district court order granting a preliminary injunction prohibiting appellants State of Nevada Department of Business and Industry, the Financial Institutions Division, and its Commissioner, George E. Burns, (collectively, the Department) from regulating the collection activities of respondents Nevada Association Services, Inc.; RMI Management, LLC; and Angius & Terry Collections, Inc. (collectively, NAS)." *State, Dept. of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Services, Inc.*, 57470, 2012 WL 1923974 (Nev. May 23, 2012). The unpublished, Supreme Court decision merely affirmed Judge Johnson's ruling that the Financial Institutions Division did not have authority to interpret a real estate statute (NRS 116.3116) in regulating its own licensees. The Supreme Court did not entertain argument or render any ruling on the whether NRS 116.3116(2) constituted a cap on the Super Priority Lien (which is the matter before this Court). Indeed, at oral argument, Justice Douglas commented that it would likely have to rule on the issue of the lien cap in due course. Thus, Defendant's use of the unpublished, Supreme Court ruling as both legal authority [2] and as a justification to file its untimely Motion for Reconsideration is both violative of Supreme Court Rules and a red herring.

Even assuming Defendant's Motion for Reconsideration was timely filed, rehearings are only appropriate when "substantially different evidence is subsequently introduced or the decision is clearly erroneous," *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 941 P.2d 486 (1997); see also Moore v. City of Las Vegas, 92 Nev. 402,405,551 P.2d 244,246 (1976)* ("Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted"). Nowhere in Defendant's Motion does it argue that this Court's ruling was "clearly erroneous." Even under Defendant's own standards, no "substantially different evidence" is or was introduced since this Court's original ruling. The exact argument made in Defendant's Opps to Dec Relief is again being made in Defendant's Motion for Reconsideration (necessitating additional hours of legal work to draft this Opposition and remake the same arguments as before). The below chart illustrates the duplicative nature of Defendant's Motion:

---

[2] See Motion for Reconsideration at 3:5-17 and 4:22-5:12 where Defendant cites the Supreme Court ruling as legal authority.

Argument	Motion for Reconsideration	Opps to Dec Relief
"EXPLICITLY REJECTED"	"Horizons notes that the **CCICCH has explicitly rejected** the notion that there is a numerical maximum for the super-priority lien." Motion, 3:18-19 "The **CCICCH Advisory Opinion explicitly rejected** the position this Court adopted in the Order." Motion, 5-6 "... **the CCICCH expressly rejected** the "nine times monthly assessments" approach urged by Plaintiff in this case." Motion, 6:13-14.	"**The Commission rejected** the "Assessment Cap" argument that Plaintiff presents-that the Super Priority Lien is limited to nine times monthly assessments...." Opps to Dec Relief, 12:3-4. "Moreover, **the Commission's Advisory Opinion explicitly rejects** the position Plaintiff urges this Court to adopt...." Opps to Dec Relief, 12:17-18.
"TEMPORAL LIMITATION"	"Therefore, according to the CCICCH, there is no numerical "cap" on the total amount of the super-priority lien, **merely a temporal limitation** on the assessment portion of the so-called "nine months of assessments" that underlie that total super-priority lien amount." Motion, 8:7-10	"As evidenced by the very language quoted by Plaintiff, the Commission Advisory Opinion **contemplates only a temporal limitation** on the amount of the homeowners' association's lien that is entitled to super priority...." Opps to Dec Relief, 13:1-3
HUDSON HOUSE CASE	"The foregoing reference to the "State of Connecticut" is notably an express citation to and adoption of Hudson House Conominium Ass'n, Inc. v, Brooks, 611 A2d 862 (Conn, 1992), which specifically considered whether collection fees and costs survived foreclosure as part of the super-priority lien in addition to "nine months" worth of assessments." 611 A.2d at 613." Motion, 6:24-28.	"One case the Commission considered was Hudson House Condominium Association, Inc. v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992)." Opps to Dec Relief, 13:15-18.

Defendant does not seek to introduce new evidence in its Motion. It merely makes the same argument and requests a different result. Federal jurisprudence upholds the same standard as that of Nevada that reconsideration of a prior ruling is only appropriate in very limited circumstances. *See e.f. Brown v. Gold*, 378 F. Supp.2d 1280, 1288 (D.Nev. 2005)("[r]econsideration of a prior ruling is appropriate only in limited circumstances, such as discovery of new evidence, an intervening change

in controlling law, or where the initial decision was clearly erroneous or manifestly unjust"). Moreover, a motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled." *Id.* Other jurisdictions discourage such motions because it seriously compromises the position of a litigant. *Gillett v. Price* , 135 P.3d 861, 863-64 (Utah 2006)(characterizing post-final-judgment motions to reconsider as the "cheatgrass of the litigation landscape) *Id.*

With such standard at bar, this Court should not consider any "substantive" arguments in Defendant's Motion because the requirements for reconsideration have not been met. Before this Court may open the door to reexamine the prior ruling, Defendant must first demonstrate and argue new evidence has been discovered which it has crucially failed to do. In addition, to the extent Defendant does raise any new arguments, points or contentions not raised in the original hearing cannot be maintained or considered on rehearing. *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996); *see also Chowdry v. NLVH, Inc.*, 111 Nev. 560, 893 P.2d 385 (1995). (A party's failure to make arguments in previous proceedings constitutes a waiver of such arguments); *Trentacosta v. Frontier Pac. Aircraft Industries, Inc.*, 813 F.2d 1553, 1557 (9th Cir. 1987) (a party may not present evidence for the first time in motion for reconsideration when evidence was earlier available). Thus, Defendant's arguments that NAC 116.470 (a regulation passed in 2011, some 20 years after the passage of NRS116.3116) which regulates how much a homeowners' association can charge in collection costs to a homeowner, has something to do with NRS 116.3116(2), which limits an association's Super Priority Lien after the foreclosure of the first mortgage lender, is not only mixing apples and oranges, but is procedurally defective. Such an argument was not made in the original briefing and is, pursuant to Nevada Supreme Court precedent, waived and cannot be made now. As a result of the error and futility of Defendant's Motion, the Court should deny leave for reconsideration without any consideration of the merits of Defendant's motion. There is simply nothing new before the Court.

B. THE DUBIOUS HISTORY OF THE CCICCH'S ADVISORY OPINION

Although the CCICCH's Advisory Opinion should be irrelevant to these proceedings (it did not opine on the issue before this Court), it should be noted that the drafting and publishing of the Advisory Opinion was accomplished by a combination of an unlawful request and a stark conflict of interest. The dark history of the Advisory Opinion must be revealed as Defendant has argued to this Court that, "The Nevada Supreme Court has made it clear that courts are to give "great deference" to administrative interpretation." Motion, 5:21-22.

The CCICCH is an administrative agency of the Nevada Real Estate Division, which in turn is a division of the Nevada Department of Business & Industry. Regarding advisory opinions, pursuant to NAC 232.040(1), any interested person may petition the Director to issue a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Department or any of its divisions. However, NAC 232.040(4) also states, " An interested person may not file a petition for a declaratory order or an advisory opinion concerning a question or matter that is an issue in an administrative, civil or criminal proceeding **in which the interested person is a party**." Thus, only in the case where the petitioner is a party to an administrative, civil or criminal proceeding concerning the subject of the petition, is the petitioner precluded from requesting an advisory opinion or declaratory order.

The CCICCH's Advisory Opinion, which has been well spun and much cited by the homeowners' association and collection industry, was procured in direct violation of NAC 232.040 and must now finally be disregarded by Nevada courts. The Advisory Opinion was requested by RMI Management, a large homeowners' association collection agency (Ex. 3 at ¶9, a true and correct copy of the Agenda of the CCICCH) which happened to be a client of the Jones Vargas law firm whose partner, Michael Buckley, Esq., also happened to be the Chairman of the CCICCH and the author of the Advisory Opinion.[3] Coincidentally, the Advisory Opinion was published by Mr. Buckley shortly after RMI hired Jones Vargas as a lobbyist to attempt to change NRS 116.3116 to permit collection costs to be added on top of the Super Priority Lien (a legislative proposal that failed). Even more

[3] This has been admitted by Michael Buckley himself (at a hearing wherein this Counsel directly inquired of him about the relationship between Jones Vargas and RMI).

disturbing was that at the time RMI requested the Advisory Opinion from the Partner of its own law firm (and Chairman of the CCICCH,) RMI was engaged in intense litigation against groups of investors over the issues related to collection costs and the Super Priority Lien.[4] This put RMI's and Commissioner Buckley's actions in requesting and publishing the Advisory Opinion in direct contravention to NAC 232.040(4) and places grave doubts over the Opinion's legality and propriety. Not surprisingly, the collection industry and homeowners' association industry immediately began taking selective portions of dicta of the Advisory Opinion to continually argue that the CCICCH's Advisory Opinion supports their view. While such a tactic is easily countered by dicta supporting Plaintiff's position, the Advisory Opinion (and the murky history concerning its publication) should be of concern to this Court such that this Court gives little or no deference to it.

C. CONTRARY TO DEFENDANT'S ARGUMENT, THE NEVADA REAL ESTATE DIVISION'S COMMON INTEREST COMMUNITY COMMISSION'S ADVISORY OPINION SUPPORTS THE POSITION TAKEN BY PLAINTIFF IN THIS CASE

With apologies to this Court, Plaintiff must now duplicate the same arguments it made in its briefings which gave rise to the Order granting Plaintiff's declaratory relief claim.

The CCICCH's advisory opinion did not directly address the question which is before this Court. The Advisory Opinion asked the following question:

> May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments? *(Ex. C of Defendant's Motion for Reconsideration, CCICCH Advisory Opinion, pg. 1).*

The Advisory Opinion answered the question by stating that 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.

Of course, those points are not disputed. There has been universal agreement that collection costs may be *part* of the Super Priority Lien amount. However, the question which was not directly addressed by the Advisory Opinion is the one that is before this Court, i.e., whether NRS 116.3116(2) limits the Super Priority Lien to the extent of an amount equaling 9 months of assessments. Nowhere

[4] NRED ADR No. 10-87 (which is still ongoing).

in the CCICCH's Advisory Opinion does it conclude that the Super Priority Lien amount can exceed an amount equaling 9 months of assessment plus repair costs. Nowhere in the Advisory Opinion does it conclude that collection costs can be added "on top of" the Super Priority Lien amount. Nowhere in the Advisory Opinion is the Colorado case law supporting the cap rejected. In fact, the Advisory Opinion cites with approval the Colorado case law and Professor James Winnokur's law review article which state that the Super Priority Lien is capped at a figure equaling 9 months of an association's assessments.

The Advisory Opinion favorably cites the Colorado case law and James Winokur's law review article and states that the Nevada statutory language is consistent with Colorado's law and Winokur's commentary, i.e., the Super Priority Lien in Nevada and Colorado is limited to the extent of an amount equaling 9 times (6 times in Colorado) the association's monthly assessments. As part of this limited amount, collection costs may be included.

The Advisory Opinion found "very helpful" the language of the Colorado courts and Winokur's law review article:

> 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 Atlantic 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 (I), 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.]
>
> 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 3-1 16(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.**
> *(Ex. C of Defendant's Motion for Reconsideration, CCICCH Advisory Opinion, pgs. 5-6)*

Thus, the CCICCH's Advisory Opinion supports Plaintiff's position that the super priority portion of the lien exists only to the extent of a figure equaling 9 months of an association's assessments. The Advisory Opinion fully accepts the Colorado holdings and Winokur's commentary, finds them helpful, and concludes that Nevada's statutory language is the same as Colorado's (i.e., there is a definite cap on the super priority lien amount). Indeed, the CCICCH stated, "A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical." (See CCICCH Advisory Opinion at Page 6).

Regardless of the dicta that appears in the Advisory Opinion, the CCICCH never addressed the question of whether the Super Priority Lien is capped. It only addressed the issue of whether collection costs can be included within the Super Priority Lien. The question addressed by this Court (which was not posed to the CCICCH) was even though fines, fees, penalties, interest, and collection costs can be included within the Super Priority Lien, does NRS 116.3116(2) set a maximum limit on what amount the Super Priority Lien can be? This Court answered the question by simply reading the statute (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."). Thus, whether the Court disregards the Advisory Opinion because it is irrelevant, or whether it disregards the Advisory Opinion because its publication was borne of violations of regulations and undisputed conflicts of interest, the Court should not give the tainted Advisory Opinion deference.

D. DEFENDANT MISCONSTRUES THE HOLDING IN THE CONNECTICUT CASE OF *HUDSON HOUSE*. THERE IS NO CASE LAW IN ANY STATE THAT SUPPORTS DEFENDANT'S POSITION

As its sole, published, common law precedent for the proposition that the super priority portion of an association's lien can consist of both 9 months of assessments plus collection costs, Defendant

cites *Hudson House Condominium Association v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992).* A case decided prior to Connecticut's unique statutory amendment to the UCIOA allowing for attorney's fees in addition to the 6 month assessment figure, Defendant claims that the Hudson House case stands for the proposition that, "... fees and costs survived foreclosure as part of the super-priority lien, even though assessments had already been capped at the so-called "nine times monthly assessment" amount." (Motion, 6:28-7:2).

However, Defendant fails to understand that the sole reason why that one, single case allowed 6 months of assessments plus costs is not because costs are allowed to be added on top of the Super Priority Lien pursuant to the super priority language of the statute, but only because the homeowner's association (Hudson House Condominium Association) in that particular case obtained a judgment against the homeowner (Michael Brooks) and the homeowner's first mortgage lender, Connecticut Housing Finance Authority ("CHFA"). The Connecticut Supreme Court held that pursuant to another provision of Connecticut law (Section 47-258(g)), when as association obtains a judgment, only then can an association obtain both 6 months of assessment plus fees and costs. Nowhere did the Connecticut Court hold that an association can obtain both collection costs and 6 months of assessments as a matter of course, without first obtaining a judgment. In fact, in applying the original UCIOA that Nevada adopted, no Supreme Court or Appellate Court anywhere has ever so held. The Connecticut Court specifically determined that:

> 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." It is undisputed that HHCA, as the plaintiff and the party in whose favor the trial court rendered judgment, is the prevailing party in this, its own foreclosure action. CHFA does not dispute that § 47-258(g) authorizes the inclusion of these costs and fees as part of HHCA's judgment.... *Hudson House Condo. Ass'n, Inc. v. Brooks, 223 Conn. 610, 616, 611 A.2d 862, 866 (1992)*

Thus, Section 47-258(g) specifically states, "A judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." *Conn. Gen. Stat. Ann. § 47-258 (West).* In fact, Nevada has enacted the very same law in NRS 116.3116(7) which states, "A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." There is simply no question that if an association obtains a judgment against the lender and the lender retakes the property through foreclosure, like in

the *Hudson House* case, that fees and costs may be added to the 6 month assessment figure as against the foreclosing lender. Indeed, there is a specific statute that allows for it.

However, the obvious distinction between the case at bar and *Hudson House* is the fact that in *Hudson House*, the homeowner's association obtained a judgment allowing them to get attorney's fees and costs under Section 47-258(g), and in this case Defendant did not received any judgment whatsoever. Therefore, pursuant to both Connecticut's statute as originally adopted (before the amendment) and Nevada's current statute, if Defendant obtained no judgment against the lender or investor, then no fees and costs can be legally awarded against the lender or added to the 6 or 9 month cap. *(See NRS 116.3116(7)).*

Here, like in *Hudson House*, the opposing parties asserted that the statute which caps the Super Priority Lien (and which was duly passed by the legislature,) is inequitable and unfair and that it violates "public policy." However, the *Hudson House* Court had a response to such an argument that is most apropos and which should be appreciated by this Court:

> 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. *Hudson House Condo. Ass'n, Inc. v. Brooks, 223 Conn. 610, 616, 611 A.2d 862, 865 (1992)*

In short, the Connecticut Court, in applying the pre-amended version of its super priority statute[5] completely and unequivocally supports the fact that the Super Priority Lien is capped, and (consistent with NRS §116.3116), unless the Defendant had obtained a judgment against Plaintiff pursuant to NRS §116.3116(7) (or *Conn. Gen. Stat. Ann. § 47-258(g))* no attorney's fees, collection costs, or other such costs can be added to the 9 month assessment cap. Such fees may, of course, be included within the Super Priority Lien to the extent the Super Priority Lien does not exceed the cap of a figure equaling 9 months of assessments. Any assessment or collection fee which exceeds the Super Priority Lien amount is still a lien against the homeowner's property, just a less prioritized lien

[5] In 1991, Connecticut's Legislature amended its Super Priority Lien statute to permit attorney's fees and collection costs to be added on top of the Super Priority Lien.

which may be extinguished through the foreclosure of a first mortgage holder.

Ultimately, the Connecticut legislature changed its super priority statute to allow for both 6 months of assessments plus attorney's fees and costs. The *Hudson House* Court noted:

> No. 91-359 of the Public Acts of 1991 (Public Act 91-359), which repealed and replaced General Statutes § 47-258(b) and which took effect on July 5, 1991, after the judgment of strict foreclosure in this case, clarified that attorney's fees and costs are included in the priority debt. Public Act 91-359 provides that the "lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and (B) the association's costs and attorney's fees in enforcing its lien" *Hudson House Condo. Ass'n, Inc. v. Brooks, 223 Conn. 610, 617, 611 A.2d 862, 866 (1992)*

Of course, Nevada has not amended its Super Priority Lien statute to allow for both 9 months of assessments plus collection costs. Instead, on October 1, 2009, the Nevada legislature amended NRS 116.3116(2) to increase the Super Priority Lien amount from an amount equaling 6 times the monthly assessments to an amount equaling 9 times the monthly assessments. It also allowed unit repair costs to be added to the super priority lien amount.

E. DEFENDANT'S CITE TO NAC 116.470 ALLOWING HOMEOWNERS' ASSOCIATIONS TO CHARGE HOMEOWNERS COLLECTION COSTS OF $1,950.00 IS A RED HERRING

A "Red Herring" has been defined as "something intended to divert attention from the real problem or matter at hand; a misleading clue." (See Dictionary.com). Defendant's cite to a 2011 CCICCH regulation which caps the amounts and defines the types of collection costs which can be charged to a homeowner by a homeowners' association is a Red Herring. This regulation has nothing to do with the Super Priority Lien. Indeed, prior to 2011, a homeowners association could charge whatever collection costs it decided to charge (as permitted by its CC&RS). Regardless, whether a homeowners' association can charge its homeowners $1.00 or $5,000.00 in collection costs, once a first mortgage holder forecloses on the homeowner's property, NRS 116.3116(2) is triggered and the Super Priority Lien cap must be applied. In short, it makes no difference what an association charges in collection costs to the homeowner, once the home is foreclosed upon by the first mortgage holder, the association's lien is extinguished but for a figure equaling 9 months of assessments plus certain external repair costs (see NRS 116.3116(2) and this Court's Order).

F. FALSE CLAIMS ACT COMPLAINT IS IRRELEVANT TO THIS MOTION AND THIS ISSUE

It is not readily perceived why the fact that James Adams and Puoy Premsrirut are relators in a Federal False Claims Act litigation is legal grounds for reconsideration of this Court's Order granting Declaratory Relief on NRS 116.3116. To be sure, Judge Robert C. Jones will make an independent determination of whether the elements of 31 U.S.C. § 3729 have been. Other litigations which have completely different sets of proofs are quite irrelevant to this Court's determination of whether Defendant met its burden for reconsideration of this Court's well reasoned Order.

CONCLUSION

In conclusion Defendant rehashes identical arguments previously raised and makes absolutely no showing of new evidence or clear error. Based on the foregoing, Plaintiff respectfully requests the Court deny Defendant's Motion for Reconsideration.

Dated this 27th day of June, 2012.

ADAMS LAW GROUP, LTD.

/s/ James R. Adams

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
Tel: 702-838-7200
Fax: 702-838-3600
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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 **OPPOSITION TO MOTION FOR RECONSIDERATION** 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
x	Email
	Certified Mail, Return Receipt Requested.

addressed as follows:

Kurt Bonds, Esq.
Alverson Taylor Mortensen and Sanders
7401 W. Charleston Blvd.
Las Vegas, NV 89117-1401
Office: 702.384.7000
Fax: 702.385.7000
Kbonds@AlversonTaylor.com
Ehinckley@AlvresonTaylor.com

Patrick Reilly, Esq.
Holland & Hart
9555 Hillwood Dr., Second Floor
Las Vegas, NV 89134
Attorney for Defendant
preilly@hollandhart.com

Dated the 27th day of June, 2012.

An employee of Adams Law Group, Ltd.

Ex. 1

ALVERSON, TAYLOR,
MORTENSEN & SANDERS
KURT R. BONDS, ESQ.
Nevada Bar #6228
ERIC W. HINCKLEY, ESQ.
Nevada Bar #12398
7401 W. Charleston Boulevard
Las Vegas, NV 89117
(702) 384-7000
Attorney for Defendant Horizons At
Seven Hills Homeowners' Association

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. XXVIII

DEFENDANT, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION'S, OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT

COMES NOW, Defendant, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION, by and through its attorneys of record, Kurt R. Bonds, Esq., and Eric W. Hinckley, Esq., of ALVERSON, TAYLOR, MORTENSEN & SANDERS, and hereby files its Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Summary Judgment.

KB/19223

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

This Opposition and Counter-Motion is made and based on the following Points and Authorities, the papers and pleadings on file herein and any oral argument the Court entertains at the time of hearing on the Motion.

DATED this 28th day of November, 2011.

ALVERSON, TAYLOR,
MORTENSEN & SANDERS

KURT R. BONDS, ESQ.
Nevada Bar #6228
ERIC W. HINCKLEY, ESQ.
Nevada Bar #12398
7401 W. Charleston Boulevard
Las Vegas, NV 89117
Attorney for Defendant Horizons At
Seven Hills Homeowners' Association

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

POINTS AND AUTHORITIES

I.

INTRODUCTION

This case concerns Ikon Holdings, LLC's (hereinafter "Ikon" or "Plaintiff") obligation to satisfy a lien on real property that is located within the Horizons at Seven Hills Homeowners' Association (hereinafter "Association"). In its Complaint, Ikon seeks declaratory relief regarding what has been commonly referred to as a Homeowner's Association's "Super Priority Lien" as it applies to delinquent assessments. The Association requests this Court deny Plaintiff's Motion and grant the Association's Motion for Summary Judgment, because the relief requested by Plaintiff is improper under NRS 116.

Pursuant to N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. This particular lien is afforded superiority over virtually every other lien or encumbrance against the property, including the first deed of

trust. The lien applies to assessments that accrue in the nine (9) months preceding an action to enforce the lien (i.e. foreclosure) plus certain repair costs under NRS 116.310312. Pursuant to Nevada law, late fees, interest and collection costs are also included in the Super Priority Lien. *See* Section III.B.8. below. Lenders and investors are required to satisfy the Super Priority Lien in order to secure marketable title to re-sell the home.

Therefore, the Association requests that this Court deny Ikon's Motion for Partial Summary Judgment and grant the Association's Motion for Summary Judgment.

II.

STATEMENT OF FACTS

On or around June 28, 2010, Scott Ludwig purchased the real property located at 950 Seven Hills Drive, Suite 1411, Henderson, Nevada 89052 (hereinafter "Property") at a foreclosure sale held by the first mortgage lender. The Property is located within the Association. The Association had previously filed a Notice of Default against the Property on or around August 4, 2009 in the amount of $4,289.50. Mr. Ludwig then transferred title of the Property to Ikon on or around July 14, 2010. Therefore, Ikon was on notice of the Association's lien when it purchased the Property.

On or around September 30, 2010, the Association filed a lien against the Property, including past due assessment and collection costs. On or around the first week of October 2010, Ikon requested a payoff amount in order to gain clear title to the property. In response, the Association informed Ikon that the outstanding balance was $6,287.94. On or around November 18, 2010, the Association filed a Notice of Default against the Property.

///

///

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTE. & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

III.

LEGAL AUTHORITY

A. SUMMARY JUDGMENT

Plaintiff seeks Summary Judgment on its cause of action for Declaratory Relief from this court with respect to two issues: (1) the monetary limit of a homeowners' association's "Super Priority" lien for delinquent assessments under NRS 116.3116; and, (2) whether the Association is required to commence a civil action in order to enforce its lien. As Plaintiff notes, there is no factual dispute in this case. As such, the Association requests that this Arbitrator deny Plaintiff's Motion for Partial Summary Judgment and grant the Association's Counter-Motion for Summary Judgment. All of Plaintiff's causes of action are dependent on its cause of action for declaratory relief. Therefore, if this Arbitrator grants summary judgment in favor of the Association on the cause of action for declaratory relief, this Arbitrator must grant summary judgment against Plaintiff on all of its causes of action.

This Arbitrator should grant summary judgment in the Association's favor in this case as the controlling authority clearly indicates that the Super Priority lien includes late fees, interest and collection costs and that the Association need not file a lawsuit in order to enforce its lien.

SUPER PRIORITY LIEN

Generally, under N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over nearly every lien or encumbrance against the property as to the full amount of the lien, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home. And, pursuant to Nevada law, late fees, interest and the costs associated with

collection are included in the Super Priority Lien.

To be clear, N.R.S. § 116.3116(1) provides, in relevant part, as follows:

> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . 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. . . .
>
> 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 . . . 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 116.3103121 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).

NRS 116.3116 is plain and unambiguous and review of the Legislative History is not necessary for this court to determine that: (1) penalties, fees, charges, late charges, fines and interest are enforceable as assessments as against a unit (NRS 116.3116(1)); (2) the association has a lien on a unit for any assessment levied against that unit (NRS 116.3116(1)); and (3) the Association's Lien is prior to the first security interest and all other security interests (NRS 116.3116 (2)(c)). Any assertion that fees and collection costs are in addition to the super priority lien is erroneous as these fees and collection costs are included in the super priority lien.

Fees and collection costs are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115." First, collection costs and fees

---

1 See also NRS 116.310312(6), which provides, "Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . . ."

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTE[illegible]N & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

are assessments because NRS 116.3116(1) states "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**." Moreover, fees and collection costs are assessments for common expenses, because said fees and costs are expenditures made by, or financial liabilities of, the association, together with any allocations to reserves." Finally, fees and collection costs are based on the periodic budget adopted pursuant to NRS 116.3115 because collection costs and fees are caused by the failure of a unit owner to pay assessments, and are chargeable as assessments under NRS 116.3115(6). Thus, when the statute is considered in its entirety, the plain language shows fees and collection costs are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115", and therefore the full amount of reasonable fees and costs associated with enforcement of the super priority lien are included in the super priority lien.

When a statute is clear on its face, a court must not go beyond the statute's plain language to determine the Legislature's intent. Hardy Cos. v. SNMARK, LLC, 245 P.3d 1149, 1153 (Nev. 2010). Only when a statute is ambiguous should a Court turn to the Legislative history to determine the meaning of the statute and the Legislative intent. J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC, 2011 Nev. LEXIS 6, 10-11 (2011). Moreover, when a statute contains words that have a plain and certain meaning, no part of the statute should be rendered superfluous or meaningless in a manner that would produce an absurd result. Allstate Insurance Co. v. Fackett, 206 P.3d 572, 576 (Nev. 2009).

In this case, the Legislature has expressly given the Association the right to recover penalties, fees, charges, late charges, fines and interest in connection with 9 months of delinquent assessments. To promulgate the Association's right to recover these fees and costs, but then to exclude those as part of the Super Priority lien produces an unworkable and unjust result. If the

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Court were to grant Plaintiff's Motion, the language of NRS 116.3116(1) would be rendered superfluous and the Association's right to collect these fees and costs, illusory. See S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (holding that a court must read a statute in its entirety, so that the reading "would not render words or phrases superfluous or make a provision nugatory.")(emphasis added).

Following Plaintiff's argument that the Association's lien is limited to the total of nine months worth of monthly assessments, the Association would never seek to enforce its super priority lien. The cost of retaining an attorney plus filing fees and costs would certainly exceed many times over the total of nine months of past due assessments. Therefore, per Plaintiff's position, the Legislature provided homeowners' associations with a special super priority lien knowing that the association would never enforce it. Clearly, this is not what the Legislature intended when it promulgated NRS 116.

Subsection (2) of NRS 116.3116 includes no numeric cap on the super priority lien. The lien given super priority status is defined with regard to the particular time period only, not any numerical limitation or mathematical calculation of nine times the monthly assessments. If the Legislature intended to define the super priority lien, it could have done so by simply setting forth that mathematical calculation in the statute. In fact, Assembly Bill (AB) 448, which was introduced during the 2011 legislative session, proposed to do just that. As discussed below, AB 448 sought to include the express language calculating the super priority lien based on nine times the amount of monthly assessments. However, the Nevada Legislature, aware that the Clark County District Court had ruled that collection fees and costs are part of the super priority lien without a numerical cap, declined to adopt AB 448.

It is interesting to note that Plaintiff asks this Court to interpret the plain language of the statute but then proceeds to offer his own interpretation of the statute's language. Clearly, this is

unnecessary given the statute's language in favor of the Association's position. In addition to the statutory interpretation favoring the Association's position, recent case law further supports this Court's denial of Plaintiff's Motion.

B. PURSUANT TO CURRENT LEGAL AUTHORITY, PLAINTIFF'S MOTION MUST BE DENIED

1. The Uniform Common Interest Ownership Act (UCIOA) and its Legislative History

NRS 116 differs significantly from the UCIOA with regard to the super priority lien. Plaintiff argues that the UCIOA comments indicate that the super priority lien was intended to be a fixed amount, but this is irrelevant for two reasons. First, Nevada did not adopt the UCIOA as written; rather Nevada's statutory scheme provides for a much broader super priority lien than the UCIOA. The differences between NRS 116 and the UCIOA are discussed more fully below. As a result of these differences, the comments to the UCIOA are not instructive. Second, contrary to the UCIOA, it is not possible for the super priority lien to be a fixed amount in Nevada because the super priority lien includes "charges incurred by the association on a unit pursuant to NRS 116.310312." The charges incurred by the association on a unit pursuant to NRS 116.310312 are not fixed, and cannot be determined in advance. Thus, the legislative history cited by Plaintiff in support of its argument that the super priority lien must be a fixed amount has no bearing on the proper interpretation of NRS 116.

2. Plain Language of NRS 116

As discussed above, the plain language of NRS 116 dictates that fees and collection costs are enforceable as assessments under NRS 116.3116(1). Also as outlined above, the plain language of NRS 116 dictates that fees and costs of collection are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115." Thus, the plain language of the statute dictates that fees and collection costs must be included

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

when calculating the amount of the super priority lien.

3. Wingbrook Capital, LLC v. Peppertree Homeowners' Association

Plaintiff cites an Order in the Wingbrook Capital, LLC v. Peppertree Homeowners' Association case for the proposition that the super priority lien does not include collection costs and fees. Although the Wingbrook Order is not binding on this Court, Plaintiff misrepresents the facts at issue and the import of the ruling issued by Judge Gonzalez in Wingbrook. In Wingbrook, the issues before the Court primarily concerned an abatement lien for work performed by the homeowners' association to abate a public health hazard and nuisance. *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion to Dismiss, attached hereto as Exhibit 1. In fact, the moving papers presented by the homeowners' association raise no similar arguments raised by the Association in the instant matter. Rather, the homeowners' association in Wingbrook states, "unlike a lien for delinquent assessments, there is no cap to charges made for repairs under NRS 116.310312." Id. at p. 9:24-27.

Thus, because the primary issue in Wingbrook was the abatement lien, the homeowners' association focused solely on its right to recover construction costs as part of the super priority lien and raised no argument that fees and costs of collecting delinquent assessment are part of the super priority lien. As a result, with regards to fees and costs of collecting delinquent assessments, Judge Gonzalez's decision in Wingbrook was made without the benefit of a full presentation of the arguments on both sides of the issues presented herein. Although Judge Gonzalez ruled that costs of collection of the abatement liens are collectible, her decision was limited to the abatement lien and not delinquent assessments.

Moreover, Judge Gonzalez did not address fees and collection costs associated with delinquent assessments. Following issuance of the Wingbrook order, the homeowners' association filed a Motion for Reconsideration. *See* Peppertree Homeowners Association's

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Motion for Reconsideration Regarding the Grant of Summary Judgment in Favor of Wingbrook Capital, LLC, attached hereto as Exhibit 2. Based on the Motion for Reconsideration, it appears Judge Gonzalez did not address collection costs. The Motion for Reconsideration states, "This Court granted Plaintiff's motion, in part, and ordered that interest and late fees were improperly charged. This court did not address collection costs." Id. at 3:15-17. The Motion for Reconsideration goes on to state, "Similarly, this court did not address collection costs. Thus, although the Order seems to provide an Assessment Cap Figure that bars interest and late fees under NRS 116.3116, the Court did not rule that the collection costs were barred." Id. at 8:19-22. There is no way to know whether Judge Gonzalez would have granted the Motion for Reconsideration, because the parties settled the case before the motion was heard. Thus, not only did Wingbrook deal primarily with issues that have no bearing on the instant matter, it is uncertain what ruling, if any, Judge Gonzalez intended to issue with regard to fees and collection costs related to delinquent assessments (as opposed to fees and costs related to the abatement lien.)

4. Financial Institution Division

The Advisory Opinion issued by the Financial Institutions Division ("FID") is entitled to no weight whatsoever. First, the FID opinion was issued without jurisdiction, and has been enjoined by this Court. Moreover, contrary to Plaintiff's argument that "Judge Johnson did not dispute the substance of the Declaratory Order," the true facts are that Judge Johnson had no need to rule on the substance of the Advisory Opinion because jurisdiction was the threshold issue and Judge Johnson's ruling on that issue was dispositive.

Second, the reason the FID did not have jurisdiction to issue the Advisory Opinion is the very reason the FID's opinion is entitled to no weight: the FID is not the agency charged with interpretation of NRS 116. The FID, which is a division of the Nevada Department of Business

and Industry, is limited in both jurisdiction and expertise to the interpretation and enforcement of NRS 649, which governs collection agencies. Thus, it is the Commission on Common Interest Community's (hereinafter "Commission") interpretation of NRS 116 that is entitled to deference.

5. ADR 10-87

The decision and Interim Award issued by the Arbitrator are entitled to no deference in this action. It is undisputed that this Court must conduct a *de novo* review of the issues presented. Thus, not only is ADR 10-87 irrelevant, but it would be improper for this Court to rely on ADR 10-87 in deciding the issues presented herein.

Moreover, the decision issued in ADR 10-87 is not a decision of the Commission or the Real Estate Division. There is no process by which the Commission or Real Estate Division approves, reviews or even offers any input to an arbitrator with regard to decisions issued by that arbitrator. Thus, the decision of the Arbitrator cannot be attributed to the Commission.

6. ADR 10-49

The decision and award issued in ADR 10-49 has no bearing on this Court's decision for all the same reasons the Interim Award in ADR10-87 has no bearing. Additionally, contrary to Plaintiff's assertion, the Arbitrator in ADR 10-49 did not rule that NRS 116.3116 calls for a cap on the amount of the super priority lien. Rather, in that case, the parties stipulated to every fact set forth in the Decision and Award, including the amount of the "assessment for common expenses based on the periodic budget." *See* Arbitrator's Decision and Award, attached hereto as Exhibit 3. It is unclear from the Award whether either party even argued that any fees and/or collection costs were part of those common assessments.

7. Plaintiff's Position contradicts the Advisory Opinion set forth By the Commission for Common Interest Communities and relevant case law.

Pursuant to NRS 116.623, the Nevada Real Estate Division has the authority to issue advisory opinions to interpret NRS 116. On December 8, 2010, the Commission for Common-

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Interest Communities, which is part of the Nevada Real Estate Division, issued an advisory opinion regarding whether fees and costs could be recovered by an association as part of the Super Priority Lien. The Commission rejected the "Assessment Cap" argument that Plaintiff presents—that the Super Priority Lien is limited to nine times monthly assessments—and instead concluded:

> An association may collect as 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.

Comm'n for Common Interest Communities and Condominium Hotels, Ad. Op. No. 2010-01, pp. 14, attached hereto as Exhibit 4.

Thus, when the Commission wrote that the "costs of collecting" may be included as part of the super priority lien, the Commision did so with the express written contemplation that such "costs of collecting" would be part of the super priority lien even where there are "6 or 9 months of super priority assessment" that are unpaid.

Moreover, the Commission's Advisory Opinion explicitly rejects the position Plaintiff urges this Court to adopt:

> The argument has been advanced that limiting the super priority to a finite amount...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" 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.

Commission Advisory Opinion, p. 12.

ALVERSON, TAYLOR, MORTEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

As evidenced by the very language quoted by Plaintiff, the Commission Advisory Opinion contemplates only a temporal limitation on the amount of the homeowners' association's lien that is entitled to super priority:

> ...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.

See Plaintiff's Motion for Partial Summary Judgment, p. 39:19-21. Thus, the super priority lien is that portion of the homeowners' association's lien that accrues during the finite number of months (i.e. six or nine months) preceding an action to enforce the lien. The super priority lien itself is the only limitation on that portion of the homeowners' association's lien entitled to super priority, and the super priority lien is defined temporally (i.e. a finite number of months), not numerically.

Importantly, in its Advisory Opinion, the Commission reviewed the Legislative History and case law from other jurisdictions in order to interpret NRS 116.3116. One case the Commission considered was Hudson House Condominium Assocation, Inc. v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992). In Hudson House, the Connecticut Supreme Court reviewed statutory language that is almost identical to NRS 116.3116.[2] On appeal, the Court in that case was asked, in part, whether the trial court improperly excluded attorneys' fees and other costs from a homeowners' association's super priority lien. The Connecticut Supreme Court determined that attorneys' fees and other costs must be included in the Super Priority Lien to produce the only reasonable and logical result. Id. at 616. The Court's rationale is concisely provided as follows:

> 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,

2 Although Connecticut has since amended their statute to explicitly include attorneys' fees, the Hudson House decision was decided under the previous version of Connecticut's statute, which mirrored NRS 116.3116.

> 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 and the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.

Id. at 616-17 (citations omitted).

Thus, when the Nevada Commission on Common Interest Communities considered the Hudson House case, it considered the Court's analysis and rationale as just and equitable and the only reasonable result in light of the fact that the Nevada and Connecticut statutes were virtually identical. Plaintiff cites to Colorado statutes similar to NRS 116 and Colorado case law interpreting the Colorado statutory scheme. This is irrelevant as no Nevada court or body with authority to interpret NRS 116 has adopted the Colorado court's reasoning. In fact, the Nevada Commission on Common Interest Communities adopted the reasoning from the Connecticut Supreme Court, which directly contradicts the Colorado Supreme Court's position.

8. The Eighth Judicial District has adopted the reasoning of Hudson House and the Commission's Advisory Opinion.

The issue concerning what amounts are included within the Super Priority Lien has already been addressed in the Eighth Judicial District Court.

a. Korbel Family Trust v. Spring Mountain Ranch Master Ass'n.

In Korbel, the Honorable Jackie Glass specifically ruled that the super priority lien includes, and the homeowners' association is entitled to recover, the following:

> -Assessments for common expenses;
>
> -Late fees imposed for non-payment of assessments for common expenses;
>
> -Interest on principal amount of unpaid assessments for common expenses;
>
> -The HOA's "costs of collection, which may include legal fees and costs, that accrue prior to the date of the foreclosure of the first deed of trust" and

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

> -The transfer fee for conveyance and change of ownership of the property foreclosed upon pursuant to the first deed of trust.

See Exhibit 5 Order attached hereto. The issues presented in Korbel were identical to the issues presented in this case. Since the issuance of the Korbel decision, Judge Glass's opinion has been relied upon in the industry by the homeowners' associations, the law firms and/or collection agencies that represent them and Fannie Mae, Freddie Mac, and the Federal Home Loan Mortgage Corporation.

Defendants assert Fannie Mae, Freddie Mac and the Federal Home Loan Mortgage Corporation do not follow the Korbel decision, and provide correspondence from the Cooper Castle law firm to Plaintiff's counsel James Adams in support of this argument. Although the Cooper Castle law firm may not express satisfaction with the Korbel decision, it certainly follows the holding in Korbel.

On July 16, 2010, the Cooper Castle law firm sent an "Owner's Request for Super-Priority Demand and NRS 116.419 Information," to Sun City Anthem on behalf of the Federal Home Loan Mortgage Corporation. The Cooper Castle law firm stated,

> "It is the intent of the Federal Home Loan Mortgage Corporation to immediately pay all sums which are properly due and owing to the Association pursuant to NRS 116.3116(2)... 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.**"

(emphasis added). The Korbel decision properly interpreted NRS 116.3116 and Fannie Mae and Freddie Mac's adherence to the decision only further solidifies the ruling.

b. Elkhorn Community Ass'n v. Valenzuela and JP Morgan Chase Bank

In Elkhorn, Judge Valerie Vega held collection fees and costs are included in the super priority lien in addition to other assessments that came due in the nine month period immediately

preceding the first action to enforce the lien. *See* Exhibit 6, Court Minutes attached hereto. Similarly, in JP Morgan Chase, the honorable Judge Timothy Williams stated as follows:

> 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.
> ...
> 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.

See Exhibit 7, Order and Judgment attached hereto. In each of these cases, the Courts have found that costs of collection, interest, and late fees are included in the Super Priority Lien Amount.

The issues presented in Elkhorn and JP Morgan Chase are nearly identical to the issues raised here. As such, to find in Plaintiff's favor would contradict the agency that is authorized to interpret NRS 116 and contradicts the only reasonable, just and equitable result under the statute—that the Association is entitled to collect various fees and costs as outlined in NRS 116.3116(1) as part of the Super Priority Lien. Moreover, any judgment for Plaintiff in this case would produce an inconsistent result as compared to other courts, including Nevada's District Court, facing the same issue.

Plaintiff may argue that the Elkhorn and JP Morgan Chase are not controlling because those cases involved a judicial foreclosure. However, the Court Orders are clear. The Orders specifically address the fact that collection costs and fees are included in the super priority lien. Further, NRS 116.3116 makes no distinction between the super priority lien afforded to homeowners' associations that choose judicial as opposed to non-judicial foreclosure.

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Therefore, the Court has on numerous occasions ruled on the same issue presented in the instant case and consistently found that collection costs and fees are included in the super priority lien.

9. Legislative Proposals

Plaintiff notes that there have been several proposed amendments to NRS 116, which have not passed, and argues the fact that these amendments have not passed is evidence that the Legislature does not intend fees and collection costs to be included in the super priority lien. The proposed amendments, however, made multiple changes to the statute and there is no indication in the record that the failure to enact these changes was in any way related to the issues before this Court. In fact, when the Legislature was considering the most recently proposed amendment to this statute, AB 174, they were undoubtedly aware of the Korbel Family Trust decision and the fact that multiple District Court decisions have held that fees and collection costs are included in the super priority lien. For example, in the April 15, 2011 Senate Committee on Judiciary, Senator Buckley stated, "There is a decision in the Eighth Judicial District Court that attorney's fees and collection costs are part of the superpriority." *See* Minutes of the Senate Committee on Judiciary, attached hereto as Exhibit 8, p.16.

Moreover, the Minutes of the Meeting of the Assembly Committee on Judiciary attached as Exhibit 22 to Plaintiff's Motion for Partial Summary Judgment contain absolutely no comments indicating the failure to pass AB 204 had anything to do with the proposed changes to NRS 116.3116 included in that bill. The language from those Minutes quoted by Plaintiff shows the proposed amendment to NRS 116.3116 were intended to clarify-not change- the current state of the law with regard to fees and collection costs: "What I am saying is that, with the existing law, there is a difference of opinion whether the six-months priority can include the association's costs. The proposal that we sent to the sponsor and that was adopted by the 2008 uniform

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

commissioners would **clarify** that the association can recover, as part of the priority, their costs in attorney's fees. *See* Plaintiff's Motion for Partial Summary Judgment, p. 42:8-11.

Similarly, with regard to AB 174, Plaintiff argues that Senator Allison Copening proposed this bill to change the current law to allow for inclusion of fees and collection costs in the super priority lien. This is simply not the case. In discussing AB 174, Senator Copening states, "These are the costs a collection company can charge. A homeowners' association (HOA) can retain an attorney to foreclose on a home, for example, and it is part of the super priority lien. **We are not changing law.**" *See* Minutes of the Senate Committee on Judiciary, attached hereto as Exhibit 8, p. 8. This shows that the proposed legislation was not intended to change the law as Plaintiff alleges.

In addition to the proposed amendments cited by Plaintiff, AB 448 proposed amending the statutory super priority lien language to read:

> The lien is also prior to all security interests described in paragraph (b) but only in an amount not to exceed charges incurred by the association on a unit pursuant to NRS 116.310312 **plus an amount not to exceed *nine times the monthly assessment* for common expenses based on the periodic budget** adopted by the association pursuant to NRS 116.3115 which is in effect at the time of the commencement of a *civil action* to enforce the association's lien...

See Exhibit 9, p. 43-44. This amendment appears to be designed to change NRS 116.3116 to more closely match Plaintiff's proposed interpretation of that statute. Tellingly, AB 448 was not passed.

10. Scholarly Publication

Plaintiff erroneously claims "the only scholarly article written on this issue has determined that the Super Priority Lien is capped." *See* Plaintiff's Motion for Partial Summary Judgment, p. 5:26-27. In the article cited by Plaintiff, Professor James Winnokur does not directly address the issues before this Court. *See* James Winnokur, Meanor Lienor Community

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Associations: The "Super Priority" Lien and Related Reforms Under The Uniform Common Interest Ownership Act, 27 Wake Forest L.Rev., 354 357-362 (1992). First, Winnokur was discussing the scope of the super priority lien under the UCIOA. The difference between the UCIOA and NRS 116 is very significant. The super priority lien in all three (3) versions of the UCIOA (1982, 1994, and 2008) is limited to the extent of "common expenses based on the periodic budget adopted by the Association pursuant to section 3-115(a)." Nevada, however, specifically removed the limitation to subsection (a) (which is Subsection 1 of NRS 116.3115 in Nevada's statutory scheme). Thus, common expenses for purposes of the super priority lien under the UCIOA are limited to 3-115(a), while common expenses for purposes of the super priority lien in Nevada includes all of NRS 116.3115, including 116.3115(6), which addresses common expenses caused by an owner's misconduct, such as failure to pay assessments. In other words, "common expenses" is much broader under the Nevada statute than it is under the UCIOA and includes amounts assessed against a specific unit. Such common expenses, including those costs and fees caused from a unit owner's misconduct, must be included in Nevada's super priority lien amount.

Second, the article as a whole supports the Association's position that as a matter of public policy, homeowners' associations must be able to recover the fees and collection costs associated with delinquent assessments. For example, Professor Winnokur states,

> Contributing to many associations financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective.
>
> ...
>
> Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort, When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default-neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association.

> As their assessments rise, these owners face great pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs.
>
> ...
>
> This syndrome of disproportionately burdening owners in good standing- whose resulting assessment defaults further burden a shrinking group of owners still paying- is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities. As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CIC's will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll.

Id. at 357-362.

Additionally, Professor Winnokur authored a later article, in which he again acknowledges the important policy concerns underscoring the need for a homeowners' association to be able to enforce its super priority lien. In fact, Professor Winnokur states, "Indeed, an argument can be made that common interest community assessments- all assessments, and not just the most recent six months in default- should be appropriately prioritized as superior to even a first lien on each residence because the assessments are needed to fund facilities and services for the public in much the same sense as those financed by public government property taxes." James Winnokur, Critical Assessment: The Financial Role of Community Associations, 38 Santa Clara L.Rev. 1135, 1158-1159 (1998). Regardless of the opinion of the author of these articles as to whether the super priority lien under the UCIOA includes fees and collection costs, these articles clearly demonstrate the devastating and absurd results that would flow from imposing a numeric cap on the super priority lien as Plaintiff requests.

///

///

ALVERSON, TAYLOR, MORTE & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

C. NO CIVIL ACTION IS REQUIRED TO ENFORCE THE SUPER PRIORITY LIEN

As previously noted, under N.R.S. § 116.3116, the Association has a lien on a unit for any assessment levied against the unit by the Association. The Lien is prior to all security interests, including the first deed of trust, "to the extent" of charges included in an abatement lien (i.e. no limit) and "to the extent" of the monthly assessments that "would have become due . . . during the 9 months immediately preceding institution of **an** action to enforce the lien." N.R.S. § 116.3116(2)(c) (emphasis added). Importantly, the statute does not mandate that the Association (or any party) bring an action to enforce the lien; it simply provides that there must be some "action" or event that occurs in order to determine what assessments accumulated during the 9 month period of time. The policy of the statute is thus to require some event that would trigger the Association's accounting of when the 9 months would begin and end.

In this case, the foreclosure of the property was the "action" that triggered the accounting. Notably, the Nevada Supreme Court has previously recognized that foreclosure on real property constitutes an "action." Levinson v. Eighth Judicial Dist. Court, 109 Nev. 747, 750-751 (Nev. 1993). Plaintiff's argument that the lien holder must file a civil action to enforce its super priority lien does not make sense. The reason the lien is given super priority is to allow the Association to retain its lien even after a separate lien holder forecloses on the property. NRS 116 clearly contemplates a homeowners' association's lien remaining on the property after the bank institutes foreclosure proceedings and all other liens are extinguished. Otherwise, the Association's lien would be treated as any other lien which must be enforced or is subject to extinguishment by a senior lien.

The phrase civil action is used throughout NRS 116, but not in NRS 116.3116, which only refers to an 'action' to enforce the lien. "Action is one thing; cause or right of action is quite another. The action is the means of redress of the legal wrong described by the words

cause of action. The cause of action precedes and affords the right to the remedy by such action as the laws furnish." Scheuing v. State, 177 Ala. 162, 59 So. 160, 161 (1912). "Perhaps at times, incautious use by judicial writers of terms indicative of failure to note the important distinction between the right and the remedy has invited some confusion which might otherwise have been avoided." Id. Thus, where the term "action" is used in a statute in such a manner as to render the term ambiguous, one must look to the means of redressing the particular legal wrong at issue to determine the appropriate definition of the term.

Plaintiff's reliance on the Nevada Rules of Civil Procedure is misplaced, as it is the substantive law governing the legal right at issue that determines what is required to bring an "action." *See* e.g. Sierra Club v. Colorado Refining Co., 852 F.Supp. 1476, 1484 (D. Colo. 1994). Here, the substantive law governing the means by which a homeowners' association makes a legal demand of its right to enforce a lien is outlined in NRS 116.31162, which allows a homeowners' association to foreclose its lien by sale after (1) the homeowners' association has mailed the unit's owner a notice of delinquent assessment, (2) executed and caused to be recorded a notice of default and election to sell, and (3) the unit's owner fails to pay the amount of the lien for 90 days following the recording of the notice of default and election to sell. No other "action" is required of the homeowners' association.

The case law cited by Plaintiff in support of the proposition that "action" means "civil action" does not apply to the instant case. First, in Trustees of MacIntosh Condominium Ass'n v. FDIC, 908 F.Supp. 58, the parties stipulated that an "action" required a "law suit." There, the Court clearly states, "It is uncontested by the parties that a lawsuit is required before a lien for unpaid condominium fees achieves a 'super priority' status." Id. at 63. The Court said this because the parties agreed a lawsuit must be filed!

ALVERSON, TAYLOR, MORTE N & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

In each of the remaining cases cited by Plaintiff, the word "action" is being construed in a completely different context. Thus, those cases address only a possible use or meaning of the word "action." Here, the context dictates a different result, because NRS116 specifically allows homeowners' associations to enforce their liens by non-judicial sale without filing a lawsuit. As noted above, the homeowners' association can foreclose on a property and enforce their lien by simply filing a notice of default and election to sell. This Court cannot ignore NRS 116.31162. No other "action" is required of the homeowners' association.

In support of their argument that a civil action is required to create the super priority lien, Plaintiff cites to the proposed amendments to NRS 116 included in Senate Bill 174. Plaintiff argues that that Senate Bill 174 did not pass and therefore the Legislature intended to require a civil action. Plaintiff offers no citation to the legislative history to support this argument. Senate Bill 174 proposed several changes to NRS 116, and there is absolutely no reason to believe the Legislature's decision not to adopt Senate Bill 174 was in any way related to require homeowners' associations to institute a civil action to enforce the super priority lien.

Notably, AB 448 proposed amending the statutory super priority lien language to require a civil action:

> The lien is also prior to all security interests described in paragraph (b) but only in an amount not to exceed charges incurred by the association on a unit pursuant to NRS 116.310312 **plus an amount not to exceed nine times the monthly assessment for common expenses based on the periodic budget** adopted by the association pursuant to NRS 116.3115 which is in effect at the time of the commencement of a *civil action* to enforce the association's lien ...

See Assembly Bill No. 448, attached hereto as Exhibit 9, p.43-44. Following the decisions of the Nevada courts, the Legislature could not interpret the current statute to require a civil action, and therefore, this amendment to NRS 116.3116 was not adopted.

ALVERSON, TAYLOR, MORTE N & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

IV.

CONCLUSION

Based on the foregoing, the Association respectfully requests that the Arbitrator grant the Association's Counter-Motion for Summary Judgment and find the following: (1) that the homeowners' association super priority lien includes nine times the monthly assessment amount in addition to late fees, interest, collection costs and attorney's fees; (2) that the foreclosure is sufficient to satisfy the action to enforce the lien as required by NRS 116.3116; (3) that the Association's CC&R's permit the Association to recover past due monthly assessments from the new unit owner.

DATED this 28th day of November, 2011.

ALVERSON, TAYLOR,
MORTENSEN & SANDERS

KURT R. BONDS, ESQ.
Nevada Bar #6228
ERIC W. HINCKLEY, ESQ.
Nevada Bar #12398
7401 W. Charleston Boulevard
Las Vegas, NV 89117
Attorney for Defendant Horizons At
Seven Hills Homeowners' Association

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28TH day of November, 2011, service of the foregoing DEFENDANT, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION'S, OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT was made this date by depositing a true copy of the same for mailing, first class mail at Las Vegas, Nevada, addressed as follows:

James R. Adams, Esq.
Assly Sayyar, Esq.
ADAMS LAW GROUP, LTD.
8330 W. Sahara Ave., Suite 290
Las Vegas, NV 89117

Puoy K. Premsrirut, Esq.
PUOY K. PREMSRIRUT, ESQ., INC.
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

An Employee of ALVERSON, TAYLOR, MORTENSEN & SANDERS

N:\kurt.grp\CLIENTS\19200\19223\pleading\Opposition to Motion for Summary Judgment.doc

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

Ex. 2

NEOJ
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Avenue Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawgroup.com
assly@adamslawgroup.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

ADAMS LAW GROUP, LTD.
8681 W. SAHARA AVENUE, SUITE 280
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

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 OF ORDER

PLEASE TAKE NOTICE that on the 1st day, January2012, the attached Order was entered in the above referenced matter.

Dated this 20th day of January, 2012.

ADAMS LAW GROUP, LTD
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8010 W Sahara Ave. Ste. 260
Las Vegas, NV 89117

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:

Eric Hinckley, Esq.
Alverson Taylor
Mortensen and Sanders
7401 W Charleston Blvd.
Las Vegas, NV 89117-1401

Dated the 20th day of January, 2012.

Loni D Harmon
An employee of Adams Law Group, Ltd.

ADAMS LAW GROUP, LTD.
8681 W. SAHARA AVENUE, SUITE 280
LAS VEGAS, NEVADA 89117
TELEPHONE (702) 838-7200
FACSIMILE (702) 838-3636

Electronically Filed
01/19/2012 03:08:18 PM

CLERK OF THE COURT

ORD
ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.
Nevada Bar No. 9178
8330 W. Sahara Ave. Suite 290
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

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 came before the Court on December 12, 2011 at 9:00 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief and Defendant's Counter 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. Eric Hinckley, 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 Court has determined that a justiciable controversy exists in this matter as Plaintiff has asserted a claim of right under NRS §116.3116 (the "Super Priority Lien" statute) against Defendant 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 of NRS 116.3116) 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 NRS §116.3116 (including whether Defendant demanded from Plaintiff amounts in excess of that which is permitted under the NRS §116.3116); 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 property that had been the subject of a homeowners' association statutory 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

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; and

WHEREAS, the Court is persuaded that Plaintiff's position is correct relative to the components of the Super Priority Lien (exterior repair costs and 9 months of regular assessments) and the cap relative to the regular assessments, but it is not persuaded relative to Plaintiff's position

concerning the need for a civil action to trigger a homeowners' association's entitlement to the Super Priority Lien.

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

1. Plaintiff's Motion for Partial Summary Judgment on Declaratory Relief is granted in part and Defendant's Motion for Summary Judgment on Declaratory Relief is granted in part.

2. NRS §116.3116 is a statute which creates for the benefit of Nevada homeowners' associations a general statutory lien against a homeowner's unit for (a) any construction penalty that is imposed against the unit's owner pursuant to NRS §116.310305, (b) any assessment levied against that unit, and (c) any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due (the "General Statutory Lien"). The homeowners' associations' General 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.

3. Pursuant to NRS §116.3116(2), the homeowners' association's General 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 General Statutory Lien which remains superior to the First Security Interest (the "Super Priority Lien").

4. Unless an association's declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102(1)(j) to (n), inclusive, are enforceable in the same manner as assessments are enforceable under NRS §116.3116. Thus, while such penalties, fees, charges, late charges, fines and interest are not actual "assessments," they may be enforced in the same manner as

assessments are enforced, i.e., by inclusion in the association's General Statutory Lien against the unit.

5. 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 is clear that the amount of the Super Priority Lien (which is that portion of a homeowners' associations' General 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 association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action to enforce its General Statutory Lien (which is 9 months of regular assessments) and "to the extent of" external repair costs pursuant to NRS §116.310312.

6. The base assessment figure used in the calculation of the Super Priority Lien is the unit's un-accelerated, monthly assessment figure for association common expenses which is wholly determined by the homeowners association's "periodic budget," as adopted by the association, and not determined by any other document or statute. Thus, the phrase contained in NRS §116.3116(2) which states, "... 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..." means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments. If assessments are paid quarterly, then 3 quarters of assessments (i.e., 9 months) would equal the Super Priority Lien, plus external repair costs pursuant to NRS §116.310312.

7. 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.

8. Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 times the homeowners' association's regular 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, plus external repair costs pursuant to NRS 116.310312.

9. Further, if regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien (i.e., shorter than 9 months of regular assessments,) the shorter period shall be used in the calculation of the Super Priority Lien, except that notwithstanding the provisions of the regulations, that shorter period used in the calculation of the Super Priority Lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

10. Moreover, ~~the Super Priority Lien can exist only if an "action" is instituted by the association to enforce its General Statutory Lien. The term "action" as used in NRS §116.3116(2) (as opposed the term "action" as contained in NRS §116.3116(7)), does not mean a "civil action" as that phrase is defined in NRCP 2 and NRCP 3 (i.e., "action" as used in NRS §116.3116(2) does not mean the filing of a complaint with the court).~~ the need for the institution of an actual civil action in order to enforce the Super Priority Lien can be obviated if the issue is otherwise properly raised in the court, as is the situation here where foreclosure in effect constitute an action within the meaning of NRS 116.3116(2)(c).

IT IS SO ORDERED.

1/12/12

DISTRICT COURT JUDGE Date

Submitted by:

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
ASSLY SAYYAR, ESQ.

Nevada Bar No. 9178
ADAMS LAW GROUP, LTD.
8330 W. Sahara Ave., Suite 290
Las Vegas, Nevada 89117
Tel: 702-838-7200
Fax: 702-838-3600
james@adamslawnevada.com
assly@adamslawnevada.com
Attorneys for Plaintiff

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com
Attorneys for Plaintiff

Approved:

NOT APPROVED

Eric Hinckley, Esq.
Alverson Taylor Mortensen and Sanders
7401 W. Charleston Blvd.
Las Vegas, NV 89117-1401
Office: 702.384.7000
Fax: 702.385.7000
Ehinckley@AlversonTaylor.com
Attorney for Defendant

Ex. 3

JIM GIBBONS
Governor

STATE OF NEVADA

DIANNE CORNWALL
Director

GAIL J. ANDERSON
Administrator

DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
2501 E. Sahara Avenue, Suite 303
Las Vegas, Nevada 89104
(702) 486-4606 Fax (702) 486-4520
E-mail: tlthompson@red.state.nv.us
www.red.state.nv.us

NOTICE & AGENDA OF PUBLIC MEETING

OF THE

NEVADA COMMISSION FOR COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

DECEMBER 7-8, 2010 @ 8:30 A.M.

The Nevada Commission for Common-Interest Communities and Condominium Hotels will conduct a meeting at the following locations:

DECEMBER 7, 2010
PUBLIC UTILITIES COMMISSION
9075 W. DIABLO DRIVE
ROOM 250
LAS VEGAS, NEVADA 89148

THE MEETING WILL BE VIDEO CONFERENCED TO:
PUBLIC UTILITIES COMMISSION
1150 E. WILLIAM STREET
CARSON CITY, NEVADA 89701

DECEMBER 8, 2010
DEPARTMENT OF BUSINESS AND INDUSTY
2501 E. SAHARA AVENUE
2ND FLOOR CONFERENCE ROOM
LAS VEGAS, NEVADA 89104

THE MEETING WILL NOT BE VIDEO CONFERENCED ON DECEMBER 8, 2010

COMMISSION MEMBERS WILL BE PRESENT IN LAS VEGAS, NEVADA

STACKED AGENDA: Below is an agenda of all items scheduled to be considered. Unless otherwise stated, items may be taken out of the order presented on the agenda by the discretion of the Chairperson. Persons who have business before the Commission are solely responsible to see that they are present when their business is conducted. Public Comment may be limited to three minutes per person at the discretion of the Chairperson. The Commission may only take action on those items denoted as potential action items.

NOTICE: Reasonable efforts will be made to assist and accommodate physically handicapped persons desiring to attend the meeting. Please call Teralyn Thompson at (702) 486-4606, prior to the meeting so arrangements may be conveniently made.

*** Denotes Potential Action Item**

1) **COMMISSION/DIVISION BUSINESS:**
   A) Introduction of Commissioners in attendance.
   B) Introduction of Division staff in attendance.

2) **PUBLIC COMMENT**
   MEMBERS OF THE PUBLIC ARE ENCOURAGED TO ADDRESS THE COMMISSION REGARDING ANY MATTER. HOWEVER, NO ACTION MAY BE TAKEN ON A MATTER. NO COMMENTS MAY BE MADE REGARDING A MATTER THAT IS OR MAY BE THE SUBJECT OF A FORMAL COMPLAINT BEFORE THE COMMISSION. PERSONS WHO DESIRE TO SUBMIT WRITTEN TESTIMONY ARE REQUESTED TO SUBMIT TEN (10) COPIES TO THE COMMISSION COORDINATOR. ***PUBLIC COMMENT MAY BE LIMITED TO THREE MINUTES PER PERSON AT THE DISCRETION OF THE CHAIRPERSON.***

3) **12/7/10 @ 9:00 a.m. ADOPTION HEARING FOR LCB FILE No. R164-09**
   Hearing by the Commission for Common-Interest Communities and Condominium Hotels to adopt LCB File No. R164-09 which establishes the following:
   - A regulation relating to reserve study specialists;
   - Repeals certain requirements for the issuance of a permit to act as a reserve study specialist;
   - Establishes requirements for the registration of a reserve study specialist;
   - Revises certain provisions relating to the required qualifications of a reserve study specialist; and,
   - Providing other matters properly relating thereto.

4) **12/7/10 @ 9:30 a.m. ADOPTION HEARING FOR LCB FILE No. R166-09**
   Hearing by the Commission for Common-Interest Communities and Condominium Hotels to adopt LCB File No. R166-09 which establishes the following:
   - A regulation relating to community managers;
   - Amends provisions pertaining to education of community managers;
   - Establishes provisions concerning audits of instructors and courses approved or funded by the Commission for Common-Interest Communities and Condominium Hotels;
   - Amends provisions concerning courses of continuing education for community managers;
   - Amends certain requirements imposed on sponsors of courses approved by the Commission; and,
   - Providing other matters properly relating thereto.

5) **12/7/10 @ 10:00 a.m. ADOPTION HEARING FOR LCB FILE No. R199-09**
   Hearing by the Commission for Common-Interest Communities and Condominium Hotels to adopt LCB File No. R199-09 which establishes the following:
   - A regulation relating to common-interest communities;

- Establishes provisions concerning fees charged by an association or person acting on behalf of an association to cover the costs of collecting a past due obligation of a unit's owner; and,
- Providing other matters properly relating thereto.

6) 12/7/10 @ 1:30 a.m. ADOPTION HEARING FOR LCB FILE No. R186-07
Hearing by the Commission for Common-Interest Communities and Condominium Hotels to adopt LCB File No. R186-07 which establishes the following:

- A regulation relating to common-interest realty;
- Provides standards of practice for members of an executive board of an association of a condominium hotel;
- Requires certain information to be included in reserve budgets;
- Establishes reporting principles and practices of financial accounting for associations of condominium hotels;
- Establishes provisions for the audit and review of financial statements for associations of condominium hotels;
- Establishes provisions relating to reserve studies;
- Establishes certain fees that a hotel unit owner may charge for the preparation of certain certificates;
- Establishes provisions governing the receipt of gifts, rewards or other items of value by certain persons;
- Requires certain information to be disclosed in a public offering statement and a resale package;
- Requires association to include certain information in annual registration forms filed with the Real Estate Division of the Department of Business and Industry;
- Makes technical corrections relating to certain publications that have been adopted by reference by the Commission for Common-Interest Communities and Condominium Hotels; and,
- Providing other matters properly relating thereto.

7) 12/7/10 @ 3:30 p.m. REGULATION WORKSHOP FOR LCB FILE No. R156-09
Workshop by the Commission for Common-Interest Communities and Condominium Hotels to receive comments regarding proposed regulations known as LCB File No. R156-09 which establishes the following:

- A regulation relating to community managers;
- Prescribing the form, type and amount of the bond which must be posted by an applicant, or the employer of an applicant, for the issuance, renewal or reinstatement of a certificate as a community manager; and,
- Providing other matters properly relating thereto.

8) DIVISION BUSINESS:

A) Administrative Program Officer's report on:
1. Intervention Program;
2. Number and types of associations registered within the State;
3. Alternative Dispute Resolution filings and subsidy claims;
4. Notices of Sales.

B) Licensee and board member discipline report.
C) Compliance Section's current caseload report.
D) Administrator's report on:
1. Agency submitted administration budget for the 2012/2013 biennium;
2. Personnel;

3. Status of Policies and Procedures Manual;
4. Status of proposed regulations LCB File No. R099-09 regarding arbitration under NRS Chapter 38;
5. Division advisory opinions.

9) **COMMISSION BUSINESS:**

A) Attorney General's case status report.
B) Discussion regarding the Policies and Procedures Manual.
*C) Discussion and possible action regarding an Advisory Opinion to the Division and the Commission from RMI Management dated November 29, 2010 requesting an interpretation of NRS 116.3115 and NRS 116.3116 regarding the application of the so called super priority lien.
*D) Discussion and possible action to approve minutes of the October 13, 2010 Commission meeting.
*E) Discussion and possible action regarding proposed legislative changes for the 2011 Legislative Session, including but not limited to:
1. Senator Copening's Working Group on changes to NRS 116 and related chapters; and,
2. Substitution of the word "assessments" for "dues" in NRS 116.31038(3)(b) and NRS 116.41095(3).
*F) Discussion and possible action regarding the status of:
1. LCB File No. R121-10 concerning unit owners' complaints; unit owners' the right to counsel; changes to NAC 116.410 and NAC 116.482.
2. LCB File No. R204-09 concerning service of process on out of state persons.
*G) Discussion and possible action on the criteria for seeking receiverships over associations under NRS 116.790.
*H) Discussion and possible action regarding proposed meeting schedule for calendar year 2011.
I) Discussion regarding Commissioners' speaking engagement requests.

*10) **EDUCATION:**

The Commission may take the following actions:

1. To change the designation of any of the following courses; or
2. To approve or disapprove any of the following courses for the amount of hours requested, recommended or any amount the Commission deems appropriate.

NEW COMMUNITY MANAGEMENT CONTINUING EDUCATION COURSES

1. Nevada Association of Community Managers
"Preventive Maintenance of HOA Properties"
Request: 3 hours General Classroom

2. Cook and Co.
"Accessibility Requests-The Manager's Guide"
Request: 3 hours General Classroom

*11) **DISCUSSION AND POSSIBLE ACTION ON DATE, TIME, PLACE, AND AGENDA ITEMS FOR UPCOMING MEETINGS.**

12) **PUBLIC COMMENT**

MEMBERS OF THE PUBLIC ARE ENCOURAGED TO ADDRESS THE COMMISSION REGARDING ANY MATTER. HOWEVER, NO ACTION MAY BE TAKEN ON A MATTER. NO COMMENTS MAY BE MADE REGARDING A MATTER THAT IS OR MAY BE THE SUBJECT OF A FORMAL COMPLAINT BEFORE THE COMMISSION. PERSONS WHO DESIRE TO SUBMIT WRITTEN TESTIMONY ARE REQUESTED TO SUBMIT TEN (10) COPIES TO THE COMMISSION COORDINATOR. ***PUBLIC COMMENT MAY BE LIMITED TO THREE MINUTES PER PERSON AT THE DISCRETION OF THE CHAIRPERSON.***

13) **COMMISSIONER COMMENTS**

*14) **ADJOURNMENT**

THIS NOTICE AND AGENDA HAS BEEN POSTED ON OR BEFORE 8:30 A.M. ON THE THIRD WORKING DAY BEFORE THE MEETING AT THE FOLLOWING LOCATIONS:

NV Real Estate Division
1179 Fairview Drive, Suite E
Carson City, NV 89701-5453

NV Real Estate Division
2501 E. Sahara Avenue, #102
Las Vegas, NV 89104-4137

NV Association of REALTORS
760 Margrave Drive, Ste. 200
Reno, NV 89502

Sierra Nevada Association of REALTORS
300 South Curry St., #3
Carson City, NV 89703

Elko Board of REALTORS
557 W. Silver Street
Suite #201 B
Elko, NV 89801

Greater Las Vegas
Association of REALTORS
1750 East Sahara Avenue
Las Vegas, NV 89104

Reno/Sparks Association
of REALTORS
5650 Riggins Court
Reno, NV 89502

Incline Village Board
of REALTORS
924 Incline Way, Suite 1
Incline Village, NV 89452

Nevada State Library
100 Stewart Street
Carson City, NV 89710

Community Associations Institute - Nevada Chapter
6135 Harrison # 3
Las Vegas, NV 89120

CAMEO, Inc.
9101 W. Sahara Ave. Suite 105-J24
Las Vegas, NV 89117

State of Nevada
Dept. of Business & Industry
Nevada Real Estate Division
INTERNET PAGE:
http://www.red.state.nv.us

Electronically Filed
07/09/2012 04:37:46 PM

CLERK OF THE COURT

RIS

Kurt R. Bonds, Esq.
Nevada Bar No. 6228
Eric W. Hinckley, Esq.
Nevada Bar No. 12398
Alverson, Taylor, Mortensen
& Sanders
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Tel: (702) 384-7000
Fax: (702) 385-7000
Email: kbonds@alversontaylor.com
ehinckley@alversontaylor.com

Patrick J. Reilly, Esq.
Nevada Bar No. 6103
Nicole E. Lovelock, Esq.
Nevada Bar No. 11187
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
Fax: (702) 669-4650
Email: preilly@hollandhart.com
nelovelock@hollandhart.com

Attorneys for Defendants
Horizons At Seven Hills Homeowners Association

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

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, Defendants.	Case No. : A-11-647850-B Dept. No.: XIII **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF** Hearing Date: July 16, 2012 Hearing Time: 9:00 am

Defendant Horizons At Seven Hills Homeowners Association ("Horizons"), by and through its attorneys of record Holland & Hart LLP, hereby submit its Reply in Support of the Motion for Reconsideration of the Order Granting Summary Judgment on Claim of Declaratory

Relief entered January 20, 2012 ("Order").

This Reply is made and based upon the attached memorandum of points and authorities, the pleadings and papers on file herein, and any oral argument this Court may choose to hear.

DATED this 9th day of July, 2012.

HOLLAND & HART LLP

By _____

Patrick J. Reilly, Esq.
Nicole E. Lovelock, Esq.
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

Kurt R. Bonds, Esq.
Eric W. Hinckley, Esq.
Alverson, Taylor, Mortensen
& Sanders
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117

Attorneys for Defendants Horizons At Seven Hills Homeowners Association

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF

I.

INTRODUCTION

Unfortunately, Plaintiff has tried to complicate a basic matter. Very simply, the Nevada Supreme Court has held that the Commission for Common-Interest Communities and Condominium Hotels (the "CCICCH") and the Nevada Real Estate Division (the "NRED") are ***solely*** responsible for determining the type and amount of fees that may be collected by associations, including ***whether they maintain a priority***.[1] Defendant is asking this Court to expressly consider the advisory opinion adopted by the CCICCH on December 8, 2010 (the "CCICCH Advisory Opinion"), to give it the appropriate weight which it is due, and to

[1] ***See State of Nevada, Department of Business and Industry, Financial Institutions Division v. Nevada Associated Services, Inc. et al.***, 2012 WL 1923974, *3 (May 23, 2012) (emphasis added).

reconsider its prior ruling that the statutory super-priority lien of NRS 116.3116 is strictly limited to "nine times monthly assessments." As previously discussed, this case will likely be appealed to the Nevada Supreme Court. Therefore, Defendant is seeking a full record, including an express determination by this Court of the weight and importance the CCICCH Advisory Opinion, something this Court has not yet done in this case.

Despite Plaintiff's misstated contentions, a motion for reconsideration is the correct procedural device, as this is an instance when there is ***new law*** that warrants reconsideration of a prior decision. ***See Moore v. City of Las Vegas***, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which ***new*** issues of fact or ***law*** are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.") (emphasis added). Indeed, much of Plaintiff's Opposition is wasted on the dubious contention that a motion for reconsideration is improper, even when a pending case such as this is impacted by the issuance of a related Nevada Supreme Court decision. Given that this Court has never expressly weighed the significance of the CCICCH Advisory Opinion, and given the Nevada Supreme Court's recent decision, this Court must give the CCICCH Advisory Opinion the "great deference" to which it is entitled and grant the instant Motion.

II.

STANDARD OF REVIEW

A. The Motion for Reconsideration is Timely, Appropriate, and Necessary.

It is without question that this Court has inherent authority to reconsider prior orders. ***Trail v. Faretto***, 91 Nev. 401, 536 P.2d 1026 (1975) ("[A] court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the progress of the cause or proceeding.") Moreover, "unless and until an order is appealed the district court retains jurisdiction to reconsider the matter." ***See*** NRCP 56; ***Harvey's Wagon Wheel v. MacSween***, 96 Nev. 215, 606 P.2d 1095 (1980) (district judge did not abuse his discretion by rehearing the motions for summary judgment); ***Gibbs v. Giles***, 96 Nev. 243, 246–47, 607 P.2d 118, 120 (1980)(overruled on other grounds). Not only does a district court have authority, but a district court has great discretion on the question of rehearing. ***See,***

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

e.g., Harvey's Wagon Wheel, 96 Nev. at 217-18, 606 P.2d 1095 at 1097 (1980); ***Masonry & Tile Contractors v. Jolley, Urga & Wirth***, 113 Nev. 737, 941 P.2d 486 (1997) (reconsideration is appropriate if substantially different evidence is subsequently introduced or the decision is clearly erroneous); ***Moore***, 92 Nev. at 405, 551 P.2d at 246 (reconsideration appropriate where "new issues of fact or law are raised supporting a ruling contrary to the ruling already reached.").

Indeed, this is one of those "very rare instances in which new issues of fact ***or law*** are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." ***See Moore***, 92 Nev. at 405, 551 P.2d at 246. As such, the instant motion is timely, as a person who seeks reconsideration based upon a change in law may do so at any time. ***Id.***; ***see also*** EDCR 2.24(b); ***see also*** NRCP 60.

B. The NAS/State of Nevada Opinion Has Been Published.

Plaintiff repeatedly maintains that this Court should disregard as non-binding the recent Nevada Supreme Court decision in ***NAS/State of Nevada*** solely because it is unpublished. Plaintiff is wrong. On June 21, 2012, the Nevada Supreme Court issued an order authorizing the decision for publication. A copy of this Order Granting Motion for Publication is attached hereto as **Exhibit "A"**.

Given the Court's Order, the Nevada Supreme Court decision in ***NAS/State of Nevada*** is now binding authority upon this case. That binding authority directs that the CCICCH and the NRED have the jurisdiction to interpret NRS Chapter 116. Motion, Exhibit A ("Based on a plain reading of the statutes, the responsibility for 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."). Pursuant to the statutory authority of NRS Chapter 116, the CCICCH did just that in December 2010. Yet this Court has never expressly addressed the weight or authority of the CCICCH Advisory Opinion, and thus far has essentially ignored that opinion.

C. The CCICCH Advisory Opinion Addresses The Ultimate Issue In This Case.

Plaintiff contends that the CCICCH Advisory Opinion does not address the issues being raised in this lawsuit. More specifically, Plaintiff maintains the Advisory Opinion only

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

addresses the narrow question of whether collection fees and costs may be considered as "part of" the super-priority lien. ***See*** Opposition, 9-11. At the same time, however, Plaintiff maintains that the points raised in the Advisory Opinion "are not disputed" and that there has always been "universal agreement that collection costs may be *part* of the super-priority lien amount." Opposition at 9:23-24 (emphasis in original).

Plaintiff's arguments raise an obvious question—why would the CCICCH bother writing a 14-page advisory opinion answering a question upon which there was "universal agreement"? Indeed, if the CCICCH Advisory Opinion were confined to the narrow question of whether collection fees and costs were "part of" the super-priority lien, the Advisory Opinion would be relatively short, as the answer to that limited question can be found plainly in NRS 116.3116(1), which states that "any penalties, fees, charges, late charges, fines and interest" are enforceable as assessments under NRS 116.3116. Therefore, while Plaintiff gamely tries to characterize the CCICCH Advisory Opinion as limited in scope, this "spin" makes no sense at all. There is no reason or purpose for the CCICCH to issue a 14-page Advisory Opinion on an issue for which there is "universal agreement" and upon which the answer can be found quickly.

Instead, Plaintiff is half-correct. The CCICCH Advisory Opinion is essentially a two-part document—the first part being the threshold issue of whether collection fees and costs can be "part of" the super-priority lien, and the second part being whether Section 116.3116 limits assessment and the non-assessment portion of the super-priority lien to "nine times monthly assessments." Plaintiff focuses on only the first part of the Advisory Opinion, quoting the CCICCH's favorable citations to ***Sunstone*** and ***Winokur***, and buries its proverbial head in the sand as to the second part of the opinion.

The CCICCH Advisory Opinion addresses the exact issue—and the ultimate issue—that is being considered by this Court in this case. Indeed, this is evidenced by the Question Presented, which states:

///

///

///

Holland & Hart L
9555 Hillwood Drive, Sec. .loor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

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?***

Attached hereto as **Exhibit "B"** is a true and correct copy of the CCICCH Advisory Opinion. Later, when the CCICCH begins its analysis, it notes as follows:

> 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***....

Exhibit B at p. 4. Based on the foregoing, the CCICCH Advisory Opinion explicitly addresses whether there can "***also***" be a recovery for costs and fees in the super-priority lien that is "***other than just***" 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 6 or 9 month super priority period." ***It is therefore without question that the CCICCH is addressing the same ultimate issue—the same issue that is before this Court.***

Despite Plaintiff's contentions to the contrary, it was Puoy Premsrirut, Esq., Plaintiff's counsel, who requested the formal opinion by CCICCH (the "Request") on March 19, 2010. Attached hereto is **Exhibit "C"** is a true and correct copy of the Request. The CCICCH responded to Ms. Premsrirut's Request in May 2010 with the draft advisory opinion that was then formally adopted by the CCICCH on December 8, 2010. The Request made by counsel to the CCICCH did not merely ask for an opinion as to whether collection fees and costs were "part of" the SUPER-PRIORITY LIEN. Rather, Plaintiff's counsel made a far broader request—she specifically asked the CCICCH to sort through the differing positions of HOAs and investors and answer the ultimate question, stating in pertinent part:

> There are differing positions as to what is permissible under the statute. As practiced by the HOAs and CAs [collection agencies], the super-priority lien amount may

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

> include all assessments, collection fees, legal fees, notice charges, delinquency costs and virtually anything that is associated with the HOA balance, ***for the preceding nine months***. On the other hand, the subsequent purchasers at foreclosure, who desire to transfer the property to a new buyer, ***take the position that the super-priority lien amount may only be 9xs the amount of the monthly assessment as budgeted by the HOA***.

Exhibit C (emphasis added). Ms. Premsrirut's letter makes it clear that the question that was asked of the CCICCH—and the ultimate issue that was presented to that body—was whether the super-priority lien was strictly limited to the numerical cap of "nine times monthly assessments." Given counsel's direct involvement in presenting that matter to the CCICCH, it is disingenuous for Plaintiff to suggest that the Advisory Opinion has a more limited scope. Plaintiff—and their counsel—know better.

Despite Plaintiff's attempt to rewrite history, the CCICCH explicitly rejected the notion that there is a finite numerical maximum for the super-priority lien, and made an express finding to that effect in its Advisory Opinion. The CCICCH reasoned that:

> **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" [footnote omitted] 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 authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.
>
> . . . .
>
> **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

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

> 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.

See Exhibit B (emphasis added). The foregoing language answers the ultimate question in this case. The CCICCH expressly rejected the argument (urged by Plaintiff and thus far embraced by the Court in this case) of limiting the super-priority lien to a "finite amount" of six times or nine times monthly assessments and, in doing so, concluded that the state of Connecticut, NCCUSL, as well as "Fannie Mae and local lenders" had all rejected Plaintiff's analysis and approach.[2]

Indeed, according to the CCICCH in the Advisory Opinion, ***the super-priority lien consists conceptually of two separate components***—the "assessment portion of the lien" that is made up of the so-called "monthly assessments" ("Assessment Super-Priority Element") and the remaining portion made up of interest permitted by NRS 116.3115, late fees and charges authorized by the declaration, and the "costs of collecting" authorized by NRS 116.310313 ("Costs Super-Priority Element"). See Exhibit B at p. 9. According to the CCICCH Advisory Opinion, NRS 116.3116 only places a **temporal** limitation on the **assessment portion** of the HOA's lien that is entitled to super-priority, and places no limit on the remaining portion. In other words, while the Assessment Super-Priority Element of the super-priority lien is capped by NRS 116.3116, the Costs Super-Priority Element is not capped by the statute. In this case, Plaintiff seeks to place a numerical cap on **both** components, the Assessment Super-Priority Element and the Costs Super-Priority Element, to a finite amount, which is in direct contravention of the CCICCH Advisory Opinion.

This is also consistent with NAC 116.470, which was adopted by the NRED in 2011 in direct response to criticism that collection fees and costs sometimes dwarfed the underlying principal

[2] Horizons notes that the CCICCH made no mention of Winokur or the two Colorado cases at this point of the Advisory Opinion. While those authorities may have been "very helpful" to the CCICCH in addressing the threshold issue of whether collection fees and costs are "part of" the super-priority lien, those authorities are not referenced at all when the CCICCH answers the ultimate question that is the subject of the dispute in this case.

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

amount. NAC 116.470 is far from a "red herring" as Plaintiff suggests. Rather, the NRED set a maximum cap of $1,950.00 on all collection fees when it adopted NAC 116.470. One wonders why the NRED would have bothered with imposing such a cap if there was already a strict "nine times monthly assessment" numerical cap under NRS 116.3116. Indeed, if Plaintiff's theory in this case is correct, the maximum amount of NAC 116.470 would be completely irrelevant to all homeowners except those who have "monthly assessments" that exceed $216.66 (9 times $216.66 equals $1949.94). There is nothing in the record of adoption for NAC 116.470 to suggest this was the NRED's intent. Of course, this Court must interpret statutes and regulations "in harmony with other rules and statutes." ***Albios v. Horizon Communities, Inc.***, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). Plaintiff's theory in this case makes no sense at all when viewed in light of the adoption of NAC 116.470.[3]

As such, this Court must reconsider its Order to give "great deference" to which the CCICCH Advisory Opinion is entitled under Nevada law. In doing so, this Court must conclude that all reasonable costs of collecting (subject to the limits imposed by the NRED in NAC 116.470) are part of the super-priority lien and that it is not simply limited to a "six times monthly assessments" or "nine times monthly assessments" equation.

C. Plaintiff Distorts the Background of the CCICCH Advisory Opinion.

Unfortunately, this is not the first time Plaintiff's counsel has slung mud at Michael Buckley, the former chairman of the CCICCH, in an attempt to distract from the implications of the CCICCH Advisory Opinion. Indeed, the mere fact that Plaintiff has attacked Mr. Buckley is revealing. Simply stated, Plaintiff would not bother to attack Mr. Buckley if the CCICCH Advisory Opinion stated only that collection fees and costs may be "part of" the super-priority lien —a proposition upon which there is "universal agreement." Plaintiff and their counsel know that the CCICCH Advisory Opinion answers the ultimate question in this case, and that is why they have attacked him so vigorously here

[3] Plaintiff asks this Court to turn a blind eye to NAC 116.470 and claims without any legal authority that this argument was somehow "waived" by Horizons by not being raised in a prior summary judgment brief. This argument is truly absurd, given that Ikon has filed ***three separate summary judgment motions*** in this case, raising brand new arguments each time it asks for summary judgment. NAC 116.470 is the law in the State of Nevada, and it evidences an attempt by the NRED to place a cap on collection fees and costs, which in turn evidences the fact that the NRED does not consider collection fees and costs to be capped by NRS 116.3116.

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

and in other fora.

Significantly, Plaintiff fails to inform this Court that Plaintiff's counsel has asserted ethics charges against Mr. Buckley, which are on these same allegations, and the allegations were found to have "insufficient credible evidence" to even a hold a hearing before the Commissioner of the Nevada Commission on Ethics. Attached hereto as **Exhibit "D"** is the Panel Determination. As such, it is improper to call into question the weight of the CCICCH Advisory Opinion, especially since the Nevada Supreme Court has stated that the CCICCH and the NRED have "the responsibility of determining which fees may be charged, the maximum amount of such fees, and ***whether they maintain a priority***..." ***State of Nevada, Department of Business and Industry, Financial Institutions Division***, 2012 WL 1923974 at *3 (emphasis added).

Even more inappropriate is Plaintiff's distortion of how the CCICCH opinion was requested, Plaintiff asserts that the request for advisory opinion "was procured in direct violation of NAC 232.040 and must now finally be disregarded by the Nevada courts." ***See*** Opposition, 8:18-20. This is based upon the allegation that RMI Management, Inc. requested the Advisory Opinion. However, Plaintiff's counsel, Ms. Premsrirut, actually requested the Advisory Opinion on March 19, 2010. ***See*** Exhibit C. Ms. Premsrirut wrote a letter to the CCICCH requesting "a formal opinion" on the questions relating to NRS 116.3116 and the super-priority lien. The CCICCH responded to Ms. Premsrirut's request in May 2010 with the draft advisory opinion and the CCICCH simply adopted the draft advisory opinion on December 8, 2010—the same opinion which had been sought in the first place by Ms. Premsrirut. RMI Management, Inc., along with others, merely requested a vote adopting the draft opinion ***after*** Plaintiff's counsel had already improperly sought and obtained the advisory opinion from the Nevada Financial Institutions Division ("FID") and the matter was being litigated in district court.[4]

Another example of Plaintiff's hyperbole is its assertion that "there is no case law in any state that supports Defendant's Position." Opposition at 11:25. Plaintiff seems to have forgotten conveniently about ***Hudson House***, which is referenced repeatedly (and ultimately embraced) in

[4] The FID withdrew their advisory opinion after the Nevada Supreme Court held that the FID did not have jurisdiction. Attached hereto as **Exhibit "E"** is the Order Withdrawing the Declaratory Order.

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

the CCICCH Advisory Opinion, along with ***Korbel*** or any of the other decisions that have rejected Plaintiff's analysis, including the recent decisions in the following cases:

- ***Higher Ground, LLC v. Adagio Homeowners' Association, et al.***, Nevada Real Estate Division Case No. 11-90 (Mar. 28, 2012);
- ***McAllester v. Silver State Condominium Owners' Association, Inc.***, Nevada Real Estate Division Case No. 12-19 (June 15, 2012); and
- ***McAllester v. Baker Place Condominium Association***, Nevada Real Estate Division Case No. 12-27 (April 20, 2012).

Copies of these decisions are respectively attached hereto as **Exhibit "F"** through **Exhibit "H"**.

Now that the Nevada Supreme Court has asserted that the CCICCH has and had the jurisdiction to interpret the amounts included in the super-priority lien, and the CCICCH agrees with the opinion of the HOAs, Plaintiff is willing to make allegations that are just not founded in fact. These collateral and personal attacks should be rejected by this Court.

Rather, Horizons asks that this Court to give the "great deference" to which the CCICCH is entitled pursuant to Nevada law. ***Imperial Palace v. State, Dep't Taxation***, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); ***Dep't of Taxation v. DaimlerChrysler***, 121 Nev. 541, 549, 119 P.3d 135, 139 (2005); ***Thomas v. City of N. Las Vegas***, 122 Nev. 82, 101, 127 P.3d 1057, 1070 (2006)(citing ***Chevron U.S.A. v. Not. Res. Def. Council***, 467 U.S. 837 (1984). If the need for this "great deference" was not clear prior to the ***NAS/State of Nevada*** opinion, it certainly is now.

///

///

///

///

///

///

///

///

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

III.

CONCLUSION

Given the recent authority issued by the Nevada Supreme Court in the ***NAS/State of Nevada*** case, Horizons requests the Court grant the instant motion, reconsider the Order that is contrary to the CCICCH's Advisory Opinion, and issue an order consistent with the CCICCH Advisory Opinion that the super-priority lien includes costs of collection with no numerical limit on collection fees and costs, except as specifically provided by NAC 116.470.

DATED this 9th day of July, 2012.

HOLLAND & HART LLP

By _____

Patrick J. Reilly, Esq.
Nicole E. Lovelock, Esq.
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

Kurt R. Bonds, Esq.
Eric W. Hinckley, Esq.
Alverson, Taylor, Mortensen
& Sanders
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117

Attorneys for Defendants Horizons At Seven Hills Homeowners Association

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on July 9, 2012, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF** by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

James R. Adams, Esq.
Assly Sayyar, Esq.
Adams Law Group, Ltd.
8010 West Sahara Avenue, Suite 260
Las Vegas, Nevada 89117
Tel: (702) 838-7200
Fax: (702) 838-3636
Email: james@adamslawnevada.com
assly@adamslawnevada.com

Puoy K. Premsrirut, Esq.
Puoy K. Premsrirut, Esq. Inc.
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Tel: (702) 384-5563
Fax: (702) 385-1752
Email: ppremsrirut@brownlawlv.com

Attorneys for Plaintiff

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION; AND GEORGE E. BURNS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION,
Appellants,
vs.
NEVADA ASSOCIATION SERVICES, INC.; RMI MANAGEMENT, LLC; AND ANGIUS & TERRY COLLECTIONS, INC.,
Respondents.

No. 57470

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION FOR PUBLICATION

This court entered an order of affirmance in this matter on May 23, 2012. Two motions have been filed requesting that this court publish that decision as an opinion. Respondents represent that appellants have no opposition to publication. Cause appearing, we grant the motions. A published opinion affirming the district court's order will be forthcoming. Issuance of the remittitur is stayed pending publication of the opinion. NRAP 41(a)(1).

It is so ORDERED.

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Susan Johnson, District Judge
Attorney General/Las Vegas
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk

EXHIBIT B

EXHIBIT B

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. . . .