IN THE SUPREME COURT OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Appellant, v. IKON HOLDINGS, LLC, a Nevada limited-liability company, Respondent.	Supreme Court Case No. 63178 District Court Case No. A-11-647850-B

Brief of Amicus Curiae Community Association Management Executive Officers, Inc. in Support of Appellant Horizons at Seven Hills Homeowners Association

J. Randall Jones, Esq.
Carol L. Harris, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000
Fax (702) 385-6001
clh@kempjones.com
jrj@kempjones.com
nrr@kempjones.com

Attorneys for Amicus Curiae
Community Association Management Executive
Officers, Inc.

NRAP 26.1 Disclosure

The undersigned counsel of record hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Community Association Management Executive Officers, Inc.; and
2. Kemp, Jones & Coulthard, LLP

Dated this 11th day of December, 2013.

/s/ J. Randall Jones
J. Randall Jones, Esq.
Carol L. Harris, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

Attorneys for Amicus Curiae Community Association Management Executive Officers, Inc.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Treatises

I. Introduction

The Community Association Management Executive Officers, Inc. ("CAMEO") submits this amicus brief in support of Appellant Horizons at Seven Hills Homeowners Association ("Horizons"). Horizons' appeal asks the Court to determine whether the super priority lien provided common-interest associations under Nevada Revised Statute ("NRS") section 116.3116 includes the cost of collecting past-due assessments. Past-due assessments and the costs of collecting them are a burden. When enacting and amending NRS 116.3116, the Nevada Legislature sought to fairly balance that burden between (1) associations and their assessment-paying homeowners, and (2) foreclosing banks and their purchasers by giving associations a limited super priority lien. The district court's interpretation of NRS 116.3116—excluding collection costs from that super priority lien—upsets the Legislature's carefully crafted balance and leads to unreasonable results.

Although collection costs are relatively small and statutorily capped, they constitute a significant amount to associations and their homeowners. If associations are unable to recover collection costs they will be forced to pass that burden onto their assessment-paying homeowners in the double-whammy of increased assessments and reduced services. Or they will forego collection efforts altogether, instead opting to immediately pass the burden of lost assessments onto the assessment-paying homeowners until the delinquent unit is foreclosed upon by

the lender and resold to a new homeowner. Either option will have a snowball effect on associations: foreclosures will necessarily lead to higher assessments and reduced services, and the increase of assessments and decrease in services will lower property values and lead to more foreclosures. The converse is less dire. If the collection costs allowed under NAC 116.470 are included in the super priority lien, they will be paid by foreclosing banks and their purchasers, who are better equipped to absorb them, as a minor cost of doing business.

The latter is how this uniform act has been interpreted in Connecticut. As the Connecticut Supreme Court put it, the former interpretation would have the legislature "fashioning a bow without a string or arrows." *Hudson House Condo. Assn., Inc. v. Brooks*, 611 A.2d 862, 866 (Conn. 1992) ("*Hudson House*"). As one of the states hit hardest in the housing collapse,[1] Nevada's associations desperately need those strings and arrows to keep foreclosure processes moving forward.

The body charged with interpreting and enforcing Chapter 116, the Commission for Common Interest Communities and Condominium Hotels ("Commission"), issued an advisory opinion interpreting NRS 116.3116 as including the following in an association's super priority lien: "(a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration,

[1] Les Christie, *Foreclosures: America's hardest hit neighborhoods*, CNN Money (Jan. 23, 2012) (identifying Las Vegas, Nevada, neighborhoods as the top five worst hit by the collapse) (available at http://money.cnn.com/2012/01/23/real_estate/foreclosure_zip_codes/).

(c) charges for preparing any statements of unpaid assessments and (d) the 'costs of collecting' authorized by NRS 116.310213." Appellant's Appendix ("AA") 0455. The Commission's interpretation is consistent with the language of the act and avoids the unreasonable result of giving associations unstrung bows and no arrows in their quivers. CAMEO therefore requests that the Court adopt the Commission's interpretation of NRS 116.3116 and reverse the decision of the district court.

II. Amicus Curiae Identity, Interest, and Source of Authority

CAMEO is a non-profit Nevada corporation organized for the owners or executive officers of community association management companies that do business in Nevada, and the business partners and individual managers that are directly employed by Nevada community associations. CAMEO acts through its executive director and officers, who are active leaders in the association-management industry. CAMEO has numerous members that serve over 1,000 common-interest community associations in this State. CAMEO's authority to file this brief is derived from NRAP 29(c) and a corresponding order from the Court granting CAMEO's motion for leave to file an amicus brief.

CAMEO provides educational services, support, and resources to its members so they, in turn, can better manage associations for the benefit of those associations' members. Appellant correctly argues that CAMEO's members

perform an integral service, for without them "associations would have little or no ability to enforce their rights to collect" past-due assessments from delinquent homeowners. Appellant's Opening Brief ("AOB") 26. That is because the services CAMEO's members provide are sophisticated: from developing yearly budgets for associations' operating and reserve accounts to navigating the complex lien-collection and foreclosure laws that associations must tread in order to collect the delinquent assessments they desperately need to fund their budgets. A key issue in this appeal is whether costs of collecting delinquent assessments are part of NRS 116.3116's super priority lien. Because that issue directly affects services that CAMEO's members provide, they have an interest in this appeal.

III. Argument

A. The district court's interpretation of NRS 116.3116 is contrary to authorities the Court finds "highly persuasive" and to which it gives "great deference."

Chapter 116 is Nevada's embodiment of the uniform act of Common-Interest Ownership. Chapter 116 directs that it "must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject to this chapter among states enacting it." NEV. REV. STAT. § 116.1009(2). The Court has explained that when construing "a uniform act applied in many states, the jurisprudence of sister jurisdictions applying the [u]niform [a]ct is highly persuasive." *Waldman v. Maini*, 195 P.3d 850, 860 (Nev. 2008).

The Court has also explained that "'[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as necessary precedent to administrative action' and that 'great deference should be given to the agency's interpretation when it is within the language of the statute.'" *State v. Morros*, 766 P.2d 263, 266 (Nev. 1988) (quoting *Clark Co. Sch. Dist. v. Local Govt.*, 530 P.2d 114, 117 (Nev. 1974)). "While not controlling, an agency's interpretation of a statute is persuasive." *Id.* (citing *Nevada Power Co. v. Public Serv. Commn.*, 711 P.2d 867, 869 (Nev. 1986)).

The highest court of another state that enacted this uniform act has already examined the central question in this appeal and concluded that the super priority lien includes the cost of collecting delinquent assessments. The same conclusion was also reached in an advisory opinion issued by the body charged with interpreting and enforcing Chapter 116. When interpreting NRS 116.3116 in this appeal, the Court should be persuaded by and give great deference to those authorities.

1. The Connecticut Supreme Court's interpretation of the uniform act avoids the unreasonable result of disarming associations.

The Supreme Court of Connecticut was the first court to examine whether the super priority lien includes the costs of collecting delinquent assessments. It began by assuming "'the legislature intended to accomplish a reasonable and rational result.'" *Hudson House*, 611 A.2d at 616 (quoting *Stoni v. Wasicki*, 426

A.2d 774 (Conn. 1979)). The Connecticut Supreme Court then looked at what the statute does: (1) creates "a statutory lien for delinquent common expense assessments"; (2) "authorizes the foreclosure of the lien"; (3) "provides for a limited priority over other secured interests for a portion of the assessment accruing during the six month period preceding the institution of the action"; and (4) "specifically authorizes the inclusion of the costs of collection as part of the lien." *Id.* at 617 (examining General Statutes § 47–258 of Connecticut's Common Interest Ownership Act (Rev. to 1989)). That court's final step was to determine what interpretation had a more reasonable and rational result—inclusion of collection costs in the super priority lien or not. The court reasoned that because monthly assessments are relatively small, the priority period short (six months), and it is likely to be the only priority debt, "it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to a priority." *Id.* "To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows." *Id.* The *Hudson House* court thus held that "attorney's fees and costs" are included "in the sums entitled to a priority." *Id.*

No material difference exists between the Connecticut statute considered by the *Hudson House* court and NRS 116.3116 that would merit a different holding by this Court. Like the Connecticut Supreme Court, this Court begins by assuming

that the Legislature intends for its enactments to have reasonable and rational results. *See e.g. Steward v. Steward*, 890 P.2d 777, 781 (Nev. 1995) (citing *Rose v. First Fed. Savings & Loan*, 777 P.2d 1318, 1320 (Nev. 1989) and *Cragun v. Nev. Pub. Employees' Ret. Bd.*, 547 P.2d 1356 (Nev. 1976)). It is, in fact, "a fundamental rule of statutory interpretation" in Nevada "that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." *Sheriff, Washoe County v. Smith*, 542 P.2d 440, 443 (Nev. 1975).

Similar to the Connecticut statute: NRS 116.3116(1) creates a statutory lien for delinquent common expense assessments; (2) NRS 116.3116(6), (10) & 116.31162 authorize foreclosure of that lien; (3) NRS 116.3116(2) provides limited priority over other secured interests for a portion of the assessment accruing during the nine month period preceding the institution of the action; and (4) NRS 116.3116(8) specifically authorizes the inclusion of the costs of collection as part of the lien.[2] And also like in Connecticut, monthly assessments in Nevada are

[2] The portion of the Connecticut statute the *Hudson House* court identified as "specifically authoriz[ing] the inclusion of the costs of collection as part of the lien[,]" § 47-258(g), 611 A.2d at 866, is nearly identical to NRS 116.3116(8) and 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." *See* NEV. REV. STAT. § 116.3116(8) (providing "must" rather than "shall").

relatively small (generally $50),[3] the priority period is short (nine months), and is likely the only priority debt.

The Colorado Court of Appeals has also considered whether the super priority lien includes collection costs. *See First Atlantic Mortg., LLC v. Sunstone North Homeowners Assn.*, 121 P.3d 254 (Colo. App. 2005). The Colorado court found that "'fees, charges, late charges, attorney fees, fines, and interest'" are included in the super priority lien, but capped the amount of that lien at six times monthly assessments. *Id.* at 255 (quoting COLO. REV. STAT. § 38-33.3-316 (2004)(1) (2004)). Colorado's statute provides the association's lien

> is also prior to the security interests . . . to the extent of[] **an amount equal to** the common expense assessments . . . [that] would have become due, in the absence of any acceleration, during the six months immediately preceding institution . . . of an action. . . .

Id. (emphasis added) (quoting COLO. REV. STAT. § 38-33.3-316(2)(b)(I)). Importantly, Nevada's counterpart does not contain the "an amount equal to" limiting language found in Colorado's statute. NEV. REV. STAT. § 116.3116(2). The disparate language of Nevada's statute thus does not support a similar cap.

Colorado's cap is also unworkable here because it leads to unreasonable results. That cap is tantamount to not including collection costs in the super priority lien because, in practice, collection costs will almost always be **in addition**

[3] Declaration of Chris Yergensen ¶ 13, attached as Exhibit 1 to CAMEO's Motion for Leave to File Brief of Amicus Curiae ("Decl. Yergensen").

to the six or nine months of assessments and thus rarely, if ever, included in the super priority lien. This happens because it takes months for an association to work through the collection and foreclosure processes; with each passing month the association works through those processes, another assessment goes delinquent.[4] So by the time the lender eventually forecloses on the delinquent unit, six or nine months of assessments will have been missed **and** the association will have incurred significantly more than those assessment amounts attempting to collect on its lien.[5] Knowing their assessment-paying homeowners will be left holding the entire bag for collection costs, associations will cease their collection efforts. The Colorado court's interpretation thus suffers from the same defect as the district court's interpretation: it gives associations unstrung bows and arrowless quivers.

Colorado's cap is also directly at odds with NRS 116.1114's mandate that "[t]he remedies provided by this chapter must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." NEV. REV. STAT. § 116.3114. An association is an aggrieved party when a homeowner fails to pay his obligations, like assessments, to the association. The purpose behind NRS 116.1114 is to ensure the association obtains a remedy that puts it in the same position as if no delinquency occurred, which necessarily requires the other party to pay collection costs. If those costs are borne by the

[4] Decl. Yergensen ¶ 8.
[5] *Id.*

association alone, it will be in an even worse position. This makes Colorado's interpretation even more unreasonable.

Connecticut's interpretation of this uniform act avoids unreasonable results while fairly balancing the burden of delinquent assessments and the costs of collecting them between (1) associations and their homeowners, and (2) foreclosing banks and their purchasers. Colorado's interpretation, on the other hand, leads to unreasonable results and places the burden of collection costs solely on the shoulders of the associations and their innocent homeowners. The Court must therefore reject Colorado's unreasonable interpretation of this uniform act in favor of Connecticut's reasonable interpretation. *See Sheriff, Washoe County*, 542 P.2d at 443.

2. The Commission's interpretation is a beacon for the Court.

The Court recently determined that "[b]ased on a plain, harmonized reading of [NRS 116.615 and NRS 116.633], 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 [Commission]." *State Dept. Business and Indust. Fin. Institutions Div. v. Nev. Assn. Servs., Inc.*, 294 P.3d 1223, 1227 (Nev. 2012) ("*Nevada Association*") (emphasis added). This finding is important here because the Commission adopted an advisory opinion it issued in December 2010, interpreting NRS 116.3116 to include the following amounts, "to

the extent [they] relate to the unpaid 6 or 9 months of super priority assessments[,]" into the association's super priority lien: "(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." AA 0468.

The Real Estate Division ("Division") issued a contrary advisory opinion two years later.[6] Although the Division and Commission are both charged with administering Chapter 116, *see* NEV. REV. STAT. § 116.615; *accord Nevada Association*, 294 P.3d at 1225, it is the Commission that holds sway in the pair. *See id.* at § 116.615(2)–(4) ("The Commission and the Division may do all things necessary and convenient to carry out the provisions of this chapter, including, without limitation, prescribing such forms and adopting such procedures as are necessary to carry out the provisions of this chapter. **The Commission, or the Administrator [of the Division] with the approval of the Commission**, may adopt such regulations as are necessary to carry out the provisions of this chapter. The Commission may by regulation delegate any authority conferred upon it by the provisions of this chapter to the Administrator to be exercised pursuant to the regulations adopted by the Commission." (Emphasis added)). The Division thus

[6] State of Nevada Department of Business and Industry Real Estate Division Advisory Opinion No. 13-01 (Dec. 12, 2012), attached as Addendum A.

acts under the supervision and control of the Commission, not the other way around. *See* NEV. REV. STAT. § 116.615(3) & (4).

The Division offered its opinion in the absence of any petition or specific delegation of authority to it by the Commission. And because it is contrary to the previous opinion provided by the Commission, does not have the necessary "approval of the Commission." *See* NEV. REV. STAT. § 116.615(3). As a result, the Division exceeded its statutory authority when it issued an advisory opinion on this topic.[7] Accordingly, the interpretation of the Commission, not the Division, should be given "great deference" by the Court. The Division's interpretation should also be rejected by the Court because, identical to the district court's and Colorado's interpretation of this uniform act, it leads to unreasonable results and conflicts with the intent of the Legislature to fairly balance the burden of delinquent assessments and the costs of collecting them between (1) associations and their members, and (2) banks and their purchasers.

[7] The Division appears to acknowledge as much as its *sua sponte* opinion ends by providing that "[t]he statements in this advisory opinion represent the views of the Division and its general interpretation of the provisions addressed. It is issued to assist those involved with common interest communities with questions that arise frequently. **It is not a rule, regulation, or final legal determination. The facts in a specific case could cause a different outcome**." Addendum A at 20 (emphasis added).

B. The district court's interpretation of NRS 116.3116 is bad public policy.

Public policy requires that community associations "have sufficient power to enforce the collection of assessments; otherwise, the association will not be able to continue to function and meet its obligations without unfairly burdening the other members of the community." *Board of Managers of Parkway Towers Condominium Assn., Inc. v. Carcopa*, 403 S.W.3d 590, 593 (Mo. 2013) (quoting *Dunhill Condo. Assn., Inc. v. Gregory*, 492 S.E.2d 242, 243 (Ga. 1997)). The district court's interpretation of NRS 116.3116 robs associations of that power.

The average monthly assessment in Nevada is approximately $50.[8] Due to the numerous steps involved in collecting delinquent assessments, the average collection costs are close to $2,500 in Nevada.[9] A super priority lien capped at nine months, without adding costs of collecting, will end up costing the average association approximately $2,000—leaving the association in a much worse position than if it had simply chosen not to pursue the delinquent assessment.[10] By ruling that an association's super priority lien is limited to the monetary equivalent of nine months of past-due assessments, the district court effectively chills

[8] Decl. Yergensen ¶ 13.

[9] Decl. Yergensen ¶ 14.With NRS 116.310313 the Legislature gave the Commission exclusive authority to regulate what an association may charge a unit's owner for costs of collection. NEV. REV. STAT. § 116.310313(1); *accord Nevada Association*, 294 P.3d at 1226–27. On that authority the Commission enacted NAC 116.470, which delineates the charges that an association may impose on a unit's owner for collection costs.

[10] Decl. Yergensen ¶ 14.

associations against exercising their right to collect on those delinquent assessments, for they will be forced to pass those costs onto their assessment-paying homeowners. But foregoing collection efforts is not a viable option for Nevada's associations.

Associations will be forced to address budgetary shortfalls caused by uncollected delinquent assessments in two ways: (1) increase assessments to the homeowners that do pay; and (2) reduce the services offered to those same assessment-paying homeowners. Either option is fraught with peril because increased assessments often lead to additional delinquencies, and even more foreclosures, while reduced services can lower property values and also lead to more foreclosures. The district court's ruling promotes a vicious cycle, some have even called it a "death spiral," where it is cost prohibitive to try to collect past-due assessments, so the snowballing budgetary gap is alternatively addressed by increasing assessments that then result in additional delinquencies. Those additional delinquencies then create even greater assessments and more delinquencies and so on until there is no one left that can afford the assessments.[11] This is the result of the district court's interpretation of NRS 116.3116, and it places the financial burdens created by delinquent members squarely onto the shoulders of the already-paying members. It is, in essence, a mandate that members

[11] Monica Hatcher, *Mediators Foresee Gloom, Doom In Condo Industry*, Miami Herald H1 (Jan. 4, 2009).

in good standing must provide private financial support to the defaulting members; it is an unjust, inefficient, and poor public policy.

1. Associations need to collect past-due assessments in order to operate and protect the value of homeowners' properties by providing agreed-upon services and enforcing community standards.

With an estimated half of all Nevada homes in over 3,000 common-interest communities, the laws affecting the ability of the associations to collect money and, in turn, continue to function, impact a substantial portion of the State's population.[12] Associations typically function like a pseudo-municipal government and serve homeowners by providing and maintaining things like parks, recreational facilities, streets, utilities, lighting, security, and garbage removal.[13] James Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 Santa Clara L. Rev. 1135, 1139 (1998). In addition to providing these services, associations also protect home values by enforcing covenants, conditions, and restrictions, which generally require homeowners to maintain the character and

---

[12] *Office of the Ombudsman Fills Need*, Las Vegas Rev.-J. E1 (Aug. 30, 2008) (available at http://www.reviewjournal.com/real-estate/office-ombudsman-fills-need).

[13] In fact, when CICs struggle to meet their budgetary needs they often push those costs back on to local governments that can scarcely afford the additional burdens due to their own strained budgets. *See e.g. Changes Concerning Common Interest Communities: Hearing on AB 204 Before the Assemb. Comm. On Judiciary*, 2009 75th Sess. 40, at 38 (Nev. Mar. 6, 2009) (available at http://www.leg.state.nv.us.Session/75th2009/Minutes/Assembly/JUD/Final/391.pdf)

appearance of their residence to a minimum standard. Winokur, 38 Santa Clara L. Rev. at 1143.

Associations need funds to provide these services and be able to protect home values; those funds are derived exclusively from the community's residents through regular and special assessments. *Id*. at 1139; *see also* Decl. Yergensen ¶¶ 17 & 18. An assessment is a homeowner's "proportionate share of the expenses incurred to fund the association's business and governmental services." Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 Fordham L. Rev. 2503, 2510 (2004) (quoting Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 35–36 (1981)). The amount paid in assessments by homeowners is determined by proportionately divvying up the projected expenses incurred to fund the association's business and governmental services, and assumes that every homeowner will pay his or her share. Giantomasi, at 2510–2512. In budgeting, every dollar assessed by an association is destined to cover a projected expense; this is referred to as "zero sum" budgeting.[14] When homeowners do not cover their share of the assessments, associations have problems meeting expenses, budgeting for the next year, and have trouble providing the agreed-upon services. Giantomasi, at 2512.

[14] Decl. Yergensen ¶ 17.

Assessments are therefore critical to an association's ability to protect its homeowners, because when homeowners fail or refuse to pay, the association's operational ability is seriously endangered. If associations are unable to pursue the collection of past-due assessments, those delinquencies will necessitate deferring budgeted-for costs onto the other homeowners, causing either an immediate increase in assessments for other homeowners or an immediate decrease in the agreed-upon services. *Id.*; *see also* AA 1737–1738. Under either scenario, it is solely the assessment-paying homeowners who will suffer the burden of unpaid assessments. But it does not have, nor was it intended to be, that way.

2. The Commission's interpretation vests associations with just enough power to collect on delinquent assessments.

California research firm RealtyTrac recently ranked Nevada number two for foreclosure activity in October 2013, with one in every 407 housing units in some phase of default.[15] Unfortunately, even though a home may be in some phase of default, banks are often waiting long periods of time before moving forward with foreclosure proceedings.[16] Generally, when a homeowner encounters difficult

[15] Jennifer Robison, *Nevada Again Ranked among Top States for Foreclosure*, Las Vegas Rev.-J. (Nov. 13, 2013) (available at http://www.reviewjournal.com/business/nevada-again-ranked-among-top-states-foreclosures).

[16] *See* Jeff Ostrowski, *Foreclosures Force Homeowners Associations to Skimp*, Palm Beach Post A1 (Apr. 16, 2008) (available at http://www.palmbeachpost.com/business/content/business/epaper/2008/04/16m1a_condos_0416.html).

financial times, he or she will usually default on monthly assessments and monthly mortgage payments at the same time. Decl. Yergensen ¶ 7; AA 1737; *see also* Gary A. Poliakoff, *Law of Condominium Operations* § 5.57 (2010) ("Frequently, a unit owner's delinquency in assessments is accompanied by a delinquency in other obligations so that several liens may arise at approximately the same time."). Because lenders are unable to foreclose in a short timeframe, defaulted and delinquent homes can sit empty for years. Accordingly, without the ability to spur the process along by way of a super priority lien that includes costs necessarily expended pursuing delinquent assessments, associations lose out on a large swath of assessments with no hope of recompense while banks simply sit and wait to foreclose.

The following example demonstrates the dire situation associations face under the district court's interpretation of NRS 116.3116. The Rancho Nevada Homeowners' Association ("Rancho Nevada") has monthly assessments of $50, the Nevada average.[17] Rancho Nevada is dealing with a number of foreclosures and corresponding delinquencies on assessments within the community. As a result, Rancho Nevada is looking at a significant budget shortfall. Under the district court's ruling, what is Rancho Nevada to do? It cannot pursue any sort of collection efforts because even though it may be able to get six or nine months of

[17] Decl. Yergensen ¶ 13.

delinquent assessments (up to $450), it would cost Rancho Nevada $2,500 to get that amount. Unable to gamble on collection efforts, Rancho Nevada must assume it will **never** recover more than $450, and immediately shift the burden of all future assessments for that delinquent unit onto its other homeowners. Rancho Nevada's only hope is that the lender will foreclose on the delinquent unit and allow a new, assessment-paying owner to enter the scene. But banks sit on defaulted properties for years at a time, so until the bank forecloses, the other homeowners must cover assessments for the delinquent unit. This is an absurd and inequitable result.

Associations must therefore be able to try to recover unpaid assessments in order to cover budgetary gaps. Most associations, however, lack the resources, personnel, and ability to pursue collections of these past-due sums on their own. AA 1737. As a result, Nevada associations typically hire property managers, collection agencies, or attorneys to assist them in collecting unpaid assessments. *Id.*; Decl. Yergensen ¶ 9. Without their services, associations would not have the resources to enforce their rights to collect from delinquent homeowners. *Id*; *see also* AA 1743. And without assurance that they will be able to recover some of their collection costs if the lender forecloses on the unit, delinquent assessments will be immediately passed along to the paying homeowners. AA 1743.

The Commission clearly understood the value in allowing associations to pursue delinquent assessments when it opined that the "costs of collecting" authorized by NRS 116.310313 are included in an association's super priority lien. AA 0468. Under the Commission's interpretation, associations not only have the authority (bow) to pursue delinquent assessments, but also the practical ability (string and arrows) to do so, and are thus in a better position to avoid ever increasing assessments and decreasing services to close the gaps in their budgets.

3. Associational collection efforts actually inure to the benefit of short-term real estate investors like Ikon.

Protection of property value is one of the key attractions to living in a common-interest community. Winokur, 38 Santa Clara L. Rev. at 1143. The position taken by short-term real estate investors like Ikon—that associations should cease their collection efforts and simply saddle their other homeowners with the revenue lost while banks slog through the lengthy foreclosure process—is extremely short-sighted. While the statutorily capped collection costs minimally decrease Ikon's profit when it flips a foreclosed unit, it actually benefits from the efforts those costs represent because they keep property values from further deflating. An association that is active in protecting its rights helps the property to change hands faster. A faster turn-around means less loss of property value and more potential profit for Ikon.

When properties sit abandoned while waiting to be foreclosed for extended periods of time, the homes are often vandalized, yards become overgrown, and serious health and safety risks can result.[18] If associations are chilled from attempting to collect past-due assessments, they will have fewer funds to maintain homes that have fallen into disrepair, which is a negative outcome for everyone involved. AA 1744–45. This erosion to the community's minimum standards generally causes a decrease in interest from potential buyers, thereby driving home values down. [19] As more homes are abandoned, even more fall into disrepair and a cycle begins where foreclosures lead to a decline in the neighborhood which leads to more foreclosures and, ultimately, a further drop in the property values. 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, 360 (1992).

Perpetually decreasing property values make it more difficult for short-term real estate investors like Ikon to turn a profit. Keeping associations stable and

---

[18] Jeff Collins, *Foreclosures Put County's HOAs in Financial Bind*, Orange County Reg. (Sept. 28, 2008) (available at http://www.ocregister.com/articles/association-19565-hoa-foreclosures.html); *see also* Maureen Milford, *Foreclosures Become Forgotten Burdens in Neighborhoods*, USA Today (June 11, 2008) (available at http://abcnews.go.com/Business/story?id=5034423&page=2).

[19] Alan S. Choate, *Foreclosures Aren't Neighborly*, Las Vegas Rev.-J. 1B (Oct. 23, 2008) (available at http://www.reviewjournal.com/business/housing/foreclosures-arent-neighborly).

funded allows them to care for the properties within these communities, which directly impacts the value and desirability of the properties that investors like Ikon are trying to resell. Including the statutorily capped costs of collecting delinquent assessments into the super priority lien goes a long way toward meeting the goal of stable, funded associations. The Commission's interpretation of NRS 116.3116 is reasonable because it does just that.

IV. Conclusion

For the foregoing reasons, the Court should adopt the Commission's interpretation that the super priority lien afforded associations under NRS § 116.3116 includes "(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

/ / /

/ / /

/ / /

116.310213"; reverse the district court's judgment; and remand with instructions to enter judgment in favor of Horizons consistent with the Court's interpretation.

Dated this 11th day of December, 2013.

/s/ J. Randall Jones

J. Randall Jones, Esq.
Carol L. Harris, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

Attorneys for Amicus Curiae Community Association Management Executive Officers, Inc.

Certificate of Compliance

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,093 words.

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

/ / /

/ / /

/ / /

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of December, 2013.

/s/ Carol L. Harris

J. Randall Jones, Esq.
Carol L. Harris, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

Attorneys for Amicus Curiae Community Association Management Executive Officers, Inc.

ADDENDUM A

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

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

QUESTION #1:

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

QUESTION #2:

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

QUESTION #3:

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

SHORT ANSWER TO #1:

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

SHORT ANSWER TO #2:

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

SHORT ANSWER TO #3:

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

ANALYSIS OF THE ISSUES:

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

(1) The reasonable expenses of sale;

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

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

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

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

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

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

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

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

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

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

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

NRS 116.3116(2) states:

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).[13]

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

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

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

---

[12] See Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-fifth Session, March 6, 2009 at 44-45.
[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY CONCLUSION:

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

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

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

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

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

[14] NRS 116.31164.

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

IN THE SUPREME COURT OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Appellant, v. IKON HOLDINGS, LLC, a Nevada limited-liability company, Respondent.	Supreme Court Case No. 63178 District Court Case No. A-11-647850-B

Motion for Leave to File Brief of Amicus Curiae in Support of Appellant Horizons at Seven Hills Homeowners Association

J. Randall Jones, Esq.
Carol L. Harris, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000
Fax (702) 385-6001
clh@kempjones.com
jrj@kempjones.com
nrr@kempjones.com

Attorneys for proposed Amicus Curiae Community Association Management Executive Officers, Inc.

Introduction

The Community Association Management Executive Officers, Inc. ("CAMEO") moves the Court under NRAP 29 for leave to file the attached amicus brief in support of Appellant Horizons at Seven Hills Homeowners Association ("Horizons"). The Court should grant CAMEO leave to file an amicus brief because CAMEO and its members will be impacted by the Court's decisions on the issues in this appeal and CAMEO can uniquely speak to those issues, which are matters of general public interest.

Argument

A. NRAP 29 authorizes the Court to grant leave to file an amicus brief.

When the consent of all the parties cannot be obtained, NRAP 29 authorizes proposed amicus curiae to seek leave of the Court to file an amicus brief. NEV. R. APP. 29(a) & (c). Respondent Ikon Holding, LLC, has not consented to CAMEO filing an amicus brief in this matter. A motion for leave to file an amicus brief "shall be accompanied by the proposed brief" and state the "movant's interest" and "the reasons why an amicus brief is desirable." *Id.* at (c). An amicus brief by CAMEO is desirable in this appeal. The Court should therefore grant CAMEO leave to file its proposed amicus brief submitted herewith under NRAP 29.

/ / /

/ / /

B. The issues in this appeal affect CAMEO and its members.

CAMEO is a Nevada non-profit organization for the owners or executive officers of community association management companies that do business in Nevada, and the business partners and individual managers that are directly employed by Nevada community associations. CAMEO's goal is to improve business conditions for the community-management industry. CAMEO has numerous members and is the only organization of its type in the State. CAMEO's members serve over 1,000 community associations in Nevada.

The overarching theme of this appeal is whether the super priority lien provided associations under NRS 116.3116 includes statutorily capped costs of collecting delinquent assessments. One of the functions CAMEO's members perform for their associations is to collect unit's owners' past-due obligations[1]; NRS 116.3116 is a significant tool in their collection efforts.[2] CAMEO provides educational services, resources, and support to assist its members in their functions, including collection of unpaid assessments. The Court's decisions on the issues in this appeal will affect the services CAMEO provides to its members and, in turn, the services CAMEO's members provide to Nevada common-interest communities. It is desirable to hear from the persons and entities that serve

[1] Declaration of Chris Yergensen ¶ 5, attached as Exhibit 1.
[2] *Id.* at ¶ 16.

associations in this capacity and will be affected by the Court's decisions in this appeal.

C. An amicus brief from CAMEO is desirable because it will broaden the Court's perspective on issues that are relevant to the general public.

"[T]he classic role of amicus curiae" is to "assist[ ] in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor and Indust. St. of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (citing *Alexander v. Hall*, 64 F.R.D. 152, 155 (D. S.C. 1974); 3A C.J.S. *Amicus Curiae* § 6 at 427 (1973). CAMEO and its proposed brief fill that role perfectly.

With 2,993 registered community associations in Nevada containing 500,208 units, many of the State's citizens reside in a common-interest community.[3] Horizons' appeal asks the Court to determine if the district court erred in its interpretation of NRS 116.3116, a statute that associations rely on to collect delinquent assessments. As a result, the Court's decisions will not be limited to the parties in this appeal, but will affect all of Nevada's common-interest community associations and their managers and members. The issues in this appeal are therefore of consequence to the general public, making an amicus brief desirable.

[3] Nevada Real Estate Division, Association & Unit Overview in Common Interest Community Stats for October 2013 (available at www.red.state.nv.us/CIC/stats.htm).

CAMEO's proposed brief seeks to direct the Court's attention to points and authorities that were not discussed by the Appellant. CAMEO's proposed brief also seeks to apprise the Court of the broad legal and economic implications that its decisions will have on CAMEO, its members, and the hundreds of thousands of Nevada residents they serve. With its members serving over 1,000 associations, CAMEO is in a unique position to speak on those topics. A brief by a single organization like CAMEO, which represents a multitude of association managers, is preferable to multiple briefs by all or some of those individuals and entities.

Conclusion

CAMEO's and its members' interest in this appeal and the arguments set forth in its brief are unique and relate to a question of general public importance with respect to the extent associations have a super priority lien under NRS 116.3116. Accordingly, CAMEO respectfully requests that the Court grant its motion and order the Clerk to file the brief submitted herewith.

Dated this 11th day of December, 2013.

/s/ J. Randall Jones

J. Randall Jones, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

Attorneys for proposed Amicus Curiae Community Association Management Executive Officers, Inc.

Certificate of Service

Pursuant to NRAP 25(b), I hereby certify that I am an employee of Kemp, Jones & Coulthard, LLP; that on December 11, 2013, I electronically filed the foregoing **Motion for Leave to File Brief of Amicus Curiae in Support of Appellant Horizons at Seven Hills Homeowners Association** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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

Patrick J. Reilly, Esq.
Nicole E. Lovelock, Esq.
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
Fax: (702) 669-4650
Email: preilly@hollandandhart.com
nelovelock@hollandandhart.com

Puoy K. Premsrirut, Esq.
Brown Brown & Premsrirut
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Tel: (702) 384-5563
Fax: (702) 385-1752
Email: ppremsrirut@brownlawlv.com

Attorneys for Respondent

Kurt R. Bonds, Esq.
Alverson, Taylor, Mortensen & Sanders
7401 West Charleston Boulevard
Las Vegas, Nevada 89117
Tel: (702) 384-7000
Fax: (702) 385-7000
Email: kbonds@alversontaylor.com

Attorneys for Appellants

/s/ Angela Embrey
An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 1

DECLARATION OF CHRIS YERGENSEN

I, Chris Yergensen, hereby declare and state under penalty of perjury as follows:

1. I am over the age of 18 years and competent to testify to the matters contained herein.

2. I have personal knowledge of the matters set forth herein.

3. I am Corporate Counsel for Nevada Association Services, Inc. ("NAS"). NAS is a collection agency that works on behalf of several common-interest communities ("associations") in the State of Nevada, including Appellant Horizons at Seven Hills Homeowners Association ("Horizons").

4. I have been in the industry of association management since 2008. I was Senior Vice President of the Nevada operation for the largest community management company in North America, FirstService Residential, and prior to 2008, I served as President of a large real estate development company in Las Vegas. I am very familiar with associations, association budgets, and association collection actions.

5. I served as a representative of Community Association Management Executive Officers, Inc. ("CAMEO") at the last three State legislative sessions through my former position with FirstService Residential, which is a leading community-management company in Nevada. CAMEO's members provide associations with services that include developing yearly budgets for associations'

operating and reserve accounts to assistance in navigating the complex lien-collection and foreclosure laws associations must tread in order to collect the past-due assessments.

6. I am informed and believe that Nevada continues to be among the highest foreclosure rates in the United States. In Southern Nevada alone, there have been some 40,000 foreclosures in the past few years. Generally, about 60% of these foreclosures are within associations.

7. In my experience, almost without exception, homeowners who are in default with their lenders simultaneously default on their association obligations. This results in unpaid assessments and neglected properties.

8. It is also my experience that collection and foreclosure processes take months to complete and assessments continue to become delinquent while associations work though those processes. By the time lenders foreclose on delinquent units, associations have incurred significantly more than six or nine months of assessments attempting to collect on the delinquent assessments.

9. Associations often engage attorneys or collection agents, such as NAS, to collect unpaid assessments from delinquent homeowners. This task is of particular importance with the foreclosure crisis currently overwhelming the Nevada housing market because most associations lack the resources, staff, and ability to pursue collections on their own.

10. I am informed and believe that many other states require attorneys to perform collection services even if the collection process is statutorily a non-judicial collection process. For example, Virginia and Texas require attorneys to file and record all notices affecting title to real property, including association liens and notices. Nevada is a little different in that collection agencies may be used, which in turn saves associations money. However, many Nevada associations do use law firms to collect. Thus, if associations are not able to include collection costs as part of a super-priority lien amount, attorney's fees incurred in attempting to collect past-due assessments are at risk of going unpaid as well.

11. Associations retain collection agencies and attorneys to collect many different categories of assessments for common expenses ranging from special assessments for repairs to common areas, charges for late payment of assessments, and fees or charges for the use, rental, or operation of the common elements.

12. While an association possesses a statutory lien pursuant to NRS Chapter 116 on unpaid assessments, it must take active steps to collect if it has any chance of recovering delinquent amounts. Without collection agencies and attorneys to pursue these past-due assessments, associations would have little or no ability to enforce their rights to collect delinquent assessments from homeowners who do not pay voluntarily, thereby significantly increasing the costs to those homeowners who are not delinquent.

13. In Nevada, the average monthly assessment payment is around $50. If associations' super-priority lien amount is capped at nine months of assessments, it will mean that the average association could only collect $450 following a lender's foreclosure sale.

14. In order to pursue the collection of delinquent assessments, associations, their attorneys, and collection agencies must incur out-of-pocket expenses, like publication and posting costs, in advance of a foreclosure sale. And, given that Nevada law requires numerous steps in order for an association to collect on its delinquency, the average costs of collecting for an association is close to $2,500. Therefore, a limit capping an association's super-priority lien at 9 months of assessments, without adding costs of collecting, would cost most associations about $2,000 per collection action.

15. Given the foregoing, if associations cannot recover reasonable collection costs, they will be effectively paying $2,500 to collect $450, and thereby be unable to pursue and collect from property owners who are in violation of their assessment obligations when there is a lender foreclosure.

16. Including interest, late fees, and collection costs in Nevada's super-priority lien is and has been common practice in the industry for years. It allows associations to continue to function in a normal manner and it benefits the homeowners by keeping assessments down, especially when Nevada has been had

hit with the collapse of the real estate market. If collection costs were not part of the super-priority during these calamitous times in Nevada, associations would have had to pay approximately $2,000 per lender foreclosure, which would be tens of millions of dollars given the huge volume of lender foreclosures.

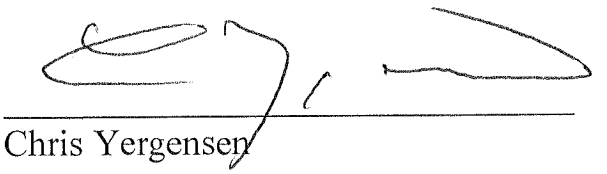
17. Associations must come up with yearly budgets for the costs to keep up the community. The associations then obtain the funds to cover these costs through assessments to the homeowners within the association. These budgets are referred to as zero sum budgets or zero-based budgeting, where you identify the costs first and then calculate the funding resources. Because collection costs are part of the super-priority lien, and lenders have been paying these collection costs as a part of the super-priority lien following a lender foreclosure, these collection costs have not been figured into the associations' budgets as a cost item allocated to those good standing homeowners who regularly pay their assessments.

18. Given that associations have no funding resources other than assessing the homeowners, and the budget is based at a yearly zero sum (i.e., there is no extra money allocated in the budget for any unidentified cost items), if collection costs are not a part of the super-priority lien, associations will have to increase their cost items in their budgets which will increase the assessments to the homeowners that are currently in good standing to cover delinquent assessments and collection costs. Also, associations might also have to specifically assess their homeowners

tens of millions of dollars to reimburse the lenders that have paid the collection costs within the thousands of super-priority liens over the last 10 years due to the real estate collapse in Nevada.

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

DATED this 11th day of December, 2013



Chris Yergensen