IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

v.

IKON HOLDINGS, LLC, a Nevada limited liability company;

Respondent,

CASE NO. 63178

Dist. Ct. Case No. A-11-647850-B

RESPONDENT'S APPENDIX

VOL. 3

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DATED this 24th day of February, 2014.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, REAL ESTATE DIVISION; STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION;

Plaintiffs,

vs.

ACCOUNT RECOVERY SOLUTIONS, LLC; ATC ASSESSMENT COLLECTIONS, LLC; NEVADA ASSOCIATION SERVICES, INC.; SILVER STATE TRUSTEE SERVICES LLC; TERRA WEST COLLECTIONS GROUP, LLC, DOE PERSONS 1 THROUGH 10; DOE ENTITIES 1 THROUGH 10; DOE CORPORATIONS 1 THROUGH 10;

Defendants.

CASE NO.: A-13-688795-B

DEPT. NO.: XXIX

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, State of Nevada, Department of Business and Industry, Real Estate Division and State of Nevada, Department of Business and Industry, Financial Institutions Division, by and through their attorneys of record, hereby moves this Court for an Order granting summary judgment in their favor and against Defendants. This Motion is made and based upon NRCP 56, the attached Points and Authorities, the papers and pleadings on file herein, and any oral argument that the Court may entertain at the time of any hearing on this Motion.

Dated this 18 day of October, 2013.

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Attorney General

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NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT on for hearing before the above-entitled court on the 21 day of NOVEMBER, 2013, at the hour of 9:00AM .m. o'clock of said date, in Department XXIX or as soon thereafter as counsel can be heard.

Dated this 18 day of October, 2013.

CATHERINE CORTEZ MASTO
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POINTS AND AUTHORITIES

I. INTRODUCTION

This case was filed by two agencies of the State of Nevada to prevent the further abuse and exploitation of tens of thousands of homeowners and home purchasers, as well as banks, credit unions, title companies, escrow agents, real estate agents, mortgage brokers, and federal mortgage associations and housing agencies by collection agents for homeowner associations (HOA). In Nevada, there is a law against adding costs of collecting to liens from unpaid HOA assessments. In Nevada, there is a law which caps the amount of that lien to 9 months of regular assessments. And, unfortunately, in Nevada, there are collection companies acting as agents for HOAs who regularly violate those laws.

Plaintiff Nevada Real Estate Division ("NRED") is the state agency charged with administration, interpretation and enforcement of NRS Chapter 116, the statute related t common interest communities. Plaintiff Financial Institutions Division ("FID") is charged with

the administration, interpretation and enforcement of NRS Chapter 649, the statute related collection agencies. Defendants are all licensed collection agencies under NRS Chapter 649. NRED and FID filed this action to obtain a judicial declaration that costs of collecting are not part of HOA liens, that liens for assessments cannot exceed 9 months of assessments, and an injunction to prevent the Defendants from forcing homeowners, home purchasers and banks to pay these illegal charges.

While the law is clear, Defendants have been able to avoid any regulatory enforcement by stating that it is one agency's responsibility to read the law and another's responsibility to act upon that interpretation. NRED issued an advisory opinion which explicitly states what is and is not included in the HOA lien. NRED and FID seek a declaration to validate the interpretation of the statute, and to preclude any Defendant from violating its provisions. Further, FID requests that this Court declare that it has the power and authority to act upon that interpretation should any Defendant refuse to comply with the law.

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II. PROCEDURAL HISTORY AND BACKGROUND FACTS

As detailed in the complaint, FID issued a Declaratory Order and Advisory Opinion Regarding Collection Agency Fees from Homeowner Association Liens Following Foreclosure (the "FID Declaratory Order") on November 18, 2010. FID believed it had the right to force collection companies it licenses to comply with NRS 116. The FID Declaratory Order concluded that the super priority lien could never exceed nine months of assessments, plus costs under NRS 116.310312 ("Abatement Costs").[1] Three HOA collection agencies – RMI Management, LLC, Nevada Association Services, Inc. and Angius & Terry Collections – commenced an action on December 1, 2010, and thereafter sought a Temporary Restraining Order and Preliminary Injunction (the "Preliminary Injunction") to prevent enforcement of the FID Declaratory Order.

[1] See Declaratory Order and Advisory Opinion Regarding Collection Agency Fees From Homeowner Associati Liens Following Foreclosure, Fin. Inst. Div., State of Nev. Dep't of Bus. and Indus., November 18, 2010 ("F Opinion") attached at Ex. 1.

On December 8, 2010, at the request of RMI Management, LLC, the Commission for Common Interest Communities and Condominium Hotels (CCICCH) adopted an advisory opinion on whether costs of collecting are included in an HOA's super priority lien ("CCICCH Opinion").[2] The CCICCH's Opinion was drafted by the chairman of the CCICCH who provided it to the members of the CCICCH and then "abstained" from voting on adoption of the advisory because his law firm was hired to perform legal services for the requestor, RMI Management, LLC.[3] The CCICCH Opinion concluded that "costs of collecting" defined by NRS 116.310313 are part of the super priority lien, but the opinion did not specifically address whether there is a cap on the super priority lien.[4]

The collection companies were successful in receiving the Preliminary Injunction against FID and avoiding enforcement of the FID Declaratory Order.[5] Unfortunately, the issue of the super priority lien was not addressed by the court. Instead, the Preliminary Injunction was granted based on the court's finding that FID does not have jurisdiction to issue the FID Declaratory Order because it required an interpretation of NRS 116.[6]

On May 23, 2012, the Nevada Supreme Court affirmed the District Court order.[7] The Supreme Court stated that FID's Declaratory Order "not only interpreted [FID's] own regulations, NRS Chapter 649, but also interpreted [NRED's] chapter, NRS Chapter 116."[8] The Supreme Court found that NRS Chapter 116 did not grant FID the authority to regulate or interpret the language of the chapter. The Supreme Court concluded that, "the responsibility of determining which fees may be charged, the maximum amount of such fees, and whether

[2] See Minutes of Commission for Common-Interest Communities and Condominium Hotels (CCICCH) Meeting 10-11 (December 8, 2010) attached at Ex. 2.

[3] See Id.

[4] Commission for Common Interest Communities and Condominium Hotels Advisory Op. 2010-01 (Dec. 8, 2010) ("CCICCH Op.") attached at Ex. 3.

[5] State, Fin. Inst. Div. v. Nevada Ass'n Serv., 294 P.3d 1223 (Nev. 2012).

[6] State, Fin. Inst. Div., 294 P.3d at 1227-28.

[7] Id.

[8] Id. at 1227.

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they maintain a priority, rests with the Real Estate Division ... ."[9] The Supreme Court decisi did not address the CCICCH advisory opinion.

On December 12, 2012, NRED issued an advisory opinion pursuant to NRS 116.623 (the "NRED Opinion") concluding that: (1) Costs of collecting are not part of an HOA's lien; and (2) Other than Abatement Costs, the priority lien consists solely of unpaid assessments and is limited to 9 times the regular monthly assessment due.[10]

Beginning in June of 2011, the following cases decided by six departments within this Court – including this Department – concluded that the HOA's super priority lien attributable to assessments is limited to 9 times the regular monthly assessment due:

1. Wingbrook Capital v. Peppertree HOA, *Order* (Case No. A-11-636948-B, filed Jun. 3, 2011).[11]
2. Ikon Holdings v. Horizons at Seven Hills HOA, *Order* (Case No. A-11-647850-C, Filed Jan. 19, 2012).[12]
3. Peccole Ranch Community Assoc. v. Elsinore, *Order Denying in Part and Granti in Part Plaintiff's Motion for Partial Summary Judgment* (Case No. A-12-658044-C, Filed Sept. 17, 2012).[13]
4. Prem Deferred Trust v. Aliante Master Assoc., *Order* (Case No. A-11-651107-B; Filed Sept. 25, 2012).[14]
5. U.S. Bank Nat'l Assoc. v. Perry, *Order and Decision* (Case No. A-12-666569-C; Filed Mar. 26, 2013).[15]

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[9] Id.

[10] Real Estate Division, State of Nev., Dep't of Bus. and Indus. Advisory Op. 13-01 (Dec. 12, 2012) ("NRED Op.") attached at Ex. 4.

[11] Attached at Ex. 5.

[12] Attached at Ex. 6.

[13] Attached at Ex. 7.

[14] Attached at Ex. 8.

[15] Attached at Ex. 9.

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6. Metroplex Realty v. Black Hawk HOA, *Order* (Case No. A-12-663304; Filed May 31, 2013).[16]

Judge Allf, in *U.S. Bank v. Perry*, considered the NRED Opinion "highly persuasive" in concluding that the super priority lien is limited to the amount of 9 months of assessments.[17] In *Prem Deferred Trust*, this Court considered the CCICCH Opinion, but found it "did not directly opine upon the issue of whether there was a maximum limit to the Super Priority Lien regardless of the constituent elements thereof, which was the question before this Court."[18]

While these cases addressed NRS 116.3116 as it related to the maximum amount of the super priority lien, NRED and FID are asking this Court to take the analysis a step further. The previous cases did not consider what comprised the super priority lien – only what amount it was limited to. As this Court stated "regardless of the constituent element thereof," these cases concerned the limits of the super priority lien, not what exactly the lien can consist of.[19]

For example, if the super priority lien is limited to the amount of 9 months of assessment and the assessments are $40 a month, is the $360 super priority lien amount for assessments or can it be for anything else, i.e. fines, penalties, late charges, or interest? NRED and FID assert that the HOA's lien cannot include costs of collecting, and that the only part of the HOA's lien subject to priority is delinquent regular assessments and Abatement Costs.

III. ISSUES PRESENTED

NRED and FID seek to have this Court grant a declaratory judgment as follows:

1. That the lien defined by NRS 116.3116(1) does not include "costs of collecting" defined by NRS 116.310313;

. . .

[16] Attached at Ex. 10.

[17] U.S. Bank Nat'l Assoc. v. Perry, *Order and Decision* 4:11-13 (Ex. 9).

[18] Prem Deferred Trust v. Aliante Master Assoc., *Order* 4:20-24 (Ex. 8).

[19] Id.

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2. That the super priority lien defined by NRS 116.3116(2) is limited to costs und NRS 116.310312 and regular monthly assessments not to exceed 9 months; and

3. That FID has the jurisdiction and authority to enforce the NRED Opinion.

NRED and FID further seek a permanent injunction enjoining Defendants from:

1. Charging costs of collecting as part of the HOA's lien pursuant to NRS 116.3116; and

2. Charging more than 9 months of delinquent assessments, plus Abatement Costs, as the super priority lien.

IV. LEGAL ARGUMENT

A. SUMMARY JUDGMENT STANDARD

NRCP 56(a) permits a party seeking recovery on a claim or a declaratory judgment "at any time after the expiration of 20 days from the commencement of the action" to "move with or without supporting affidavits for a summary judgment in the party's favor upon all" of the claims in a lawsuit. Summary judgment is appropriate when there is "no genuine issue as t any material fact."[20]

As the Nevada Supreme Court stated in *Wood v. Safeway, Inc.,*[21] "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'"[22] The complaint requests a legal determination of NRS 116.3116 and a permanent injunction against the Defendants to enjoin them from acting contrary to NRS 116.3116. Statutory interpretation is a question of law.[23]

There are no issues of fact in this matter. Summary judgment is appropriate.

. . .

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[20] NEV. R. CIV. P. 56(c).

[21] 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[22] Id. (quoting NEV. R. CIV. P. 56(c)).

[23] Consipio Holding, BV v. Carlberg, 282 P.3d 751, 756 (Nev. 2012) (citing Sims v. Dist. Ct., 125 Nev. 126, 12 30, 206 P.3d 980, 982 (2009)).

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B. THE NRED OPINION IS ENTITLED TO DEFERENCE BY THIS COURT.

NRED is given authority within NRS 116 to issue advisory opinions regarding the interpretation of NRS 116. The NRED Opinion provides a detailed account of how the Division came to its interpretation of NRS 116.3116. The NRED Opinion is consistent with the plain language of NRS 116. The CCICCH Opinion is not specifically authorized by NRS 116 and does not apply the plain language of NRS 116 to reach its conclusions.

1. REASONABLY CONSISTENT AGENCY DECISIONS ARE ENTITLED TO DEFERENCE.

NRED has statutory authority to administer NRS 116 under NRS 116.615(1). NRED has the ability to interpret the provisions of NRS 116 under NRS 116.623 through the issuance of advisory opinions and declaratory orders. Under its statutory authority, NRED issued the NRED Opinion interpreting NRS 116.3116 and other relevant statutes. The Nevada Supreme Court has "repeatedly recognized the authority of agencies ... to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts."[24]

Moreover, the U.S. Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[25] Explaining the deference afforded to administrative agencies, the U.S. Supreme Court in *Chevron v. National Resources Defense Council* noted that "the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or . . .

[24] International Game Tech., Inc., v. Second Jud. Dist. Ct., 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) (citing Meridian Gold v. State, Dep't of Taxation, 119 Nev. 630, 636-37, 81 P.3d 516, 520 (2003); Malecon Tobacco v. State, Dep't of Taxation, 118 Nev. 837, 841 & 842 n. 15, 59P.3d 474, 477 & n. 15) (accord United Sates v. State Engineer, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002); Sierra Pac Power v. Dep't Taxation, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980)).

[25] Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (cited by Thomas v. City of North L. Vegas, 122 Nev. 82, 101, 127 P.3d 1057, 1070 (2006)).

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even the reading the court would have reached if the question initially had arisen in a judic proceeding."[26]

When a court interprets a statute, it "should consider multiple legislative provisions as a whole."[27] Furthermore, the "language of a statute should be given its plain meaning unless, in so doing, the spirit of the act is violated."[28] Only if the statute is ambiguous – reasonably susceptible to more than one meaning – should the court examine the statute "through reason and considerations of public policy to determine the legislature's intent."[29] NRED applied these same principles interpreting NRS 116 in the NRED Opinion. Based on the deference the NRED Opinion should be afforded as acknowledged by both the Nevada Supreme Court and the U.S. Supreme Court, the Court should adopt the findings in the NRED Opinion.

2. THE CCICCH OPINION IS NOT REASONABLY CONSISTENT WITH THE LAW AND IS NOT ENTITLED TO DEFERENCE BY THIS COURT.

While the CCICCH also adopted an advisory opinion two years before NRED in 2010, the CCICCH Opinion is not consistent with the law and was adopted under questionat circumstances. In 2012, the Nevada Supreme Court upheld a preliminary injunction against FID from enforcing its declaratory order and opinion regarding NRS 116 finding "that the CCICCH and [NRED] are responsible for regulating and administering [NRS 116]."[30] The Court found that FID exceeded its authority by interpreting provisions of NRS 116.[31] The Court did not say anything about the CCICCH Opinion from 2010.[32] NRS 116 does not say

[26] Chevron, 467 U.S. at 843 n. 11.

[27] Int'l Game Tech., 122 Nev. at 152, 127 P.3d at 1102 (citing University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 731, 100 P.3d 179, 193 (2004)).

[28] Id.

[29] Id. (citing Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003); Salas v. Allstate Rent–A–Car, Inc., 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000)).

[30] State, Fin. Inst. Div., 294 P.3d at 1227.

[31] See Id. at 1227-28.

[32] See Id.

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that the CCICCH has authority to issue an advisory opinion.[33] In addition, the fac surrounding the issuance of the CCICCH Opinion are cause for concern about its legal conclusions.

The advisory opinion was drafted by the CCICCH chairman Michael Buckley who "abstained" from the vote for adoption because his law firm represented the requestor of the advisory, RMI Management.[34] The CCICCH's attorney expressed concerns about the issuance of an advisory opinion in light of the FID Opinion.[35] The CCICCH minutes of the discussion state as follows:

> Senior Deputy Attorney General Deonne Contine stated that in May 2010 the Commission discussed an advisory opinion that Chairman Buckley later drafted. Ms. Contine stated that she reviewed the draft and discussed with Chairman Buckley some of her concerns with issuing an advisory opinion on contested cases that were in litigation, arbitration or some judicial proceeding. Ms. Contine stated that her other concern was that most state agencies have a process for requesting advisory opinions and do not often issue advisory opinions absent a request from a constituent of some type.
>
> Ms. Contine stated that Commissioner Burns of the Financial Institutions Division issued an advisory opinion/declaratory order interpreting FID statutes but mentioning NRS 116 that prompted RMI Management's request for an advisory opinion from the Commission or Division. Ms. Contine stated that she has concerns about issuing an advisory opinion in light of the Financial Institution Division's advisory.[36]

There was cause for concern about the CCICCH issuing an advisory opinion that was requested by a party in an ongoing litigation, because the Department of Business and Industry regulations regarding advisory opinions is very clear that it is prohibited. NAC 232.040(4) states, "An interested person may not file a petition for a declaratory order or an advisory opinion concerning a question or matter that is an issue in an administrative, civil or criminal proceeding in which the interested person is a party." The CCICCH members did not

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[33] See NEV. REV. STAT. 116.623 (2013).

[34] See Minutes of CCICCH Meeting 10-11 (December 8, 2010).

[35] See Id.

[36] Minutes of CCICCH Meeting 11 (December 8, 2010).

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discuss the substantive legal conclusions expressed in the advisory, the concerns of the attorney, or the conflict of interest identified by Mr. Buckley prior to adopting the CCICCH Opinion unanimously.[37]

At the time the CCICCH Opinion was adopted, RMI Management, Nevada Association Services, and Angius & Terry Collections were suing the FID for the Preliminary Injunction.[38] They testified about it at the CCICCH's open meeting just before the commission members voted to adopt the opinion.[39] RMI Management was also involved in arbitration through NRED which started in May of 2010 over the issue of the super priority lien.[40] There is no question that the CCICCH Opinion's conclusion benefits RMI Management and every other collection company. Every collection company relies on it to support their business practice of adding collection costs to the super priority lien, even though the CCICCH Opinion does not address whether the super priority lien is capped, but cites authority that says the priority lien is limited.[41] In addition to the conflict with NAC 232.040, the legal conclusions of the CCICCH are not supported by the law as is provided in more detail below. For all of these reasons, the CCICCH Opinion should not be afforded deference by this Court.

On the other hand, the NRED Opinion is an analysis of the law based on the language of the law. NRED has no interest in spinning the law to benefit any particular stakeholder. NRED's only directive is to administer the law the way the legislature enacted it regardless of whether NRED agrees with it from a policy perspective. It is the job of the Nevada Legislature, not NRED, to decide what is good public policy with regard to HOA liens. The NRED Opinion is entitled to deference as its legal conclusions are supported by the plain

[37] See Id.

[38] See Id. at 10-11.

[39] See Id.

[40] NRED Alternative Dispute Resolution 10-87; District Court Case No. A638834; Supreme Court Case No. 60476.

[41] See CCICCH Op. 6 (Ex. 3) (citing James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 WAKE FOREST L. REV. 353, 367, which states that the super priority language "limits the maximum amount of all fees or charges... which can come with the Prioritized Lien.").

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language of the relevant statutes.

C. COSTS OF COLLECTING ARE NOT PART OF AN HOA'S LIEN.

1. NRS 116.3116 LIMITS AN HOA'S LIEN.

Defendants – as collection companies for HOAs – engage in the business of asserting liens on property in common interest communities for their collection charges. In order for Defendants to be able to lien property for their charges, the HOA must have the right to lien the property for those charges. The NRED Opinion concludes that NRS 116.3116(1) does not allow for costs of collecting to be part of the HOA lien.[42] NRS 116.3116(1) provides for an HOA's right to lien and provides what the lien can consist of. The HOA lien is limited by the language of NRS 116.3116. 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].

When a court examines a statute, it first looks at the statute's plain language.[43] The court gives effect to the plain and ordinary meaning of words when a statute is clear and unambiguous.[44]

Based on the plain language of the first sentence of NRS 116.3116(1), the HOA lien consists of the following: construction penalties; assessments; and fines. Absent from the language is anything about collection costs. The only way costs of collecting can be part of the HOA lien is if those costs are included in the second sentence which incorporates paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102. It is not just any and all

[42] NRED Op. at 1 (Ex. 4).

[43] Sims v. Dist. Ct., 125 Nev. 126, 130, 206 P.3d 980, 982 (2009).

[44] Consipio Holding, 282 P.3d at 756.

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possible penalties, fees, charges, late charges, fines and interest the sentence refers to – i only those penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1) (j) - (n).

NRS 116.3102 (1) (j)-(n) states as follows:

> 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.

Based solely on the plain, unambiguous language in NRS 116.3102, costs of collecting do not fall within any category listed in (j) through (n). Taken in order, item (j) applies to charges for use of the common elements and abatement costs pursuant to NRS 116.310312. Item (k) applies to charges permitted by NRS 116.3115 which allows interest at the statutory rate. Item (l) refers to construction penalties. Item (m) applies to fines. Item (n) applies to charges for amending the CC&R's or supplying a resale package under NRS 116.4109. Costs of collecting are not included in any of this language.

The Nevada Supreme Court has adopted the statutory construction principle of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another).[45] The Ninth Circuit Court of Appeals described the principle as follows:

> The doctrine of expressio unius est exclusio alterius 'as applied to statutory interpretation creates a presumption that when a statute designates certain

[45] State v. Wyatt, 84 Nev. 731, 448 P.2d 827 (1968), citing, State v. Baker, 8 Nev. 141 (1872); In Re Baile Estate, 31 Nev. 377, 103 P. 232 (1909); Ex Parte Arascada, 44 Nev. 30, 189 P. 619 (1920).

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persons, things, or manners of operation, all omissions should be understood as exclusions."[46]

Thus, where the Legislature omits language from a list, it is presumed that omission was intentional and the omitted item is excluded. In NRS 116.3116, the Legislature provides for the specific parts of the HOA lien. An HOA is authorized to charge a unit owner for costs of collecting pursuant to NRS 116.310313, but it is not part of NRS 116.3116 or referenced in NRS 116.3102. Based on the principle of *expressio unius est exclusio alterius*, the omission of costs of collecting from the items that the HOA can lien for is an exclusion of those charges from the lien. Defendants are not permitted to add costs of collecting where NRS 116.3116 specifically lists the items that comprise the lien and cost of collecting is not one of them. Based on the clear reading of NRS 116.3116(1) and NRS 116.3102(1) (j)-(n), costs of collecting are not part of the HOA's lien under NRS 116.3116(1).

2. NRS 116.310313 AUTHORIZES CHARGES FOR COSTS OF COLLECTING, BUT DOES NOT ALLOW THOSE COSTS TO BE PART OF A LIEN.

Added to NRS 116 in 2009, NRS 116.310313 states as follows:

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

[46] Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 885 (9th Cir.2005) (quoting Boudett v. Barnette, 923 F. 754, 756-57 (9th Cir. 1991)).

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(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Based on the definition of "costs of collecting," the costs apply not only to the collection of assessments, but to ***any obligation*** owed to the HOA – that could include fines and construction penalties. "Obligation" is separately defined to include anything that can be charged by the HOA. NRS 116.310313 allows the HOA to charge an owner for the costs of collecting, but it does not say anything about costs of collecting being a lien on the unit.

Compare this statute to another statute also adopted in 2009, NRS 116.310312 which allows an HOA to remove or abate a public nuisance on the exterior of a unit in certain circumstances.[47] The HOA may lien the property for those expenses according to NRS 116.310312 and NRS 116.3116 (through specific inclusion in NRS 116.3104(1)(j)). In 2009, the Nevada Legislature made a conscious effort to expand the lien of the HOA with explicit language in NRS 116.310312 and NRS 116.3116 and NRS 116.3104(1)(j). That is why Abatement Costs are not only part of the lien, but are also part of the super priority lien. Cos of collecting were not treated the same.

The Nevada Legislature did not make NRS 116.310313 (costs of collecting) part of NRS 116.3116 (super priority lien) in any way. If costs of collecting are not a lien under NRS 116.3116 – which defines the HOA's lien – or NRS 116.310313 – which gives the HOA authority to charge collection costs to the owner – then NRS 116 does not authorize an HOA to lien a unit for costs of collecting. Therefore, Defendants, as agents of HOAs, have no statutory right to assert a lien on a property for their charges. Defendants' actions are in violation of NRS 116 and they must be stopped.

[47] See NEV. REV. STAT. 116.310312 (2013).

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D. THE HOA'S SUPER PRIORITY LIEN IS LIMITED BY NRS 116.310312 AN REGULAR MONTHLY ASSESSMENTS NOT TO EXCEED 9 MONTHS

Defendants not only lien residential property for their charges in contradiction to NRS 116.3116(1), but they assert that lien even after a foreclosure by the first security interest holder. NRS 116.3116(2) allows a portion of the HOA's lien to have priority status over the first security interest – commonly referred to as the "super priority lien." In order for Defendants to include their charges in a super priority lien, those charges would have to be part of the HOA's lien. As explained in the foregoing Section D, NRS 116.3116(1) does not allow for costs of collecting to be part of the lien which would mean that the super priority lien cannot include costs of collecting. But assuming arguendo that the HOA's lien can include costs of collecting in spite of the express language of NRS 116.3116(1), the priority portion of the HOA lien may not include anything other than 9 months of assessments.

1. THE OVERWHELMING WEIGHT OF DECISIONS COMING FROM THIS COURT FINDS THAT THE SUPER PRIORITY LIEN IS LIMITED BY TH CLEAR LANGUAGE OF NRS 116.3116(2).

While multiple cases[48] in this Court have decided that NRS 116.3116 is clear and that the super priority lien is limited, Defendants continue their practices of improperly placing liens on residential property after a foreclosure sale in excess of the super priority lien permitted by law. They take advantage of misinformed owners and others who just want clear title to their homes and are forced to pay whatever is demanded. Subsection 1 of NRS 116.3116 provides for the HOA's lien and subsection 2 provides for the priority of that lien. NRS 116.3116(2) states as follows:

> 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;

[48] See Ex. 5-10.

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(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].

This language is very clear. The HOA lien with priority status over the first security interest, i.e. the super priority lien, consists of: (1) Charges incurred pursuant to NRS 116.310312; and (2) 9 months of assessments based on the HOA's budget. The language "to the extent of" which references both the costs under NRS 116.310312 and 9 months of assessments has no other purpose than to impose a limit on the amount. As stated by Judge Allf, "The language used, 'to the extent of,' is not reasonably susceptible to more than one meaning beyond the placement of a ceiling, a limit, or an amount which is not to be exceeded."[49] Judge Allf acknowledged the non-binding nature of the NRED Advisory Opinion, but found that it "is directly on point and is, therefore, highly persuasive."[50] Judge Allf also

[49] U.S. Bank Nat'l Assoc., *Order and Decision* 4:1-3 (Ex. 9).

[50] Id. at 4:11-13 (Ex. 9).

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relied on several other departments within the Eighth Judicial District Court that address this issue previously.[51]

This Court found that the language of "NRS 116.3116 is clear on its face."[52] This Court further ordered that, "[t]he 9 month figure is derived by taking the monthly assessment figure for common expenses as contained in the association's periodic budget which existed immediately prior to the association's institution of an action to enforce its lien, and multiplying by 9."[53] Without a doubt, the super priority lien is capped in the amount of 9 months of assessments and Abatement Costs. The CCICCH Opinion did not address this issue.[54] NRED's conclusion that the super priority lien is limited to 9 months of assessments and Abatement Costs is supported by law and entitled to deference.

2. THE ASSESSMENT PORTION OF THE SUPER PRIORITY LIEN IS ONLY FOR ASSESSMENTS AND NOTHING ELSE.

The issue of whether the super priority lien is limited to Abatement Costs and the amount of 9 months of assessments is well-settled by this Court. What has not been considered by this Court is whether the reference to *assessments* as part of the super priority lien means only assessments or is the reference to assessments intended only to set a dollar amount. The NRED Opinion concludes that the reference to assessments in the super priority lien language of NRS 116.3116(2) is intended to allow for just that – assessments to survive a foreclosure.[55] Any other interpretation would lead to an absurd result, and contradicts the intent behind having a super priority lien at all.

Certainly there is no question that the language allowing for Abatement Costs is not a reference to just a dollar figure, but is a reference to a very specific cost associated with

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[51] Id. at 5-6 (including citations to orders by Presiding Civil Judge Elizabeth Gonzalez, Judge Mark Denton, this Department, Judge Susan Scann, and Judge Abbi Silver) (Ex. 9).

[52] Prem Deferred Trust, *Order* 5:3 (Ex. 8).

[53] Id. at 5:13-16 (Ex. 8).

[54] Id. at 4:20-24 (Ex. 8).

[55] NRED Op. at 11-14 (Ex. 4).

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abatement of a nuisance. The language in the statute introduces each part of the sup priority lien the same: "to the extent of." In other words – to the extent the lien consists of Abatement Costs and 9 months of assessments – those portions of the lien have priority lien status. It stands to reason that given the statute's plain language, the reference to Abatement Costs and to assessments is to identify exactly what survives a lender's foreclosure not merely to establish a dollar figure.

If the assessment language is only to set a dollar amount for the super priority lien, any part of the HOA's lien could be satisfied by that amount and different parts of the HOA lien can achieve priority status. For example, NRS 116.3116(1) provides that the HOA lien can include construction penalties and fines. Is it reasonable to conclude that construction penalties and fines could survive a foreclosure by the first lender? NRED answers that question in the negative for a number of reasons.

Typically, a lien for fines cannot be foreclosed by the HOA and are allowed to be imposed to enforce the governing documents.[56] What would be the public policy argument to say HOA cannot foreclose for fines, but can keep their lien for fines on a property even after a foreclosure by the lender? There is no reason, because the law was never intended to allow for it. Furthermore, if the assessment portion of the super priority lien was only to set a dollar amount for the lien, then it would not matter if assessments were even delinquent. An HOA could assert a lien for the amount of 9 months of assessments, but that amount could be for some other part of the HOA lien even while assessments are current. NRED does not believe the intent of the super priority lien is supported if something other than delinquent assessments can survive the lender's foreclosure.

As discussed previously, the principle of *expressio unius est exclusio alterius* supports the finding that costs of collecting – while a charge an HOA can make against an owner – are not part of the HOA's lien, because they are not part of NRS 116.3116(1) which defines the HOA lien. The principle also applies to the list of items that are entitled to super priority lien status.

[56] See NEV. REV. STAT. 116.31162(4) (2013).

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By stating specifically what the super priority lien consists of, all other parts of the lien a
excluded.

Moreover, the purpose for allowing any portion of the HOA lien to survive a lender's foreclosure is to compensate the HOA for the unpaid assessments it needs to meet its expenses. This is no more evident than in the comments to the Uniform Common Interest Ownership Act (UCIOA) (1982) from which NRS 116.3116 is derived.[57] NRS 116.3116 is substantially the same as Section 3-116 from UCIOA (1982).[58] The UCIOA comments to Section 3-116 state:

> **To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens.**
>
> . . .
>
> [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.[59] [Emphasis added].

This comment makes it clear that the assessment lien is what is subject to priority status. The priority lien concept was to strike a balance between the need to collect unpaid assessments and to protect the priority of lenders. The comment is clear that 6 months of assessments survive the lender's foreclosure; the language is not just to establish a dollar figure.

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[57] In 1991, Nevada adopted UCIOA (1982). NRS 116.3116 mirrors Section 3-116 from UCIOA (1982).

[58] As adopted in 1991, the priority lien for assessments was 6 months. Nevada extended the 6 month assessment lien priority to 9 months in 2009 with the passage of Assembly Bill 204 (2009) and added the abatement costs to the priority lien also in 2009.

[59] Uniform Common Interest Ownership Act (1982) at 155 attached at Ex. 11.

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The CCICCH Opinion quotes a proposed amendment to Section 3-116 of UCIOA (2008) as support for its conclusions. In fact, in 2008, UCIOA was amended and Section 3-116 was revised. Section 3-116 of UCIOA was amended to expand the HOA lien and it expanded the super priority lien by adding specific language.[60] The problem is Nevada never adopted the 2008 UCIOA changes relating to Section 3-116.[61] The CCICCH Opinion states "that associations should be able to include specified costs of collecting as part of the association's super priority lien."[62] The CCICCH Opinion sounds more like a persuasion paper for the Nevada Legislature to adopt the 2008 changes to the Uniform Common Interest Community Ownership Act (UCIOA) rather than an interpretation of the actual statutory language.

The CCICCH takes "assessments for common expenses" and says that it also means costs of collecting, interest, late charges, and charges for preparing statements, because it *should*. The CCICCH interpretation does not give the language of the statute its plain and ordinary meaning. Regardless of what *should be* the law, the UCIOA changes from 2008 were never made part of NRS 116.3116 by the Nevada Legislature. The public policy for the 2008 UCIOA changes cannot be insinuated into NRS 116.3116. It is up to the Nevada Legislature, not the CCICCH, to decide whether the super priority lien and what it consists of is sound public policy.

NRS 116.3116(c) provides a priority lien "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." This language is not intended to simply state a dollar amount. The language is actually very clear that the assessments for common expenses are what receive priority status. Based on the comments to the original language in UCIOA and the purpose for having a priority lien at all –

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[60] In 2008, UCIOA added the following language to the super priority lien: "and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien."

[61] See NRED Op. at 5-7 (Ex. 4) (For a discussion of Senate Bill 174 (2011) and Senate Bill 204 (2011)).

[62] CCICCH Op. at 12 (Ex. 3).

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assessments for common expenses means just that. NRED asks that this Court conclud that the language is clear on its face and that "assessments for common expenses" means the priority lien is for assessments for common expenses and nothing else.

E. FID HAS THE JURISDICTION AND AUTHORITY TO REQUEST A PERMANENT INJUNCTION BASED UPON THE NRED OPINION.

As stated above, NRED has issued an authoritative advisory opinion which is not only entitled to deference by the Court but enforceable by FID as well. As the Nevada Supreme Court ruled in *State, Dep't of Bus. and Indus., Fin. Inst. Div. v. Nevada Ass'n Serv., Inc.*,[63] NRED has authority to interpret NRS Chapter 116.[64] Only based upon that interpretation could the FID enforce violations of NRS Chapter 116. As the Court stated:

> [T]he [FID] can rely on the interpretations and regulations of the Real Estate Division concerning NRS Chapter 116. The [FID] would not need to act on its own to properly effectuate its statutory powers. Further, if the [FID] determines that certain regulations should be enacted or that an interpretation of a provision is required, nothing prevents it from requesting the CCICCH and/or the Real Estate Division to so act.[65]

Since any action upon NRS 116.3116 relies upon the interpretation of the statute and NRED has issued a definitive interpretation of the statute, FID has the authority to rely upon it.

NRED has determined that costs of collecting are not part of the super priority lien and that in no event can the amount of the super priority lien exceed 9 months of regular assessments, plus Abatement Costs. Pursuant to NRS 649.400(1)(b), the FID is authorized to petition this Court for an injunction against a collection agency that is conducting its business in violation of NRS Chapter 649.

Defendants are all licensed collection agencies pursuant to NRS Chapter 649. As such, they have been subject to annual examinations.[66] Pursuant to that examination, FID

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[63] 294 P.3d 1223, 1228 (Nev. 2012).

[64] State, Fin. Inst. Div., 294 P.3d at 1227 (quoting NRS 116.623(1)(a)).

[65] State, Fin. Inst. Div., 294 P.3d at 1228, n.4.

[66] NEV. REV. STAT. 649.335(2) (2013).

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determined that Defendants were including costs of collecting in charges as part of the sup priority lien, resulting in Defendants claiming more than 9 months of assessments under the super priority lien. Thus, FID determined that Defendants were in violation of the interpretation issued by NRED and were in violation of NRS 649.375(2). That statute prohibits a collection agency from collecting or attempting to collect any interest, charge, fee or expense incidental to the principal obligation unless such charge is authorized by law or agreed to by the parties. Since the charging of these amounts as a lien on the property and as part of the super priority lien is not permitted by law, FID is entitled to a permanent injunction against Defendants to prohibit this practice.

V. CONCLUSION

Based upon the foregoing, Plaintiffs NRED and FID respectfully request that this Honorable Court grant its Motion for Summary Judgment declaring:

1. That the lien defined by NRS 116.3116(1) does not include "costs of collecting" defined by NRS 116.310313;

2. That the super priority lien defined by NRS 116.3116(2) is limited to costs under NRS 116.310312 and regular monthly assessments, if delinquent, not to exceed 9 months; and

3. That FID has the jurisdiction and authority to enforce the NRED Opinion against Defendants.

Plaintiffs NRED and FID further respectfully request this Honorable Court permanently enjoin Defendants from:

4. Charging costs of collecting as part of an HOA's lien pursuant to NRS 116.3116; and

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5. Charging more than 9 months of delinquent assessments, plus Abatement Costs, the super priority lien.

Dated this 18 day of October, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Michelle D. Briggs
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EXHIBIT "1"

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STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS DIVISION

1179 Fairview Drive, Ste. 201
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In Re: The Petition of Prem Investment, LLC, a Nevada limited liability company; Rutt Premsrirut, Manager, for an application for Advisory Opinion and Declaratory Order pursuant to NAC 232.040, Petitioner.	**DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE**

DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE

Nevada, Department of Business and Industry, Financial Institutions Division (hereinafter "Division") hereby issues its Declaratory Order and Advisory Opinion regarding Petitioner PREM INVESTMENTS, LLC (hereafter "the Petitioner") regarding the collection of fees and charges by collection agencies and community managers for homeowners associations following the foreclosure of residential real estate.

JURISDICTION

1. The business of collecting claims for others or of soliciting the right to collect or receive payment from another of any claim in the State of Nevada is governed by chapter 649 of the Nevada Revised Statutes (NRS) and chapter 649 of the Nevada Administrative Code (NAC). The State of Nevada, Department of Business and Industry, Financial Institutions Division (hereinafter "Division") has primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. NRS 649.026.

2. The rule regarding the issuing of Declaratory Orders and Advisory Opinions by this agency are governed by NRS 233B.120, which reads as follows:

> Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

3. The Nevada Administrative Code (NAC) 323.040(1) establishes the procedure for filing a petition for declaratory order as follows:

> Except as otherwise provided in subsection 4, an interested person may petition the Director to issue a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Department or any of its divisions.

4. Upon receipt by the Director, the petition is then referred to the Commissioner for the Financial Institutions Division for determination. NAC 232.045.

FACTUAL BACKGROUND

5. Petitioner PREM INVESTMENTS, LLC is registered under the laws of the State of Nevada and has submitted this Petition by and through its attorney, James Adams, Esq. from the law firm Adams Law Group, Ltd.

6. On September 24, 2010, Petitioner filed its Petition for a Declaratory Order and Advisory Opinion with the Division.

7. Petitioners present a factual scenario which is all too common in the State of Nevada. A homeowner is unable to pay the mortgage and the monthly assessments to the homeowners' association.

8. Two actions are initiated. The bank begins foreclosure proceedings on the property.

9. At the same time, the homeowners association (hereafter "the association") initiates collection of its delinquent assessments by filing a lien on the property.

10. The property is sold at foreclosure, but the association's assessments continue because the association maintains a priority lien for its assessments.

11. The association's claim for assessments is sent to a collection agency or a community management company acting as a collection agency. When the bank attempts to sell the property, the new homeowner must pay the assessments and fees associated with the lien in order to obtain a clear title.

12. The lien includes additional fees and charges added by the collection agency, which often dwarf the amount of the original assessment.

13. Moreover, the fees being charged to the current homeowner or subsequent purchaser are generally not part of the collection contract between the agency and the association nor are they included in the governing documents of the association.

14. Therefore, the association never approves of the fees and charges added to the original assessment and fines charged to the homeowner who is subject to a lien or a subsequent purchaser at a foreclosure sale.

15. While the central focus of the issues raised by the Petition for Declaratory Order and Advisory Opinion concerns the priority of collection fees being charged, the Division has additional concerns regarding the undisclosed nature of these fees which are charged to homeowners and purchasers alike.

QUESTION PRESENTED

16. The Petitioner presents the following question for an advisory opinion:

a. Under NRS 116.3116, a homeowners' association has a lien on a unit for any assessments levied against that unit and any fines imposed against the unit's owner from the time the assessment or fine becomes due. Pursuant to NRS 116.3116, what portion of the lien, if any, is superior to the unit's first mortgage lender's security interest ("super priority lien") and may the sum total of the super priority lien amount, whether it be comprised of assessments, fees,

costs of collection or other charges, ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 1116.3115 plus any charges incurred by the association on a unit pursuant to NRS 116.310312 (unit repair expenses)?

b. Pursuant to NRS 116.3116, does a "super priority lien" exist in the absence of a homeowners' association's failure to file a complaint with the court to enforce the lien, i.e., the failure to institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3?

17. While the questions address an interpretation of NRS Chapter 116, the Division will address the issues as they relate to collection agencies and the implications of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f, prohibition against false, deceptive or misleading communications.

18. The federal Fair Debt Collection Practices Act (FDCPA) was made applicable to licensed collection agencies under NRS 649.370. More generally, a violation of the FDCPA can be considered a deceptive trade practice pursuant to NRS 598.023(3) which defines deceptive trade practice as "Violates a state or federal statute or regulation relating to the sale or lease of goods or services."

LEGAL ANALYSIS

19. NRS 649.020(3)(a) defines collection agency as including "a community manager while engaged in the management of a common-interest community or the management of an association of a condominium hotel if the community manager, or any employee, agent or affiliate of the community manager, performs or offers to perform any act associated with the foreclosure of a lien pursuant to NRS 116.31162 to 116.31168, inclusive, or 116B.635 to 116B.660, inclusive."

20. As a collection agency, any "interest, charge, fee or expense" added to the principal obligation must be "authorized by law or as agreed to by the parties." NRS 649.375(2).

21. As the associations have not established amounts of fees for collection services in their governing documents and collection agency contracts do not include the type and amount of fees which will be collected, the analysis of the questions presented will focus on what, if any, is permitted by law to be collected.

A. Is the amount of the "super priority" lien established pursuant to NRS 116.3116 capped at the amount of 9 months of assessments?

22. Pursuant to NRS 116.3116(1), the association can impose a lien for assessments and the fees and late charges for those assessments.

> 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.

23. The association can impose a lien on assessments which have priority over the first mortgage on the real property. However, the lien amount is not without limits and the statute is clear that the amount of a lien which retains its priority status is "to the extent" that those assessments would have become due in the preceding nine (9) months prior to enforcement of the lien. NRS 116.3116(2) reads in part as follows:

> 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,** .... 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.

24. NRS 116.3116(1) includes as part of the lien for assessments fees, charges, interest and costs which are permitted by NRS 116.3102(1)(n). That statute permits the addition of fees by "the association" which are "**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." NRS 116.3102(1)(n).

25. The types of charges authorized by NRS 116.4109 are extensive. The list of charges which can be collected, include, "any transfer fees, transaction fees or any other fees associated with the resale of a unit," NRS 116.4109(1)(e), and "association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit." NRS 116.4109(1)(f).

26. Since the statute includes the additional fees and charges as part of the "super priority" lien, then those fees, charges, interest and penalties, as stated above, are also subject to the nine (9) month assessment limitation established in NRS 116.3116(2).

27. As the Petitioner points out, numerous policy reasons exist to limit the amount which has priority not the least of which is to provide needed understanding by the first mortgage holder that its security interest in the property is not reduced by assessments and the unlimited amount of fees, charges, interest, penalties, fines and interest imposed by the association or its collection agent.

28. Further, Petitioner is correct in stating that the remainder of the lien is not removed from the property, but only the priority status over the first mortgage holder.

29. The Division adopts the interpretation that NRS 116.3116(2) is a limit on the amount an association can place a lien which has priority over the first mortgage holder.

30. While the Petitioner refers to this amount as "9 times" the monthly assessment by the association, that statement would not be entirely correct because changes in the amount of assessments may occur during the time period. The amount of the lien which has priority over the first mortgage cannot exceed what the association would have regularly charged for common expenses for the unit in the nine (9) months prior to the institution of an action to enforce a lien.

31. Any balance exceeding the nine (9) month limitation would be subordinate to the first mortgage holder's security interest.

32. Consequently, pursuant to the requirements of NRS 649.375(2)(a), the only charges "authorized by law" to collect after the foreclosure of the first mortgage are those that do not exceed the amount charged over the preceding nine (9) months of normal association assessments.

33. The Division further concludes that additional fees and charges can be included in the "super priority" lien as permitted by statute but the total of all of the amounts cannot exceed the nine (9) month assessment limitation. .

34. While the associations and their collection agencies should be mindful that the charges must be reasonable, the Division concludes that collection agencies are not permitted to add fees of any amount without the expressed approval of the association.

35. As the statutes cited above make clear, the association is the entity required to impose the fees and charges, not its collection agency. NRS 116.3116(1) ("The **association** has the lien"); NRS 116.3102(1) ("the **association** may do any or all of the following ..."); NRS 116.4109(3) ("the **association** shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package ...").

36. Consequently, no additional collection charges are "permitted by law" unless they are first approved by the association.

37. NRS 649.375(2) prohibits the collection of "interest, charge, fee or expense" which is not "authorized by law or as agreed to by the parties..."

38. A similar requirement exists in the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f(1) defining an "unfair practice" as "[t]he collection of amount (including any interest, fee, charge or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

39. As stated above, the association is permitted to make additional charges to the assessments for the collection of assessments, however, the statute requires that the association approve the charge, and it may not leave it to the collection agency to determine the amount of fees it may collect.

40. The collection agencies are operating as agents of the homeowners' association and it is a relationship based upon contract. *Hamm v. Arrowcreek Homeowners' Ass'n*, 183 P.3d 895, 902 (Nev. 2008) ("An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired.") However, the collection agency, alone, does not have the power to create and impose fees, where, as here, the statutes have delegated that authority to the association.

41. Therefore, the Division further concludes that if any charges or fees are added to the assessments to be charged pursuant to NRS 116.3102, or added to a lien pursuant to NRS 116.3116, then those fees, interest and charges must have been expressly approved by the association pursuant to its governing documents or in the contract with the collection agency prior to the time those fees, charges, interest, costs and penalties were incurred.

B. Is the association required to file a civil action prior to asserting its lien for assessments with "super priority" status?

42. Petitioner requests clarification of what is meant by the "action" in NRS 116.3116 in order to determine the "super priority" status of the association's lien. As above NRS 116.3116(2) reads, in part, as follows:

> 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,** .... 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.

43. Petitioner's claim that the language "institution of an action to enforce the lien" creates a statutory requirement that the association is required to file a civil action before the lien can achieve priority status. The Division disagrees. Nothing in the statute would indicate an intent to require a court action to secure priority status during the non-judicial foreclosure process.

44. As the Nevada Supreme Court stated, in order to determine what is meant by a term, an examination of the context and spirit of the statute is necessary.

> To clarify a statute's ambiguity, we look at the "context" and "spirit" in which it was enacted to effect a construction that best represents the legislative intent in enacting the statute. *Boucher v. Shaw*, 124 Nev. 96, ----, 196 P.3d 959, 961 (2008). Our goal is to read "statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Allstate Insurance Co. v. Fackett*, 206 P.3d 572, 576 (2009).

Citizens for Cold Springs v. City of Reno, 218 P.3d 847, 851 (Nev.,2009)(citations included)..

45. In the present case, the term "action" appears at the conclusion of the point of measurement for the limitation period in order to determine when to begin the nine (9) month period.

46. In no other part of NRS 116.3116 does the statute mention any civil action requirement for either the creation of the lien or its status of priority. NRS 116.3116(1)

clearly states, "the association has a lien on a unit" and that lien "is prior to all other liens and encumbrances..." NRS 116.3116(2).

47. Given that Nevada is a non-judicial foreclosure state and that NRS 116.31162 specifically states the procedure for foreclosure and means of enforcing an association lien, the term "action" was not used to establish a civil action requirement prior to determining the priority of an association's lien.

CONCLUSION

48. Based upon the foregoing, the Division hereby issues its Advisory Opinion and Declaratory Order as follows:

49. A collection agency is limited to the total of nine (9) months of assessments for common charges on the amount it can collect pursuant to priority status provided in NRS 116.3116(2). This nine (9) month cap includes any additional fees, charges, interest, costs, penalties or fines which the association could apply towards a lien pursuant to NRS 116.3116.

50. Additionally, prior to the imposition of any additional fees, charges, penalty and interest to any assessment or fine by a collection agency, the association must expressly approve the fees, charges, penalty and interest pursuant to the provisions in its governing documents.

51. Finally, neither associations nor their collection agencies are required to initiate civil action in order to secure the priority status of an association lien pursuant to NRS 116.3116.

DATED this 18th day of November, 2010.

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

By: _____
GEORGE E. BURNS,
Commissioner

EXHIBIT "2"

COMMISSION FOR COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS MEETING
DECEMBER 8, 2010
DEPARTMENT OF BUSINESS AND INDUSTRY
2501 E. SAHARA AVENUE
2ND FLOOR CONFERENCE ROOM
LAS VEGAS, NEVADA 89104

MINUTES

DECEMBER 8, 2010 **8:37 A.M.**

1-A) Introduction of Commissioners in attendance.
M. Favil West, Scott Sibley, Gary Lein, Michael Buckley, Randolph Watkins, Robert Schwenk, Marilyn Brainard, Senior Deputy Attorney General Deonne Contine serving as Commission Counsel.

1-B) Introduction of Division staff in attendance.
In Las Vegas: Gail Anderson, Administrator; Lindsay Waite, Ombudsman; Susan Clark, Licensing Manager; Nicholas Haley, Education Officer; Sonya Meriweather, Program Officer; Teralyn Thompson, Commission Coordinator, Senior Deputy Attorney General Kimberly Arguello serving as Division Counsel.

2) Public Comment
Jonathan Friedrich commented. Mr. Friedrich submitted three written documents titled "Review of Alvin Apfelberg Arbitrator Awards 2005 to 2009", "Fees Charged by HOA Boards Attorneys in Arbitration Cases in FY 2010" and "Fees Charged by NRED Arbitrators".

Mr. Friedrich stated that he did an analysis based upon documents that are on the Division's website. Mr. Friedrich stated that he created a summary of the fees that were charged by homeowner associations' attorneys and by arbitrators.

Mr. Friedrich stated that during the October 2010 Commission meeting there was a discussion regarding courses. Mr. Friedrich stated that he made observations and one of the attendees refuted Mr. Friedrich's comment. Mr. Friedrich stated that he sent Ms. Thompson, by email, copies of emails regarding the issue and wanted to know if that email was forwarded to the Commission.

Chairman Buckley requested that Ms. Thompson forward that email to the Commission.

Carol Clark commented on the structure and relationship of her board in relation to the management company.

9-A) Attorney General's case status report.
Deonne Contine presented this report. Ms. Contine did not submit a written report to the Commission.
- Thirteen cases at the Attorney General's Office
- All cases assigned to Kim Arguello

9-B) Discussion regarding the Policies and Procedures Manual.
This is a standing agenda item. There was no discussion by the Commission.

9-I) Discussion regarding Commissioner's speaking engagement requests.

None

9-D) Discussion and possible action to approve minutes of the October 13, 2010 Commission meeting.
Chairman Buckley requested that the meeting minutes reflect the Commission action taken during workshops and adoption hearings.

Commissioner West stated that there should be a correction on page one agenda item two. Commissioner West stated that within Mr. Lum's public comment the word "interrupted" should be "interpreted".

Commissioner Brainard stated that there should be a correction on page four agenda item 4-C-2. Commissioner Brainard stated that the second paragraph refers to the Nevada Common-Interest Community Manual as a training manual and she would like the minutes to reflect that it is called the Nevada Common-Interest Community Manual.

Commissioner Brainard stated that there should be a correction on page five agenda item 4-G-2. Commissioner Brainard requested that in the third paragraph the language "a regulation" be removed because it is redundant.

Commissioner Brainard moved to approve the minutes with corrections. Seconded by Commissioner Watkins. Unanimous decision.

9-E-1) Discussion and possible action regarding proposed legislative changes for the 2011 Legislative Session, including but not limited to Senator Copening's Working Group on changes to NRS 116 and related chapters.
Chairman Buckley stated that he received an email from Senator Copening stating that her proposals are in draft form with the Legislative Counsel Bureau and are not available. Chairman Buckley stated that he informed Senator Copening of the Commission's weekly meetings during the legislative session, and that the Commission will take time during those meetings to review bill drafts as they are submitted.

9-E-2) Discussion and possible action regarding proposed legislative changes for the 2011 Legislative Session, including but not limited to substitution of the word "assessments" for "dues" in NRS 116.31038(3)(b) and NRS 116.41095(3).
Commissioner Brainard moved that the Commission request that Senator Copening include in her bill draft request the correction of the improper use of the word "dues" in NRS 116.31038(3)(b) and NRS 116.41095(3). Seconded by Commissioner Watkins. Unanimous decision.

9-F-1) Discussion and possible action regarding the status of LCB File No. R121-10 concerning unit owners' complaints; unit owners' right to counsel; changes to NAC 116.410 and NAC 116.482.
Teralyn Thompson reported on this agenda item. Ms. Thompson stated that the regulation is still with the Legislative Counsel Bureau. Ms. Thompson stated that once the Division receives the regulation from the Legislative Counsel Bureau an adoption hearing will be scheduled.

9-F-2) Discussion and possible action regarding the status of LCB File No. R204-09 concerning service of process on out-of-state persons.
Teralyn Thompson reported on this agenda item. Ms. Thompson stated that the regulation is still with the Legislative Counsel Bureau. Ms. Thompson stated that once the Division receives the regulation from the Legislative Counsel Bureau an adoption hearing will be scheduled.

9-G) Discussion and possible action on the criteria for seeking receiverships over associations under NRS 116.790.
Chairman Buckley stated that he received an email from Assemblywoman Siegel regarding this issue.

Chairman Buckley stated that he received a telephone call from Donna Zanetti from Terra West. Chairman Buckley stated that it involves a situation where there is not a board of directors. Chairman Buckley stated that the community manager has documents and funds but there is no one to turn information over to.

Moana Vineyard, employed with Terra West commented. Ms. Vineyard stated that she inherited the association without a board six months ago. Ms. Vineyard stated that the association has been trying to get a board for over a year. Ms. Vineyard stated that the association has less than one hundred units. Ms. Vineyard stated that multiple candidacy notices have been sent to homeowners and notices informing homeowners of the financial and legal consequences for not volunteering to be on the board.

Ms. Vineyard stated that Terra West would like to be appointed receiver to be authorized to handle the accounts payable, receive management fees and be indemnified in terms of the manager. Ms. Vineyard stated that there is no process to address the situation.

Ms. Vineyard stated that this was brought to the Division's attention over a year ago.

Senior Deputy Attorney General Kimberly Arguello stated that in these particular circumstances, the receiver is probably not going to get paid because the assets are diminishing and due to loop holes in the process. Ms. Arguello stated that she is currently in a receivership situation with another state agency and it has been an ongoing ordeal for over a year. Ms. Arguello stated that the expenses are exorbitant.

Ms. Arguello stated that the association would have to pay for the receiver and the receiver's attorney.

Chris Yergensen from RMI Management commented. Mr. Yergensen stated that his company is a receiver and in the position to be a receiver for this purpose. Mr. Yergensen stated that receivership is not a large issue and that the Commission should be cautious in taking steps to seek receivership on behalf of associations. Mr. Yergensen stated that he thinks that there are enough remedies for Terra West to file for receivership without the Commission getting involved.

9-H) Discussion and possible action regarding proposed meeting schedule for calendar year 2011.
Teralyn Thompson gave the 2011 meeting dates:

- February 23-25, 2011
- April 26-28, 2011
- June 28-30, 2011
- October 4-6, 2011
- December 6-8, 2011

9-C) Discussion and possible action regarding an Advisory Opinion to the Division and the Commission from RMI Management dated November 29, 2010 requesting an interpretation of NRS 116.3115 and NRS 116.3116 regarding the application of the so called super priority lien.
Chairman Buckley stated that his law firm has been engaged to performs legal services for RMI Management in the Nevada Legislature. Chairman Buckley abstained from voting for this reason.

Vice Chair Commissioner Watkins took over as the Chair.

The Commission reviewed a document titled "Collection Cost NRS 116.3116 Analysis" that was attached to an email from Kevin Wallace of RMI Management dated December 3, 2010.

Senior Deputy Attorney General Deonne Contine stated that in May 2010 the Commission discussed an advisory opinion that Chairman Buckley later drafted. Ms. Contine stated that she reviewed the draft and discussed with Chairman Buckley some of her concerns with issuing an advisory opinion on contested cases that were in litigation, arbitration or some judicial proceeding. Ms. Contine stated that her other concern was that most state agencies have a process for requesting advisory opinions and do not often issue advisory opinions absent a request from a constituent of some type.

Ms. Contine stated that Commissioner Burns of the Financial Institutions Division issued an advisory opinion/declaratory order interpreting FID statutes but mentioning NRS 116 that prompted RMI Management's request for an advisory opinion from the Commission or Division.

Ms. Contine stated that she has concerns about issuing an advisory opinion in light of the Financial Institutions Division's advisory. Ms. Contine stated that the State of Nevada Attorney General does not issue Attorney General Opinions when matters are in litigation.

Kevin Wallace from RMI Management commented. Mr. Wallace stated that his company requested the advisory opinion because of the considerable amount of confusion that is in the industry. Mr. Wallace stated that NRS 116.620, NRS 116.623 and NRS 116.624 make the Commission in charge of NRS 116. Mr. Wallace stated that the Commission is the body that should decide this issue.

David Stone commented. Mr. Stone stated that his company, RMI Management and Angius & Terry Collections brought the law suit against the Financial Institutions Division. Mr. Stone stated that they have received a temporary restraining order and are in the process of getting a preliminary injunction issued.

Mr. Stone requested that the Commission adopt the advisory opinion to provide clarity to the industry.

Paul Terry from Angius & Terry Collections commented. Mr. Terry stated that he agreed with Mr. Stone's comments and requested that the Commission issue an advisory opinion.

Commissioner West moved to have the Commission adopt the advisory opinion. Seconded by Commissioner Brainard.

Commissioner West stated that he is concerned about getting clarification as quickly as possible. Commissioner West stated that the Commission can give an opinion and the courts can always overturn that opinion.

Commissioner Brainard stated that she agrees with Commissioner West. Commissioner Brainard stated that the Financial Institution Division oversees collection agencies but the Commission has to be concerned with associations. Commissioner Brainard stated that she is in favor of the Commission adopting the advisory opinion.

Motion carried with one abstention from Chairman Buckley.

10-1) Nevada Association of Community Managers
"Preventive Maintenance of HOA Properties"
Request: 3 hours General Classroom

Nicholas Haley presented this course. Mr. Haley stated that this course was previously approved by the Commission but since there were changes to the course and the instructor, Mr. Haley requested that the course be resubmitted.

Commissioner Lein requested that the instructor's resume be included with the Commissioners' meeting packets. Commissioner Lein stated that it would be helpful because some of the instructors' names are not familiar to him.

Commissioner Brainard moved to approve the course for three hours of general credit. Seconded by Commissioner Schwenk. Unanimous decision.

10-2) Cook and Co.
"Accessibility Requests-The Manager's Guide"
Request: 3 hours General Classroom

Nicholas Haley presented this course. Mr. Haley stated that he is recommending approval. Mr. Haley stated that the recommendation on the education report is incorrect.

Commissioner Lein moved to approve this course for three hours of general credit. Seconded by Commissioner Brainard. Unanimous decision.

11) Discussion and possible action on date, time, place and agenda items for upcoming meetings.
Chairman Buckley stated that there should be standing agenda items regarding legislation, regulations and the policies and procedures manual.

Chairman Buckley stated that LCB File No. R156-09 should be on the next Commission meeting as an adoption.

Chairman Buckley stated that the Commission would like an update from Ms. Gierer regarding the outstanding regulations at the next Commission meeting.

Chairman Buckley stated that the Commission should get an update from Ms. Anderson regarding the Division advisory opinions.

Commissioner Brainard stated that she would like electronic communications for transmission of notices and agendas if the unit owner agrees to be added as an agenda item for the next meeting.

Commissioner Brainard stated that the other agenda item she would like to discuss at the next meeting to be regarding mandatory education for a set number of minutes at executive board meetings by the community manager to ensure better informed board directors.

12) Public Comment
Jonathan Friedrich commented on an email that he received from Sara Barry regarding management companies refusing to accept payments on accounts that have been turned over to collection companies. Mr. Friedrich read the email to the Commission.

13) Commissioner Comments
Commissioner Brainard commented on the deed based transfer fees. Commissioner Brainard stated that this is a very huge issue with the Federal Housing Finance Authority. Commissioner Brainard stated that CAI is working energetically and closely with congressional staff to try to get the regulation fixed before it is issued.

Commissioner Brainard stated that a national survey was sent out and twelve hundred fifty-two communities responded. Commissioner Brainard stated that fifty percent of the communities have deed based fees in their governing documents.

14) Adjournment
Meeting adjourned on December 8, 2010 at 10:30 a.m.

Respectfully Yours,

Teralyn Thompson
Commission Coordinator

EXHIBIT "3"

ADOPTED DECEMBER 8, 2010

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

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

QUESTION

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

ANSWER

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] The changes noted are to 1994 UCIOA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT "4"

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

Subject: The Super Priority Lien	Advisory No. **13-01**	20 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

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

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

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

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

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

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

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

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

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

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

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

(1) The reasonable expenses of sale;

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

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

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

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

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

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

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

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

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

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

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

NRS 116.3116(2) states:

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).[13]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY CONCLUSION:

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

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

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

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

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

[14] NRS 116.31164.

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

EXHIBIT "5"

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DISTRICT COURT JUDGE

June 2, 2011
Date

Submitted by:

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EXHIBIT "6"

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DISTRICT COURT

CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company,

Plaintiff,

vs.

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive,

Defendant.

Case No: A-11-647850-C
Dept: No. 13

ORDER

This matter came before the Court on December 12, 2011 at 9:00 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief and Defendant's Counter Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Eric Hinckley, Esq., of Alverson, Taylor, Mortensen & Sanders appeared on behalf of the Defendant. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Plaintiff has asserted a claim of right under NRS §116.3116 (the "Super Priority Lien" statute) against Defendant and Defendant has an interest in contesting said claim, the present controversy is between persons or entities whose interests are adverse, both parties seeking declaratory relief have a legal interest in the controversy (i.e., a legally protectible interest), and the issue involved in the controversy (the meaning of NRS 116.3116) is ripe for judicial determination as between the parties. *Kress v. Corey 65 Nev. 1, 189 P.2d 352 (1948);* and

WHEREAS Plaintiff and Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116 (including whether Defendant demanded from Plaintiff amounts in excess of that which is permitted under the NRS §116.3116); and

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

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

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

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

WHEREAS, the Court is persuaded that Plaintiff's position is correct relative to the components of the Super Priority Lien (exterior repair costs and 9 months of regular assessments) and the cap relative to the regular assessments, but it is not persuaded relative to Plaintiff's position

concerning the need for a civil action to trigger a homeowners' association's entitlement to the Super Priority Lien.

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

1. Plaintiff's Motion for Partial Summary Judgment on Declaratory Relief is granted in part and Defendant's Motion for Summary Judgment on Declaratory Relief is granted in part.

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

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

4. Unless an association's declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102(1)(j) to (n), inclusive, are enforceable in the same manner as assessments are enforceable under NRS §116.3116. Thus, while such penalties, fees, charges, late charges, fines and interest are not actual "assessments," they may be enforced in the same manner as

assessments are enforced, i.e., by inclusion in the association's General Statutory Lien against the unit.

5. Homeowners' associations, therefore, have a Super Priority Lien which has priority over the First Security Interest on a homeowners' unit. However, the Super Priority Lien amount is not without limits and NRS §116.3116 is clear that the amount of the Super Priority Lien (which is that portion of a homeowners' associations' General Statutory Lien which retains priority status over the First Security Interest) is limited "to the extent" of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action to enforce its General Statutory Lien (which is 9 months of regular assessments) and "to the extent of" external repair costs pursuant to NRS §116.310312.

6. The base assessment figure used in the calculation of the Super Priority Lien is the unit's un-accelerated, monthly assessment figure for association common expenses which is wholly determined by the homeowners association's "periodic budget," as adopted by the association, and not determined by any other document or statute. Thus, the phrase contained in NRS §116.3116(2) which states, "... to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien..." means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments. If assessments are paid quarterly, then 3 quarters of assessments (i.e., 9 months) would equal the Super Priority Lien, plus external repair costs pursuant to NRS §116.310312.

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

8. Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 times the homeowners' association's regular monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien, plus external repair costs pursuant to NRS 116.310312.

9. Further, if regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien (i.e., shorter than 9 months of regular assessments,) the shorter period shall be used in the calculation of the Super Priority Lien, except that notwithstanding the provisions of the regulations, that shorter period used in the calculation of the Super Priority Lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

10. Moreover, the ~~Super Priority Lien can exist only if an "action" is instituted by the association to enforce its General Statutory Lien. The term "action" as used in NRS §116.3116(2) (as opposed the term "action" as contained in NRS §116.3116(7)), does not mean a "civil action" as that phrase is defined in NRCP 2 and NRCP 3 (i.e., "action" as used in NRS §116.3116(2) does not mean the filing of a complaint with the court).~~ the need for the institution of an actual civil action in order to enforce the Super Priority Lien can be obviated if the issue is otherwise properly raised in the Court, as is the situation here where foreclosure in effect constitute an action within the meaning of NRS 116.3116(2)(c).

IT IS SO ORDERED.

1/12/12

DISTRICT COURT JUDGE Date

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

PECCOLE RANCH COMMUNITY ASSOCIATION, a domestic non-profit homeowners association corporation, Plaintiff, vs. ELSINORE, LLC, a Nevada Limited Liability Company, Defendant. ELSINORE, LLC., on behalf of itself and as representatives of the class herein defined Counter Claimant, vs. PECCOLE RANCH COMMUNITY ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Counter Defendant.	CASE NO. A-12-658044-C DEPT. NO. XV Date of Hearing: August 29, 2012 Time of Hearing: 9:00 a.m. **ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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SEP 07 2012

This matter came before the Court on August 29, 2012, at 9:00 a.m., upon the Plaintiff's MOTION FOR PARTIAL SUMMARY JUDGMENT. James R. Adams, Esq., of ADAMS LAW GROUP, LTD., and Puoy K. Premsrirut, Esq., of PUOY K. PREMSRIRUT, ESQ., INC., appeared on behalf of the Defendant/Counter Claimant. Don Springmeyer, Esq., of WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP., appeared on behalf of the Plaintiff/Counter Defendant. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby, DECLARES, ORDERS, ADJUDGES AND DECREES that Plaintiff's Motion for Partial Summary Judgment is denied in part and granted in part.

WHEREAS, the undisputed facts are as follows: Plaintiff is a Nevada homeowners association. Defendant was an owner of residential real property located within the Peccole Ranch Community Association. In particular, Defendant purchased the property located at 2209 Storkspur, Las Vegas, NV, at a foreclosure sale on or about September 8, 2008. Defendant had obtained title to the property through a trustee's sale whereby a secured first trust deed holder foreclosed on the property thereby extinguishing Plaintiff's statutory general homeowners' association lien against the property, but for the super priority portion of that general lien. According to Defendant, the Association by itself or through its authorized agents, demanded and collected amounts from the Defendant. The amount demanded was $2,580.70. The amount allegedly paid by Defendant was $2,649.90.

IT IS FURTHER ORDERED that NRCP 56(b) provides as follows: A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The Court may enter summary judgment on questions of law where the facts are not in dispute. *Exchange Bank v. Strout Realty*, 94 Nev. 86, 525 P.2d 589 (1978). Thus, this Court may issue partial summary judgment on the declaratory issues pertaining to NRS 116.3116 and CC&Rs Section 8.3. Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713 (2002). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005). The substantive law controls which factual disputes are material and will preclude summary judgment; factual disputes not germane and central to the claims for relief are irrelevant. *Id.* The burden to establish the absence of a triable issue of fact is on the moving party, and the court is obligated to construe the evidence in the light most favorable to the party against whom the motion is directed. *Butler v. Bogdonovich*, 101 Nev. 449, 451 (1985); *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 145 (1967). Where the party moving for summary judgment will bear the burden of persuasion at trial, it must present evidence that would entitle it to judgment as a matter of law in the absence of contrary evidence. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. Adv. Rep. 60 (2011) (quoting *Cuzze v. Univ. & Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03 (2007)). If the nonmoving party will bear the burden of persuasion at trial, the moving party may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party s claim or (2) pointing out ... that there is an absence of evidence to support the nonmoving party's case. *Id.* In such instances, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the operative facts to defeat a motion for summary judgment. *Wood, supra* (quoting *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986)). When the motion is made and supported as required by Rule 56, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact. *Francis*, 262 P.3d at 714-15. The non-moving party's documentation must be admissible evidence, and he or she is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Posadas v. City of Reno*, 109 Nev. 448, 452 (1993) (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284 (1983)). In considering a motion for summary judgment, the court should not regard Rule 56 as a disfavored procedural shortcut, but should instead view it as an integral part of the ... Rules [of Civil Procedure] as a whole, which are designed to secure the just,

speedy and inexpensive determination of every action. *Wood*, 121 Nev. at 730-31 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Accordingly, when the movant has met the standard and the non-moving party has failed to establish a genuine issue of material fact, it is incumbent upon the court to grant the judgment sought forthwith. NRCP 56(c); *Dzack v. Marshall*, 80 Nev. 345 (1964).

The Plaintiff Association requested the following relief:

1. That pursuant to NRS 116.3116, the Association has a Super Priority Lien over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.
2. That the Association's Super Priority Lien Amount pursuant to NRS 116.3116 includes interest, late fees and costs of collection, which are in addition to, not capped by, the applicable period of common expense assessments.
3. That the Association's Super Priority Lien Amount pursuant to NRS 116.3116(2) includes costs of collection, which pursuant to NRS 116.310313 may include any fee, including legal fees and costs, and
4. That NRS 116.3116 supersedes the provisions of Section 8.3 of the Association s CC&Rs.

The Court finds that, in accordance with recent rulings by the Eighth Judicial District Court Honorable Judges Gonzalez, Denton, and Scann, Summary Judgment on requests numbers 1, 2 and 3 are DENIED.

Summary judgment on Plaintiff's request number 4 is GRANTED.

Pursuant to NRS 116.3116(2), the Association's Statutory Lien has priority over a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent the (First Security Interest) only to the extent of those assessments for common expenses based upon the Association's periodic budget that would have become due in the 9 month period immediately preceding an the Association's institution of an action to enforce its statutory general lien and to the extent of external repair pursuant to NRS 116.310312. This portion will be

referred to as the "Super Priority Lien". The Super Priority Lien amount is not without limits. The Association's Super Priority Lien Amount pursuant to NRS 116.3116 may include interest, late fees and costs of collection, but is capped by the applicable period of common expense assessments, i.e., a figure equaling 9 months of common expense assessments based upon the Association's periodic budget. The words to the extent of contained in NRS 116.3116(2) mean no more than, which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

Therefore, after the foreclosure by a First Security Interest holder of a unit located within a homeowners' association, pursuant to NRS 116.3116(2), the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien, plus external repair costs pursuant to NRS 116.310312.

For the foregoing reasons, the Court denies Plaintiff's Motion for Partial Summary Judgment on requests 1, 2 and 3 and grants request 4.

IT IS SO ORDERED.

WR DISTRICT COURT JUDGE Abbi Silver 9.13.12 Date

Submitted by:

9/6/12 Date

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EXHIBIT "8"

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PREM DEFERRED TRUST, on behalf of itself and as representatives of the class herein defined Plaintiff, vs. ALIANTE MASTER ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Defendant.	CASE NO. A-11-651107-B DEPT. NO 29 **ORDER**

This matter came before the Court on 07/24/2012, at 10:00 a.m., on Plaintiff and the Class' MOTION FOR SUMMARY JUDGMENT ON DECLARATORY RELIEF and Defendant Aliante Master Association's OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIM FOR DECLARATORY RELIEF AND COUNTER-MOTION FOR SUMMARY JUDGMENT. James R. Adams, Esq., of Adams Law Group, Ltd., appeared on behalf of the Plaintiff and the Class. Kurt Bonds, Esq., of Alverson, Taylor, Mortensen & Sanders appeared on behalf of the Defendant. Patrick Reilly, Esq., of Holland and Hart appeared on behalf of Nevada Association Services, Inc., and RMI Management, Inc., as Amici Curiae of the Court.

After review and consideration of all the pleadings and briefs of Plaintiff, Defendant and the Amici Curiae, including all exhibits attached thereto, and including the oral arguments of Counsel for Plaintiff and the Class, Counsel for Defendant and Counsel for the Amici Curiae, the Honorable Court hereby rules:

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WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Plaintiff and the Class have asserted a claim of right under NRS §116.3116(2) (the "Super Priority Lien" statute) against Defendant and Defendant has an interest in contesting said claim. The issue contained in the briefing is, therefore, ripe for determination. Further, the present controversy is between persons or entities whose interests are adverse and who have a legal interest in the controversy (*Kress v. Corey* 65 Nev. 1, 189 P.2d 352 (1948)); and

WHEREAS Plaintiff, the Class and the Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116; and

WHEREAS Plaintiff and the Class, and the Defendant have a legal interest in the controversy as it is Plaintiff's and the Class' property that is the subject of Defendant's Super Priority Lien and all parties, therefore, have a legal interest in a determination of to what extent the Super Priority Lien can exist; and

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

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

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

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

1. Plaintiff's and the Class' MOTION FOR SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF is granted.
2. Defendant's COUNTER-MOTION FOR SUMMARY JUDGMENT is denied.

3. NRS §116.3116(1) is a statute which creates for the benefit of Nevada homeowners' associations a statutory lien against a homeowner's unit for (a) any construction penalty that is imposed against the unit's owner pursuant to NRS §116.310305, (b) any assessment levied against that unit, and (c) any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due (the "General Statutory Lien").

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

5. Defendant, as a Nevada homeowners' association, therefore, has a Super Priority Lien which has payment priority over the First Security Interest on a homeowners' unit. However, the Super Priority Lien amount is not without limits and NRS §116.3116(2) is clear that the amount of the Super Priority Lien (that portion of the General Statutory Lien which retains a priority payment status over the First Security Interest) is limited "to the extent" of a homeowners' association's assessments for common expenses based upon the association's periodic budget that would have become due, in the absence of acceleration, in the 9 month period immediately preceding Defendant's institution of an action to enforce its General Statutory Lien (which is 9 months of regular, common assessments) and "to the extent of" external repair costs pursuant to NRS §116.310312 unless regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien.

6. The base assessment figure used in the calculation of the Super Priority Lien is the unit's un-accelerated, monthly assessment figure for association common expenses which is wholly determined by the homeowners association's "periodic budget," as adopted by the association, and not determined by any other document or statute. Thus, the phrase contained in NRS §116.3116(2) which states, "... to the extent of the assessments for common expenses

based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien..." means a maximum figure equaling 9 months of an association's regular, monthly (not annual) assessments. If assessments are paid quarterly, then 3 quarters of assessments (i.e., 9 months) would equal the Super Priority Lien, plus external repair costs pursuant to NRS §116.310312.

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

8. Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 months of the Defendant's regular monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien, plus external repair costs pursuant to NRS 116.310312.

9. In addition to the arguments of counsel contained in the briefs on file, in rendering this decision, the Court considered all exhibits appended to such all briefs, including but not limited to law review articles, the legislative history of NRS 116.3116, the history of the Uniform Common Interest Ownership Act, intermediate appellate and supreme court case law of other states, and the Commission on Common-Interest Communities & Condominium Hotels' Advisory Opinion which opined that a homeowners' association may collect as a part of the Super Priority Lien interest, late fees or charges, and the costs of collecting, but did not directly opine upon the issue of whether there was a maximum limit to the Super Priority Lien regardless of the constituent elements thereof, which was the question before this Court.

10. While the Court considered all such supporting materials, the Court is bound by the precedent of the Nevada Supreme Court which directs trial courts that, "[W]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the

legislature's intent." *Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 94, 993 P.2d 50 (2000).

11. The Court finds that NRS 116.3116 is clear on its face. After the foreclosure by a first security interest on a unit recorded before the date on which the assessment sought to be enforced became delinquent, a portion of a homeowners' association's statutory lien under NRS 116.3116(1) is prior to the first security interest only to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 (exterior repair costs) and only to the extent of the assessments for common expenses which are 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. The 9 month figure is derived by taking the monthly assessment figure for common expenses as contained in the association's periodic budget which existed immediately prior to the association's institution of an action to enforce its lien, and multiplying by 9.

12. Prior to the October 1, 2009, amendment increasing the Super Priority Lien, the maximum amount of the Super Priority Lien was limited to the extent of the assessments for common expenses which are based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien, 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.

IT IS SO ORDERED.

DISTRICT COURT JUDGE Sept. 24, 2012 Date

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EXHIBIT "9"

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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

U.S. BANK NATIONAL ASSOCIATION, Plaintiff v. LINDA A PERRY; and TERRACINA TERRASOL HOMEOWNERS ASSOCIATION, Defendants	CASE NO.: A-12-666569-C DEPARTMENT 27

DECISION AND ORDER

Plaintiff U.S. Bank National Association (hereinafter "Plaintiff" or "US Bank"), filed its Verified Complaint for Judicial Foreclosure and Deficiency Judgment of Deed of Trust on August 9, 2012. Defendant Terracina Terrasol Homeowners Association (hereinafter "TTHOA") filed an Answer to Plaintiff's Verified Complaint on September 7, 2012. The Default of Defendant Linda Perry (hereinafter "Perry") was entered December 10, 2012.

Plaintiff filed a Motion for Summary Judgment on February 8, 2013. TTHOA filed a Limited Opposition and Countermotion for Summary Judgment to Enforce Super Priority Lien Pursuant to NRS 116.3116 on February 27, 2013. Plaintiff filed a Reply in support of its Motion for Summary Judgment and Opposition to TTHOA's Countermotion for Summary Judgment on March 4, 2013. TTHOA filed a Reply in Support of its Countermotion on March 8, 2013. The Court heard oral argument on the

matters March 14, 2013 and took the pending Motions under advisement. The Court now issues its Decision and Order as follows:

COURT FINDS after review that, in contrast to Plaintiff's request for absolute priority with respect to US Bank's first mortgage security interest, the basis for TTHOA's Limited Opposition is simply a request that TTHOA's super priority lien be accounted for in the Order and Judgment herein. In consideration of the super priority lien amount due TTHOA, the Court must determine whether or not the super priority lien, statutorily granted to the homeowners' association, includes not only the assessment amounts but also late fees, interest, collection fees and costs, and attorney's fees, as TTHOA posits.

Defendant argues that attorney's fees, late fees, interest, and collection fees are calculated on top of the 9-month assessment amount which results in the following:

Assessments	=	$62/month * 9 months	=	$ 558.00
Late Fees	=	$10/month * 9 months	=	$ 90.00
Interest	=	5.25% * $648 ($558 + $90)	=	$ 34.02
Collection Fees & Costs			=	$ 519.80
Attorney Fees			=	$3,370.50
SUPER PRIORITY LIEN TOTAL			=	$4,572.32

Plaintiff's Reply in Support of its Motion for Summary Judgment acknowledges a super priority lien in favor of the Defendant TTHOA for $558.00 only.

COURT FURTHER FINDS after review NRS 116 governs common-interest ownership communities, and NRS 116.3116 *et seq.* governs the rights of a homeowners' association to its lien interests. Specifically, NRS 116.3116 states that

> The association has a lien on a unit for...*any assessment levied against that unit or any fines imposed against the unit's owner from the time the 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...

NEV. REV. STAT. 116.3116 (1) (emphasis added).

Further, the statute provides

> [a] lien under this [NRS 116.3116] is prior to all other liens and encumbrances on a unit except...[l]iens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to...[a] 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...
>
> 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...*

NEV. REV. STAT. 116.3116 (2) (emphasis added).

COURT FURTHER FINDS after review TTHOA argues that NRS 116.3116 (7), in conjunction with Defendant's interpretation of NRS 116.3116 (2), entitles TTHOA to attorney's fees in addition to the nine (9)-month assessment calculation. While this Court acknowledges that NRS 116.3116 (7) provides that "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party," attorney's fees are *not* included within the super priority lien amount. NEV. REV. STAT. 116.3116 (7).

COURT FURTHER FINDS after review that "where a statue is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 88, 94-95, 993 P.2d 50, 55 (2000).

Here, the plain meaning of the language of NRS 116.3116 (2) reads "*to the extent of*...assessments...which would have become due...during the 9 months immediately preceding institution of an action..." NEV. REV. STAT. 116.3116 (2) (emphasis added).

The language used, "to the extent of," is not reasonably susceptible to more than one meaning beyond the placement of a ceiling, a limit, or an amount which is not to be exceeded.

Although the Nevada Supreme Court has not yet addressed the instant issue, there exists a library of persuasive authority which support the conclusion that the super priority lien, including fees, interest, and the like are not to exceed an amount equal to nine (9) months of HOA assessments. The first opinion is found in the State of Nevada, Department of Business and Industry, Real Estate Division's ("NRED") December 12, 2012 Advisory Opinion (Adv. Op. 13-01, Issued Dec. 12, 2012) (hereinafter "Decision 13-01). Although the Court acknowledges the non-binding nature of the Advisory Opinion, Decision 13-01 is directly on point and is, therefore, highly persuasive.

NRED Decision 13-01 asks the question, "Pursuant to NRS 116.3116, may the portion of the association's...super priority lien...contain "costs of collecting" defined by NRS 116.310313?" *Decision 13-01*, at pg. 1. NRED answered this question in the negative. Id. NRED Decision 13-01 further considers, "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...plus charges incurred...pursuant to NRS 116.310312?" Id. Again, NRED answered in the negative: "The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien...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.*" Id. at 2 (emphasis added). NRED expanded in saying "...while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged...the total amount of

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super priority lien attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget." Id. at 12 (emphasis in original).

COURT FURTHER FINDS after review that several departments in the Eighth Judicial District Court ("EJDC") have addressed this issue, and those departments have consistently ruled that NRS 116.3116 (2) establishes a statutory cap on the super priority lien.

Presiding Civil Judge Elizabeth Gonzalez of the EJDC, Department XI, ruled that "The words 'to the extent of' contained in NRS 116.3116 (2) mean 'no more than,' which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded." Wingbrook Capital, LLC v. Peppertree Homeowners Assoc., *Order* at 4:3-5 (Case No. A-11-636948-B, filed Jun. 3, 2011) ("Gonzalez Order"). Judge Gonzalez ruled that

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

Id. at 4:13-18.

Judge Mark Denton of the EJDC, Department XIII, similarly ruled

> ...the Super Priority Lien amount is not without limits and NRS § 116.3116 is clear that the amount of the Super Priority Lien...is limited 'to the extent' of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action...Thus, the phrase contained in NRS § 116.3116 (2) which states, '...to the extent of...' means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments...
>
> The words "to the extent of' contained in NRS § 116.3116 (2) mean 'no more than,' which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded...

> Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, *in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 times the homeowners' association's regular monthly assessment amount...*

Ikon Holdings, LLC v. Horizons at Seven Hills Homeowners Assoc., *Order* at 4:4-5:4 (Case No. A-11-647850-C, filed Jan. 19, 2012) (emphasis added) (hereinafter "Denton Order").

Judge Susan Scann of the EJDC, Department XXIX, also issued an Order in the case of Prem Deferred Trust v. Aliante Master Assoc., which contained, verbatim, the language of the Denton Order, *supra.* Id., *Order* at 4:4-5:4 (Case No. A-11-651107-B, filed Sep. 25, 2012) (emphasis added) (hereinafter "Scann Order").

Judge Abbi Silver, EJDC, Department XV, issued a similar decision:

> The Association's Super Priority Lien Amount pursuant to NRS 116.3116 may include interest, late fees and costs of collection, but is capped by the applicable period of common expense assessments, i.e., a figure equaling 9 months of common expense assessments based upon the Association's periodic budget. The words to the extent of contained in NRS 116.3116(2) mean no more than, which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

Peccole Ranch Community Assoc. v. Elsinore, LLC, *Order Denying in Part and Granting in Part Plaintiff's Motion for Partial Summary Judgment*, at 5:2-6 (Case No. A-12-658044-C, filed Sep. 17, 2012) (emphasis added) (hereinafter "Silver Order").

COURT ORDERS for good cause appearing, and consistent with NRED Decision 13-01 and the decisions of the EJDC departments which have considered the issues before this Court, Plaintiff's Motion for Summary Judgment GRANTED IN PART and DENIED IN PART. Defendant TTHOA's Countermotion for Summary Judgment is also GRANTED IN PART and DENIED IN PART.

Plaintiff's Motion for Summary Judgment shall be GRANTED, but subject to a super priority lien in favor of Defendant TTHOA in the amount of five hundred fifty-eight dollars and zero cents ($558.00).

Dated: March 20, 2013

Nancy L. Alf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I mailed to the attorneys and in proper person as follows:

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K. Lawrence

Karen Lawrence
Judicial Executive Assistant

EXHIBIT "10"

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

METROPLEX REALTY, LLC., Plaintiff, vs. BLACK HAWK HOMEOWNERS ASSOCIATION, SHADOW WOOD HOMEOWNERS' ASSOCIATION, INC, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Defendants.	Department No: 18 Case No: A-12-663304-C **ORDER** Date of Hearing: May 7, 2013 Time of Hearing: 8:15 a.m.

This matter came before the Court on May 7, 2013, at 8:15 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Ryan Kerbow, Esq., of Alessi & Koenig appeared on behalf of the Defendants. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

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WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Plaintiff has asserted a claim of right under NRS §116.3116(2) (the "Super Priority Lien" statute) against Defendants and Defendants have an interest in contesting said claim, the present controversy is between persons or entities whose interests are adverse, both parties have a legal interest in the controversy (i.e., a legally protectible interest), and the issue involved in the controversy (the meaning of NRS 116.3116(2)) is ripe for judicial determination as between the parties. *Kress v. Corey 65 Nev. 1, 189 P.2d 352 (1948);* and

WHEREAS Plaintiff and Defendants, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116(2) (including whether Defendant demanded from Plaintiff amounts in excess of that which is permitted under the NRS §116.3116(2)); and

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

WHEREAS the issue of the meaning, application and interpretation of NRS §116.3116(2) is ripe for determination in this case as the present controversy is real, it exists now, and it affects the parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS §116.3116(2) would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

WHEREAS, pursuant to NRS §30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by NRS §116.3116(2) and they may, therefore, have determined by this Court any question of construction or validity arising under NRS §116.3116(2) and obtain a declaration of rights, status or other legal relations thereunder; and

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

1. Plaintiff's Motion for Summary Judgment on Declaratory Relief is granted in part.

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

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

4. However, the Super Priority Lien amount is not without limits and NRS §116.3116(2) is clear that the amount of the Super Priority Lien is limited "to the extent" of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action to enforce its General Statutory Lien (which is 9 months of regular, common assessments) and "to the extent of" external repair costs pursuant to NRS §116.310312.

5. The base assessment figure used in the calculation of the Super Priority Lien is the unit's un-accelerated, monthly assessment figure for association common expenses which is wholly determined by the homeowners association's "periodic budget," as adopted by the association, and not determined by any other document or statute. Thus, the phrase

contained in NRS §116.3116(2) which states, "... to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien..." means a maximum figure equaling 9 months of the association's regular, common expense assessments. If assessments are paid quarterly, then 3 quarters of assessments (i.e., 9 months) would equal the Super Priority Lien, plus external repair costs pursuant to NRS §116.310312.

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

7. Further, if regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien (i.e., shorter than 9 months of regular, common expense assessments,) the shorter period shall be used in the calculation of the Super Priority Lien, except that notwithstanding the provisions of the regulations, that shorter period used in the calculation of the Super Priority Lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

8. At this time, the Court declines to rule on that part of Plaintiff's Motion that requests a determination specifying what, if any, amounts demanded by Defendants exceeded the limitations imposed by NRS 116.3116(2).

IT IS SO ORDERED.

MAY 2 9 2013

DISTRICT COURT JUDGE Date

Submitted by:

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EXHIBIT "11"

UNIFORM COMMON INTEREST OWNERSHIP ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30-AUGUST 6, 1982

WITH PREFATORY NOTE AND COMMENTS

the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

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

(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 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. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale

statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) 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 agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other

disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as 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. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal

priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal

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DISTRICT COURT

CLARK COUNTY, NEVADA

PREMIER ONE HOLDINGS, INC., a Nevada Corporation, Plaintiff(s), vs. WELLS FARGO BANK, N.A., an Unknown Entity; TARGET NATIONAL BANK, an Unknown Entity; HIGHLAND HILLS ESTATES II LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada Non-Profit Corporation; NEVADA AFFORDABLE HOUSING ASSISTANCE CORPORATION, a Nevada Non-Profit Corporation; NEVADA ASSOCIATION SERVICES, INC., a Nevada Corporation; DOES I-X INDIVIDUALS; and DOE ENTITIES XI-XX, Defendants, and WELLS FARGO BANK, N.A., Counterclaimant, vs. PREMIER ONE HOLDINGS, INC., Counterdefendant, and WELLS FARGO BANK, N.A., Cross-Claimant,	CASE NO. A675178 DEPT NO. XV

OCT 22 2013

ABBI SILVER
DISTRICT JUDGE

DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

vs.

HIGHLAND HILLS ESTATES II LANDSCAPE MAINTENANCE ASSOCIATION,
Cross-Defendant,

and

WELLS FARGO BANK, N.A.,

Third-Party Plaintiff,

vs.

LIQUN HOLDINGS LIMITED,

Third-Party Defendant.

Plaintiff(s),

DECISION AND ORDER

THIS matter having come on for hearing on October 23, 2013, for Defendant Wells Fargo Bank, N.A.'s Notice of Motion and Motion for Partial Judgment on the Pleadings Pursuant to NRCP 12(c), the Defendant being represented by CHRISTINA S. BHIRUD, ESQ. and the Plaintiff being represented by CHARLES D. LOMBINO, ESQ., and after reviewing the moving papers on file herein, this Court makes the following Decision and Order.

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ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

FACTS AND PROCEDURE

On January 15, 2004, Kelvin and Germaine Roby ("Robys") purchased 5531 Megan Faye Street in North Las Vegas. The Robys purchased the property for $189,154 with a loan from New Freedom Mortgage Corporation, secured by a senior deed of trust encumbering the property. New Freedom recorded the deed on January 21, 2004. On November 30, 2009, Mortgage Electronic Registration Systems, Inc. ("MERS"), as the nominee of New Freedom, assigned the deed of trust for 5531 Megan Faye to Wells Fargo Bank, N.A. ("Wells Fargo"). On the same day, Wells Fargo substituted National Default Servicing Corporation as the trustee under the deed of trust.

The Robys worked with Wells Fargo to modify their obligations under the senior loan agreement. On July 20, 2010, Wells Fargo recorded the modification agreement against the property, securing the new principal balance of $191,585.08. On March 1, 2012, MERS re-assigned the deed of trust to Wells Fargo.

The property at 5531 Megan Faye is part of the Highland Hills Estates II Homeowners Association ("HOA"). On October 20, 2011, after the Robys failed to pay their HOA fees, Taylor Association Management, Inc., the HOA's agent, recorded a notice of delinquent assessment lien against the property. At that time, the Robys owed $1,205. On April 27, 2012, the HOA substituted Nevada Association Services, Inc. ("NAS") as its agent under the notice, and NAS subsequently recorded a Notice of Default and Election to Sell pursuant to the HOA lien. The Robys owed $2,594.50. Finally, on October 4, 2012, NAS recorded a Notice of Foreclosure Sale, with the outstanding lien amount at $3,875.17. Premier One Holdings, Inc. ("Plaintiff") purchased 5531 Megan Faye on November 2, 2012, at the foreclosure sale, for $6,000.

Plaintiff filed a Complaint to Quiet Title on January 16, 2013, naming Wells Fargo Bank, N.A., Target National Bank, Highland Hills Estates II Landscape Maintenance

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Association, Nevada Affordable Housing Assistance Corporation, and Nevada Association Services, Inc. as Defendants. Plaintiff claims to be the superior title holder of the real property located at 5531 Megan Faye Street, North Las Vegas, NV. In its Complaint, Plaintiff seeks to Quiet Title and Cancel Instruments held by all Defendants, claiming that its purchase at the foreclosure sale extinguished all other liens.

On February 27, 2013, Defendant Wells Fargo filed an Answer and Counterclaims, denying Plaintiff's claim and seeking Rescission of Sale and Quiet Title. Defendant Wells Fargo claims to be the senior lien encumbering 5531 Megan Faye Street. Plaintiff filed an Answer to Counter Claim on March 19, 2013.

On July 19, 2013, Defendant Wells Fargo filed an Amended Answer, Counterclaim, Cross-Claim, and Third Party Complaint, seeking Quiet Title as the senior deed of trust on the property. Plaintiff filed its Answer on August 1, 2013.

On September 18, 2013, Defendant Wells Fargo filed its Notice of Motion and Motion for Partial Judgment on the Pleadings Pursuant to NRCP 12(c), requesting judgment on the pleadings as to Plaintiff's claims for relief against Defendant Wells Fargo Bank, N.A. Plaintiff filed its Opposition to Defendant Wells Fargo's Motion for Partial Judgment on the Pleadings Pursuant to NRCP 12(c) and Countermotion for Summary Judgment on October 1, 2013. Defendant Wells Fargo filed its Reply in Support of its Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) on October 16, 2013.

DISCUSSION

Pursuant to this Court's prior ruling in *Design 3.2, LLC v. Bank of New York Mellon*, Case No. A-10-621628-C, attached herein as Exhibit 1, and for the reasons set forth below, Summary Judgment in favor of Wells Fargo is GRANTED.

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I. Standard of Review

If matters outside the pleadings are presented and not excluded by the court, a motion to for judgment on the pleadings shall be treated as one for summary judgment. NRCP 12(c), Schneider v. Continental Assur. Co., 110 Nev. 1270, 1271 (1994). Both parties attached exhibits in support of their respective pleadings, which the Court considered in making its decision. Accordingly, the Court treats this as Defendant Wells Fargo Bank N.A.'s Motion for Summary Judgment.

Summary Judgment is appropriate when there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. NRCP 56(c). The Court must determine, viewing the evidence in the light most favorable to the non-moving party, whether any issue of material fact remains. Wood v. Safeway, 121 Nev. 724, 731 (2005).

II. Legislative Intent of NRS 116.3116

During the 77th Session of the Nevada Legislature, Senate Bill 280 modified NRS 116, with the newly revised chapter effective October 1, 2013. At the meeting of the Assembly Committee on the Judiciary, the Committee reviewed the SB 280 1st Reprint with Committee Chairman, Assemblyman Jason Frierson, explaining,

> "In short, that mock-up creates a statutory structure where an HOA is allowed to place a lien for assessments and abatements, the lien has super-priority status, and the HOA is allowed to foreclose on that lien. If there is a subsequent HOA foreclosure sale, **this mock-up clarifies that the sale does not extinguish the first**; however, the HOA is allowed from that sale to receive the amount of the lien that is owed to them."
> (emphasis added)

Meeting of the Assemb. Comm. on Judiciary, 77th Legislature, p. 81 (May 17, 2013). Ultimately, the changes to NRS 116 include a new provision allowing first security interest holders to establish escrow accounts for advance payments of assessments;

however, the Legislature did not adopt the language that would clarify the effect of HOA foreclosure sales on first security interest holders.[1] Without further guidance from the legislature clarifying NRS 116, this Court follows its own prior analysis and additional persuasive authority.

III. NRS 116.3116

When the language of a statute is plain and unambiguous, the court should give the language its plain meaning. City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 891 (1989). Whenever possible, statutory provisions should be interpreted in harmony with other rules and statutes. Albios v. Horizon Communities, Inc., 122 Nev. 409, 418 (2006).

Under NRS 116.3116(1), a homeowner's association has a lien on a unit for any penalties, assessments, or fines from the time such penalty, assessment, or fine comes due. NRS 116.3116(2) further states that this lien has priority over all other liens and encumbrances on a unit *except*:

> (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 on the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent... (emphasis added)

A further exception in NRS 116.3116(2) states,

> 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

[1] The Court would note that amendments and revisions to SB 280, including those that made it through Assembly votes, would have clarified that the sale of property at an HOA foreclosure sale does not extinguish the first security interest. See Senate Bill 280 2d Reprint, 77th Legislature (2013); Amendment 777 to SB 280, 77th Legislature (2013).

> by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien... (emphasis added)

Read in harmony, the plain language of NRS 116.3116 establishes priority for the homeowner's association lien above other liens and encumbrances. However, in relation to the first security interest of subsection (b), this "super priority" is limited "to the extent" of charges incurred by the association pursuant to NRS 116.310312,[2] and nine months of assessments. There is nothing in the plain language of the statute that would allow the foreclosure of a homeowner's association lien to extinguish the first security interest. Rather, NRS 116.3116(2) merely provides priority for the homeowner's association lien over the first secured interest on a limited basis; that is, to the extent of charges incurred or nine months of assessments. This is essentially an attempt at ensuring that the homeowner's association is made whole. As such, if the holder of the first security interest, e.g., the bank, forecloses on the property, then the homeowner's association receives "super priority" status to the extent of charges or fees, and nothing more. Furthermore, if the homeowner's association properly forecloses on the property pursuant to this chapter, then the buyer takes the property subject to the prior security interest.[3]

Here, New Freedom Mortgage Corporation recorded the first security interest deed of trust encumbering 5531 Megan Faye on January 21, 2004. That security interest was assigned to Defendant Wells Fargo, and Defendant Wells Fargo has continued to record and modify its interest, including a modified agreement that was recorded on July 20, 2010. TAM, on behalf of the HOA, recorded the Notice of Delinquent Assessment against the property on October 20, 2011. As such, Defendant Wells Fargo is the first security

[2] NRS 116.310312 concerns a homeowner's association's ability to enter a unit for maintenance and to dispose of public nuisances, as well as the potential hearings and fines that would arise from such action.
[3] Whether the HOA sale is proper is predicated on whether the HOA followed the appropriate procedures, including proper notice to the homeowners, holder of the first security interest, and other lien holders.

interest, as outlined in NRS 116.3116(2)(b). Accordingly, the HOA lien had limited super priority in relation to Defendant Wells Fargo's interest, and that priority was limited "to the extent" of charges incurred by the association, and nine months of assessments.

In so holding, this Court follows the reasoning in its prior decision, *Design 3.2, LLC v. Bank of New York Mellon*, Case No. A-10-621628-C. ("...the Deed is in first priority according to common law. In the absence of countervailing equities, the order of priority depends on timing. Here, [Defendant] recorded first. After-acquired interests are subject to the rights of the holder of a properly recorded valid mortgage."). Additionally, the Court finds persuasive recent decisions from the United States District Court of Nevada, which held that NRS 116.3116(2) creates a limited super priority lien only for the nine months of assessments and charges incurred by the association. See Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 2013 WL 2460452 (D. Nev. June 6, 2013) ([Plaintiff's] interpretation avoids an extreme result "that the foreclosure of a small lien for even $1000 of delinquent HOA dues could extinguish an earlier-recorded security interest on the order of hundreds of thousands of dollars, when the purpose behind the super-priority statute was simply to ensure that HOA's are made whole up to a certain amount"); Beverly v. Weaver-Farley, 2013 WL 5592332 (D. Nev. Oct. 9, 2013) ("The plain language of NRS 116.2116(2)(c) simply creates a limited super priority lien for nine (9) months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest").

CONCLUSION

Pursuant to NRS 116.3116, when Plaintiff purchased 5531 Megan Faye, it did so subject to the secured interest of Defendant Wells Fargo, and that security interest was not extinguished by the foreclosure sale. Therefore, without additional guidance from the Legislature, and based on the facts of this case, this Court can find no genuine issue of

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DEPARTMENT FIFTEEN
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material facts present, and, even when considering the facts in the light most favorable to Plaintiff, Defendant Wells Fargo is entitled to Judgment as a matter of law. Accordingly, Summary Judgment in favor of Defendant Wells Fargo is GRANTED.

Accordingly, Plaintiff Premier Holding's Countermotion for Summary Judgment is DENIED.

DATED this 22 day of October, 2013.

JUDGE ABBI SILVER
EIGHTH JUDICIAL COURT XV

CERTIFICATE OF SERVICE

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

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CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STONE HOLLOW AVENUE TRUST,

Plaintiff,

v.

GREAT SENECA FINANCIAL CORPORATION; a Massachusetts Corporation; RJM ACQUISITIONS, LLC, a New York Limited Liability Company; JEANETTE FERNANDEZ LEON, an individual; PEDRO MENDOZA ARAUJO, an individual; MANUEL MENDOZA, an individual; BANK OF AMERICA, NATIONAL ASSOCIATION; PROFESSIONAL COLLECTION CONSULTANTS OF NEVADA, a Nevada Limited Liability Company, a/k/a PROFESSIONAL COLLECTION CONSULTANTS and DOES 1 through 10, inclusive,

Defendants, et al.

Case No.: A-12-669423-C
Dept.: XXIX

ORDER GRANTING PLAINTIFFS' MOTION IN PART BUT DENIED AS TO BANK OF AMERICA ONLY AND ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS

Stone Hollow Avenue Trust's (**Stone Hollow**) motion for summary judgment and Bank of America, N.A.'s (**Bank of America**) countermotion for summary judgment, having come on for hearing on October 22, 2013. Steve Shevorski, Esq. of Akerman LLP appeared for Bank of America. Zachary P. Takos, Esq. of Greene Infuso, LLP appeared for Stone Hollow. No appearance was made by any other party. The Court reviewed Stone Hollow's motion for summary

judgment, Bank of America's opposition and countermotion, Stone Hollow's reply in support of its motion for summary judgment, and Bank of America's reply in support of its countermotion, the exhibits attached thereto, the oral arguments of counsel for Bank of America and counsel for Stone Hollow, and good cause appearing,

IT IS HEREBY ORDERED Stone Hollow's motion for summary judgment is **GRANTED IN PART** but denied as to Bank of America.

IT IS FURTHER ORDERED that Bank of America's countermotion for summary judgment against Stone Hollow is **GRANTED**.

FINDINGS OF UNDISPUTED MATERIAL FACTS

1. Pedro Mendoza Araujo (**Araujo**) purchased the property located at 6124 Stone Hollow Avenue, Las Vegas 89156 (**the property**) via deed, which was recorded on June 9, 2010.

2. Araujo borrowed $105,578 from W.J. Bradley Mortgage Capital Corporation. This loan was secured by first position deed of trust, which was recorded on June 9, 2010.

3. The note and deed of trust were assigned to Bank of America, as successor by merger to BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P. The assignment was recorded on March 2, 2012. Bank of America is the successor by merger to BAC Home Loans Servicing as of July 1, 2011.

4. Heritage Estates Homeowners Association (**HOA**) recorded its notice of delinquent assessment on October 12, 2011.

5. HOA recorded a notice of default and election to sell on November 29, 2011.

6. Bank of America responded to the notice of default by tendering the super priority amount to the HOA's agent, Nevada Association Services, Inc. (**NAS**).

7. HOA, agent, NAS, refused to accept Bank of America's tender of the super priority amount.

8. HOA went forward with the non-judicial foreclosure sale and recorded a notice of sale on August 3, 2012. HOA sold the property to Stone Hollow for $6,700.

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LEGAL STANDARD

"Summary judgment is appropriate when the pleadings and other evidence establish that no 'genuine issues as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Cromer v. Wilson*, 126 Nev. ___, ___, 225 P.3d 788, 790 (2010). *(alteration in original) (quoting Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). A party may file an opposition and countermotion. E.D.C.R. 2.20(d). The countermotion shall be heard at the same time. *Id.*

LEGAL CONCLUSIONS

Stone Hollow has pled claims for quiet title and declaratory relief. Stone Hollow asks the Court to declare that it bought the property free and clear of all liens. Bank of America filed a counterclaim for quiet title against Stone Hollow. Bank of America seeks an order from the Court to declare that Stone Hollow purchased the property subject to Bank of America's senior deed of trust.

When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction. *Seput v. Lacayo*, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). NEV. REV. STAT. §116.3116(1) gives an association a lien for unpaid assessments levied against a particular unit in the common interest community. NEV. REV. STAT. §116.3116(2)(c) grants an HOA a super priority lien for up to nine (9) months of assessments over a senior deed of trust. NEV. REV. STAT. §116.31162(1) gives HOA the power to foreclose its lien by sale. The Court finds these statutes to be plain and unambiguous. The HOA's foreclosure sale eliminated the interests of all junior lien holders. The Court therefore grants Stone Hollow's motion for summary judgment as to all junior lien holders.

However, the Court denies Stone Hollow's motion for summary judgment as to Bank of America only. The Court finds that Bank of America's senior deed of trust was not extinguished by the HOA's foreclosure sale. Bank of America tendered the super priority amount to the HOA prior to the HOA's foreclosure sale, but the HOA refused to accept Bank of America's tender. Bank of America's tender of the super priority amount satisfied the super priority portion of the HOA's lien

against the property. Stone Hollow therefore purchased the property subject to Bank of America's senior deed of trust. The Court therefore grants Bank of America's countermotion for summary judgment.

ORDER BASED UPON COURT'S FINDINGS AND CONCLUSIONS OF LAW

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Stone Hollow's Motion for Summary Judgment is GRANTED IN PART as to all defendants, except Bank of America. Stone Hollow's Motion for Summary Judgment is DENIED as to Bank of America.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Bank of America's countermotion for summary judgment is GRANTED.

DATED this 25th day of November, 2013.

THE HONORABLE SUSAN W. SCANN

DISTRICT COURT JUDGE

Submitted by:

AKERMAN LLP

#8256

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Curtis Eddie, Trustee of the 1065 Thrill Court #101 Trust, Plaintiff, vs. Amy Kaffka, Green Tree Servicing, LLC, Defendants.	CASE NO.: A-12-688919-C DEPARTMENT XXVII

DECISION AND ORDER GRANTING DEFENDANT GREEN TREE SERVICING, LLC's MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on the 21st day of November, 2013; Aaron R. Dean, Esq. appearing for and on behalf of Plaintiff, Curtis Eddie, Trustee of the 1065 Thrill Court #101 Trust (hereinafter "Plaintiff" or "Thrill Court"); Michael R. Brooks, Esq appearing for and on behalf of Defendant Green Tree Servicing, LLC (hereinafter "Defendant" or "Green Tree"); and the Court having heard arguments of counsel, and being fully advised in the premises, **COURT FINDS** after review:

(1) This dispute arises from foreclosure proceedings against a residential property located at 1065 Thrill Court #101, Henderson, Nevada 89002, Parcel No. 179-34-713-046 (the "Property"). The Property is located within a common-interest community known as Paradise Court which is governed by a homeowners' association ("HOA") as defined in NRS Chapter 116,

(2) On March 28, 2005 Defendant Amy Kaffka executed a deed of trust (Deed of Trust) against the subject property to secure repayment of a loan in the amount of $144,980.00 in favor of DHI Mortgage Company, Ltd. The Deed of Trust was recorded with Clark County on April 7, 2005 as Instrument No. 20050407-0003469. Green Tree subsequently became the beneficiary of the Deed of Trust through an assignment recorded with Clark County on February 12, 2013 as Instrument No. 20130212-0000269. Non-judicial foreclosure proceedings pursuant to the power of sale in the Deed of Trust were commenced when Green Tree recorded a Notice of Default against the property on May 28, 2013. A Notice of Sale was later recorded on September 4, 2013, however the foreclosure sale has not yet taken place.

(3) Meanwhile, Defendant Kaffka became delinquent on her monthly assessments due to Paradise Court HOA sometime in 2011. In response, the HOA asserted a lien against the Property[1] and initiated non-judicial foreclosure proceedings pursuant to NRS 116.3116 *et seq.* which culminated in a foreclosure sale conducted on June 14, 2013.

(4) Plaintiff acquired the Property by successfully bidding on the Property at the June 2013 publicly-held foreclosure auction in accordance with NRS 116.3116, *et. seq.* ("HOA foreclosure sale"), and the resulting foreclosure deed, stating the conveyance was "without warranty express or implied," was recorded in the Official Records of the Clark County Recorder as Instrument Number 20130912-0002452 ("HOA Foreclosure Deed"), on September 12, 2013.

(4) Plaintiff filed its Complaint on September 19, 2013, stating four causes of action: (First) Quiet Title Pursuant to 116.3116, *et. seq.*; (Second) Declaratory Relief Pursuant to NRS 30.010; (Third) Unjust Enrichment; and (Fourth) Injunctive Relief.

[1] Notice of delinquent assessment lien against the property was recorded August 10, 2011.

(5) Plaintiff filed an Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time to prevent Green Tree foreclosing on the property, and the Court issued the TRO on September 23, 2013. At a subsequent Preliminary Injunction Hearing on October 1, 2013, the Court denied Plaintiff's Motion for Preliminary Injunction, finding the Plaintiff did not have a reasonable likelihood of success on the merits, the balance of hardships favors the Defendant, and the Plaintiff can be compensated through monetary damages. Plaintiff filed a Notice of Lis Pendens on October 3, 2013. Defendant Green Tree filed a Motion for Summary Judgment on October 21, 2013, and Plaintiff filed an Opposition on November 12, 2013.

(6) As presented by the parties, the material facts are undisputed, and the issue before this Court involves a question of law: did the June 13, 2013 non-judicial foreclosure sale conducted pursuant to NRS 116.3116 *et seq.* and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguish, by operation of law, any and all prior encumbrances upon the Property?

(7) Pursuant to Nevada Rule of Civil Procedure ("NRCP") 56, "[a] party against whom a claim...is asserted...may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." NRCP 56 (b). "The judgment sought shall be rendered forthwith if...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56 (c).

(8) The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. Cuzze v. Univ. and Comm. College Sys. Of Nev., 123 Nev. 598, 172 P.3d 131, 134 (2007). If this initial

burden is met, the non-movant must then by affidavit or other admissible evidence introduce specific facts that show a genuine issue of material fact. Id. The substantive law defines which facts are material. *See* Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A review of the record in regards to a motion for summary judgment must be viewed in a light most favorable to the non-moving party. Fire Ins. Exchange v. Cornell, 120 Nev. 303, 305 (Nev. 2004).

(9) The plain language of Nevada Revised Statutes § 116.3116 (2) (c) creates, for an association, a super priority lien "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." NEV. REV. STAT. 116.3116 (2) (c) (emphasis added). No clear, binding Nevada case law exists to date, which would provides direction on the necessity, or not, of judicial foreclosure proceedings in order to extinguish a first security mortgage interest.[2] However, without institution of a judicial foreclosure, the interest of junior lien holders cannot be extinguished by the process employed here.

(10) While not bound by decisions from other jurisdictions, the Court finds persuasive the conclusion of almost every Nevada federal court that an HOA super priority lien cannot extinguish a first position deed of trust. *See* Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2013 WL 4048573 *5 (D. Nev., 2013) (listing

[2] See First 100, LLC v. Ronald Burns, et al., Order Denying Defendant's Motion to Dismiss, at 7:25-28 (Case No. A677693, Eighth Judicial Dist. Ct. of Nev., filed May 31, 2013).

cases).[3] Further, this Court has previously ruled consistent with Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev., 2013), which held:

> NRS 116.3116 (2) (c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, *but it does not eliminate the first security interest*... the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses. Instead, as in this case, the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the *purchaser at the sale takes the property subject to the security interest*.

Id. at *3.

(11) This Court also agrees with the decision in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC et al., 2013 WL 2460452 (D. Nev., 2013) as consistent with the "dominant understanding of the actors in the real estate market" and an interpretation that "gives each section of the statutes significant application and avoids an extreme result that was almost certainly not intended by the state legislature." *Id.* at *7.

The Bayview court explained:

> The Court rejects [SFR's] reading of the statues [sic]. It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

Id. at *5. This Court agrees.

(12) This Court recognizes that although the Advisory Opinion of the Nevada Real Estate Division[4], cited by Plaintiff, is contrary to this Court's current and prior rulings, that Opinion includes a disclaimer that it lacks the force of law.

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[3] This Court acknowledges that Judge Philip Pro reached the opposite conclusion in the most recent federal decision. *See Limbwood Court Trust v. Wells Fargo Bank N.A. et al.* 2:13-CV-506-PMP-GWF *14 (D. Nev., Oct. 28, 2013).

[4] Nevada Real Estate Division, Advisory Opinion, No. 13-01, at 9 (Dec. 12, 2012) ("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.").

(13) Finally, this Court gives considerable emphasis to the due process of all parties and rejects the arguments of Plaintiff and the Real Estate Division that a lawsuit is not required for due process. It is of great concern to this court that NRS 116.311635(1)(b)(2) does not unequivocally require a HOA to give notice of lien or sale to prior secured lenders. Non-judicial foreclosure, as employed in this case, simply does not afford a first mortgage lien holder adequate due process to protect its lien interests. Therefore this Court reads NRS 116.3116(2) to require the HOA to institute a judicial foreclosure action to enforce its super priority lien interest, before a junior lien can be extinguished.

COURT ORDERS for good cause appearing and for the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED.**

Dated: December 19, 2013

Nancy L. Allf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I mailed a copy of the foregoing to the attorneys as follows:

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Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

February 14, 2014

Randolph Watkins, Chairman
Commission for Common-Interest Communities
and Condominium Hotels
Department of Business and Industry
Nevada Real Estate Division
2501 E. Sahara Avenue
Las Vegas, Nevada 89104

Dear Mr. Watkins:

You have requested an opinion from this office regarding the authority of the Commission for Common-Interest Communities and Condominium Hotels (Commission) to issue advisory opinions interpreting Nevada Revised Statutes (NRS) Chapter 116.

QUESTION

Does the Commission have authority under NRS 233B.120 to adopt their own advisory opinions concerning NRS Chapter 116, or does the more specific language of NRS 116.623 granting such authority to the Real Estate Division (Division) preclude the Commission from doing so?

ANALYSIS

NRS Chapter 233B is the Administrative Procedures Act (APA). NRS 233B.020 specifies the legislative intent for the APA as follows:

> 1. By this chapter, the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive

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> Department of the State Government and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter. This chapter confers no additional regulation-making authority upon any agency except to the extent provided in subsection 1 of NRS 233B.050.
>
> 2. The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

The legislature, in enacting the APA, recognized that agencies may have more specific requirements as part of their own statutes and explicitly states that the APA is not meant to abrogate or limit more specific requirements included in agency statutes.

The APA recognizes that agencies have the authority to respond to petitions for declaratory orders and advisory opinions. Agencies are recognized as having the authority to opine on the applicability of statutes, regulations, and decisions of the agency. NRS 233B.120 provides:

> Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

NRS 233B.031 provides the following definition for the term "agency": "'Agency' means an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases." Both the Commission and the Real Estate Division fall under the definition for the term "agency" provided in NRS 233B.031. NRS 233B.120 is a general statute that requires agencies to provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions.[1] It also requires that advisory opinions be mailed to the petitioner that requested the opinion.

NRS Chapter 116 is the Uniform Common-Interest Ownership Act. NRS 116.001. Unlike the APA, the Uniform Common-Interest Ownership Act provides

[1] Neither the Commission nor the Division have regulations regarding the filing and prompt disposition of petitions for declaratory orders and advisory opinions.

more specific requirements to the Division and the Commission regarding their respective duties and authority in administering the laws regulating Common-Interest Communities. The Uniform Common-Interest Ownership Act includes a specific statute addressing advisory opinions and declaratory orders. NRS 116.623 provides:

> 1. The Division shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability or interpretation of:
>
> (a) Any provision of this chapter or chapter 116A or 116B of NRS;
>
> (b) Any regulation adopted by the Commission, the Administrator or the Division; or
>
> (c) Any decision of the Commission, the Administrator or the Division or any of its sections.
>
> 2. Declaratory orders disposing of petitions filed pursuant to this section have the same status as agency decisions.
>
> 3. A petition filed pursuant to this section must:
>
> (a) Set forth the name and address of the petitioner; and
>
> (b) Contain a clear and concise statement of the issues to be decided by the Division in its declaratory order or advisory opinion.
>
> 4. A petition filed pursuant to this section is submitted for consideration by the Division when it is filed with the Administrator.
>
> 5. The Division shall:
>
> (a) Respond to a petition filed pursuant to this section within 60 days after the date on which the petition is submitted for consideration; and
>
> (b) Upon issuing its declaratory order or advisory opinion, mail a copy of the declaratory order or advisory opinion to the petitioner.

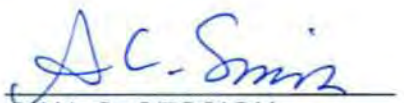
NRS 116.623 imposes the specific duty on, and gives sole authority to, the Division, not the Commission, to respond to petitions for declaratory orders and advisory opinions. *See also, State Dep't of Bus. And Indus., Fin. Inst. Div. v. Nevada Ass'n Services, Inc. et. al.*, 128 Nev. ___, ___, 294 P.3d 1223, 1227 (Adv. Op. 34, Aug. 2, 2012). It is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally. *Anderson Family Assoc. v. Hugh Ricci, P.E.*, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008).

CONCLUSION

Pursuant to NRS 116.623, the Division, not the Commission, has the sole duty and authority to issue advisory opinions as to the applicability of any statutory provision, agency regulation, or decision related to the Uniform Common-Interest Ownership Act.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
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