IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Appellant, vs. IKON HOLDINGS, LLC, a Nevada limited liability company, Respondents,	Supreme Court Case No.: 63178 District Court Case No. A711-678504

APPELLANT'S REPLY BRIEF

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I. THE COURT SHOULD REJECT THE NRED AMICUS BRIEF.

On March 7, 2014, the Office of the Attorney General filed an Amicus Curiae Brief ("Amicus Brief") on behalf of the State of Nevada, Department of Business & Industry, Real Estate Division ("NRED"). The Amicus Brief raises but one legal issue—whether collection fees and costs may even be included as part of an association lien under NRS 116.3116(1).[1] The NRED contends that, because collection fees and costs may not be included in the association lien in the first place, there is no need for this Court to decide whether the lien can ever exceed "nine times" or "six times" monthly assessments.[2]

The NRED's untenable legal position was rejected entirely at the lower court by both parties, their counsel, as well as the lower court itself. Indeed, when arguing before the lower court that it was entitled to partial summary judgment, **Ikon** argued very specifically as follows:

> [P]laintiff and Defendant agree on one fundamental issue. Assessments, fines, fees, penalties, collection costs, etc. may be included within the Super Priority Lien amount. Such a position is supported by the Nevada Common Interest Ownership Commission's Advisory Opinion, the Colorado appellate courts and by argument of Plaintiff's and Defendant's counsel.[3]

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[1] Amicus Brief at 2.
[2] *Id.* at 15.
[3] AA0758 (emphasis in original).

Not surprisingly, the lower court concluded that it was entirely appropriate for Horizons to include collection fees and costs in its lien under NRS 116.3116(1).[4] As Ikon agreed with the lower court's determination, it did not appeal said determination.

On that basis alone, this Court could and should strike the NRED's entire Amicus Brief, as its sole purpose is to raise a novel issue that is not disputed by the parties to this appeal.[5]

A. THE NRED'S POSITION IS WITHOUT MERIT

Despite the foregoing procedural deficiency, this Court should be fully aware as to just how poorly reasoned the NRED's position is. In its Amicus Brief, the NRED has inexplicably failed to take into consideration NRS 116.31162(1)(c), in which associations are entitled to foreclose on "**the amount of the lien, including costs, fees and expenses incident to its enforcement.**"[6] The use of the word "including" in this statute is unmistakable—costs, fees, and expenses incident to enforcement of an association lien are **included** in the lien. NRS 116.31162(1)(c) completely undermines the NRED's legal position, and it is quite

[4] AA2150-51 at ¶ 4 ("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] *See, e.g.*, AA0758.
[6] NRS 116.31162(c) (emphasis added).

remarkable that the NRED would file an Amicus Brief with a legal argument that is so obviously and easily disposed.

The principal flaw in the NRED's reasoning is that it arises from a strict, isolated, and extremely narrow interpretation of NRS 116.3116(1). However, NRS 116.1114 requires this Court to interpret NRS Chapter 116 **liberally**, rather than narrowly:

> **Remedies to be liberally administered.** The remedies provided by this chapter must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed....

Indeed, under Nevada law, remedial statutes are supposed to be construed broadly, not narrowly.[7]

As a result, it is not surprising that the NRED's legal analysis is so badly flawed. Like a prospector searching with an upside-down treasure map, the NRED's statutory interpretation heads 180 degrees in the wrong direction from the very beginning. The NRED's legal analysis is the sum of a strict and narrow interpretation of the statute, when the law requires the exact opposite approach.

And, the NRED's position makes little practice sense. The NRED concedes that an association may collect fees and costs when it conducts its own

[7] *See, e.g., I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 296 P.3d 1202 (Nev. 2013) citing *Peccole v. Luce & Goodfellow*, 66 Nev. 360, 370–71, 212 P.2d 718, 723–24 (1949); *Las Vegas Plywood v. D & D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982); *Colello v. Administrator, Real Est. Div.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984) (recognizing that "[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained").

foreclosure.[8] Yet, according to the NRED, those same collection fees and costs are not part of the lien upon which that same foreclosure takes place at a later time. The NRED does not explain why NRS Chapter 116 would specifically allow for recovery of collection fees and costs upon an association's foreclosure, but at no point prior to that foreclosure.

So there is no mistake, NRS 116.3116(1) states that "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." NRS 116.3102(k) and (n) specifically allow associations to "impose charges for late payment of assessments" and for "statements of unpaid assessments," among other things. The collection fees and costs at issue in this case are specifically governed by NAC 116.470, which repeatedly refers to such costs of collection as "charges." Needless to say, what would "charges for late payment of assessments" be except for the collection fees and costs incurred by an association in the pursuit of an unpaid lien?

Finally, Horizons vigorously disagrees that the NRED's poorly reasoned opinion is entitled to "great deference." The NRED seems to forget that the CCICCH issued its own written opinion in December 2010, two years before the

[8] Amicus Brief, citing NRS 116.31164(3).

NRED opinion was issued.[9] On its face, the "advisory opinion" appears to have been written solely for the purpose of undermining and contradicting the CCICCH written opinion. In fact, the NRED opinion refers to the CCICCH Opinion throughout. The NRED's result-oriented logic conveniently ignores other related statutes, such as NRS 116.31162(1)(c) and NRS 116.1114, and further ignores basic common sense. Notably, an arbitrator *appointed by the NRED* expressly called into question the motivation behind the issuance of the NRED opinion.[10] And, perhaps most significant, while the Office of the Attorney General has submitted an Amicus Brief arguing vigorously on behalf of the NRED, it has not bothered to submit a contrary amicus brief on behalf of the CCICCH. Given the foregoing, the NRED opinion is hardly worthy of "great deference" from this Court, as there is "reason to suspect that the interpretation 'does not reflect the agency's fair and considered judgment on the matter.'"[11]

II. IKON IMPROPERLY CITES THE LOWER COURT RECORD.

Ikon did not follow NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page of the appendix where the matter relied on is to be found. This failure has made it

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[9] AA0647-57.

[10] *Bank of America, NA v. Olympia Management Services, LLC*, Nevada Real Estate Division Arbitration Case No. 13-14, Arbitration Decision and Award, at 8:26-27 (September 6, 2013) (Wenzel, Arb.). *See* Addendum to Opening Brief.

[11] *Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S. Ct. 2156, 2159 (2012).

particularly difficult for Horizons to "fact check" Ikon's arguments, not just to determine whether such contentions are accurate, but to determine whether such arguments were ever made at all. Rule 28(e) specifically prohibits such lax briefing to prevent procedural disadvantages in this Court.

III. IKON HAS IMPROPERLY RAISED NEW ARGUMENTS.

Arguments that were not raised before the district court normally cannot be raised for the first time on appeal.[12] Yet, Ikon's Answering Brief is replete with improper new arguments that were not argued or litigated before the lower court, and cannot be considered here. The following is a list of new arguments that the Court should not consider:

IKON'S CLAIM THAT COLLECTION FEES CANNOT BE INCLUDED IN AN ASSOCIATION'S LIEN

In the Answering Brief, Ikon, suddenly, and for the first time, agrees with NRED that collection fees and costs cannot be included in the lien.[13] This is remarkable, given that Ikon *argued the exact opposite position before the lower court.* Ikon repeatedly conceded that the parties agreed—and in fact urged the lower court to rule—that collection fees and costs may be included in the super-

[12] *See, e.g., Coast to Coast Demolition and Crushing, Inc. v. Real Equity Pursuit, LLC*, 126 Nev. ——, ——, 226 P.3d 605, 607 (2010) (noting that issues not litigated in the lower court and raised for the first time on appeal need not be considered by this court). *Valley Health Sys., LLC v. District Ct.*, 127 Nev. ——, ——, 252 P.3d 676, 679 (2011) (stating that an issue not raised in district court is generally deemed waived and will not be considered upon appeal).

[13] Amicus Brief, 1-2, and 50:3-7 ("Certainly a homeowner may owe such costs to an association, but such costs do not become part of the general lien.")

priority lien.[14] Ikon's position is stated unequivocally in the opening sentence of a reply brief, which provides:

> [P]laintiff and Defendant agree on one fundamental issue. Assessments, fines, fees, penalties, collection costs, etc. may be included within the Super Priority Lien amount. Such a position is supported by the Nevada Common Interest Ownership Commission's Advisory Opinion, the Colorado appellate courts and by argument of Plaintiff's and Defendant' counsel. However, that is not the issue before this Court. The issue before this Court is that even though the Super Priority Lien can include many things like assessments, fines, fees, and collection costs, is there s cap on the Super Priority Lien, or is Super Priority Lien limitless.[15]

Despite conceding there was "universal agreement" on this issue before the lower court, Ikon suddenly argues the opposite now. Moreover, Ikon did not appeal the lower court's determination that collection fees and costs are part of the super-priority lien.[16] For these reasons, this Court should summarily disregard this contention.

IKON'S DISTORTED HISTORY OF THE UCIOA

Ikon spends pages introducing the Uniform Common Interest Ownership

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[14] AA0110 "[c]ollection costs may be included in the capped figure"; AA0112 "collection costs can be included within the Super Priority lien"; AA0112 "Every intermediate appellate and supreme court in every state that has the same super priority statute as Nevada...collection fees and costs may be included within the Super Priority Lien"; AA0768 "[t]here as been universal agreement that collection costs may be *part* of the Super Priority Lien amount." (emphasis added in original).

[15] AA0758 (emphasis added in original).

[16] AA2150-51 at ¶4 ("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.").

Act ("UCIOA") to the Court by providing an apocryphal history that sets forth distorted, unsupported reasons as why the UCIOA was promulgated.[17] Not only is this new argument,[18] but there is simply no support for Ikon's contentions. Indeed, throughout this "history" that supposedly sheds light on intent, there are few citations, simply the musings and speculation of counsel. However, arguments of counsel are not evidence and may not be treated as such by this Court.[19]

There is no support for Ikon's contentions that a fixed numerical amount was needed to induce lenders to develop land or that a fixed amount was created for predictability. Rather, according to the drafters of the UCIOA, the purpose of the super-priority lien is to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments."[20] In accomplishing this goal, the drafters of UCIOA §3-116 believed that the six-month association lien priority struck a functional balance between the need to protect the financial integrity of

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[17] Answering Brief, §IIIA, 9-16.

[18] To the contrary, Ikon repeatedly argued below that the text of NRS 116.3116 is plain and unambiguous, precluding the need to consider legislative intent, or public policy. Answering Brief, IIIB, 16-23.

[19] *See, e.g., Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); *Greene v. State*, 113 Nev. 157, 169, 931 P.2d 54, 61 (1997) overruled on other grounds by *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *Flanagan v. State*, 112 Nev. 1409, 1420, 930 P.2d 691, 698 (1996); *Bonacci v. State*, 96 Nev. 894, 896–97, 620 P.2d 1244, 1246 (1980) (reiterating the district court's admonishment that " 'arguments of counsel are not evidence' ").

[20] AA0277; UCIOA §3–116, cmt. 1 (1982); *see also* NRS 116.1109(2) ("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among state enacting it.").

community associations and the legitimate expectations of first mortgage lenders.[21] Significantly, this belief was premised on the assumption that a first mortgage lender holding a defaulted mortgage would take ***prompt*** action to enforce that mortgage via foreclosure, and that in most states such a foreclosure could be completed within six months or a reasonable period of time thereafter, minimizing the period during which unpaid assessments would accrue for which the association would not have first lien priority.[22] This belief was further premised on the assumption that a common interest unit would typically have a value sufficient to allow the recovery of both the first mortgage balance and six months of unpaid assessments.[23]

This, of course, is not the case in Nevada. Lender foreclosures must go through a lengthy mediation process and notice procedure prior to foreclosure.[24] Moreover, the realities of the Nevada real estate market today demonstrate that these basic assumptions were incorrect. Many common interest units are "under water," with property values below the outstanding first mortgage balance.[25] Furthermore, there are long delays in the completion of foreclosures by deed of trust holders.[26] During these delays, neither the defaulting unit owners nor the

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[21] AA0275-96.
[22] *Id.*
[23] *Id.*
[24] *See, e.g.*, NRS Chapter 40.
[25] AA0984-86.
[26] *Id.*

deed of trust holders typically pay the assessments on the unit.[27] Indeed, many lenders have chosen to delay instituting foreclosure proceedings.[28] The consequences of such delays are devastating to a common interest community and the law-abiding residents who pay their periodic assessments in full and on time.[29]

IKON'S CLAIM THAT THE FORECLOSURE IS NOT THE REFERENCE POINT

Shockingly, and for the very first time, Ikon suggests that the foreclosure on the deed of trust is not the reference point to calculate the super-priority lien.[30] Yet, this is exactly what the lower court held based upon Ikon's arguments. In fact, the lower court held that "foreclosure in effect constitutes an action within the meaning of NRS 116.3116(2)(c)."[31] The "foreclosure" the Court references is that of the first trust deed holder.[32] Thus, the foreclosure by the deed of trust holder is the reference point that starts the look back period under either interpretation of NRS 116.3116. Ikon's new argument—that there must be an "action" upon the association's lien to start the look back period—is fraught with issues. While this argument is analogous to Ikon's failed argument that a civil action is a condition

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[27] *Id.*
[28] *See, e.g.,* NRS Chapter 40.
[29] Notably, the foregoing facts could have been detailed in a far more lengthy record, had Ikon raised this issue before the lower court. Horizons should not be placed at a procedural disadvantage by having to respond to Ikon's unsupported "facts" with a record that was not fully developed because Ikon did not raise this issue below. When that happens, appellate argument devolves from a well considered fact and law based analysis into one lawyer's personal opinion versus that of another. That is no way for this Court to hear any appellate matter, much less one as important as this.
[30] Answering Brief, §IIIC, 23-26.
[31] AA0973.
[32] *Id.*

precedent to the establishment of a super-priority lien (which the lower court rejected and Ikon did not appeal), this argument was not argued before the lower court.

According to Ikon, an association that does nothing to enforce its lien is not even entitled to a super-priority lien. Yet, in the very same brief, Ikon spends pages arguing that an association should do absolutely nothing to enforce its lien, and allow the lender to foreclose first to avoid the "Self-Inflicted Problem" of incurring collection fees and costs.[33] Indeed, Ikon states "to complain that associations' are damaged by not being able to collect collection costs...when the associations and collection agents are aware of a first lenders' pending foreclosure is a self-created, self-inflicted and self-perpetuated problem."[34] These two positions are completely at odds with one another, and Ikon makes no effort to reconcile them.

The importance and significance of these inherently contradictory positions cannot be understated. Ikon has constructed a "damned-if-you-do-damned-if-you-don't" scenario in which associations should never lift a finger to pursue unpaid assessments because they will ultimately recover their "super-priority lien" after a bank foreclosure—but at the same time can never recover a "super-priority lien" if they do not "act" to enforce their liens. Which is it? Why is Ikon so obviously

[33] Answering Brief, §IIIAiv, 14-16.
[34] *Id.* at 15-16.

contradicting itself? And, more importantly, what do such inherently contradictory positions say about the soundness of Ikon's overall statutory interpretation?

Still, there is no question that the foreclosure upon a deed of trust starts the look back period. In Nevada, associations have immediate liens against real property from the moment when an assessment or other cost is incurred.[35] According to NRS 116.3116(4), recording the association's declaration "constitutes record notice and perfection of the lien" and "[n]o further recordation of any claim of lien for assessment under this section is required." Before the lower court, Ikon agreed that the "super-priority" lien period was comprised of a "look-back" period.[36] If the association is supposed to avoid the "Self-Inflicted Problem" of incurring collection fees and costs and simply allow the lender to foreclose (as Ikon maintains), the only possible target date to commence the look-back is the foreclosure date. If the association forecloses ahead of the lender, NRS 116.31164 (and not 116.3116) governs payment to the association, and there is no "look back" required.

IKON'S CLAIM THAT THE CCICCH LACKS AUTHORITY TO ISSUE ADVISORY OPINIONS

The argument that the Commission for Common Interest Communities and

[35] *See* NRS 116.3116(1); *see also Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp.2d 1222 (D. Nev. 2013).
[36] AA0803 at lns. 23-25.

Condominium Hotels ("CCICCH") cannot issue advisory opinions is brand new.[37] Still, this contention is incorrect as a matter of law. In *State v. Nevada Ass'n Services, Inc.*, this Court concluded that the CCICCH has the legal authority to interpret NRS Chapter 116.[38] Ikon cites to a recent Attorney General Opinion dated February 14, 2014—the timing of which is extremely curious—for this claim. Yet, an attorney general opinion is not precedent, particularly when it contradicts binding Nevada Supreme Court precedent.[39] Importantly, rather than deciding this case upon politically motivated opinions that are of questionable merit, this Court will ultimately interpret NRS 116.3116 based on its own interpretation of the statute, not based on what the NRED or the CCICCH said at any given time.

IKON'S CLAIM THAT A RECENT PROPOSED LEGISLATIVE AMENDMENT IS EVIDENCE

Ikon argues that a proposed amendment in 2013 to NRS 116.3116 provides meaningful insight that its interpretation of NRS 116.3116 is correct.[40] This, too, is a brand new argument raised on appeal for the first time, and should not be considered by the Court. Setting that aside, the actual legislative history

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[37] Answering Brief, §IIIF, 36-38.
[38] *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (Nev. 2012) ("We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116.").
[39] *University System v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001); *Cannon v. Taylor*, 88 Nev. 89, 493 P.2d 1313 (1972).
[40] Answering Brief, §IIIJ, 46-49.

demonstrates that various proposals (which were made on both sides of the aisle in 2011 and 2013) merely sought to clarify the existing law (which was and is very much in dispute), not to change it.[41] Notably, NRS 116.3116(2) was not amended in either legislative session in favor of either interpretation of NRS 116.3116(2).[42] This may ultimately say more about the Legislature and its willingness to tackle a difficult political issue, rather than providing any meaning or insight into a statute that was enacted in 1991.

IV. BECAUSE NRS 116.3116(2) IS AMBIGUOUS, THE COURT MUST LOOK BEYOND THE WORDS OF THE STATUTE

Ikon argues repeatedly that NRS 116.3116(2) is "unambiguous, clear, and plain."[43] This position is untenable. Numerous different arbitrators and district courts have interpreted this statute differently for various reasons.[44] Even the State of Nevada Department of Business and Industry has two competing advisory opinions within its ranks—one by the CCICCH and one by the NRED[45]—that are totally at odds with one another.[46] At this point, after four-plus years of litigation

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[41] AA0992-93.
[42] *Id.*
[43] Answering Brief, 16-23.
[44] AA0996-99.
[45] The Nevada Financial Institutions Division (FID) also had an advisory opinion on this issue, which itself was different from these two opinions. Yet, this Court held that the FID did not have jurisdiction to render such an opinion. *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (Nev. 2012)
[46] AA0644-57. Subsequent to the issuance of partial summary judgment by the lower court, and before the entry of final judgment, the NRED issued its own advisory opinion contrary to the CCICCH advisory opinion. However, Ikon never maintained that the NRED opinion should be followed, and ***it is not part of the***

in dozens of lawsuits, this is simply an absurd claim. Rather, a statute is deemed ambiguous "when it is capable of more than one reasonable interpretation."[47] The sheer number of conflicting decisions concerning NRS 116.3116(2) belies Ikon's suggestion that NRS 116.3116(2) contains a simple, unambiguous, bright-line rule.

Once this Court concludes that NRS 116.3116(2) is ambiguous—as it must—an assortment of rules of statutory construction come into play. First, NRS 116.1114 directs that this Court construe NRS 116.3116(2) **liberally**. Common sense and public policy play important roles in this Court's analysis.[48] Absurd and unreasonable results must be taken into account.[49] The history of how the statute has been historically applied is also important.[50]

Ikon's claim that the statute is clear and should have a plain meaning is

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lower court record. Setting that aside, it has already been ruled by NRED Arbitrator Steven Wenzel that the conflicting NRED opinion is subservient to the CCICCH Advisory Opinion, as the NRED "generally must act under the supervision and control of the CCICCH." *Bank of America, NA v. Olympia Management Services, LLC*, Nevada Real Estate Division Arbitration Case No. 13-14, Arbitration Decision and Award, at 8:26-27 (September 6, 2013) (Wenzel, Arb.). Arbitrator Wenzel further concluded that the NRED opinion "must be viewed as a fugitive document, issued without authority or any legal effect whatsoever." *Id.* at 10:3-4. This authority, plus this Court's recent decision directing that the CCICCH is "***solely*** responsible for determining the type and amount of fees that may be collected by associations," directs that the CCICCH Advisory Opinion control. *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012). A copy of that Arbitration opinion is included in an Addendum attached to the Opening Brief in accordance with NRAP 28(f).

[47] Orion Portfolio Servs. 2, L.L.C. v. Cnty. of Clark ex rel. Univ. Med. Ctr. of S. Nev., 126 Nev. ——, ——, 245 P.3d 527, 531 (2010).

[48] *McGrath v. Dep't of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007); *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

[49] *Id.*

[50] *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F.Supp.2d 1222 (D. Nev. 2013).

especially preposterous when Ikon's interpretation of NRS 116.3116(2) ***literally*** requires one to change the words of the statute. To arrive at its predetermined result, Ikon superimposes "in an amount not to exceed" in place of "to the extent of" and then glosses over the words "which would have become due in the absence of acceleration..." Thus, Ikon is asking this Court to impose a judicial rewrite of the statute. This is not allowed, as Nevada courts should use words in their usual and natural meaning when interpreting a statute, and not read additional language into the provisions.[51] It would have been very simple (and much clearer for purposes of interpretation) for the Legislature to have limited the super-priority lien to "an amount not to exceed nine months of assessments." This did not happen, and this Court may not impose language into the statute that is not there.

Because the language of this statute is not clear on its face and is susceptible to multiple interpretations, this Court must look beyond the language. As discussed in Horizon's Opening Brief and *infra*, the rules of statutory interpretation determine that the super-priority includes fees and costs of collection in addition to so-called "nine times monthly assessments."[52]

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[51] *McGrath v. Dep't of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007).

[52] *See, e.g., Orion Portfolio Servs. 2 v. Clark County*, 126 Nev. ——, ——, 245 P.3d 527, 531 (2010).

A. IKON'S INTERPRETATION OF NRS 116.3116(2) CREATES ABSURD RESULTS.

Ikon's interpretation of NRS 116.3116(2) is certainly the type of absurd result Nevada canons of statutory construction direct the Court to avoid. When a court is faced with an ambiguous statute, such as here, it must interpret the statute "in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." [53] Unquestionably, the statutory purpose of the super-priority lien is to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments."[54] Because Ikon's interpretation is absolutely contrary to this purpose, the Court cannot find that the super-priority is limited to "nine-times monthly assessments" without regard to the collection fees or costs that the association has incurred in the process of trying to collect this debt.

Tellingly, Ikon does not suggest a single absurd or unreasonable result arising from Horizons' interpretation of NRS 116.3116(2). Yet, there are numerous absurd and unreasonable results arising from Ikon's interpretation. For example:

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[53] *See Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (noting that when a court is faced with an ambiguous statute, it must interpret the statute "in light of the policy and the spirit of the law, and the interpretation should avoid absurd results."); *Great Basin Water Network v. Taylor*, 126 Nev. ——, ——, 234 P.3d 912, 918 (2010).

[54] AA0277; UCIOA §3–116, cmt. 1 (1982); *see also* NRS 116.1109(2) ("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among state enacting it.").

- **Unreasonable Result #1**—Ikon agrees that an association is entitled to recover all of its collection fees and costs under NRS 116.31164 when the association conducts a foreclosure sale before the lender does. Why is an association able to recover collection fees and costs when it happens to foreclose first, but not when it loses the race to foreclose? Is this consistent with NRS 116.1114? And did the Legislature really intend to create such irrationally disparate results?
- **Unreasonable Result #2**—It is cost prohibitive for an association to undertake collections if it cannot recover its collection fees and costs. If an association charges $50 per month in assessments ($450 for 9 months), it is guaranteed to lose money on the foreclosure publication alone ($500), not considering any other factors, if the lender happens to foreclose before the association does.
- **Unreasonable Result #3**—Ikon's interpretation actually encourages more foreclosures. Under the previous scenario, if an association cannot recover its collection fees and costs on a "super-priority" lien, it will not dare wait for the lender to foreclose. It will commence its own foreclosure solely so it can recover its collection fees under NRS 116.31164. This will increase the number of foreclosures and create a "race to foreclose" between the association and lender. No sane

individual would suggest that this is a reasonable result.

- **Unreasonable Result #4**—Associations will be liable to their collection agencies for collection fees and costs that were incurred but not recovered. Those losses will fall upon the other homeowners—the people who actually paid their bills—even though they had no control over the fact that their neighbor defaulted. Real estate "flippers' like Ikon—who bought distressed property with eyes wide open making huge profit margins when they resell—get a free ride at the expense of law-abiding homeowners. In short, the risk of loss falls to innocent parties who did nothing wrong.
- **Unreasonable Result #5**—Ikon's interpretation favors "rich" associations at the expense of "poor" ones. If an association has a high periodic assessment (i.e., $1,000 per month), the inability to recover collection fees and costs does not matter nearly as much as it does for an association with a low periodic assessment (i.e., $40 per month). For the former association, the failure to collect fees and costs is an inconvenient expense. For the latter, it becomes cost prohibitive to even bother to pursue the lien. This interpretation undermines the purpose of the statute for "prompt and efficient enforcement" because it will prevent some associations from ever

seeking enforcement.

Ikon attempts to smooth over these absurd and unreasonable results by claiming that an association creates a "Self Inflicted Problem" when it seeks to collect on its lien.[55] According to Ikon, associations should take *no action* once a lender has filed a notice of default and just wait indefinitely for the lender to foreclose.[56] According to Ikon, "[a]ssocations have absolutely no purpose to compound additional collection fees and costs when the borrower is already in default and facing the loss of his home."[57] Of course, this argument presumes that the lender will foreclose promptly and efficiently. However, there is no promise or guarantee that this will actually happen.

If the lender conducts its foreclosure sale within 9-12 months, Ikon's scenario works quite smoothly. But what if the lender waits 18 months to foreclose? 24 months? 36 months? What if the unit owner sues the lender to stop the foreclosure, and ties up the proceedings for years? What if the lender (through inadvertence or negligence) waits the full limitations period—6 years under NRS 11.190—to foreclose? Who pays for the landscaping and upkeep of the common areas in the meantime? Who pays to clean the algae in the pool in the meantime? The association does. Yet, according to Ikon, the association should deliberately sit on its hands, forego its numerous statutory collection rights under NRS Chapter

[55] Answering Brief, §IIIAiv, 14-15.
[56] *Id.*
[57] *Id.*

116,[58] and pray for a quick foreclosure by the lender. This is utter nonsense.

Not only does Ikon's interpretation run contrary to the purpose of Nevada's adoption of the UCIOA, it is unrealistic and contrary to common sense. The reality is, with depressed property values and so many foreclosures, delinquent maintenance payments and foreclosure actions have skyrocketed. Significantly, lender foreclosure times have increased steadily, not just because of additional foreclosure volume, but also because of the additional notices, waiting periods, and mandatory mediations imposed by the Legislature.[59]

It is absurd for Ikon to argue that an association should sit idly by waiting for a lender to foreclose, with no promise that a foreclosure will actually take place, and no guarantee of when it will take place. Rather, an association is entitled to take action to enforce its own lien, and this costs money. If the lender manages to foreclose before the association, the association should not have to simply forfeit those fees and costs by the mere fact that it "lost" the race to foreclose. Such an interpretation creates a right without a meaningful remedy, a "bow without string or arrows,"[60] and ignores the remedial purpose of these statutes, which must be applied liberally.[61]

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[58] *See, e.g.,* NRS 116.3102; NRS 116.310313(1); NRS 116.310313(2); NRS 116.310313(3)(a); NRS 116.3116(1); AA0825-26.
[59] *See, e.g.,* NRS Chapter 40.
[60] *Hudson House Condominium Ass'n, Inc. v. Brooks,* 611 A.2d 862, 617 (Conn. 1992).
[61] NRS 116.1114.

Thus, pursuant to core canons of statutory construction, the Court should not follow the interpretation of the lower court because it would violate the spirit of the act and a meaningless and unreasonable result would occur.[62]

B. HORIZONS' INTERPRETATION OF NRS 116.3116(2) ACCOMPLISHES THE GOALS OF THE LEGISLATURE

Unlike Ikon's interpretation of NRS 116.3116(2), Horizons' interpretation accomplishes the goals of the UCIOA. When read together—and the provisions must be read together under Nevada law[63]—there is no doubt that NRS 116.3116(2) is an ***expectancy*** clause for the association. It is a look-back provision, designed to place the association **in the same place as if there had been no default** for the nine months preceding foreclosure. Before the lower court, Ikon consistently focused on the words "to the extent of" to urge a reading limiting the entire amount of the lien to what it described as "nine times monthly assessments." Indeed, Ikon has replicated the same "PowerPoint" analysis of NRS 116.3116(2) that it presented to the lower court. However, Ikon glosses over the phrase after that—"which would have become due in the absence of acceleration" (i.e., default). These phrases, read together, direct that the purpose of NRS

[62] *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1293 (2006)(Meaningless or unreasonable results should be avoided by courts when interpreting statutes); *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

[63] *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. Adv. Op. 70, — P.3d —, 2013 WL 5497736, at * 5 (Oct. 3, 2013) ("Whenever possible, we will interpret a rule or statute in harmony with other rules or statutes.") (internal citations and quotations omitted).

116.3116(2) is to place the association in the same position as if there had been no default in the nine months prior to foreclosure. Indeed, the intent and purpose of NRS 116.3116 was to give Horizons not only a legal ***right*** to recover some of the unpaid principal amounts as a result of a default, but the ***means*** to actually recover.[64] This is the exact reason that the super-priority lien was created—to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments."[65] It was designed precisely to avoid crafting the "bow without a string or arrows" that is referred to in *Hudson House*. *Hudson House*[66] goes precisely to the spirit, purpose, and intent of super-priority liens as a whole and the unreasonable and absurd results created by the interpretation proffered by Ikon.

Importantly, statutes with a protective purpose should be ***liberally*** construed in order to effectuate the intended benefits.[67] Not only should it be construed liberally based upon statutory construction principles, but NRS 116.1114 provides that the Legislature intended that *all* remedies in Chapter 116 be liberally construed. Specifically, NRS 116.1114 provides:

> NRS 116.1114 **Remedies to be liberally administered**. The remedies provided by this chapter must be liberally administered to the end

[64] *See* AA1736-38 and AA1743-45.
[65] AA0277; UCIOA §3–116, cmt. 1 (1982); *see also* NRS 116.1109(2) ("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among state enacting it.").
[66] 611 A.2d 862 (Conn. 1992).
[67] *Metz v. Metz*, 120 Nev. 786, 792, 101 P.3d 779, 783 (2004); *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1293 (2006).

> that the aggrieved party is put in as good a position as if the other party had fully performed. Consequential, special or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

Without question, the associations, and their paying homeowners, are the aggrieved party—not the real estate "flippers" who knowingly purchase a distressed property for a quick profit, and not the lender that is not foreclosing at an efficient pace. Thus, the association should be "put in as good a position as if the other party had fully performed."[68] This express purpose is undermined entirely if an association is not able to recover collection fees and costs in addition to the nine months of past due assessments.

V. IKON'S LEGAL ANALYSIS IS FLAWED.

Ikon's interpretation of NRS 116.3116(2) is teasingly simple.[69] But it is not what the statute provides. And, while its Answering Brief is filled with hyperbole and circular reasoning, Ikon at least concedes that the lower court's decision was driven by a desire for a predictable rule. While predictability is admirable, the lower court decision offered no analysis as to whether or why NRS 116.3116(2) was ambiguous or unambiguous, whether its application was consistent with the

[68] NRS 116.1114

[69] Given the enactment of NAC 116.470, Horizons' application of the statute is also fairly simple. In the event of a lender foreclosure, the association is entitled to no more than 9 months of unpaid monthly assessments, plus no more than $1,950 in collection fees, plus "hard" out of pocket costs (i.e., publication and service costs). While this formula is not as simple as "9 times monthly assessments" suggested by Ikon this amount is not difficult to calculate.

purpose of the statue, or whether the lower court's interpretation is reasonable and not absurd.[70] To the contrary, the lower court turned a blind eye to an undisputed factual record submitted by Horizons outlining the purpose of the rule, and the absurd and unreasonable results arising from its decision.

When the Court looks beyond the language of NRS 116.3116(2), which it must because the statute is ambiguous, there is simply nothing in the record to support Ikon's interpretation of the rule. Not only would it have been simple to write into the statute the words "in an amount not to exceed nine months worth of assessments," one would think there would be some legislative history to support such a reading. However, there is none. Nor is there evidence that this finite number encompasses the "policy and the spirit of the law."

A. IKON DISTORTS THE HOLDING IN HUDSON HOUSE.

In an attempt to discredit the only state supreme court case deciding this issue, Ikon shamelessly misstates the holding in *Hudson House*.[71] Specifically, Ikon has selected a block of text, taken it wholly out of context, and misrepresented its meaning to this Court. The block quote is as follows:

> HHCA further argues that CHFA will be unjustly enriched if we interpret § 47-258 to limit the priority lien to six months of common expense assessments... While the plaintiff may disagree with the equities of limiting the § 47-258(b)

[70] AA0967-74.
[71] *Hudson House Condominium Ass'n, Inc. v. Brooks*, 611 A.2d 862 (Conn. 1992).

> priority to six months of common expense assessments, this is a matter not for the judiciary, but rather for the legislature that enacted the statute. We conclude that the trial court correctly determined that HHCA's priority debt was limited to the common expense assessments that accrued in the six months immediately preceding the commencement of the foreclosure.[72]

Ikon argues that this passage directs that an association may only recover unpaid assessments, and may never recover collection fees and costs.[73] Yet, the quote cited by Ikon did not address whether fees and costs could be included in the super-priority lien in addition the capped monthly assessments. Rather, the passage cited by Ikon concerned HHCA's first argument, which was that HCCA was also entitled to a priority for the common expense assessments that accrued *during the pendency of the action.*[74] The court in *Hudson House* held that the trial court properly limited the amount of HHCA's priority debt to the common expense assessments that accrued in the six months immediately preceding the commencement of the foreclosure.[75] Thus, the section quoted by Ikon only dealt with the temporal limitation of the super-priority lien. It had nothing to do with whether the association was entitled to recover its collection fees and costs. While Horizons respects zealous advocacy, there can be no explanation or justification for falsely representing the basic holding of a case to this Court.

[72] *Id.* at 864-65.
[73] Answering Brief, §IIIi, 43-46.
[74] *Id.*
[75] *Id.*

Ikon simply ignores the next passage of *Hudson House*, in which the Connecticut Supreme Court expressly held that associations are entitled to recover collection fees and costs as part of the super-priority lien *in addition to* the capped six-month amount of assessments.[76] Despite Ikon's contentions or improper citations, the Connecticut Supreme Court rejected the overly simplistic "nine times

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[76] The court stated:

> In construing a statute, we assume that "the legislature intended to accomplish a reasonable and rational result." Section 47-258(a) creates a statutory lien for delinquent common expense assessments. Section 47-258(i) authorizes the foreclosure of the lien thus created. Section 47-258(b) provides for a limited priority over other secured interests for a portion of the assessment accruing during the six month period preceding the institution of the action. Section 47-258(g) specifically authorizes the inclusion of the costs of collection as part of the lien.
>
> Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, ***it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows. We conclude that § 47-258 authorizes the inclusion of attorney's fees and costs in the sums entitled to a priority.***611 A.2d at 616-17 (emphasis added).

monthly assessments" interpretation that Ikon peddles here.[77] The Connecticut Supreme Court did so for the very basic premise that rights should have meaningful remedies. This Court should follow the reasoning of *Hudson House* to ensure that Horizons has the necessary "string and arrows" to engage in meaningful collection of unpaid assessments.

B. IKON'S RELIANCE ON DECISIONS IN OTHER LOWER COURTS IS MERITLESS.

At the heart of its interpretation of NRS 116.3116(2), Ikon equates "in an amount not to exceed" with "to the extent of." This cornerstone argument is buried in a 4-page PowerPoint analysis of NRS 116.3116,[78] reproduced in its Answering Brief, nearly all of which is meaningless for the purpose of this appeal. Yet, this Court should pay close attention to the legal citation purporting to support Ikon's key point—its interpretation of the words "to the extent of." There is no citation to support its interpretation. It is pure unsupported argument of counsel.

Later in its brief, Ikon offers a section entitled "Local Authorities All Conclude The Super Priority Lien Is Limited."[79] This assertion is simply wrong. Ikon conveniently ignores the district court, federal court, and NRED arbitration

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[77] *Hudson House*, 611 A.2d at 617 n.4.Although the Connecticut Supreme Court noted that its legislature later amended the statute to specifically include "the Association's costs and attorney's fees in enforcing its lien," the court specifically noted that this merely "clarified that attorney's fees and costs are included in the priority debt." *Hudson House*, 611 A.2d at 617 n.4.

[78] Answering Brief, 18-21.

[79] Answering Brief, §IIIE, 29-32.

decisions that disagree with its position.[80] Ikon also seems to forget that Horizons was not a party to any of those cases.[81]

Setting that side, Ikon's argument is offensive to the appellate process. Ikon is literally arguing that this State Supreme Court should follow certain lower court cases simply because those cases were decided by lower courts. This reasoning is circular to the point of causing dizziness. What is the point of an appeal if a Supreme Court case like this is to be decided by lower court judges? Why is a Supreme Court supposed to rubber-stamp lower court decisions simply because they were made?

The argument is also sophomoric. Like a childish popularity contest, Ikon contends that it should prevail because apparently more lower court judges ruled in their favor. Setting aside Ikon's fuzzy math by ignoring NRED arbitrations, Horizons was not aware that the "herd mentality" was a proper form of statutory construction.

And, significantly, this is an issue of first impression for the Court. Horizons is entitled to a *de novo* review of the lower court's decision. Pointing to **unpublished** lower court cases in violation of SCR 123 is no basis for prevailing

[80] AA096-99; AA1960-62.
[81] Those cases have no preclusive effect on Horizons. And, significantly, as Horizons had no involvement on those cases, it had no control over what was argued, what wasn't argued, or the ultimate result.

here.[82] This Court deserves better.

C. THE CCICCH ISSUED AN OPINION ON THIS ISSUE THAT AGREES WITH HORIZONS' INTERPRETATION.

Although the lower court completely ignored the CCICCH Advisory Opinion, Ikon protests too much. Ikon misrepresents the record, and attempts to smear a CCICCH Commissioner, all in an attempt to discredit the opinion. Hopefully, this Court will recognize these tactics for what they are. They are as wrong as they are wrongheaded.[83]

Ikon also misstates the holding of the CCICCH Advisory Opinion. It claims that the Opinion does not "opine upon the issue of whether there is a cap on the super-priority lien pursuant to NRS 116.3116(2)."[84] This is wrong. While Ikon gamely tries to characterize the CCICCH Advisory Opinion as limited in

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[82] SCR 123 (providing that "[a]n unpublished opinion or order of [this court] shall not be regarded as precedent and shall not be cited as legal authority" subject to exceptions that do not apply here).

[83] Ikon notes that Mr. Buckley recused himself and did not vote on adoption of the CCICCH Advisory Opinion. Subsequently, Ikon's counsel asserted ethics charges against Mr. Buckley, based upon the same allegations he has made in his Answering Brief. These allegations were found to have "insufficient credible evidence" to even a hold a hearing before the Commissioner of the Nevada Commission on Ethics. AA1960-62. As for the false charge that RMI requested the CCICCH Advisory Opinion, counsel for Ikon requested the FID Advisory Opinion that was struck down in *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (Nev. 2012). Needless to say, because the lower court ignored the CCICCH Advisory Opinion in its entirety, it never conducted a factual determination as to whether the CCICCH Advisory Opinion was improperly procured, as Ikon alleges. Horizons would gladly participate in an evidentiary hearing on remand to fully adjudicate these allegations. That being said, however, this Court will ultimately decide this case based upon its own independent interpretation of NRS 116.3116, not relying upon the interpretation of the CCICCH or the NRED.

[84] Answering Brief, §IIFi, 33-34.

scope, the Opinion is essentially a two-part document—the first part being the threshold issue of whether collection fees and costs can be "part of" the super-priority lien and the second part being whether Section 116.3116 limits assessment and the non-assessment portion of the super-priority lien to "nine times monthly assessments." Ikon focuses on only the first part of the Advisory Opinion and ignores the rest.

Specifically, the CCICCH expressly rejected the notion that there is a finite numerical maximum for the super-priority lien, and made a finding to that effect in its Advisory Opinion. The CCICCH reasoned that:

> **The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders" [footnote omitted] have all concluded otherwise.**
>
> **Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien.** We reach a similar conclusion in finding that Nevada law authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

. . . .

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

The foregoing language answers the ultimate question in this case. The CCICCH expressly rejected Ikon's interpretation of limiting the super-priority lien to a "finite amount" of six times or nine times monthly assessments and, in doing so, concluded that the state of Connecticut, NCCUSL, as well as "Fannie Mae and local lenders" had all rejected Ikon's analysis and approach.

D. IKON CANNOT OVERCOME THE REALITY OF NAC 116.470.

Ikon's entire argument is couched upon the notion that allowing collection costs and fees in addition to capped monthly assessments would be excessive and deprive lenders of certainty. Indeed, Ikon attempts to misguide the Court into believing that

collection fees and costs are astronomical. According to Ikon, Horizons, like other associations, has adopted a "practice designed to bill thousand of dollars of collection and foreclosure related costs on already defaulting mortgagors and to permit years of assessments delinquencies to accrue..."[85] This is simply not true. In this case, Horizons' collection fees and costs amounted to $1,502.00, which $800.00 of this amount was trustee's fees and a trustee's sale guarantee.[86]

Still, Ikon argues these facts so that the Court might feel there is a burning need to cap such "monumental" collection fees and costs. Unfortunately for Ikon, there is already such a cap. NAC 116.470 was adopted by the CCICCH in 2011 in direct response to criticism that collection fees and costs sometimes dwarfed the underlying principal assessment amount owed on a unit. When it adopted NAS 116.470, the CCICCH set a maximum cap of $1,950.00 on all collection fees. The existence of an entirely separate regulatory cap on the amount of collection fees that can be charged by associations is telling. CCICCH would not have bothered to impose such a cap if there was already a strict "nine times monthly assessment" numerical cap under NRS 116.3116(2). A "cap upon a cap" would be largely redundant and unnecessary. This establishes that the CCICCH did not consider association collection fees and costs to be capped at "nine times monthly assessments."[87]

Ikon does not substantively address the import of NAC 116.470. Rather, Ikon

[85] Answering Brief at 15.
[86] AA0269-70
[87] AA0644-67.

merely calls Horizon's logic a "red herring" and then improperly claims that collection fees and costs cannot be part of a lien (which contradicts its position before the lower court). Very simply, NAC 116.470 undermines entirely the public policy arguments urged by Ikon—the need for a "simple formula" and the deterrence of out-of-control collection fees. NAC 116.470 already provides that simplicity and ceiling.

VI. IKON IMPROPERLY AND INCORRECTLY ARGUES THAT A CIVIL ACTION IS NECESSARY FOR A SUPER-PRIORITY LIEN TO EXIST

The District Court rejected Ikon's claim that a filing of a civil action is a prerequisite to asserting a super-priority lien.[88] Indeed, Ikon specifically sought declaratory relief stemming from the question of whether "[p]ursuant to NRS §116.3116, does a 'super priority lien' exist in the absence of a homeowners' association's failure to file a complaint with a court to enforce the lien."[89] The Court held that a super-priority lien exists without the filing a civil action.[90] Ikon did not appeal this issue, and its arguments on this point are deemed waived.

VII. IKON HAS RECOGNIZED THERE ARE TWO LIENS

Continuing its inconsistent arguments, Ikon filed entirely separate motions for summary judgment before the lower court, one seeking to limit the Horizons lien by invoking its *statutory* interpretation of NRS 116.3116, and then further

[88] AA0973.
[89] AA0114; *see generally* AA0108-543, AA1756-65.
[90] AA0973.

seeking to reduce Horizons' lien with its *contractual* interpretation of the CC&Rs. Yet, Ikon mocks Horizons for contending that there are two legal sources to Horizons' lien rights—one statutory and one contractual—that require separate legal analyses. Despite its mockery, Ikon indeed recognized that there were two separate liens requiring the application of two separate legal analyses.

Ikon cannot have it both ways. It cannot invoke the statute only when it is convenient to do so, and then switch to the contract when it provides additional benefits. If Horizons is limited by contract to no more than six months of assessments, as Ikon contends, then Ikon must be prepared to accept the CC&R provisions in which unpaid collection fees and costs explicitly survive a lender foreclosure.[91] Horizons does not ask for much—merely intellectual consistency. If Ikon is entitled to rely on the CC&Rs to reduce the assessment portion of the lien from 9 months to 6 months (as the lower court allowed), Ikon must also live with Section 6.1 of the CC&Rs, which provide for the extinguishment of the lien only as to "payments which became due" prior to foreclosure, and **not** as to the "late charges, costs and reasonable attorney's fees for the collection thereof" that arose

[91] *See* AA0038-39 at § 6.1. "All Assessments, together with interest thereon, late charges, costs and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit against which such assessment is made...." (emphasis added).

Also see § 7.9 "***The sale or transfer of any Unit shall not affect an assessment lien.*** However, subject to the foregoing provision of this Section 7.9, the sale or transfer of any Unit pursuant to judicial or non-judicial foreclosure of a First Mortgage shall extinguish the lien of such assessment ***as to payments which became due prior to such sale or transfer.***" (emphasis added).

in an attempt to collect those "payments which became due."

CONCLUSION

The statute is a "look-back" provision for the nine months leading up to foreclosure. In other words, NRS 116.3116(2) is designed to place the association in the same position it would have been financially ("to the extent of")[92] as if there had been no default by the unit owner ("which would have become due in the absence of acceleration")[93] for the nine months prior to foreclosure. While this amount includes recovery of all unpaid assessments arising during the nine months prior to foreclosure, *it also necessarily includes the collection fees and costs that were incurred by the association during that same period.* Otherwise, the association is not compensated "to the extent of" the amounts it would have

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[92] NRS 116.3116(2).
[93] *Id.*

received "in the absence of acceleration." This interpretation is supported by NRS 116.1114, common sense, public policy, and avoids unreasonable and absurd results.

April 16, 2014.

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VERIFIED CERTIFICATE OF COMPLIANCE

STATE OF NEVADA
COUNTY OF CLARK

I, Patrick J. Reilly, being duly sworn, do hereby depose and say:

1. I am a partner with the law firm of Holland & Hart LLP, counsel of record for Appellant named in the foregoing Reply Brief.

2. I am licensed in the State of Nevada and competent to testify to the matters set forth in this Affidavit.

3. Pursuant to NRAP 28.2, I hereby certify that I have read Appellant's Reply Brief, and to the best of my knowledge, information, and belief verify that the facts stated therein are true, and to those matters that are on information and belief, such matters I believe to be true.

4. I further certify that Appellant's Reply Brief is not frivolous or interposed for any improper purpose and complies with the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page of the appendix where the matter relied on is to be found.

5. Appellant's Reply Brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii), in that it contains no more than 7,000 words. Further, the Reply Brief complies with the formatting requirements of NRS 32(a)(4-6).

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

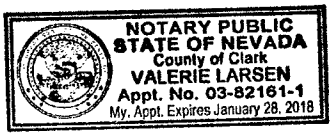
7. I make this verification on behalf of Appellant.

EXECUTED this 16th day of April, 2014.

Patrick J. Reilly

SUBSCRIBED AND SWORN to before me this 16th day of April, 2014.

Notary Public



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **APPELLANT'S REPLY BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on April 16, 2014.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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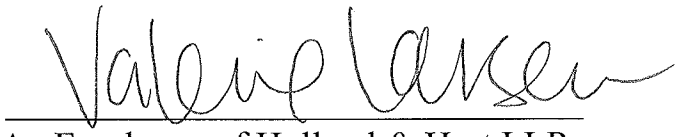

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