IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 63180

SHADOW WOOD HOMEOWNERS ASSOCIATION and GOGO WAY TRUST,

Appellants,

vs.

NEW YORK COMMUNITY BANK,

Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Abbi Silver, District Judge
District Court Case No. A-12-660328-C

RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO APPELLANT SHADOW WOOD HOMEOWNERS ASSOCIATION'S OPENING BRIEF

Respectfully submitted by:

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NRAP 26.1 DISCLOSURE

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

Respondent, NEW YORK COMMUNITY BANK ("NYCB"), is a New York State chartered savings bank. NYCB is a wholly (100%) owned subsidiary of New York Community Bancorp, Inc., which is formed under the laws of the state of Delaware and is a publicly traded corporation. No corporation owns 10% or more of New York Community Bancorp, Inc.'s stock.

DATED this 31st day of January, 2014.

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STATEMENT OF THE ISSUES

1. Following a foreclosure sale initiated by the beneficiary of a prior-recorded first deed of trust, is an existing homeowners association lien for delinquent assessments reduced to an amount equal to nine months worth of regular monthly assessments, and nothing more, as contemplated in NRS 116.3116(2)(b)?

2. Did the District Court properly invalidate the homeowners association foreclosure sale when the undisputed facts demonstrated that the homeowners association included previously extinguished amounts in the lien being foreclosed upon, refused to timely provide payoff information, provided false/inconsistent payoff amounts, and rejected a payment in excess of the actual amount of the underlying lien that had been tendered prior to the foreclosure sale?

I. STATEMENT OF THE CASE

The matter currently before the Court is an appeal of the Eighth Judicial District Court's Findings of Facts, Conclusions of Law and Order granting Respondent NYCB's Motion for Summary Judgment. In granting NYCB's Motion, the District Court set aside a foreclosure sale conducted by Appellant Shadow Wood Homeowners Association ("Shadow Wood") to collect delinquent assessments pursuant to Nevada Revised Statute ("NRS") 116.3116. The District Court found that Shadow Wood's foreclosure sale was not legitimate because the lien being foreclosed upon was based, at least in part, on collection costs, attorney's fees, and other fees that had been extinguished. The District Court also determined that the undisputed facts illustrated that Shadow Wood acted unreasonably and oppressively by claiming an amount that, in part, had been extinguished, refusing to provide accurate payoff information, and refusing the payment of an amount that represented many times the amount Shadow Wood was statutorily entitled to collect. The District Court rescinded the Trustee's Deed Upon Sale conferring title to Appellant Gogo Way Trust ("Gogo Way," and together with Shadow Wood, "Appellants") and restored title in the name of NYCB, the owner prior to Shadow Wood's foreclosure.

NYCB took title to the property in question after it completed a non-judicial foreclosure pursuant to a prior-recorded Deed of Trust. Almost immediately after NYCB took title, Shadow Wood charged ahead, attempting to collect amounts the former owner, Virginia Fedel, owed for unpaid monthly assessments and costs that had been extinguished by NYCB's foreclosure sale. Less than a month after NYCB's first monthly assessment came due, Shadow Wood initiated foreclosure proceedings, and recorded a new lien on the property. In identifying the amount of that new lien, Shadow Wood failed to acknowledge that the majority of the assessments and fees owed by Ms. Fedel had been extinguished when NYCB foreclosed on the property. Instead, Shadow Wood alleged NYCB owed huge amounts, but then it dragged its feet before providing any sort of break down of the fees being charged. However,

even when Shadow Wood did provide a ledger showing the amounts forming the basis of the lien, Shadow Wood rejected a payment for more than that amount and inexplicably claimed the amount had increased by an additional $2,000.00.

In contrast, the prior owner, Ms. Fedel, had been delinquent on her HOA assessments for years before NYCB completed its foreclosure. Although Shadow Wood recorded a lien, two notices of default, and even a notice of sale during this time period, Shadow Wood never actually foreclosed on the property. Indeed, Shadow Wood accepted payments from Ms. Fedel of as little as $250.00 as a "partial payment," sufficient to postpone foreclosure proceedings. It was not until NYCB took title to the property that Shadow Wood's collection efforts began in earnest. Even then, Shadow Wood rejected a payment of over $6,700.00 from NYCB, refusing to treat it in the same manner as it treated its other community owners by, at the very least, applying this as a "partial payment."

Arguably, Shadow Wood never intended to foreclose on Ms. Fedel and only recorded foreclosure documents while she was the owner to inflate its collection costs. Based on the vastly different ways it treated these two separate owners, it is arguable that Shadow Wood lied in wait for the senior security interest to foreclose, so that it could pursue the new owner with supposed "deep-pockets" for the exaggerated amounts it was claiming. The way Shadow Wood shoved forward with its foreclosure efforts almost as soon as NYCB took title to the property suggests that Shadow Wood or its agents planned to extort NYCB into either paying the inflated and unlawful amount demanded or risk losing the property it just obtained through HOA foreclosure. Indeed, Shadow Wood's foreclosure trustee and counsel, Alessi & Koenig, admitted to the District Court that the purchaser at its foreclosure sale happened to be a repeat client of Alessi & Koenig, so, if Alessi & Koenig could sell this property at a great discount to a repeat client, it would not only receive payment in full of these exaggerated "fees" that made up its HOA lien, but it would also be doing a solid favor to another client that would potentially result in additional

referrals.

Ultimately, the District Court saw through Shadow Wood's transparent and unfair conduct, finding it to be "unreasonable and oppressive actions" designed to frustrate NYCB's good faith efforts to pay off the lien. The District Court's holding is entirely in accord with the relevant statutes and this Court's precedent. This Court should therefore affirm the Findings of Fact, Conclusions of Law and Order granting NYCB's Motion for Summary Judgment.

II. STATEMENT OF FACTS

A. SHADOW WOOD'S FORECLOSURE SALE WAS NOT LEGITIMATE AND ATTEMPTED TO COLLECT INFLATED AMOUNTS NOT PROVIDED FOR BY STATUTE.

1. New York Community Bank Obtains Its Interest Via A Foreclosure By The Beneficiary Of A Prior-Recorded First Deed of Trust.

On May 9, 2011, NYCB purchased real property located at 3923 Gogo Way, #109, Las Vegas, Nevada, 89103 ("Subject Property"), at a foreclosure sale conducted pursuant to NRS 107.080 ("NYCB Foreclosure Sale"). (APP000012) NYCB, the beneficiary of first deed of trust, initiated the NYCB Foreclosure Sale to collect amounts owed by the former owner, Virginia V. Fedel. (Id.)

Ms. Fedel originally borrowed $127,500.00 from CCSF, LLC d/b/a Greystone Financial Group ("CCSF"), to purchase the Subject Property. (APP000022) As part of the loan, Ms. Fedel executed a Promissory Note secured by a Deed of Trust (collectively "Loan Agreement."). (Id.) The Deed of Trust was recorded in the Official Records of Clark County, Nevada as Instrument No. 20070427-0004835. (Id.) Mortgage Electronic Registration Systems, Inc., as nominee for CCSF ("MERS") was the original beneficiary of the Deed of Trust, but MERS assigned its interest to NYCB. (APP000052) The Assignment of Deed of Trust was recorded on July 7, 2010, in the Official Records of Clark County, Nevada as Instrument No. 20100707-0003641. (Id.)

After making payments for a number of years, Ms. Fedel stopped making

payments and defaulted on the Loan Agreement. (APP000048) As a result of that default, MTC Financial Inc. d/b/a Trustee Corps ("Trustee Corps"), as Trustee of the Deed of Trust, initiated the NYCB Foreclosure Sale. (APP000048-49) Trustee Corp first recorded a Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust ("NYCB NOD") in the Official Records or Clark County, Nevada as Instrument No. 201006020003706. (AP000048). The NYCB NOD specifically provided that the Subject Property would be sold if the default was not cured. (APP000048-49) However, Ms. Fedel failed to cure the default and a Certificate from the Nevada Foreclosure Mediation Program as well as a Notice of Trustee Sale ("NYCB NOS") were recorded on the Subject Property. (APP000055; APP000057-58) The NYCB NOS scheduled the NYCB Foreclosure Sale for May 9, 2011, at 10:00 a.m. (APP000057)

The NYCB Foreclosure Sale was conducted as scheduled, and NYCB took title to the property afterward with a winning bid of $45,900.00. (APP000012-13) Following the NYCB Foreclosure Sale, Trustee Corps conveyed the Subject Property to NYCB by way of Trustee's Deed Upon Sale that was recorded in the Official Records of Clark County, Nevada as Instrument No. 201105240003017. (APP000012)

2. Shadow Wood Attempts To Extort NYCB Into Paying An Extinguished Debt.

In addition to defaulting under the Loan Agreement, Ms. Fedel also apparently failed to pay Shadow Wood's regular monthly assessments. (*See* APP000248-57) Shadow Wood recorded a Notice of Delinquent Assessment (Lien), two Notices of Default and Election to Sell Under Homeowners Association Lien, and a Notice of Trustee's Sale. (APP000583-84; APP000591) The Notice of Trustee's Sale scheduled the Subject Property to be sold on May 12, 2010. (APP00591) However, that sale never took place, and for more than a year, Ms. Fedel continued to miss assessment payments without Shadow Wood taking any action. (See, Id.) Instead,

Shadow Wood accepted a few partial payments from Ms. Fedel for as little as $250.00 to forego sale. (See e.g., APP000249)

Seizing the opportunity to collect on an account that had been delinquent for years, Shadow Wood's agent, trustee and attorney, Alessi & Koenig, executed a Notice of Delinquent Assessment (Lien) ("Notice of Lien") on June 29, 2011, a little more than a month after the NYCB Foreclosure Sale. (APP000017) Tellingly, Shadow Wood initiated foreclosure proceedings in the same month that NYCB's first monthly assessment came due.[1] (*See* APP000248-57; APP000017) At the time Shadow Wood recorded the Notice of Lien, NYCB only owed Shadow Wood $168.81 for the June 2011 monthly assessment. (APP000254). Yet, the Notice of Lien claimed Shadow Wood was owed $8,238.87, which consisted of "Collection and/or attorney fees, assessments, interest, late fees, service charges," as well as collection costs. (Id.) Alessi & Koenig recorded the Notice of Lien in the Official Records of Clark County, Nevada as Instrument No. 20110707-0002436. (Id.)

Two months later, on August 29, 2011, Alessi & Koenig *executed* a Notice of Default and Election to Sell under Homeowners Association Lien ("HOA NOD") (APP000060) However, Alessi & Koenig inexplicably waited until October 13, 2011, to *record* the HOA NOD in the Official Records of Clark County, Nevada, as Instrument No. 20111013-0001665. (Id.) In the HOA NOD, Shadow Wood now claimed that, as of August 29, 2011, it was owed $6,608.34. (Id.) By the time the HOA NOD was recorded, the payoff figure was out of date by two months. (Id.)

a. Shadow Wood and Alessi & Koenig refuse to provide an accurate, updated payoff amount.

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[1] Shadow Wood's monthly assessments come due on the first of each month, and the May 2011 monthly assessment was posted to Subject Property's account on May 1, 2011. (APP000254; see generally, APP000248-57) Therefore, the first assessment charged while NYCB owned the property was for the June 2011 assessment. (APP000254)

On November 2, 2011, NYCB, through its representative, Dianna Palmer-Hopkins, made the first of many requests to Alessi & Koenig for a statement identifying all past due amounts. (APP000716-17) Alessi & Koenig did not respond. (Id.) Ms. Palmer-Hopkins made a second request for an updated payoff amount on December 2, 2011. (Id.) Once again, Alessi & Koenig failed to respond.[2] (Id.) Unable to obtain a current payoff demand from Alessi & Koenig, NYCB was forced to seek the assistance of its realtor on December 12, 2011, and NYCB asked its realtor to try to obtain a payoff statement and a W-9. (APP000358)

On December 28, 2011, Ticor Title of Nevada, Inc., sent an escrow demand to Shadow Wood's management company, MP Association Management. (APP000360) Later that same day, Gerald Marks, the owner of MP Association Management completed, signed and returned the Demand Form to Ticor Title of Nevada, Inc. (APP000364-365) The executed Demand Form was completely inconsistent with the claims being made by Shadow Wood/Alessi & Koenig. The Demand Form related

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[2] It appears Alessi & Koenig attempted to respond to NYCB's December 2, 2011, request, but responded to an internal email address rather than Ms. Palmer-Hopkins. (APP000716; see also, Shadow Wood's App. Brief p. 5, lns. 23-25). In the District Court, Shadow Wood submitted the Affidavit of Naomi Eden in support of its Opposition to Motion for Summary Judgment. (APP000682-86) Ms. Eden swore that she responded to both the November 2, 2011, request as well as the December 2, 2011, request. (APP000684) However, the very documents Alessi & Koenig provided belie this assertion. First, Ms. Eden was apparently unaware when she signed her Affidavit that her December 5, 2011, email response to NYCB was sent to another Alessi & Koenig employee - not to NYCB. (APP000716) Furthermore, Ms. Eden claimed that she sent a fax in response to the email request. (APP000684) However, counsel for Shadow Wood refused to provide the attached confirmation that the fax was delivered, or even that it was attempted. (See, APP000708-10) Moreover, nowhere in Ms. Palmer-Hopkins' request does she provide a fax number for NYCB, which makes it highly unlikely that Ms. Eden was able to provide the payoff via fax. (See, APP000716)

that the monthly dues on the Subject Property had been paid through November 31, 2011, and that the account was due for the December 1, 2011, assessment payment. (Id.) The Demand Form also indicated that the delinquent amount was only $328.94, that the account had not been sent to a collection agency and that no liens had been recorded against the Subject Property. (Id.)

On January 19, 2012, NYCB made a final request to Alessi & Koenig for a "detailed statement...[to] pay the past due amount." (APP000367) After nearly three months and numerous requests for a payoff statement, Alessi & Koenig finally provided NYCB with a ledger of past due amounts on January 23, 2012. (APP000371-72) The ledger identified an outstanding balance of $6,445.54,[3] which was good through February 28, 2012. (APP000372) In response, NYCB prepared and submitted a check in the amount of $6,783.16 (which represented $6,445.54 for the past due assessments plus $337.62 as payment for two future assessments) to Alessi & Koenig on January 31, 2013, one month before the amount on the ledger expired. (APP000257) Based on the ledger Alessi & Koenig prepared and provided, this should have been more than enough to bring NYCB's account current and have Shadow Wood release its lien. (Id.) However, the shell game continued.

Unbeknownst to NYCB, Alessi & Koenig *executed* a Notice of Trustee Sale ("HOA NOS") on January 18, 2012, the day **before** NYCB's final payoff request but five days **before** Alessi & Koenig actually provided the ledger. (See, APP000062) Amazingly, the amount claimed on the NOS was not $6,445.54 - the amount on the ledger provided to NYCB. (Id.) Instead, the NOS claimed that Shadow Wood was now somehow owed $8,539.77. (Id.) It is crystal clear that Alessi & Koenig knew it had executed the NOS when it provided the ledger in response to NYCB;

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[3] Obviously, this amount conflicts with the $8,238.87 figure identified in the Notice of Lien, the $6,608.34 claimed in the HOA NOD and the the amount Shadow Wood's management company provided, which was $328.94 as of December 28, 2011.

consequently, Alessi & Koenig knew when the ledger was sent that it would not accept the $6,445.54 amount contained in the ledger. (See id.; APP000372)

Despite the fact that the amount of the ledger was good through February 28, 2012, Alessi & Koenig recorded the HOA NOS on January 27, 2012, in the Official Records of Clark County, Nevada as Instrument No. 20120127-0002208. (APP000062) The HOA NOS set the Subject Property for foreclosure sale on February 22, 2012. (Id.)

b. Shadow Wood rebuffs NYCB's attempt to pay off the lien and forecloses on the Subject Property.

In light of the fact that Alessi & Koenig provided a meaningless ledger with an amount Shadow Wood would not accept, it is unsurprising that Alessi & Koenig rejected NYCB's $6,783.16 payment. (See, APP000245) On February 8, 2012, Alessi & Koenig's agent, Naomi Eden, informed NYCB that the payment had been rejected and for the first time informed NYCB that the actual payoff amount was now $9,017.39. (Id.) In response, NYCB explained that the ledger provided on January 23, 2012, indicated that the outstanding balance was only $6,445.54, and more importantly, that the amount was good through February 28, 2012.[4] (Id.) Without providing any explanation as to why the ledger amount differed so drastically from the HOA NOS amount, Ms. Eden simply insisted that the amount owed was $9,017.39. (Id.) To evaluate the legitimacy of that amount, NYCB requested a statement reflecting the account. (Id.) Even though NYCB had been dealing directly with Alessi & Koenig, Alessi & Koenig did not provide the statement directly to NYCB. Instead, on February 14, 2012, Ms. Eden provided Michael Moretti - NYCB's listing agent - with a breakdown of the fees, eight days before the scheduled

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[4] In her response, NYCB's representative, Dianna Palmer-Hopkins , mistakenly stated that the ledger was good through February 1, 2012. (APP000245) However, the ledger itself represents a "BALANCE AS OF: 2/28/12." (APP000257)

foreclosure sale and almost four months after NYCB's initial request. (Id.)

On February 22, 2012, Shadow Wood purported to sell the Subject Property to Gogo Way for $11,018.39 at a trustee's sale ("HOA Sale").[5] (APP000019) A Trustee's Deed Upon Sale ("HOA TDUS") documenting the alleged transfer was recorded in the Official Records of Clark County, Nevada on March 1, 2012, as Instrument No. 20120301-0004775. (Id.) Interestingly, the HOA TDUS indicated that "the amount of unpaid debt together with costs" totaled the exact amount Gogo Way paid for the Subject Property. (See, id.) Apparently, in eight days, the unpaid debt and cost had increased by more than $2,000.00.[6] (See, id.)

B. THE DISTRICT COURT CORRECTLY SETS ASIDE SHADOW WOOD'S FORECLOSURE SALE.

On April 18, 2012, NYCB commenced this action against Shadow Wood and Gogo Way and filed a First Amended Complaint ("FAC") on October 5, 2012. (APP0002; APP000119) In its FAC, NYCB alleged two causes of action, one for Quiet Title pursuant to NRS 40.010 and another for Declaratory Relief. (APP000125-26). The basis of both causes was that Shadow Wood failed to conduct HOA Sale in good faith, and that NYCB's claim to title was superior to Shadow Wood's. Therefore, the FAC contended that the HOA Sale was invalid and that

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[5] Again, it was noteworthy to the District Court that the purchaser (the trustor of the Gogo Way Trust) was a regular and repeat client of Alessi & Koenig, the HOA foreclosure trustee and HOA counsel.

[6] Shadow Wood has never produced any support for the debt claimed at the time of the HOA Sale, $11,018.39. However, Alessi & Koenig identified ***for the first time***, on March 12, 2013, (in its Reply to NYCB's Opposition to its Motion for Summary Judgment) that it was holding $2,001.00 "in excess proceeds." (See, APP000914) Neither Alessi & Koenig nor Shadow Wood have ever explained why it retained more than $2,000.00 for more than a year after its foreclosure sale without informing NYCB of these funds, despite the fact that the case was in litigation during most of that time.

NYCB remained the rightful owner of the Subject Property. (See, APP000119-26)

Shadow Wood and Gogo Way filed their Answer on October 30, 2012,[7] and Gogo Way added a counter claim, alleging a single cause of action for Declaratory Relief and Quiet Title. (APP000181-88). As was to be expected, Shadow Wood and Gogo Way alleged that the HOA Sale was conducted properly, and therefore NYCB's interest in the Subject Property was extinguished. (Id.)

After conducting discovery related to the HOA Sale, NYCB and Shadow Wood/Gogo Way submitted competing Motions For Summary Judgment. (APP000258; APP000196) Both Motions were extensively briefed, and on March 13, 2013, the District Court heard oral argument on the competing Motions for Summary Judgment. (APP000917)

The District Court granted NYCB's Motion for Summary Judgment and entered judgment in favor of NYCB. The Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Summary Judgment was filed on April 16, 2013. (APP000918) In granting NYCB's Motion for Summary Judgment, the Court specifically found that "Shadow Wood's lien was entitled to super priority status ... only to the extent of '... the assessments for common expenses based on the periodic budget adopted by the association ... which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien[.]'" (APP000923) (quoting NRS 116.3116(2)) Accordingly, the Court found that the HOA Sale was based, in part, on collection costs, attorney's fees and fines that had been extinguished by the NYCB Foreclosure Sale. (Id.) In overturning the HOA Sale,

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[7] Despite the clear conflict that was evident between Shadow Wood (seller), Gogo Way (purchaser), and Alessi & Koenig (Agent of Shadow Wood/foreclosure trustee), both Appellants were represented below by Alessi & Koenig, ultimately resulting in a Motion to Disqualify, which was denied as moot after NYCB was granted summary judgment.

the Court specifically stated that NYCB's efforts to pay off the lien "...were frustrated by the **unreasonable and oppressive actions** of Shadow Wood," and, moreover, that Shadow Wood was "...attempting to profit off of the subject HOA foreclosure sale by including **exorbitant fees and costs.**" (APP000924) (Emphasis Supplied)

The Court also specifically concluded that Gogo Way was not a bona fide purchaser and was not entitled to any protections granted pursuant to NRS 645F.440. (Id.) In the end, the Court set aside the HOA Sale and awarded immediate possession of the Subject Property to NYCB. (APP000925)

After the Court awarded judgment in NYCB's favor, NYCB filed a Motion for Attorney's Fees. (APP000950) After more extensive briefing (including supplemental briefing requested by the District Court), the Court granted NYCB's motion, finding that Shadow Wood and Gogo Way "...had no reasonable ground" upon which to base their defense and that "...their conduct was indicative of bad faith and an attempt to harass" NYCB. (APP001087) The District Court further stated that Shadow Wood and Gogo Way based their defense on an "erroneous interpretation" of NRS 116.3116 (Id.)

III. SUMMARY OF THE ARGUMENT

In its Opening Brief, Shadow Wood offers a number of convoluted arguments that attempt to explain why it should have been entitled to claim a lien on the Subject Property, and then attempt to enforce that lien by way of a foreclosure sale without providing NYCB a legitimate opportunity to pay off that lien. Shadow Wood asks this Court to employ a manner of statutory interpretation that requires using definitions from other statutory sections out of context, rather than applying the plain and unambiguous meaning of NRS 116.3116(2). Despite Shadow Wood's attempt to confound and obfuscate, the plain language of this statute clearly limits a HOA Lien to the equivalent of nine months worth of assessments following a foreclosure sale conducted by the beneficiary of the first deed of trust.

NRS 116.3116 provides an exception to the general rule that junior liens are

extinguished when a senior lien forecloses. The statute establishes that a limited portion of the extinguished lien survives foreclosure by the senior lien holder. Specifically, it gives the HOA a lien "...to the extent of the assessments for common expenses based on the periodic budget adopted by the association ... which would have become due ... during the 9 months immediately preceding the institution of an action to enforce the lien...." The plain reading of this language limits the resulting lien to nine months worth of assessments and no more. Shadow Wood seeks to force costs of collection and other fees (some of which are exorbitant)[8] into the language of the statute, but the additional fees find no home.

Not only does NYCB's interpretation comport with the must fundamental principle of statutory interpretation (i.e., to apply the plain meaning of unambiguous language), it is also consistent with the Legislature's intent in enacting the statute. While the language of the statute was originally modeled after a uniform act, the Nevada Legislature has not amended the language to remain consistent with that act. In choosing which language to include and which to omit, the Legislature has shown how it intended the statute to be used and what amounts should be included in the lien. Specifically, the Nevada Legislature rejected language that would have explicitly added the collection costs and attorney's fees to the amount of the surviving lien.

Unfortunately, despite the fact that Shadow Wood's lien was reduced to nine months worth of assessments, Shadow Wood did all that it could to collect the extinguished amount (resulting from NYCB's foreclosure sale) and charged ahead

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[8] Notably, the District Court found it significant that Shadow Wood (through its agent/counsel, Alessi & Koenig) was seeking to collect a fee of $400.00 for each Notice of Default it prepared. The District Court apparently recognized that a Notice of Default is a standard, one page, 'boiler plate' document, routinely used by Alessi & Koenig, that probably took five to ten minutes for a *legal assistant* to revise and save.

with a vengeance, refusing to cooperate with NYCB as it had with the prior owner. From the moment NYCB took title to the Subject Property, Shadow Wood engaged in oppressive and unreasonable actions aimed at profiting off its lien. Over several months, Shadow Wood demanded more than it was entitled under the statute, resisted providing an accurate accounting of the lien, demanded constantly varying and completely inconsistent amounts, and provided a misleading ledger that represented an amount it never intended to accept.

When NYCB did tender an offer an amount well in excess of Shadow Wood's actual lien, Shadow Wood rejected it. However, in all the time that it was giving NYCB the runaround, Shadow Wood continued to pile on excessive fees and charges. As noted above, it is also significant that Shadow Wood's trustee and counsel, Alessi & Koenig, represented in Court that the Trustor of Gogo Way just so happens to be a regular client of Alessi & Koenig's, which raises additional questions about Alessi & Koenig's resistance to NYCB's attempts to pay off the lien; the potential for collusion does not seem far off base under these facts. This concern is only heightened by the fact that there was a clear conflict of interest (Alessi & Koenig represented the seller (Shadow Wood), acted as the foreclosure trustee, and represented the purchaser (Gogo Way)). Despite this clear conflict, Gogo Way (the purchaser) decided to retain the counsel with whom it had a developed relationship (Alessi & Koenig) to represent its interests in the District Court action.

Ultimately, the District Court agreed with NYCB. It held that Shadow Wood's lien was limited to nine months worth of assessments, and moreover that Shadow Wood's foreclosure sale was the result of oppressive and unreasonable actions. The District Court properly set aside Shadow Woods foreclosure sale and restored title in the name of NYCB. This Court should affirm the District Court's decision.

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

The Nevada Supreme Court reviews a district court's grant of Summary

Judgment de novo and does not give deference to the lower court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Therefore, the Court will determine for itself whether a genuine issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. *Id.* Summary judgment is appropriate if 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 judgment as a matter of law." NRCP 56(c). A "genuine issue as to any material fact" exists "where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (interpreting the federal rule).

The Nevada Supreme Court abrogated the "slightest doubt" standard. *Wood*, 121 Nev. at 731, 121 P.3d at 1031. To survive a Motion for Summary Judgment, the nonmoving party must show that there is more than just a "metaphysical doubt" as to the operative facts to avoid summary judgment, and must, "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial[.]" *Id.* at 732, 121 P.3d at 1031. Neither general allegations nor conclusory statements satisfy the requirement to show genuine material facts in dispute. *See Bird v. Casa Royale W.*, 97 Nev. 67, 70-71, 624 P.2d 17,19 (1981); *See also Bond v. Stardust, Inc.*, 82 Nev. 47, 50, 410 P.2d 472, 473 (1966). Thus, an affidavit of the nonmoving party that simply provides bald assertion and conclusory statements does "not create an issue of material fact." *Bond*, 82 Nev. at 50, 410 P.2d at 473. As this Court has previously held, a non-movant must do more than restate his/her pleadings in an Affidavit, or generally aver that he/she did nothing wrong to avoid summary

judgment. *Id.*

B. SHADOW WOOD'S FORECLOSURE SALE WAS INVALID BECAUSE SHADOW WOOD ATTEMPTED TO COLLECT MORE THAN IT WAS OWED AND WRONGLY REJECTED NYCB'S OFFER FOR MORE THAN THE AMOUNT OF THE EXISTING LIEN.

The relevant statute that shapes this dispute is NRS 116.3116. It regulates HOA liens for unpaid monthly assessments and determines the priority of the HOA lien relative to other secured interests. *See,* NRS 116.3116(2). Generally, a HOA has a lien on real property 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" ("General Statutory Lien"). NRS 116.3116(1). However, the General Statutory Lien is subordinate to a prior-recorded first security instrument. NRS 116.3116(2)(b) ("A lien under this section is prior to all other liens and encumbrances on a unit **except...a first security interest** on the unit recorded before the date on which the assessment sought to be enforced became delinquent...) (emphasis added). Therefore, when the beneficiary of a first deed of trust forecloses on its interest, the General Statutory Lien is extinguished. *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens); *see also McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 818, 123 P.3d 748, 752 (2005) ("...when a senior lien holder forecloses and sells property to a person other than the junior lien holder, the junior lien holder is 'sold-out'").

However, the final provision of NRS 116.3116(2) provides a limited exception, and creates what is commonly referred to as the "Super Priority Lien." It states that: "[t]he lien is also prior to all security interests ... to the extent of the **assessments for common expenses**... which would have become due in the absence of acceleration during the **9 months** immediately preceding institution of an action to enforce the lien." NRS 116.3116(2) (emphasis added). Not only does this provision create the Super Priority Lien, it also provides the formula for calculating the amount of the

Super Priority Lien. *Id.* Simply stated, the formula is 9 x X, where X is the amount of the monthly assessment. *See id.* Shadow Wood misinterprets this statute and attempts to include amounts that are not mentioned in the statute. However, this Court should apply the plain language of the statute and limit the Super Priority Lien to nine months worth of assessments, and no more.

1. The Super Priority Lien Does Not Include Costs and Fees of Collection.

Statutory interpretation is a question of law, and this Court reviews a district court's interpretation de novo. *Sims v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 125 Nev. 126, 129-30, 206 P.3d 980, 982, (2009); *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 539, 135 P.3d 807, 810 (2006). The Court first looks to the plain language of the statute. *Firestone v. State*, 120 Nev. 13,16, 83 P.3d 279, 281 (2004). If the language is clear on its face, the Court's inquiry is complete and it "may not go beyond the language of the statute in determining the Legislature's intent." *Diaz v. Eighth Jud. Dist. Ct.*, 116, Nev. 88, 94, 993 P.2d 50-54-55 (2000). Thus, if the language is plain and unambiguous, the statute should be construed consistent with the plain meaning. *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009).

a. The language of NRS 116.3116(2) is clear and limits the Super Priority Lien to nine months worth of assessments.

Here, the language of NRS 116.3116(2) is clear. *See 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, ___ F.Supp.2d ___, 2013 WL5780793, *6 (D. Nev. Oct. 28, 2013). In crafting the language of the statute, the Legislature chose easily understood phrases to define the amount of the Super Priority Lien. First, its use of the phrase "to the extent of" is a clear indication that the Super Priority Lien is limited. *See* NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, REAL ESTATE DIVISION ADVISORY OP. 13-01 at 11, dated December 12, 2012 [hereinafter

"Advisory Opinion"].[9] In other words, regardless of the amount of the General Statutory Lien, the Super Priority Lien cannot exceed the amount prescribed in the statute. *See id.* Second, the statute then provides the appropriate unit for measuring the Super Priority Lien's limit, i.e. "assessments for common expenses reflected in the budget adopted pursuant to NRS 116.3115." NRS 116.3116(2). The phrases "for common expenses reflected in the budget" is key because a HOA budget does not include penalties, fees, charges, late fees, or fines. Advisory Opinion at 12.

That the Legislature intended there to be a the difference between the amounts included in the General Statutory Lien - as compared with the Super Priority Lien - is further signified by the fact that the "assessments" included in the two liens are defined differently. *Compare* NRS 116.3116(1) *with* NRS 116.3116(2). On the one hand, NRS 116.3116(1) provides that "**any** assessment levied against that unit" is included in the lien, and adds that certain penalties, fees, charges, late fees, and fines can be enforced as assessments. NRS 116.3116(1) (emphasis added) On the other hand, the "assessments" included in the Super Priority Lien are much more narrow and only include "assessments for common expenses reflected in the budget...." NRS 116.3116(2). The fact that the Legislature added the modifier "for common expenses reflected in the budget" to the latter section demonstrates that it intended to

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[9] While this Court has not interpreted NRS 116.3116 or addressed the amount of the Super Priority Lien, it has held that the Nevada Department of Business and Industry, Real Estate Division ("NRED") and the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") are responsible for interpreting NRS Chapter 116. *State Dep't of Bus. and Indus., Fin. Inst. Div. v. Nevada Association Services*, 128 Nev. ___, ___, 294 P.3d 1223,1227 (2012). Notably, CCICCH did issue an advisory opinion on the interpretation of NRS 116.3116 in December 2010; however its opinion relies on a 2008 amendment to the Uniform Common Interest Ownership Act ("UCIOA"). Advisory Opinion at 6. However, as explained in detail below, the Legislature refused to amendment NRS 116.3116 to incorporate the 2008 UCIOA amendment. *Id.*

distinguish these amounts. *See Coast Hotels and Casinos, Inc. v. Nevada State Labor Comm'n.*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) ("when the legislature has employed a term or phrase in on place and excluded it in another, it should not be implied where excluded.").[10]

Relying on the plain reading of the statute, other Courts, including the majority of the Judges of the Eighth Judicial District Court and the United States District Court for the District of Nevada, have interpreted NRS 116.3116(2) to limit the Super Priority Lien to nine months of regular monthly assessments. *See, e.g. 7912 Limbwood Court Trust*, ___F.Supp.2d ___, 2013 WL5780793 at *6 (stating that the Super Priority Lien "generally consists of the last nine months of unpaid assessments and any unpaid nuisance abatement costs..."); *First 100, LLC v. Ronald Burns*, Order Denying Defendant's Motion to Dismiss ¶ 37, Case No. A677693, May 31, 2013 ("a portion of the unpaid assessments (**not exceeding nine months**) are entitled to 'super priority' status..."). These courts have applied the simple statutory formula to calculate the Super Priority Lien. *Ikon Holding , LLC v. Horizons At Seven Hills Homeowners Assc.*, A-11-647850-C at *4, Jan. 19, 2013 ("The base figure used in calculation of the Super Priority Lien is the un-accelerated monthly assessment figure" which "...means a maximum figure equaling 9 times the association's regular,

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[10] Shadow Wood cites the Connecticut Supreme Court decision of *Hudson House Condominium Ass'n v. Brooks*, 611 A.2d 862, 866 (Conn. 1992) for the proposition that collection costs must necessarily be included in the Super Priority Lien. However, the relevant Connecticut statute, C.G.S.A. §47-258, specifically allows for the prevailing party in any action pursuant to that section to be awarded "costs and reasonable attorney's fees." *Hudson House*, 611 A.2d at 866. The Connecticut Supreme Court did not award attorney's fees based on the language of the Super Priority Lien, as Shadow Wood implies. *See id.* Instead, the Court's ruling was based on a separate statutory provision that specifically awards attorney's fees and costs. *Id.*; *see also* C.G.S.A. §47-258(g). Shadow Wood's citation to this case is not only unhelpful, but is also misleading.

monthly (not annual) assessments.") (APP0001047); *accord Prem Deferred Trust v. Aliante Master Assoc.*, A-11-651107-B at *3-4, Sept. 24, 2012 (APP0010553-54)

Applying the statutorily prescribed formula to calculate Shadow Wood's Super Priority Lien results in a figure significantly smaller than the amount Shadow Wood demanded in January, 2012, and significantly less than the amount Shadow Wood rejected. When Shadow Wood recorded the Notice of Lien, its monthly assessments were $168.81, thus nine months of assessments would be only $1519.29 (9 x $168.81). (See, APP000254). This is the only amount that survived NYCB's Foreclosure Sale, and the only amount NYCB should have been charged to satisfy the debt incurred by the previous owner, Ms. Fedel. Instead, Shadow Wood demanded that NYCB pay the extinguished costs and fees of collection, refusing to accept that those charges cannot be included in the Super Priority Lien. In rejecting NYCB's $6,783.16 offer, Shadow Wood (and/or its agent) apparently believed it would make a larger profit by forcing the sale, despite the fact that it was doing so unlawfully.

b. The legislative history of NRS 116.3116 supports the plain language interpretation.

While not necessary to interpret NRS 116.3116, the statute's legislative history affirms that collection costs were never intended to be included in the Super Priority Lien. NRS 116.3116 is modeled after the Uniform Common Interest Ownership Act (1982) ("UCIOA"). Advisory Opinion at 2. The original purpose of the statute was to "...strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest holders." Advisory Opinion at 9 (quoting comment to §3-116 of UCIOA). However, while NRS 116.3116 was originally modeled after UCIOA, the Legislature has intentionally refused to amend NRS 116.3116 to mirror each amendment to UCIOA.

In 2009, the Nevada Legislature amended NRS 116.3116(2) to increase the amount of the Super Priority Lien from six months to nine months. *See* Assembly

Bill 204, as enacted. Assembly Bill 204 ("A.B. 204") was proposed in response to concerns about the amount of money HOAs were able to collect given the increased time it took for foreclosures. Minutes of the Meeting of the Assembly Committee on Judiciary Seventy-Fifth Session, March 6, 2009, at 34, available at http://www.leg.state.nv.us/75th2009/Minutes/Assembly/JUD/Final/391.pdf.

During discussions of potential amendments to the bill, NRED Commissioner, Michael Buckley, specifically addressed a 2008 amendment to UCIOA that added language allowing for the inclusion of the costs of collection into the Super Priority Lien. *Id.* at 44-45. He pointed out that §3-116(c) of UCIOA (the portion creating the Super Priority Lien) now specifically included the costs and fees of collection in the Super Priority Lien. *Id.* That section states:

> (c) A lien under this section is also prior to all security interests described in subsection (b)(2) to the extent of both the common expense assessments based on the periodic budge 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.

Amendments to Uniform Common Interest Ownership Act (2008), National Conference of Commissioner of Uniform State Laws, at 189, available at http://www.uniformlaws.org/shared/docs/common%20interest%20ownership/ucioa_final_08.pdf (emphasis in orginal); Avisory Opinion at 15.

Based on Mr. Buckley's comments, the Assembly Committee on Judiciary was aware that UCIOA included language specifically allowing collection costs and fees as part of the Super Priority Lien when drafting the final language of A.B. 204; however, when the bill was passed, the language from UCIOA was omitted.[11] In

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[11] *Compare* Assembly Bill 204, as enacted, available at http://www.leg.state.nv.us/Session/75th2009/Bills/AB/AB204_EN.pdf; *with*, Minutes of the Meeting of the Assembly Committee on

(continued...)

omitting that language, the Legislature made a conscious decision to exclude costs of collection from the Super Priority Lien.

Notably, Assemblywoman Ellen Spiegel, one of the sponsors of A.B. 204, reinforced this idea when she stated on May 8, 2009:

> 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***.

Minutes of the Senate Committee on Judiciary, Seventy-fifth Session May 8, 2009, at 27, available at http://leg.state.nv.us/75th2009/Minutes/Senate/JUD/Final/1123.pdf (emphasis added).

Had the Legislature intended to include these amounts in the Super Priority Lien, it simply could have borrowed the language from the 2008 UCIOA Amendment and included it in A.B. 204. It made the conscious decision to omit that language and limit the Super Priority Lien to nine months worth of regular monthly assessments. This Court should not interpret the statute to include that language now, particularly after the Nevada Legislature specifically rejected it. *See S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("...it is not the business of this Court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.")

In 2011, the Legislature again considered amending NRS 116.3116 to incorporate the 2008 UCIOA Amendment. Advisory Opinion at 6. First, Senate Bill 174 ("S.B. 174,") proposed a change to NRS 116.3116(1) that would specifically include "costs of collecting" as defined in NRS 116.310313 in the General Statutory Lien. *Id.* However, the proposed language was removed before the first reprint, and

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[11](...continued)
Judiciary, Seventy-Fifth Session, March 6, 2009, Exhibit W at W-3, available at http://www.leg.state.nv.us/Session/75th2009/Exhibits/Assembly/JUD/AJUD391W.pdf

S.B. 174 never made it out of committee. *Id.* at 7. The second time the Legislature considered changes came through Senate Bill 204 ("S.B. 204"). *Id.* Similar to S.B. 174, S.B. 204 proposed language that would have allowed the association to include attorney's fees and other costs into the General Statutory Lien. *Id.* While S.B. 204 ultimately passed, the proposed language that would include costs of collecting was removed before then. *Id.* The final language did not mention the inclusion of any attorney's fees or additional costs. *Id.*; NRS 116.3116(1).

The Nevada Legislature has weighed whether to include attorney's fees or costs of collection in either the General Statutory Lien or the Super Priority Lien, and it has intentionally made the decision not to do so. In two different legislative sessions, the Legislature has rejected proposed language that would have allowed Shadow Wood to collect the additional amounts (i.e., amounts in excess of nine months of regular monthly assessments) it claimed. In doing so, the Legislature could have given no stronger signal that the Super Priority Lien was limited to nine months worth of assessments, and nothing more.

c. The interpretation offered by Shadow Wood defies the basic principles of statutory interpretation.

Without providing any reasoning as to why the Court should ignore the plain meaning of the statute, Shadow Wood asks the Court to engage in mental gymnastics to reach the definition Shadow Wood advocates. To reach this result, it asks this Court to forego the common meaning of the phrase "assessments" and instead read "costs of collection" into the term by referring to no less than three separate statutory provisions. Shadow Wood would have this Court believe that, rather than simply including a statutorily defined term in the plain language of NRS 116.3116(2), the Legislature created a multilevel process of definition that requires reference to three other statutes. The illogical path Shadow Wood attempts to lead this Court down is, respectfully, a dead end fraught with hurdles. In fact, the NRED has already

examined this exact line of reasoning and rejected it. *See* Advisory Opinion at 5.

First, despite the fact that term "assessments" is defined differently in NRS 116.3116(2) than it is in NRS 116.3116(1), Shadow Wood asks the Court to ignore those differences and apply the definition of assessments as used in NRS 116.3116(1) to the latter section. To reach Shadow Wood's conclusion, the Court must first read "penalties, fees, charges, late fees, and fines" into the definition of "assessment," when it is clear that the Legislature intended them to be separate. While "penalties, fees, charges, late fees, and fines" can be charged as assessments under the General Statutory Lien, the term "assessments" in the Super Priority Lien is more focused. *Compare* NRS 116.3116(1); *with* NRS 116.3116(2). Again, to accept this rationale, the Court would have to ignore the fact that the Legislature went through the trouble of refining the term in the later section as "...assessments for common expenses based on the periodic budget adopted by the association[.]"

Even if Shadow Wood could overcome this first hurdle, it must continue to play word games to get to the result it wants. As used in NRS 116.3116(1), only "penalties, fees, charges, late fees, and fines" charged pursuant to NRS 116.3102(1)(j)-(n), are included in the General Statutory Lien. NRS 116.3116(1). However, none of the charges allowed under NRS 116.3102(1)(j)-(n) specifically identify "costs of collection." *Id.*

Instead Shadow Wood again asks the Court to read a definition into a definition. In turning to NRS 116.3102(1), only one of the specifically identified charges possibly opens the door for including collection costs - Subsection (k), which allows a HOA to "...impose charges for late payment of assessments pursuant to NRS 116.3115." In order to continue down Shadow Wood's line of reasoning, the Court would need to read "charges for late payment" to necessarily include "costs of collecting," which is already identified and defined in NRS 116.310313. Once more, Shadow Wood asks the Court to ignore the plain language, without identifying any ambiguity, to extend the meaning of a statutory provision and include terms that are

not used in the section at all.

Ultimately, Shadow Wood would require this Court to examine NRS 116.3116(1), NRS 116.3102(1)(k), and NRS 116.310313 to reach the conclusion that "assessments for common expenses based on the periodic budget adopted by the association" necessarily includes "costs of collecting," a term specifically defined by statute. However, basic rules of statutory construction and the plain language of the statute simply do not support such a convoluted statutory scheme. Rather than accepting this simple truth that the Legislature did not intend "costs of collecting" to be part of the Super Priority Lien (which, as illustrated above, has been demonstrated by legislative history), Shadow Wood engages in round-about reasoning. At the end of the day, had the Legislature intended to include these amounts in the Super Priority Lien, it could have included the defined term "costs of collection" in NRS 116.3116(2). It did not and has rejected attempts to do so.

2. Shadow Wood's "Contractual Lien" Does Not Allow Shadow Wood To Collect Charges Incurred Prior To The NYCB Foreclosure Sale.

In a desperate last attempt to give some legitimacy to the HOA Sale, Shadow Wood claims that it foreclosed on a contractual lien pursuant to it CC&Rs ("Contractual Lien"). *See* Shadow Wood App. Brief at 13-16. Without citation to any legal authority or reference to the facts, Shadow Wood simply claims the Court erred because it did not make any separate findings of fact related to the Contractual Lien. *See id.* Again, Shadow Wood is mistaken. In setting aside the HOA Sale, the District Court found that the HOA Sale was "based at least in part upon collection costs, attorney's fees, and other fees that predated NYCB's Foreclosure Sale." (APP000923) Shadow Wood's Contractual Lien does nothing to enable it to collect the fees the District Court identified as having been extinguished. Therefore, no findings related to the Contractual Lien were necessary to grant judgment in NYCB's favor.

Because Nevada is a race notice state, the priority of liens on real property is

generally determined by the order in which the encumbrances are recorded. *See Buhecker v. R.B. Petersen & Sons Const. Co., Inc.*, 112 Nev. 1498, 1500, 929 P.2d 937, 939 (citing NRS 111.320; NRS 111.325); *See also* Allison Steel Mfg. v. Bentonite, Inc., 86 Nev. 494, 497, 471 P.2d 666, 668 (1970)("At common law, ...the first in time was superior in right.") The statutorily created Super Priority Lien is the exception to the general, common law rule. NRS 116.3116(2); Advisory Opinion at 8. However, Shadow Wood's Contractual Lien does not benefit from the same statutory exception and, therefore, is junior to any interests recorded before it.

The portion of the Contractual Lien that included the delinquent assessments, collections costs, or fees charged to Ms. Fedel was recorded after the Deed of Trust. The Deed of Trust was recorded on April 22, 2007. (APP000022). The Contractual Lien did not come into existence until more than a year later when the first monthly assessment went unpaid on July 1, 2008. (See, APP913-14; APP246 (evidencing a $0 balance on June 25, 2008)). Therefore, when NYCB foreclosed on its Deed of Trust, it extinguished the junior Contractual Lien. *See Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). In granting NYCB's Motion for Summary Judgment, the District Court specifically stated "**Any amount** allegedly owed by Virginia V. Fedel to Shadow Wood or its agents prior to NYCB's Foreclosure Sale was sold out, with the exception of those identified in NRS 116.3116 and NRS 116.310312..." (APP000922) Thus, the Contractual Lien amounts were completely extinguished and only the amounts specifically included in the Super Priority Lien survived the NYCB Foreclosure Sale.

The fact that Shadow Wood may have been able to claim a Contractual Lien for the "unpaid assessments that came due from the date NYCB acquired title to the Property to the date NYCB tendered payment...and...the attorney's fees and costs [Shadow Wood] incurred in attempting to collect against NYCB..." does nothing to affect the District Court's finding that the HOA Sale attempted to collection costs that

"predated NYCB's Foreclosure Sale." (APP000923)

C. SHADOW WOOD'S FORECLOSURE SALE WAS INVALID BECAUSE IT ATTEMPTED TO COLLECT MORE THAN IT WAS OWED AND REJECTED NYCB'S OFFER FOR MORE THAN THE AMOUNT OF THE EXISTING LIEN.

A foreclosure sale that is the result of "fraud, unfairness or oppression," especially when combined with a commercially unreasonable price, is ripe to be set aside. *Nevada Land & Mortgage. Co v. Hidden Wells Ranch Inc.*, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967); *see also Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) ("Mere inadequacy of price is not sufficient to justify setting aside a foreclosure sale, absent a showing of fraud, unfairness, or oppression.). The type of conduct that would "raise serious questions" about the validity of a foreclosure sale includes providing false information or withholding information. *See McLaughlin v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 57 Nev. 181, 60 P.2d 272, 276 (1936).

In regard to HOA foreclosure sales conducted pursuant to NRS 116.3116, the duty to act with candor and fairness is not merely inherent, but is explicitly included in Chapter 116. NRS 116.31113. Specifically, it requires that "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or **enforcement**." *Id.* (Emphasis Supplied); *see also* UCIOA §1-113. Good faith requires both "honesty in fact" and "reasonable standards of fair dealing." UCIOA §1-113; *see also Will v. Mill Condominium Owners' Ass'n*, 848 A.2d 336. 340-41 (Vt. 2004) (citing the Official Comment to UCIOA §1-113).[12]

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[12] Shadow Wood dedicates a significant portion of its brief attempting to shield the HOA Sale from scrutiny by claiming that NRS 116.31166 provides a conclusive evidentiary presumption that a foreclosure was processed correctly. See, Shadow Wood App. Brief. pg. 11, ln. 2-5. It claims that because the HOA NOD claimed the amount of the Shadow Wood's lien was $6.608.34 the District Court was necessarily incorrect in holding that Super Priority Lien was only $1,519.29. See, Shadow Wood App. Brief pg. 13, ln. 1-6. Shadow

(continued...)

The HOA Sale was not only the product of deceit, oppression, and unfairness, but it also resulted in the Subject Property being sold for a commercially unreasonable price. Shadow Wood and Alessi & Koenig attempted to collect extinguished debts from NYCB, refused to provide an accurate payoff amount, and when either did, the amounts claimed varied wildly. Additionally, Alessi & Koenig specifically provided an amount in January, 2012, that it ***knew*** it would not accept. The HOA Sale was not geared toward getting Shadow Wood the limited statutory amount so it could continue to operate (which is precisely the reason the Legislature allowed for a Super Priority HOA lien). It was about padding the fees as high as possible to either (1) force NYCB, with its supposed "deep pockets" to pay its inflated demand, or (2) proceed to sale and sell the property to another client of Alessi & Koenig for a fraction of its value, allowing Alessi & Koenig to profit. Regardless of whether Shadow Wood (principal) or Alessi & Koenig (agent) was steering this ship, the undisputed facts illustrate that the HOA Sale was set up, maintained, and completed deceitfully, oppressively, and unfairly.

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[12](...continued)
Wood again ignores the plain language of the statute and attempts to expand the presumption far beyond its limits. It believes that any statement in the Notice of Default is presumed true. See, id. However, the presumption created in NRS 116.31166 is confined to only the limited presumptions identified in the statute. Specifically, it only serves as proof that there was a default, the notice of delinquent assessment lien was mailed, the notice of default was recorded, 90 days elapsed between the notice of default and notice of sale, and that notice of the sale was given. NRS 116.31166(1). Nowhere in the statute does it provide that it is conclusive proof of any amounts claimed in the notice of default. *See* NRS 116.31166. Further, the simple fact that NRS 116.31162 *et seq.*, does not provide a right of redemption does little to shield the foreclosure sale from review if it is conducted in bad faith or is the result of fraud, unfairness or oppression. NYCB is not attempting to redeem the property following the HOA Sale, but is attempting to invalidate the sale itself.

Nearly immediately after NYCB took possession of the Subject Property, Shadow Wood, acting through Alessi & Koenig, recorded the Notice of Lien claiming the full amount owed by the prior owner, Ms. Fedel. (See, APP000017; APP000682-86) While Alessi & Koenig admitted ***a year later*** that it inadvertently included all of the past due assessments (instead of only nine months worth) and later some of he lien, it also extinguished by the NYCB Foreclosure Sale (i.e., anything above the nine-month Super Priority Lien Amount). (See, APP000682-86) Instead of accepting the plain language of the statute, it proceeded to push its luck in the hope that NYCB would either pay the blood money or allow it to go to sale and write off the HOA Sale as a loss. (See, APP000060; APP00062)

Aware that it was in the wrong, Alessi & Koenig gave NYCB as little information as possible about the amount of the Super Priority Lien and the amount necessary to bring NYCB's account current. After recording the erroneous Notice of Lien, Shadow Wood did not alert NYCB of the mistake. Instead, it simply recorded the HOA NOD with a different, incongruent amount. (See, APP000017; APP000060) However, even that amount was not accurate by the time it was recorded. The HOA NOD claimed that the "amount due is **$6,608.34** as of **August 29, 2011**," yet, the HOA NOD was not recorded until October 13, 2011. (APP000060) (emphasis in the original) By the time that the HOA NOD was recorded, the payoff information was nearly two months old. (Id.)

When NYCB specifically asked Shadow Wood and Alessi & Koenig for an updated payoff statement, NYCB was ignored. (See, APP000716-17) A second request was met with more silence. (Id.) While Alessi & Koenig's employee swore under oath that she responded to both requests, the facts do not support her claim. The very e-mail she used as support contradicted her claim that she replied to the first, and Alessi & Koenig refused to provide the fax confirmation to show she responded to the second. The undisputed facts provided more than sufficient evidence that Shadow Wood and/or its agents withheld information and made it

virtually impossible for NYCB to ascertain the amount to pay off the lien. (Id.)

Shadow Wood's conduct only worsened as the sale date approached Shadow Wood's blatant disregard for the good faith requirement was most evident when it did finally provide a payoff statement. After NYCB's third request for a payoff statement, Alessi & Koenig provided a ledger on January 23, 2012, showing an outstanding balance of $6,445.54. The ledger specifically indicated that it was good through February 28, 2012. However, when Alessi & Koenig provided the ledger, it knew that this was not an amount that Shadow Wood would accept; five days previous, Alessi & Koenig had executed (but had not recorded) the HOA NOS, claiming Shadow Wood was now owed $8,539.77. Therefore, NYCB's attempt to pay off the already inflated $6,445.54 identified in the ledger was doomed to failure from the start. Rather than providing an accurate payoff (or even a payoff amount that Shadow Wood would accept), Shadow Wood provided an amount it had no intention of accepting. When NYCB tendered the ledger amount - plus two additional months worth of assessments - it was flatly rejected. (APP000245)

In the end, Shadow Wood never had any intention of accepting the Super Priority Lien amount or accepting any legitimate amount to release its lien. Instead, it provided an ever-moving target,[13] and when NYCB finally got close enough to hit it, Shadow Wood and/or its agents simply provided a payoff amount that they planned to reject. These facts - the repeated requests for a payoff amount, the failure of Shadow Wood/Alessi & Koenig to provide one for months, the constantly changing amount demanded, the HOA NOS that was executed before the ledger was provided - were not and are not in dispute. As a result of its tactics, Shadow Wood ultimately received more from the HOA Sale ($11,018.39) than it would have ever legitimately received from NYCB, and Alessi & Koenig was able to sell to a repeat client at a

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[13] In the span of approximately nine months, NYCB was told that the payoff amount was: $8,238.87, $6,608.34, $328.94, $6,445.54, $9,017.39, and at the HOA Sale, it had grown to $11,018.39.

discount.[14]

Finally, the shockingly low purchase price Gogo Way paid for the Subject Property confirms that the District Court correctly set the HOA Sale aside. At the HOA Sale, the Subject Property sold for $11,018.39. (APP000000019). However, only nine months before, the same Subject Property sold for more than **four hundred percent (400%)** of that price, $45,900.00. (APP00013). Shadow Wood cannot legitimately argue that paying less than a quarter of the market value nine months later constitutes "fair value." When taken in consideration with the dubious and ***undisputed*** history related above, the District Court correctly set aside the sale and found evidence of oppression and unfairness, in addition to a commercially unreasonable sale price. Unfortunately for the Appellants, the District Court correctly recognized that Shadow Wood and/or its agents were not concerned with conducting the HOA Sale in a good faith but were only concerned with profiting off the HOA Sale and maximizing the amount they could recover on the previously extinguished debt. The District Court acted correctly and well within its discretion to set aside this illegitimate and oppressive foreclosure sale.

V. CONCLUSION

For the foregoing reasons, NYCB respectfully requests that this Court affirm the decision of the District Court.

DATED this 18th day of January, 2013.

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[14] Notably, even after recovering $11,018.39, Shadow Wood still wrote off $3,013.15 as bad debt, and it only received $3,442.39 from the HOA Sale. (APP000924) Presumably, the remainder, $7,576.00, went to Alessi & Koenig to cover costs and fees of collection. (Id.)

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this Opening Brief has been prepared in a proportionally spaced typeface using WordPerfect9 in size 14 Times New Roman. I further certify that this Answering Brief complies with the page or type volume limitations of NRAP 32(a)(7)(A) because, excluding the parts exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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

DATED this 13th day of January, 2014.

PITE DUNCAN, LLP

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CERTIFICATE OF SERVICE

I, the undersigned, declare: I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to this action. My business address is 520 South Fourth Street, Suite 360, Las Vegas, NV 89101.

I hereby certify that on January 13, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michael R. Bohn, mbohn@bohnlawfirm.com

Bradley Bace, brad@alessikoenig.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 13th day of January 2014, at Las Vegas, Nevada.

Nicole L. Schlanderer

NICOLE L. SCHLANDERER

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