EXHIBIT 3

OPPC
Amy F. Sorenson, Esq.
Nevada Bar No. 12495
Richard C. Gordon, Esq.
Nevada Bar No. 9036
Robin E. Perkins, Esq.
Nevada Bar No. 9891
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
asorenson@swlaw.com
rgordon@swlaw.com
rperkins@swlaw.com

Attorneys for Defendant Wells Fargo Bank, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST, Plaintiff, vs. WELLS FARGO BANK, N.A.; MTC FINANCIAL, INC., dba TRUSTEE CORPS; DONALD K. BLUME and CYNTHIA S. BLUME, Defendants.	CASE NO. A-13-679095-C **WELLS FARGO BANK, N.A.'S COMBINED OPPOSITION TO EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; OR ALTERNATIVELY FOR ORDER TO SHOW CAUSE** **-AND-** **COUNTERMOTION TO DISMISS**

Defendant Wells Fargo Bank, N.A. ("Wells Fargo") hereby files its Combined Opposition to Plaintiff's Ex Parte Motion for Temporary Restraining Order; or Alternatively for Order to Show Cause ("Motion") and Countermotion to Dismiss, as Plaintiff's claims fail as a matter of law.

///

This Combined Opposition and Countermotion to Dismiss are based on the Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice filed concurrently herewith, the papers and pleadings on file with the Court, and any oral argument that this Court may entertain.

Dated: May 21, 2013

SNELL & WILMER L.L.P.

By: Robin E. Perkins

Amy F. Sorenson, Esq.
Richard C. Gordon, Esq.
Robin E. Perkins, Esq.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169
Attorneys for Defendant Wells Fargo Bank, N.A.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Wells Fargo – and the Court – have seen this scenario before. Just four short months ago, the same Plaintiff ("Plaintiff" or "Daisy Trust") came to a different department of this Court, bringing identical claims against Wells Fargo, involving a virtually identical property acquisition. All this, in hopes of receiving a judicial blessing for its, literally "too good to be true" real estate purchase for pennies on the dollar. But Plaintiff did not receive its sought after judicial blessing. In fact, Plaintiff's claims were promptly rejected by the Eighth Judicial District Court on Wells Fargo's Motion to Dismiss.[1] *Daisy Trust v. Wells Fargo*, Case No. A-13-675183, Dept. XV ("Daisy One"). Despite this, and without disclosing its prior defeat, Plaintiff returned to this Court *one day after the same claims were dismissed at the Daisy One hearing* – now knocking on a different department's door – in hopes of obtaining a different outcome. In fact, since January 2013, Plaintiff has filed at least five identical actions, in an attempt to find a court that will

[1] Daisy One Order Denying Plaintiff Daisy Trust's Request for Injunctive Relief, Dissolving Temporary Restraining Order, and Granting Defendant Wells Fargo Bank, N.A.'s Countermotion to Dismiss with Prejudice ("Daisy One Order") attached as Exhibit 1 to Request for Judicial Notice ("RJN").

eventually condone its conduct.[2]

Plaintiff is just one of a growing number of real estate speculators burdening this Court with untenable claims in hopes of securing a windfall. In addition to the express rejection of Plaintiff's claims in Daisy One, sister departments throughout the Eighth Judicial District, as well as the United States District Court for the District of Nevada, continue to dismiss identical complaints brought by similarly situated plaintiffs.[3] While the case law rejecting similar claims is substantial and growing, Plaintiff's business model – which clearly includes litigation costs as part of its business strategy – remains in full swing. First, Plaintiff, or another real estate speculator, purchase property at an HOA foreclosure sale for next to nothing. They then refuse to pay the first priority liens that survived the HOA foreclosure sale and try turn a quick profit by renting the property out to unsuspecting tenants. Finally, they sue the lender (whose lien Plaintiff still refuses to pay) for "quiet title," on the alleged ground that the HOA foreclosure sale "wiped out" the lenders' first priority liens. For the reasons outlined below, this particular brand of real estate investment is both bad law and bad policy.[4] .

At the heart of this matter is the statutory construction of Nevada Revised Statute ("NRS") 116.3116(2). A brief history of NRS 116.3116 (the "Statute") is necessary to understand these issues. The Statute was modeled after the Uniform Common Interest Community Act (the "Uniform Act"), and adopted by Nevada in 1991.[5] The Statute grants an

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

---

[2] A cursory review of the Eighth Judicial District Court general docket reveals that since January 2013, Plaintiff has filed five other substantively identical lawsuits asserting identical claims and requesting identical relief. *See* Case Records Search Result, attached as Exhibit 2 to RJN, identifying Case No. A-13-675181-C, filed January 16, 2012; Case No. A-13-675183-C, filed January 16, 2013; Case No. A-13-675501-C, filed January 23, 2013; Case No. A-13-679113-C, filed March 28, 2015; and Case No. A-13-680981-C, filed April 30, 2013.

[3] *See e.g., Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2:12-CV-00949-KJD, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013.). *Sanucci Ct. Trust v. Elevado*, Case No. A-12-670423, Dept. XXX. Judge Wiese granted Bank of America's motion to dismiss plaintiff's quiet title and declaratory relief claims, entered on February 21, 2013. *Centeno v. Montesa, LLC*, Case No. A-12-667397, Dept. XXXII, Supreme Court No. 62506. On October 15, 2012, Judge Bare granted motion to dismiss quiet title and declaratory relief claims. *Centeno v. Maverick Valley Properties, LLC*, Case No. A-12-654878, Dept. XXIV, Supreme Court No. 60984. Judge Bixler held on May 15, 2012 that the lender's first deed of trust was not extinguished by the HOA foreclosure sale, and plaintiff took title subject to the lender's first deed of trust. *Design 3.2 LLC v. Bank of New York Mellon*, Case No. A-10-621628, Dept. XV, order dismissing plaintiff's complaint, entered on June 15, 2011.

[4] *See id.*

[5] The Nevada Legislature adopted the Uniform Act, codified as NRS Chapter 116 (1991). The Act has been additionally adopted in Alaska, Colorado, Connecticut, Delaware, Minnesota, Vermont, and West Virginia.

HOA a lien for unpaid dues, assessments, and other related amounts, which lien is subordinated behind a first security interest, such as a deed of trust. NRS 116.3116(2) expressly states that:

> A lien under this section ***is prior to all other liens*** and encumbrances on an unit ***except***: (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to; (b) ***A first security interest on the unit*** recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit' owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(emphasis added.) Thus, NRS 116.3116(2) specifically subordinates the HOA lien to a junior position after a "first security interest" such as a properly recorded deed of trust. Nevertheless, Plaintiff asks this Court to ignore the express subordination provision and instead rely on the following language contained in NRS 116.3116(2):

> [t]he lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien.

This section creates what has been termed a "super-priority", which allows an HOA a very limited super-priority *to payment* over the first-recorded deed of trust.[6]

As a result of NRS 116.3116(2), HOAs in Southern Nevada have begun a practice of foreclosing on properties to obtain payment of the entire amount they contend they are owed, which is typically in excess of the limited super-priority amount allowed. The sales prices are always for a nominal amount – generally between $3,000.00 and $10,000.00, which generally

[6] This super-priority claim to payment set forth in NRS 116.3116(2) is specifically limited to only certain dues and assessments, set forth in the statute, for a period of only nine (9) months. In reality, the limited priority amount is typically less than $1,000.00.

equates to less than five percent of the value of the property being sold. Using this case as an example, the foreclosure deed to Plaintiff indicates that Plaintiff paid only $10,500.00 for the Property. ("HOA Foreclosure Deed" attached as Exhibit 3 to Request for Judicial Notice ("RJN".) Yet the estimated value of the Property published on zillow.com suggests that the Property is worth $381,883 – approximately thirty-six times more than the amount Plaintiff paid for the Property. (zillow.com data sheet, attached as **Exhibit 1**.)[7]

Real estate investment groups such as Plaintiff are sweeping in to take advantage of these *literally* "too good to be true" prices. Then, these entities turn around and file lawsuits claiming quiet title, declaratory relief, injunctive relief, and similar claims, asserting that the HOA's foreclosure sale extinguished the original lender's first in time deed of trust, notwithstanding the unambiguous language in NRS 116.3116(2) that expressly subordinates the HOA's lien to the first security interest on the unit.

As set forth herein, NRS 116.3116 does not, and never was intended to, extinguish a properly recorded senior deed of trust. In fact, the express language of NRS 116.3116 makes clear that the first in time deed of trust is prior to the HOA lien. The express subordination of the priority of the HOA's lien to a first security interest on the unit contained in NRS 116.3116 was intended to encourage lenders to loan funds to borrowers for the purpose of purchasing homes. Plaintiff's proposed interpretation of the Statute (not surprisingly, identical to the interpretation that was already rejected in a separate action by the Eighth Judicial District Court[8] and by numerous other departments[9] in similar cases), undermines this intention and would wipe out millions, if not billions, of dollars of properly recorded security interests in Nevada. If Plaintiff's interpretation is upheld, the real effect would be the mass exodus of lenders out of the state and the inability of any individuals to obtain mortgages to buy homes. No lender would ever make a loan and take a first security interest if that interest could be completely wiped out

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

[7] Wells Fargo offers this generally accepted zillow.com estimate to the Court as an approximation of value, in order to avoid the expense of retaining a valuation expert at this very early stage in litigation. Note that zillow.com constantly revises and updates its valuations based upon the fluctuating market, thus valuations may change minimally from day-to-day.

[8] *Daisy Trust v. Wells Fargo*, Case No. A-13-675183, Dept. XV, Daisy One Order, attached as Exhibit 1 to RJN.

[9] *See* n.1 *supra*.

by an HOA super priority lien under NRS 116.3116. Such an absurd result would lead to a second collapse of our fragile real estate market.

Plaintiff comes to this Court seeking a judicial blessing of its business model and approval of its tortured statutory construction. As shown more fully below, Plaintiff's claims fail as a matter of law. Plaintiff purchased the Property subject to Wells Fargo's deed of trust, failed to tender all amounts due under the deed of trust, and thus, is not entitled to quiet title in its name or to object to the pending foreclosure sale. Because Plaintiff cannot demonstrate a reasonable probability of success on the merits, its Motion for injunctive relief must be denied, and the Countermotion to Dismiss must be granted

II. RELEVANT FACTUAL BACKGROUND

A. Loan History and Foreclosure Documents.

On or about September 21, 2007, Donald K. Blume and Cynthia S. Blume (the "Blumes") obtained a loan in the amount of $417,000 from Universal American Mortgage Company, LLC ("Universal") for the purchase of the real property located at 10209 Dove Row Avenue, Las Vegas, Nevada, APN 126-13-818-046 (the "Property").[10] Universal recorded its deed of trust on September 28, 2007 ("Deed of Trust" attached as Exhibit 4 to RJN.)[11]

At some point thereafter, the Blumes stopped making payments due under the Deed of Trust, and allegedly stopped paying their HOA dues as well. (*See generally* exhibits attached to RJN.) The Blumes' HOA, Westminster at Providence, recorded a lien on August 5, 2010 and a notice of default on September 30, 2010 – approximately three years after Universal recorded its Deed of Trust. ("HOA Lien" and "HOA Default" attached as Exhibits 5 and 6 to RJN.) On March 10, 2011, Wells Fargo recorded its Notice of Default and Election to Sell. ("Wells Fargo Notice of Default" attached as Exhibit 7 to RJN.)

[10] Universal is not a party to this action.

[11] Wells Fargo is the successor in interest to Universal, and is the current beneficiary and holder of the Deed of Trust at issue, a fact that Plaintiff does not contest. *See* Mot. 2:3-4, wherein Plaintiff acknowledges that Wells Fargo is the beneficiary.

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

On January 31, 2012, Westminster at Providence recorded a notice of sale.[12] ("HOA Notice of Sale" attached as Exhibit 8 to RJN.) Westminster at Providence conducted its foreclosure sale on August 3, 2012. ("HOA Foreclosure Deed" attached as Exhibit 3 to RJN.) At the HOA foreclosure sale, Plaintiff purchased the Property for $10,500.00, and recorded the HOA Foreclosure Deed on August 9, 2012. ("HOA Foreclosure Deed" attached as Exhibit 3 to RJN.) Plaintiff clearly had knowledge of Wells Fargo's priority security interest when it purchased the Property because Wells Fargo's Deed of Trust was recorded approximately five years earlier; and Wells Fargo's Notice of Default was recorded approximately 17 months earlier. Since Plaintiff's purchase of the Property, Plaintiff has failed to make any mortgage payments due to Wells Fargo pursuant to its Deed of Trust, a fact Plaintiff does not dispute.

Therefore, on March 26, 2013, Wells Fargo recorded the Nevada Foreclosure Mediation Certificate which authorizes Wells Fargo to proceed with its foreclosure sale. ("Mediation Certificate" attached as Exhibit 9 to RJN. Also on March 26, 2013, Wells Fargo recorded its Notice of Trustee Sale, noticing the foreclosure sale for April 26 2013. ("Wells Fargo Notice of Sale" attached as Exhibit 10 to RJN.) On March 28 2013, Plaintiff filed its Complaint. And on March 29, 2013, in an effort to enjoin Wells Fargo from protecting its first priority secured interest and quiet title in its own name, Plaintiff filed this Motion for injunctive relief.

B. Recent Decisions in Identical Cases.

Both the Eighth Judicial District Court and the District of Nevada have found that claims identical to Plaintiff's are legally untenable and fail as a matter of law. For example, in Daisy One (Plaintiff's prior and failed attempt to quiet title), Judge Silver found that:

1. Plaintiff's complaint for quiet title and declaratory relief fails to state a claim upon which relief can be granted pursuant to Nevada Rule of Civil Procedure 12(b)(5).

2. Pursuant to Nevada Revised Statute ("NRS") 116.3116(2)(b) a *homeowners association lien is subordinate to a first security interest* on the unit recorded before the date on which the assessment sought to be enforced became delinquent.

[12] Both the HOA Default and HOA Notice of Sale do not mention or otherwise indicate that they are foreclosing on only the superpriority portion of the HOA's lien. Instead the HOA foreclosed upon its entire lien in direct violation of NRS 116.3116(b)(2). In the event this action is not summarily denied, Wells Fargo will consider filing a counterclaim for breach of NRS 116.3116(b)(2) and invalidation of the HOA foreclosure sale.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

> 3. The super priority status of a homeowners association lien identified in NRS 116.3116(2) *allows only for a priority to payment*, relative to a first security interest, entitling the homeowners association to payment of the super priority amount only, prior to payment of a foreclosing first security interest lienholder.
>
> 4. A *homeowners association's foreclosure of its super priority lien does not extinguish a first security interest on the property* recorded before the date on which the assessment sought to be enforced became delinquent.

(*See* Daisy One Order, attached as Exhibit 1 to RJN, emphasis added.) Based upon these findings, the Court denied Daisy Trust's request for injunctive relief and dismissed Daisy Trust's complaint in its entirety and with prejudice. (Daisy One Order, attached as Exhibit 1 to RJN.) The Daisy One Court did not mince words when characterizing the conduct at issue here and the plethora of identical cases now populating the district court: "I have so many of these, and I've had a - - I just had one last week that I said it's probably criminal and borderline fraud." (Daisy One, Reporter's Transcript of Proceedings, 5:4-11.)

Additionally, Dept. XXX recently granted a lender's motion to dismiss finding that the super-priority lien at issue "is not a standalone lien that a homeowners association can foreclose upon constituting a senior position to all prior first security interests," instead "the 'super priority' lien establishes a payment priority relative to a first security interest," and "[f]oreclosure by a homeowners association of its 'super priority' lien does not extinguish a first security interest on the property recorded before the date on which the assessment sought to be enforced became delinquent." (*Sanucci Ct. Trust v. Elevado,* Case No. A-12-670423, Dept. XXX, Order ¶¶ 2 and 3, entered March 20, 2013, attached as Exhibit 11 to RJN ("*Sanucci* Order"), emphasis added.)

In *SBW Investments, LLC v. Elsinore, LLC et al*, Case No. A-13-675541-C, Dept. XVII, the court granted Elsinore's motion to dismiss finding, in relevant part, that:[13]

> 2. NRS 116.3116 does not state that foreclosure of an HOA lien extinguishes the senior deed of trust or lien.
>
> ....

[13] Defendant Elsinore, LLC purchased the property at the lender's foreclosure sale, after the Plaintiff SBW purchased the property at an HOA foreclosure sale of the HOA's alleged super-priority lien. Defendant Elsinore asserted arguments and defenses identical to those that a lender would have asserted.

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

4. The *HOA's super-priority lien only creates a priority to payment* from foreclosure proceeds.

5. The *HOA's foreclosure sale of its lien per NRS 116.3116 did not extinguish Defendant BNYM's deed of trust, as a matter of law*, because BNYM's deed of trust was recorded prior to the HOA lien and Plaintiff SBW purchased the property with notice of BNYM's first in time deed of trust.

SBW Investments, LLC v. Elsinore, LLC et al, Case No. A-13-675541-C, Dept. XVII, Order Granting Defendant Elsinore's Motion to Dismiss, entered on May 9, 2013, attached as Exhibit 12 to RJN, emphasis added.)

Moreover, in *Centeno v. Maverick Valley Properties, LLC, et al*, Case No. A-12-654878, Dept. XXIV, the court granted Defendant Maverick Valley's motion to dismiss finding that the "First DOT was not extinguished by the HOA foreclosure." (*Centeno* Order 4:2, attached as Exhibit 13 to RJN.) Additionally, the court found that an HOA "[a] purchaser that obtains title pursuant to NRS 116.31166(3) does not receive an interest in the Property that is senior to a first security interest as defined in NRS 116.3116(2)(b)" and "the person conducting the sale can only deliver to the purchaser a deed without warranty which conveys to the purchaser all title of the unit's owner to the unit." (*Centeno* Order 6:13, attached as Exhibit 13 to RJN.)

Finally, the United States District Court for the District of Nevada has also addressed this exact issue, and ruled consistently with the above opinions. The District of Nevada held that "NRS 116.3116(2)(c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, *but it does not eliminate the first security interest.*" *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2:12-CV-00949-KJD, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013.) The Court further held that "the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the *purchaser at the sale takes the property subject to the security interest.*" *Diakonos*, 2013 WL 531092, at *3.

This case does not present any new facts to the Court. The same claims have been argued, and litigated, and re-litigated, in hopes of finding a more favorable forum to bless plaintiffs' requested windfall. Despite Plaintiff's urging, this Court should resist that temptation.

Snell & Wilmer LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

III. LEGAL ARGUMENT

A. Legal Standard for Injunctive Relief.

"A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy." *No. One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 780-81, 587 P.2d 1329, 1330 (1978); *Winter v. Nat. Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (holding that to obtain injunctive relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.")

A preliminary injunction "'is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*quoting* 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995)) (emphasis in original). Notably, within the context of dispositive motions, the *Mazurek* court noted that the burden on the movant seeking a preliminary injunction is *much higher* than a movant who seeks summary judgment. *Mazurek*, 520 U.S. at 972 ("what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher"). This Court must also "weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (citing *Clark County Sch. Dist. v. Buchanan,* 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).)

Here, Plaintiff cannot carry its burden of proof by any showing, let alone one that is clear and convincing. Accordingly, the pending motion should be denied in its entirety. Plaintiff is not likely to succeed on the merits, cannot show irreparable harm, and the balance of hardships and the interest of the public weigh heavily in favor of Wells Fargo.

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5700

B. Plaintiff Will Not Prevail On the Merits of its Underlying Claim.

1. Plaintiff's claims for declaratory relief and quiet title fail as a matter of law because the express language of the Statute subordinates the HOA Lien to Wells Fargo's Lien.

Because Plaintiff's claims fail as a matter of law for one very basic reason – NRS 116.3116 does not allow for a first security interest to be extinguished as a result of an HOA's foreclosure of its super-priority lien. Plaintiff's suggestion that it does contradicts the express language of the Statute. "It is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit." *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dept.*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) (holding that "when a statute is facially clear, we will generally not go beyond its language in determining the Legislature's intent.") When interpreting a statute, this Court "must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'" *S. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (citing *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) overruled on other grounds); *see also Pub. Employees' Benefits*, 179 P.3d at 548 (holding that statutes must be construed as a whole, so that no part is rendered meaningless.)

Accordingly, "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme '*harmoniously with one another* in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *S. Nevada Homebuilders*, 117 P.3d at 173 (emphasis added) (citing *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)); *see also Weston v. Lincoln County*, 98 Nev. 183, 185, 643 P.2d 1227, 1229 (1982) (holding that it is the court's "obligation to construe statutory provisions in such a manner as to render them compatible whenever possible"); *Commodity Futures Trading Comm'n v. White Pine Trust Corp.*, 574 F.3d 1219, 1225 (9th Cir. 2009) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (holding that "[t]he court will not render any part of the statute meaningless, and will not read the statute's language so as to produce absurd or unreasonable results.").)

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5700

In this case, the Statute is clear and unambiguous in its requirement that an HOA lien "is ***prior to all other liens*** and encumbrances on a unit ***except***: . . . (b) A ***first security interest on the unit recorded before the date*** on which the assessment sought to be enforced became delinquent...." NRS 116.3116(2)(b) (emphasis added.) Such is the case here. Because there is no ambiguity in the statutory language, the law must be complied with as written.

To prevail, Plaintiff must demonstrate that the HOA's notice of delinquent assessment was recorded before Wells Fargo's Deed of Trust. *See Centeno v. Mortgage Elec. Registration Sys., Inc.*, Case No. 2:11-cv-02105-GMN-RJJ, 2012 WL 3730528, at *3 (D. Nev. Aug. 28, 2012) (holding that without an allegation that the HOA lien "chronologically precedes" the deed of trust and without submission of the first in time lien, a claim under NRS 116.3116(2) fails.) Plaintiff has not, and cannot, allege that the HOA lien was recorded first. Instead, Plaintiff admits, as it must, that Wells Fargo's Deed of Trust was recorded on September 28, 2007, approximately three years before the date the HOA lien was recorded on August 5, 2010. (Mot. 2:3-4.) Because Plaintiff cannot allege any facts to support this central element, its claims for relief fail as a matter of law. *Centeno,* 2012 WL 3730528, at *3.

Moreover, Plaintiff's interpretation of the Statute creates an absurd result by rendering a portion of the Statute meaningless and incompatible with its facial intent. Specifically, Plaintiff's interpretation effectively eliminates an express statutory provision. Under Plaintiff's strained construction, NRS 116.3116(2)(b) grants the holder of a first security interest priority over an HOA lien, only to take that priority away in the very next provision. If the Legislature intended such an absurd the result, it could have avoided any ambiguity by simply omitting subsection (2)(b) from that statute, stating that the HOA lien is senior to "all other liens and encumbrances on a unit." But the Legislature chose not to omit section (2)(b), and this Court is obligated to read the Statute so as not to render any provision meaningless. *TRW Inc.*, 534 U.S. at 31. This canon of construction should have a profound effect on the pending action. Because Plaintiff's proffered interpretation of NRS 116.3116(2) produces an absurd result – the complete evisceration of an express statutory provision – it should not be given the force of law in the pending action.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5700

Although Plaintiff contends that its statutory interpretation "is the only rational, logical interpretation, that would not lead to absurd results," that assertion simply shocks the reasonable mind. (Mot. 6:11-12.) In fact, it is Plaintiff's suggested interpretation that fails to harmoniously interpret conflicting provisions and fails to avoid unreasonable or absurd results. *See S. Nevada Homebuilders,* 117 P.3d at 173 (citing *Charlie Brown Constr.*, 797 P.2d at 949, overruled on other grounds.) Because Plaintiff's interpretation flies in the face of Nevada's longstanding rules of statutory construction, renders the HOA lien subordination provision meaningless, and effectively eliminates every first priority deed of trust in similar circumstances, Plaintiff's radical interpretation should not be countenanced by this Court.

As set forth above, this Court is obligated to reconcile and harmonize statutes as a whole and render the provisions compatible with each other. The appropriate way to ensure compatibility and avoid an absurd result is to require the entity in first position *to pay* the super-priority portion of the HOA lien upon foreclosure, not eviscerate a first priority deed of trust. Alternatively, if the HOA forecloses first, the first priority deed of trust may be *reduced*, only to the extent of the limited super-priority payment to which the HOA may be entitled, but not extinguished in its entirety. This reconciliation satisfies the intent of the drafters - creating a limited super-priority to *payment*, not to title of the Property.

2. Plaintiff's claims for declaratory relief and quiet title fail as a matter of law because the legislative intent establishes that the super-priority is only a priority to payment, not to title.

In spite of an express provision subordinating an HOA lien to a first-in-time Deed of Trust, the parties nevertheless disagree on the Statute's basic interpretation. When a statute is ambiguous, that is, it "is capable of being understood in two or more senses by reasonably informed persons," or when it does not address the issue at hand, we may look to reason and public policy to determine what the Legislature intended. *Pub. Employees' Benefits,* 179 P.3d at 548. "[W]e turn to the statute's historical background and spirit, reason, and public policy to guide us in our interpretation." *Id.*

NRS 116.3116 is based on the Uniform Common Interest Ownership Act (the "Uniform Act") which was drafted by the National Conference of Commissioners on Uniform State law

and has been enacted in Nevada and seven other states. The drafters of the Uniform Act explained that the super-priority provision was intended to protect the security interest of lenders by stating: "priority for the assessment lien strikes an ***equitable balance between*** the need to enforce collection of unpaid assessments and the ***obvious necessity for protecting the priority of the security interests of lenders.***" UNIFORM COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (1994) (amended 2008) (emphasis added.) Not surprisingly, Plaintiff ignores this language. Instead, Plaintiff cites to commentary which notes that "as a practical matter, mortgage lenders will most likely pay the 6 month's assessments . . . rather than having the association foreclose on the unit." (Mot. 8:25-27.)[14] Upon closer inspection, this commentary actually supports Defendant's construction that the HOA priority is a priority to payment, not title. Moreover, the comment never states that an HOA foreclosure extinguishes the first in time deed of trust.

Indeed, as clearly expressed in the original drafters' commentary, the intent of the super-priority is to create an "equitable balance" between the unique needs of the HOA resulting from foreclosures and the "*obvious necessity for protecting the priority of the security interests of lenders.*" UNIFORM COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (1994) (amended 2008). This demonstrates the drafters clear intent that a first security interest should be protected.

Additionally, the Nevada Legislature recently amended the Statute to increase the super-priority portion from 6 months to 9 months of assessments (notably the Legislature rejected a proposal to increase to 2 years.)[15] In hearings on that issue, the Legislature noted the intent and purpose of the Statute. "The objectives are, first and foremost, to help homeowners, *banks*, and investors *maintain their property values*; help common-interest communities mitigate the adverse effects of the mortgage/foreclosure crisis; help homeowners avoid special assessments resulting from revenue shortfalls due to fellow community members who did not pay required fees; and, prevent cost-shifting from common-interest communities to local governments."

---

[14] Notably, this comment immediately follows the comment establishing the drafters express intent to protect lenders' security interests, which Plaintiff ignores. UNIFORM COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (1994) (amended 2008).

[15] Seventy-fifth Nevada Legislative Session in 2009, Assembly Bill 204.

(Meeting Minutes, attached as Exhibit 14 to RJN, emphasis added.) At no point does the legislative history indicate that the expanded super-priority was intended to enable a real estate speculator to obtain title to property worth hundreds of thousands of dollars, for pennies on the dollar, free and clear of the deed of trust that the HOA's lien is expressly subordinated to.

Additionally, in her recent law review article, Andrea J. Boyack, visiting professor at Fordham University Law School, considered this precise issue and explained the intention of the HOA super-priority provision in the following manner:

> The six-month capped "super-priority provision of the association lien ***does not have a true priority status*** under UCIOA since the six-month assessment lien ***cannot be foreclosed as senior to a mortgage lien***. Rather it creates a ***payment priority*** for some portion of unpaid assessments, which would take the first position in the foreclosure repayment "waterfall," or grants durability to some portion of unpaid assessments allowing the security for such debt to survive foreclosure.[16]

Plaintiff's interpretation of the Statute defies common sense and nullifies the drafters' express intent to protect first security interests. Plaintiff would have this Court believe that NRS.116.3116 creates a legal "gotcha" by enabling purchasers of a distressed property to acquire the property, oftentimes worth several hundred thousand dollars, for mere pennies on the dollar, while leaving the lender without a remedy. Plaintiff asks this Court to condone a position that would enable investors to reap tremendous windfalls at the expense of lenders who advanced millions of dollars to Nevada homeowners in good faith reliance upon NRS 116.3116's express subordination provisions.

It is simply defies logic and common sense for Plaintiff to suggest that the intended purpose and result of the Statute was to wipe out first security interests. Such an interpretation would lead to massive disruption of the entire lending scheme, cost lenders hundreds of millions, if not billions of dollars, prohibit residential lending in Nevada, and interfere with the recovery of Southern Nevada's real estate market. Moreover, such purchases, and the litigation generated by them, reduce the overall property values in the Las Vegas Valley, at a time when

---

[16] Boyack, Andrea J., "*Community Collateral Damage: A Question of Priorities*", Loyola University Chicago Law Journal, p. 99 (vol. 43, 2011).

(for the first time in years) values are actually beginning to slowly increase. Such drastic value reductions counteract the increases that our market desperately needs, frustrates the long-overdue recovery, and would be devastating to the homeowners and citizens of Nevada.

3. Plaintiff's claims fail as a matter of law because Plaintiff purchased the Property subject to Wells Fargo's Deed of Trust.

NRS 116.31166 states that: "The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 ***vests in the purchaser the title of the unit's owner*** without equity or right of redemption." (emphasis added.) This language establishes that the purchaser at an HOA lien sale, such as the sale at issue here, purchases the same title the prior owner held. In this case, Plaintiff purchased the identical ownership interest of the prior owners, the Blumes. As established by the recorded documents, the Blumes held title to the Property *subject to* Wells Fargo's Deed of Trust. (Wells Fargo's Deed of Trust, attached as Exhibit 4 to RJN.) In fact, the HOA Foreclosure Deed expressly states that the transfer is "without warranty expressed or implied." (HOA Foreclosure Deed, attached as Exhibit 3 to RJN.) Thus, Plaintiff cannot come to this Court in good faith, in an attempt to strip lenders and prior lienholders of their rights, when Plaintiff's own deed, on its face, does not guarantee a transfer free of other liens and encumbrances.

Pursuant to NRS 116.31166 and the HOA Foreclosure Deed itself, Plaintiff's title, like the Blumes' title before it, is subject to Wells Fargo's Deed of Trust. Plaintiff purchased the same title that the prior owner held, nothing more. Just as the Blumes' title was subject to Wells Fargo's Deed of Trust, so too is Plaintiff's. As such, Plaintiff's claims for quiet title and declaratory relief fail as a matter of law.

4. Plaintiff's claims fail as a matter of law because Plaintiff is NOT a Bona Fide Purchaser.

To quiet title in its name, Plaintiff must do more than just challenge the title of another party – Plaintiff must establish that it has good title. *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996) (holding that "[i]n a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself.") In order to claim rights and protections afforded to

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

a bona fide purchaser for value, a purchaser must establish that "the purchase was made in good faith, for a valuable consideration; that the purchase price was wholly paid, and that the conveyance of the legal title was received before notice of the equities of [other parties]." *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 101, 106 (1880); *see also Hewitt v. Glaser Land & Livestock Co.*, 97 Nev. 207, 208, 626 P.2d 268, 269 (Nev. 1981).

The Eighth Judicial District Court has already ruled that similarly situated plaintiffs cannot succeed on identical claims because they are not bona fide purchasers. *Design 3.2 LLC v. Bank of New York Mellon,* Case No. A-10-621628, Dept. XV.[17] ("*Design 3.2* Order" attached as Exhibit 15 to RJN.) In *Design 3.2*, the Court granted summary judgment in favor of the lender, holding that the plaintiff was not a bona fide purchaser. The Court found that because the plaintiff purchased the property "with actual or constructive knowledge of [the lender's] interest" (as it was recorded approximately three years prior to the plaintiff's purchase), and because plaintiff did not pay valuable consideration for the property (since the amount of the deed of trust was $576,000 and the plaintiff purchased for only $3,743.84), then summary judgment in favor of the lender was proper. (*Design 3.2* Order, Exhibit 15 to RJN.) Additionally, this Court held that the lender's first security interest "was not extinguished by the foreclosure sale of the HOA and the plaintiffs took title of the property subject to the [deed of trust] pursuant to NRS 116.3116." (*Design 3.2* Order, Exhibit 15 to RJN.)

Plaintiff cannot demonstrate that it is a bona fide purchaser. First, it cannot be disputed that Plaintiff had knowledge of the equities in this case. Plaintiff acquired the Property approximately five years after Wells Fargo's Deed of Trust was recorded, and approximately seventeen months after Wells Fargo's Notice of Default was recorded. As such, Plaintiff was placed on notice of the existence of Wells Fargo's first in time lien and that the lien was senior in priority to the HOA's lien. NRS 111.320 states that "Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the

[17] Defendant acknowledges that this and other unpublished orders identified herein are not binding authority. However, as this is an issue of first impression yet to be decided by the Supreme Court, this order addressing the identical issue presently before this Court, provides guidance and persuasive authority.

Secretary of State or recorder for record, *impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.*" NRS 111.320 (emphasis added.) Given this constructive notice, Plaintiff cannot maintain that it did not have notice of the "equities" of the case.

Second, the purchase was not made for valuable consideration and the price paid was not commercially reasonable. Plaintiff purchased the Property for the sum of $10,500.00. (HOA Foreclosure Deed, attached as Exhibit 3 to RJN.) The original loan amount was $417,000.00 – almost forty times the amount Plaintiff paid for the Property. (Wells Fargo's Deed of Trust, attached as Exhibit 4 to RJN.) Moreover, zillow.com estimates the value today at $381,883 – approximately thirty-six times the amount Plaintiff paid for the Property.

Notably, Vermont, which has also adopted the Uniform Act, has voided an HOA foreclosure sale where the price paid was merely the small amount due to the HOA. Section 3-116(q) of the Uniform Act states that "[e]very aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and *terms*, must be *commercially reasonable*."[18] (emphasis added.) The Vermont Supreme Court voided the foreclosure sale, holding that sale of the property for $3,510.10 was not commercially reasonable when the property had a fair market value of $70,000. *Will v. Mill Condominium Owners' Ass'n*, 176 Vt. 380, 388-89, 848 A.2d 336 (Vt. 2004.) As in *Will*, the Plaintiff's purchase is commercially unreasonable as it is not valuable consideration where the fair market value is approximately thirty-six times the amount Plaintiff paid for the Property. Plaintiff is not a bona fide purchaser because its purchase price was grossly inadequate and it took with knowledge of Wells Fargo's first security interest. Therefore, Plaintiff cannot quiet title in its name, and its claims fail as a matter of law.[19]

---

[18] While the Nevada Legislature did not adopt subsection (q) of Section 3-116, this section is relevant to understand the original purpose and intent of the Act – to ensure protection of the first in time security interests.

[19] If this case is not dismissed, Wells Fargo will consider filing a counterclaim against Plaintiff seeking to invalidate the foreclosure sale for inadequate consideration. Plaintiff's purchase price is inadequate and grossly unfair, especially where Plaintiff had knowledge of Wells Fargo's first-in-time Deed of Trust. "To say that a mortgagee with power to sell, who has an incumbrance [sic] on the estate of less than one-third of its value--an incumbrance [sic] which five or six months' rent will discharge--has the right to sell the estate absolutely to the first man he meets who will pay the amount of incumbrance [sic], without any attempt to get a larger price for it, would in our opinion be equivalent to saying fraud and oppression shall be protected and encouraged." *Runkle v. Gaylord*, 1 Nev. 123, 129 (1865.) *See also Golden v. Tomiyasu*, 79 Nev. 503, 504, 387 P.2d 989 (1963) (holding that inadequacy of price plus

C. Plaintiff's Reliance Upon the Real Estate Division's Advisory Opinion Is Misplaced.

To support its construction, Plaintiff cites to the State of Nevada's Department of Business and Industry, Real Estate Division's Advisory Opinion on the calculation and determination of the super-priority assessment amount under NRS 116.3116(2) ("Advisory Opinion" attached as Exhibit 3 to Mot.). Plaintiff's reliance on the Advisory Opinion fails for the following reasons.

First, the issue of whether a first priority deed of trust is extinguished by an HOA foreclosure sale under the Statute was not presented to, or addressed by, the Real Estate Division. Instead, the issues presented were limited to the calculation and determination of the assessment amount, and action required to invoke the statutory protections.[20] The Real Estate Division did not consider and did not determine the issue of lien extinguishment, thus any commentary on that point is dicta, and not binding.

A statement in an opinion is dictum when it is "unnecessary to a determination of the questions involved." *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009); citing *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941)). Dicta is not controlling. *Argentena Consol.*, 216 P.3d at 785; *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). The statements upon which Plaintiff relies in the Advisory Opinion are unnecessary to determine the three issues presented to the Real Estate Division. As such, they are dicta and are not controlling on the issues presented in the pending motion.

Second, this Advisory Opinion, from an administrative branch of state government, is not the law of Nevada. The Supreme Court of Nevada has previously held that opinions from a state

---

fraud, unfairness, oppression, or other bad conduct, may be sufficient to set aside a sale); *Will v. Mill Condominium Owners' Ass'n*, 176 Vt. 380, 388-89, 848 A.2d 336 (Vt. 2004) (voiding an HOA super-priority foreclosure sale holding that sale of the property for $3,510.10 was not commercially reasonable when the property had a fair market value of $70,000); and *Design 3.2* Order.

[20]The only issues presented and decided were: (1) whether the costs of collecting the assessments could be included in the limited super-priority portion; (2) whether the super-priority amount could exceed nine months of assessments; and (3) whether the HOA was required to institute a "civil action." (Advisory Opinion, p. 1, attached as Exhibit 3 to Mot.)

or governmental agency do not constitute binding law. "Obviously, *the responsibility of interpreting statutes belongs to the courts; and even if the Commission took it upon itself to render an advisory legal opinion, it is the duty of the court to determine the legal meaning of a statute, de novo.*" *Nevada Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 17, 866 P.2d 297, 307 (1994) (emphasis added) (in its ruling that the Nevada Ethics Commission had no authority to interpret statutes or contracts and its advisory opinion was not law) (citing *Maxwell v. SIIS*, 109 Nev. 327, 849 P.2d 267 (1993). Additionally, the Nevada Supreme Court has held that "[t]hat Commission *can only advise. Its opinion carries no binding force.*" *Dunphy v. Sheehan*, 92 Nev. 259, 264, 549 P.2d 332, 336 (1976) (emphasis added). Moreover, the Nevada Supreme Court has held that the Nevada Ethics Commission "is a lay body in the executive department of government. It has no power to adjudicate 'violations' of the law much less to invalidate contracts." *Nevada Comm'n on Ethics*, 866 P.2d at 305.

The Nevada Supreme Court is not alone in finding that opinions of government or administrative agencies are not binding on a court of law. Indeed, the U.S. Supreme Court has held that "[t]he rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944) (the agency at issue here is the Administrator of the Fair Labor Standards Act).) The Real Estate Division of the Department of Business and Industry is an administrative agency, similar to the Nevada Ethics Commission or the Administrator of the Fair Labor Standards Act. The Real Estate Division's interpretation of any law is not binding.

Plaintiff correctly describes the Nevada Supreme Court's decision in *State Dept. of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Services, Inc.*, by stating that the "Nevada Supreme Court in late 2012 has recognized that the Nevada Real Estate Division of the Department of Business and Industry is responsible for interpreting NRS 116 and issuing advisory opinions

related to the extent and priority of the HOA super-priority lien." (Opp'n 6:13-19.) 294 P.3d 1223, 1227-28 (Nev. 2012.) *Nevada Ass'n Services,* however, does not hold or imply that a court is bound by any advisory opinion issued by any administrative agency in Nevada. Rather, it only addressed the sterile issue of *which administrative agency* had authority to issue advisory opinions regarding NRS 116 – the Department of Business and Industry or the Real Estate Division. *Id.* at 1227-28. *Nevada Ass'n Services* does not prohibit a Nevada court from interpreting NRS 116. Indeed, as detailed above and as previously held by the Nevada Supreme Court and the United States Supreme Court, advisory opinions by an administrative or governmental agency are not binding authority.

While we acknowledge that these types of advisory opinions may be considered by the Court, they are not binding. This is an issue of first impression, yet to be decided by the Nevada Supreme Court. Moreover, other departments of this Court and the Eighth Judicial District Court have already ruled on this identical issue and rejected the Real Estate Division's Advisory Opinion.[21] In the face of these thoughtful opinions, any reliance on the non-binding advisory opinion is ill advised at best.

D. <u>Plaintiff's Reliance Upon the *Summerhill* Case Is Likewise Misplaced.</u>

Plaintiff's reliance upon *Summerhill Village Homeowners Association v. Roughly* is similarly misplaced. 289 P.3d 645 (Wa. 2012). First, the issue presented to the Washington court was whether the lender had a right to *redemption*, after a *judicial* foreclosure, under the governing Washington *redemption* statute. *Id.* at 646. This opinion interprets Washington's redemption statute, not its condominium associations' super-priority lien statute. *Id.* at 649. The *Summerhill* court was not presented with, and thus did not determine, whether the lender's first security deed of trust was extinguished – the issue presented here.[22] *Id.* at 645. Presently, this Court is not interpreting Wells Fargo's right of redemption under Nevada law; indeed NRS 116.3116 does not even include a right of redemption.

---

[21] *See* n.1 *supra.*

[22] Any commentary on the extinguishment issue is dicta and not mandatory authority, as set forth herein. Moreover, even if the court had ruled on the extinguishment issue, the opinion is not binding upon a Nevada state court interpreting a different statute.

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

Second, the dispute in *Summerhill* arose out of an HOA *judicial* foreclosure of its super-priority lien, not a *non-judicial* foreclosure, as in this case. *Id.* at 646. The procedures and requirements for judicial verses non-judicial foreclosure are very different. Namely, the notice requirements under judicial foreclosure are much more stringent in that the defendant must actually be personally served with the summons and complaint. Contrast that with NRS 116.31163 which requires notice to the lender only under very limited circumstances.[23] Additionally, unlike NRS 116.3116, judicial foreclosure in the Washington case allows for a period of redemption, which exists to cure defects in the foreclosure process. Finally, under RCW 64.34.364, (which Plaintiff attempts to analogize to NRS 116.3116) if an HOA elects to foreclose *non-judicially*, the HOA loses it super-priority status![24] Thus, the statute at issue in *Summerhill* actually rejects Plaintiff's super-priority contention in cases of non-judicial foreclosure. Because a judicial foreclose action cannot be analogized to a non-judicial action, Plaintiff's reliance upon *Summerhill* is misplaced.

Third, the Washington statute at issue in *Summerhill*, RCW 64.34.364, expressly applies to *condominium* associations *only*. The relevant provisions governing homeowners associations are governed by a separate set of statutes and, in fact, do not provide for a comparable homeowners' association lien. (*See generally* RCW 64.38.) Notably, the definition of "homeowners' association" expressly excludes condominium associations governed by RCW 64.34, stating that a "'[h]omeowners' association' *does not mean an association created under chapter 64.32 or 64.34 RCW.*"[25] RCW 64.38.010(11). Because the relevant association here is a homeowners association, not a condominium association, Plaintiff's reliance on *Summerhill* is misguided.

---

[23] Under NRS 116.31163, an HOA must only give notice to a "holder of a recorded security interest encumbering the unit's owner's interest *who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest.*"

[24] RCW 64.34.364(5) which states that: "If the association forecloses its lien under this section *nonjudicially* pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association *shall not be entitled to the lien priority* provided for under subsection (3) of this section." RCW 64.34.364 and RCW 64.38.010 are attached hereto as **Exhibit 2** for ease of reference.

[25] While "condominium" is defined as "real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the unit owners, and unless a declaration and a survey map and plans have been recorded pursuant to this chapter." RCW 64.34.020(10).

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

E. Wells Fargo's Election Not to Pay the HOA Lien Amount Is Irrelevant.

Plaintiff states that Wells Fargo's Deed of Trust "requires the borrower to satisfy all HOA payments" and cites to Section 9 of the Deed of Trust. (Mot. 9:8-10.) Plaintiff's contention is a misstatement to this Court, and misrepresents Section 9. Plaintiff attempts to assert that because Wells Fargo elected not to pay the HOA Lien amount, Wells Fargo has waived its right to assert these defenses today. (Mot. 9-11.) Not only does Plaintiff misquote a provision of Wells Fargo's Deed of Trust, Plaintiff provides no legal support for its contention. The deed of trust provision Plaintiff relies on expressly states that the beneficiary "*may* do and pay for whatever is reasonable or appropriate to protect Lender's interest . . ." (Deed of Trust, § 9, attached as Exhibit 4 to RJN.) As this Court, and Plaintiff's counsel, well know, "may" is permissive – not mandatory.[26]

Conveniently, Plaintiff fails to include the last sentence of the operative provision in its briefing, which states that "[a]lthough Lender *may* take action under this Section 9, *Lender does not have to do so* and is not under any duty or obligation to do so. It is agreed that *Lender incurs no liability for not taking any or all actions* authorized under this Section 9." (Deed of Trust, § 9, attached as Exhibit 4 to RJN, emphasis added.) Plaintiff's contention is baseless and fails as a matter of law. Wells Fargo has not waived any rights or defenses to which it is legally entitled to assert in this Motion or this action.

F. Plaintiff Cannot Demonstrate Irreparable Harm.

As set forth above, Plaintiff cannot demonstrate a likelihood of success on the merits, and for that reason alone, injunctive relief should be denied. Even so, Plaintiff cannot establish irreparable harm, and has failed to even identify the irreparable harm it will allegedly suffer. Where there is an adequate remedy at law, injunctive relief cannot be granted. *Czipott v. Fleigh*, 87 Nev. 496, 498, 489 P.2d 681, 682-83 (1971) (explaining that injunctive relief is not an available remedy when a party has an adequate legal remedy whereby damages may be assessed and recovered) (citing *Sherman v. Clark*, 4 Nev. 138, 141 (1868); *Conley v. Chedic*, 6 Nev. 222

[26] "'[M]ay' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 451, 25 P.3d 175, 180 (2001) (citing *S.N.E.A. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992).)

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

(1870); *Thorn v. Sweeney*, 12 Nev. 251 (1877); *State ex rel. Mongolo v. Second Judicial District Court*, 46 Nev. 410, 211 P. 105 (1953).

Plaintiff cites to case law holding generally that real property is unique and the loss of real property results in irreparable harm. (Mot. 3-4.) However, the facts of those cases are distinguishable from the case at bar. In *Dixon*, the plaintiffs built a log cabin which they used as their home. *Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029, 1030 (Nev. 1987.) Similarly, in *Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 426, 836 P.2d 42, 44 (1992), the plaintiffs owned and resided in the property at issue. Such similar facts do not exist here. Plaintiff is a real estate speculator who purchases properties for profit. In fact, a review of the Clark County Assessor website shows that between August 9, 2012 and September 28, 2012 (a period of only 7 short weeks), Plaintiff purchased a total of 20 properties in Clark County; all at HOA foreclosure sales; and all for prices ranging from $3,700.00 to $11,300.00. (*See* Deeds, attached as Exhibits 4 and 16-33 to RJN.)[27] In light of Plaintiff's multiple Clark County purchases, it simply cannot represent in good faith that the Property in question is unique or serves as their primary residence. As such, it is not entitled to enhanced protection under the law.

Plaintiff is a shell entity formulated for the sole purpose of amassing business investments. It is not an individual or a family, and does not reside in the Property.[28] It simply leases the Property for profit, just like the other 19 properties Plaintiff purchased at similar HOA foreclosure sales over a 7 week timeframe. Nor is the Property unique to Plaintiff. It is simply a source of quick and easy revenue (especially since Plaintiff purchased the Property for $10,500.00, and likely charges between $2,000 to $3,000 for rent each month).[29] Because money damages are an adequate remedy under the facts of this case, injunctive relief is improper and Plaintiff's motion should be denied. *See Czipott,* 87 Nev. at 498, 489 P.2d at 682-83.

///

---

[27] *See also* "Daisy Trust HOA Purchases" identifying and summarizing these purchases as a demonstrative exhibit attached hereto as **Exhibit 3**.

[28] Notably, Plaintiff has created a trust, making it initially impossible to determine the actual individuals behind this business venture. Further, it is likely that whoever those individuals are, they have created multiple trusts, all purchasing multiple properties at similar foreclosure sales.

[29] *See* zillow.com data sheet, attached as **Exhibit 1** which identifies the rental value at $2,605 per month.

G. Granting Plaintiff's Request for Injunctive Relief Will Substantially Harm the Public Interest and Violates Public Policy.

If this Court enters a preliminary injunction, such relief will create a dangerous precedent for similar ongoing litigation and will embolden real estate speculators to pursue future litigation in furtherance of their business model. As discussed throughout this Opposition, the detrimental effect on Nevada homeowners and citizens from Plaintiff's course of conduct is severe. The end result will be devastating to the public who will be unable to obtain residential mortgages because lenders will refuse to loan in Nevada. Moreover, sanctioning property sales for pennies on the dollar will only reduce overall property values at a critical point in Nevada's recovery, when properties are finally, albeit slowly, increasing in value. As such, a ruling in favor of Plaintiff will have serious implications for all homeowners and citizens of Nevada. Balancing the equities of this case is not a close call. The equities not only favor Wells Fargo, they favor Nevada's homeowners and citizens who simply cannot bear the blow of a second collapse in the real estate market and a further diminution of their already depleted property values.

Plaintiff cannot succeed on the merits of its claims and has failed to demonstrate any cognizable irreparable harm. Because the interests of the public and the equities in play tip strongly in favor of Wells Fargo and Nevada's citizens, Plaintiff's motion should be denied in its entirety.

IV. COUNTERMOTION TO DISMISS

A. Legal Standard.

A defendant is entitled to dismissal of a claim when a plaintiff fails "to state a claim upon which relief can be granted." NRCP 12(b)(5). Moreover, because the subject matter of the motion to dismiss is identical to the subject matter of Plaintiff's motion for temporary restraining order and preliminary injunction, it is properly raised as a counter-motion pursuant to EDCR 2.20(d). A plaintiff fails to state a claim if it appears beyond a doubt, that the claimant can prove no set of facts that would entitle it to relief. *Buzz Stew, LLC v. City of North Las Vegas,* 181 P.3d 670, 672 (Nev. 2008); *Morris v. Bank of America*, 110 Nev. 1274, 1277, 886 P.2d 454, 456 (1994). In considering the motion, the court must accept all Plaintiff's factual allegations as true

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5700

and construe them in Plaintiff's favor. *Buzz Stew*, 181 P.3d at 672; *Morris*, 110 Nev. at 1276, 886 P.2d at 456. However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986); *see also George v. Morton*, No. 2:06-CV-1112-PMP-GWF, 2007 WL 680787, at *6 (D. Nev. March 1, 2007)[30] (stating that conclusory legal allegations and unwarranted inferences will not prevent dismissal). Even if Plaintiff's factual averments were true, Plaintiff can prove no set of facts that would entitle Plaintiff to relief. Accordingly, Plaintiff's claims must be dismissed as a matter of law.

Where a motion for dismissal is supported by documentation outside of the pleadings, the motion should be considered as a motion for summary judgment pursuant to NRCP 56. *See e.g. Lumbermen's Underwriting Alliance v. RCR Plumbing, Inc.*, 114 Nev. 1231, 1234, 969 P.2d 301, 303 (1998). However, if the materials are attached to or incorporated by reference in the complaint, or are matters of judicial notice, the motion need not be converted into one for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A document is incorporated by reference if the document is attached to the complaint, referred to extensively in the complaint, or forms the basis of plaintiff's claim. *Id.* at 908.

In considering a motion to dismiss, "the court may examine and rely on documents which the plaintiff was aware of and relied on in framing the complaint, even though the plaintiff did not attach the documents to the complaint or incorporate them by reference, as the necessity of translating a Rule 12(b)(6) motion into one for summary judgment is largely dissipated in this situation." *8 Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991); *see also In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 2002); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).[31]

///

---

[30] Federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when Nevada courts examine the Nevada Rules of Civil Procedure. *See, e.g. Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

[31] For example "[l]oan documents that were central to mortgagor's fraud claims against mortgagee and referred to and relied upon throughout operative complaint were appropriately considered on mortgagee's motion to dismiss." *Infante v. Bank of America Corp.*, 468 Fed. Appx. 918 (11th Cir. 2012).

B. Legal Argument.

As set forth in §§ III. B – E *supra*, Wells Fargo has established that Plaintiff cannot succeed as a matter of law. The arguments set forth therein are identical to those in support of this motion to dismiss. As such, dismissal of the Complaint with prejudice is appropriate at this time. This conclusion is buttressed by the prior dismissal of Plaintiff's identical claims before Judge Silver, as well as the numerous decisions issued by sister departments rejecting the same claims plead in this action.

Moreover, because Plaintiff and Wells Fargo have already litigated these identical issues and obtained a final judgment, Plaintiff is barred from bringing the same claims in the instant action, under the doctrine of collateral estoppel, or issue preclusion. "'The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties.'" *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998) (citing *University of Nevada v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) (quoting Charles A. Wright, Law of Federal Courts § 100A, at 682 (4th ed.1983)); *see also Sierra Pac. Power Co. v. Craigie*, 738 F. Supp. 1325, 1327-28 (D. Nev. 1990) (holding that "it is the record of the former case rather than the judgment that stands as a barrier to relitigation.") "The doctrine provides that any issue that was actually and necessarily litigated in [case I] will be estopped from being relitigated in [case II]." *Executive Mgmt.*, 963 P.2d at 473 (citing *Tarkanian*, 879 P.2d at 1191); *see also Sierra,* 738 F. Supp. at 1327-28.) Issue preclusion is established where: "'(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation'; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (citing *Tarkanian*, 110 Nev. at 599.)

"Issue preclusion prevents relitigation of an issue decided in an earlier action, even though the later action is based on different causes of action and distinct circumstances." *In re Sandoval,* 232 P.3d 422, 423 (Nev. 2010) (citing *Five Star Capital,* 124 Nev. at, 1056 (noting

that "while claim preclusion could not have applied because the two suits involved completely different occurrences at different locations, the 'authorized representatives' issue was the same in both cases, was decided on the merits in a final decision, involved the same government party, and was actually and necessarily litigated. Thus, issue preclusion applied to prevent relitigation of the issue.") (citing *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 171-72 (1984)); *see also Rizzolo v. Henry*, 2:12-CV-02043-APG, 2013 WL 1890665 (D. Nev. May 3, 2013) (noting that "issue preclusion prevents re-litigation of an issue decided in an earlier action, even though the later action is based on different causes of action and distinct circumstances.")

Additionally, the United States Supreme Court has held that issue preclusion applies, even when the claims arise out of a separate transaction or occurrence, and separate factual circumstances. *See Stauffer Chem. Co.*, 464 U.S. at 171-72. The Supreme Court found that "[a]ny factual differences between the two cases, such as the difference in the location of the plants and the difference in the private contracting firms involved, are of no legal significance whatever in resolving the issue presented in both cases." *Id.* at 172. The Supreme Court noted that there is no reason "to allow the [defendant] to litigate twice with the same party an issue arising in both cases from virtually identical facts. Indeed we think that applying an exception to the doctrine of mutual defensive estoppel in this case would substantially frustrate the doctrine's purpose of protecting litigants from burdensome re-litigation and of promoting judicial economy." *Id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).)

Here, issue preclusion applies and prohibits Plaintiff from re-litigating these identical claims. Plaintiff's asserted grounds for relief and causes of action in this current complaint (the "Daisy Two Complaint") and the prior Daisy One Complaint are identical. In fact, in some places the claims are copied word for word. Plaintiff alleges, in both complaints that it is entitled to ownership of the real property at issue, free and clear of Wells Fargo's first in time deed of trust, pursuant to NRS 116.3116(2).[32] Specifically, Plaintiff's first claim for injunctive relief in

[32] Both complaints state that "The interest of each of the defendants has been extinguished by reason of the foreclosure sale resulting from a delinquency in assessments due from the former owners [former owners] to the [HOA], pursuant to NRS Chapter 116." (Daisy Two Compl. ¶ 9, attached as Exhibit 34 to RJN; Daisy One Complaint ¶ 7, attached as Exhibit 35 to RJN.)

both complaints asserts "Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding." (Daisy Two Compl. ¶ 12, attached as Exhibit 34 to RJN; Daisy One Complaint ¶ 9, attached as Exhibit 35 to RJN.)

Plaintiff's second claim for declaratory relief asserts, identically in both complaints, that "Plaintiff is entitled to a determination from this court, pursuant to NRS Chapter 40.010 that the plaintiff is the rightful owner of the property and that the defendants have no right, title, interest or claim to the property." (Daisy Two Compl. ¶ 15, attached as Exhibit 34 to RJN; Daisy One Complaint ¶ 12, attached as Exhibit 35 to RJN.) Plaintiff's third claim for declaratory relief, again identical in both complaints asserts that "Plaintiff seeks a declaration form this court, pursuant to NRS 40.010, that title in the property is vested in plaintiff free and clear of all liens and encumbrances, that the defendants herein have no estate, right, title, or interest in the property, and that defendants are forever enjoined from asserting any estate, title, right, interest, or claim to the subject property adverse to the plaintiff." (Daisy Two Compl. ¶ 18, attached as Exhibit 34 to RJN; Daisy One Complaint ¶ 15, attached as Exhibit 35 to RJN.)

These identical contentions, which are purely legal issues involving interpretation of the same statutory framework, have already been rejected by the Eighth Judicial District Court, and Plaintiff is prohibited from re-litigating them now. Plaintiff has not only had the opportunity to, but actually has litigated these identical claims, and the Court already rejected them in the form of a final and appealable judgment. Issue preclusion prevents this Plaintiff from taking yet another bite at the apple. Wells Fargo should not be required to re-litigate identical issues between identical parties, which resulted in a final judgment against Plaintiff. Nor should this Court, with its scarce resources, be obligated to rehear them. Plaintiff's Complaint should be dismissed in its entirety.

///

///

///

///

///

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

V. CONCLUSION

For the reasons stated herein, Wells Fargo respectfully requests that the Court DENY Plaintiff's Motion for Preliminary Injunction in its entirety. Wells Fargo further requests that the Court GRANT its Countermotion to Dismiss.

Dated: May 21, 2013.

SNELL & WILMER L.L.P.

By: _____

Amy F. Sorenson, Esq.
Richard C. Gordon, Esq.
Robin E. Perkins, Esq.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169
Attorneys for Defendant Wells Fargo Bank, N.A.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **WELLS FARGO BANK, N.A.'S COMBINED OPPOSITION TO EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; OR ALTERNATIVELY FOR ORDER TO SHOW CAUSE -AND- COUNTERMOTION TO DISMISS** by the method indicated:

_____	U.S. Mail
_____	U.S. Certified Mail
_____	Facsimile Transmission
_____	Overnight Mail
_____	Federal Express
_____	Hand Delivery
X	Electronic Filing

and addressed to the following:

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn, Esq., Ltd.
376 E. Warm Springs Rd., Ste. 125
Las Vegas, NV 89119
mbohn@bohnlawfirm.com
Attorneys for Plaintiff

Richard J. Reynolds, Esq.
Burke, Williams & Sorensen, LLP
1851 E. First St., Ste. 1550
Santa Ana, CA 92705
rreynolds@bwslaw.com
Attorneys for MTC Financial Inc. dba Trustee Corps

Michael E Sullivan, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington St.
Reno, NV 89503
msullivan@rbsllaw.com
Attorneys for MTC Financial Inc. dba Trustee Corps

DATED May 21, 2013

An Employee of Snell & Wilmer LLP

17119824

EXHIBIT 1

EXHIBIT 1

10209 Dove Row Ave, Las Vegas, NV 89166

Sold on 10/21/11: $515,593

Zestimate®:$381,883

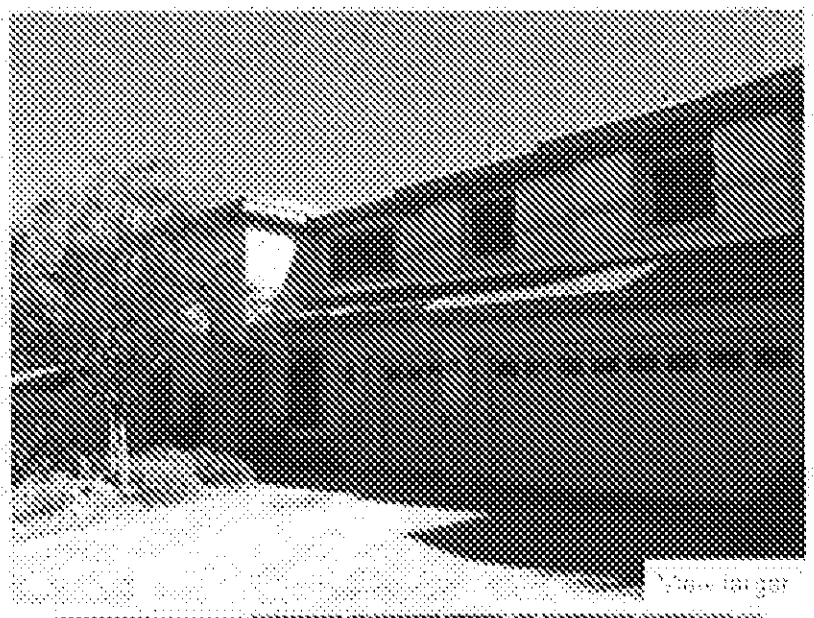
Est. Mortgage: $1,650/mo

See current rates on Zillow

Better Credit Scores Save Thousands

Bedrooms:	5 beds
Bathrooms:	3 baths
Single Family:	4,422 sq ft
Lot:	9,148 sq ft
Year Built:	2007
Last Sold:	Oct 2011 for $515,593
Heating Type:	Forced air

Photos Map Bird's Eye Street View



View larger

Correct home facts Save this home Get updates Email more

Description

ASK HOW TO GET YOUR FIRST MONTH FREE!!! Gorgeous 5bedroom home located in the northwest master plan of Providenceoffers a gated community and park-like neighborhood. Open and airyfloorplan with high ceilings, dramatic staircase and beautifulentry. This is a must see! Large master suite with sitting...

More

Cooling	Parking	Basement Type
Central	Garage - Attached	Unknown
Fireplace	**Floor Covering**	**Attic**
Unknown	Unknown	Unknown

More | Visit county website

Zestimates

	Value	Range	30-day change	$/sqft	Last updated
Zestimate	$381,883	$279K -- $485K	+$6,295	$86	05/12/2013
Rent Zestimate	$2,605/mo	$2.3K -- $3.3K/mo	+$72	$0.59	05/13/2013
Owner Estimate	Post your own estimate				
Market Guide	Zillow predicts Kyle Canyon home values will increase 7.5% next year, compared to a 5.4% rise for Las Vegas as a whole. Among Kyle...				

more

Zestimate Listing price Rent Zestimate more 1 year 5 years 10 years

Loading chart...

Contact a local agent

Get advice about selling a home

Sandi Oberling
(20 reviews)
Cell: (702) 900-6828

Billy Alt
(18 reviews)
Cell: (702) 900-0424

Leslie Ann Sherman
(3 reviews)
Cell: (702) 897-1885

Your Name

Phone

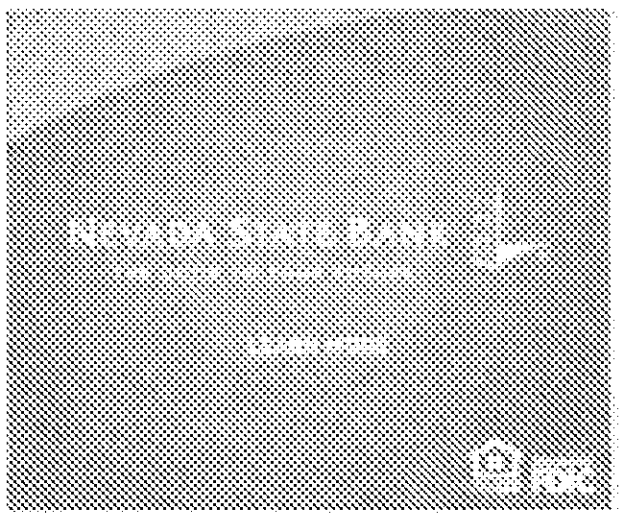
Email Address

I would like advice about selling a home similar to 10209 Dove Row Ave, Las Vegas, NV 89166

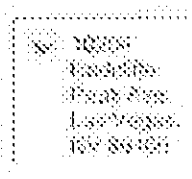
I want to get pre-approved.

Contact Agent

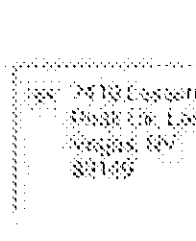
Learn how to appear in this list



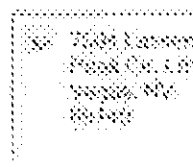
Similar Homes for Sale



10204 Radcliffe Peak A...
For Sale: $420,000
Beds: 5 Sqft: 3495
Baths: 3.0 Lot: 6969



7418 Lassen Peak Cir,...
For Sale: $400,000
Beds: 5 Sqft: 3800
Baths: 4.0 Lot: 10454



7504 Lassen Peak Cir,...
For Sale: $385,000
Beds: 5 Sqft: 3800
Baths: 4.0 Lot: 10018

See listings near 10209 Dove Row Ave

EXHIBIT 2

EXHIBIT 2

West's Revised Code of Washington Annotated
Title 64. Real Property and Conveyances (Refs & Annos)
Chapter 64.34. Condominium Act (Refs & Annos)
Article 3. Management of Condominium

West's RCWA 64.34.364

64.34.364. Lien for assessments

Currentness

(1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.

(2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. A lien under this section is not subject to the provisions of chapter 6.13 RCW.

(3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

(4) The priority of the association's lien against units encumbered by a mortgage held by an eligible mortgagee or by a mortgagee which has given the association a written request for a notice of delinquent assessments shall be reduced by up to three months if and to the extent that the lien priority under subsection (3) of this section includes delinquencies which relate to a period after such holder becomes an eligible mortgagee or has given such notice and before the association gives the holder a written notice of the delinquency. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section.

(6) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.

(8) A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes due.

(9) The lien arising under this section may be enforced judicially by the association or its authorized representative in the manner set forth in chapter 61.12 RCW. The lien arising under this section may be enforced nonjudicially in the manner set forth in chapter 61.24 RCW for nonjudicial foreclosure of deeds of trust if the declaration (a) contains a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) contains a power of sale, (c) provides in its terms that the units are not used principally for agricultural or farming purposes, and (d) provides that the power of sale is operative in the case of a default in the obligation to pay assessments. The association or its authorized representative shall have the power, unless prohibited by the declaration, to purchase the unit at the foreclosure sale and to acquire, hold, lease, mortgage, or convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment in a judicial foreclosure action, the period of redemption shall be eight months. Nothing in this section shall prohibit an association from taking a deed in lieu of foreclosure.

(10) From the time of commencement of an action by the association to foreclose a lien for nonpayment of delinquent assessments against a unit that is not occupied by the owner thereof, the association shall be entitled to the appointment of a receiver to collect from the lessee thereof the rent for the unit as and when due. If the rental is not paid, the receiver may obtain possession of the unit, refurbish it for rental up to a reasonable standard for rental units in this type of condominium, rent the unit or permit its rental to others, and apply the rents first to the cost of the receivership and attorneys' fees thereof, then to the cost of refurbishing the unit, then to applicable charges, then to costs, fees, and charges of the foreclosure action, and then to the payment of the delinquent assessments. Only a receiver may take possession and collect rents under this subsection, and a receiver shall not be appointed less than ninety days after the delinquency. The exercise by the association of the foregoing rights shall not affect the priority of preexisting liens on the unit.

(11) Except as provided in subsection (3) of this section, the holder of a mortgage or other purchaser of a unit who obtains the right of possession of the unit through foreclosure shall not be liable for assessments or installments thereof that became due prior to such right of possession. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners, including such mortgagee or other purchaser of the unit. Foreclosure of a mortgage does not relieve the prior owner of personal liability for assessments accruing against the unit prior to the date of such sale as provided in this subsection.

(12) In addition to constituting a lien on the unit, each assessment shall be the joint and several obligation of the owner or owners of the unit to which the same are assessed as of the time the assessment is due. In a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Suit to recover a personal judgment for any delinquent assessment shall be maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

(13) The association may from time to time establish reasonable late charges and a rate of interest to be charged on all subsequent delinquent assessments or installments thereof. In the absence of another established nonusurious rate, delinquent assessments shall bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020 on the date on which the assessments became delinquent.

(14) The association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

(15) The association upon written request shall furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments against that unit. The statement shall be furnished within fifteen days after receipt of the request and is binding on the association, the board of directors, and every unit owner, unless and to the extent known by the recipient to be false.

(16) To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law.

Credits
[1990 c 166 § 6; 1989 c 43 § 3-117.]

Notes of Decisions (1)

West's RCWA 64.34.364, WA ST 64.34.364
Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

End of Document

West's Revised Code of Washington Annotated
Title 64. Real Property and Conveyances (Refs & Annos)
Chapter 64.38. Homeowners' Associations

West's RCWA 64.38.010

64.38.010. Definitions

Effective: January 1, 2012
Currentness

For purposes of this chapter:

(1) "Assessment" means all sums chargeable to an owner by an association in accordance with RCW 64.38.020.

(2) "Baseline funding plan" means establishing a reserve funding goal of maintaining a reserve account balance above zero dollars throughout the thirty-year study period described under RCW 64.38.065.

(3) "Board of directors" or "board" means the body, regardless of name, with primary authority to manage the affairs of the association.

(4) "Common areas" means property owned, or otherwise maintained, repaired or administered by the association.

(5) "Common expense" means the costs incurred by the association to exercise any of the powers provided for in this chapter.

(6) "Contribution rate" means, in a reserve study as described in *RCW 64.34.380, the amount contributed to the reserve account so that the association will have cash reserves to pay major maintenance, repair, or replacement costs without the need of a special assessment.

(7) "Effective age" means the difference between the estimated useful life and remaining useful life.

(8) "Full funding plan" means setting a reserve funding goal of achieving one hundred percent fully funded reserves by the end of the thirty-year study period described under RCW 64.38.065, in which the reserve account balance equals the sum of the deteriorated portion of all reserve components.

(9) "Fully funded balance" means the current value of the deteriorated portion, not the total replacement value, of all the reserve components. The fully funded balance for each reserve component is calculated by multiplying the current replacement cost of the reserve component by its effective age, then dividing the result by the reserve component's useful life. The sum total of all reserve components' fully funded balances is the association's fully funded balance.

(10) "Governing documents" means the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.

(11) "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. "Homeowners' association" does not mean an association created under chapter 64.32 or 64.34 RCW.

(12) "Lot" means a physical portion of the real property located within an association's jurisdiction designated for separate ownership.

(13) "Owner" means the owner of a lot, but does not include a person who has an interest in a lot solely as security for an obligation. "Owner" also means the vendee, not the vendor, of a lot under a real estate contract.

(14) "Remaining useful life" means the estimated time, in years, before a reserve component will require major maintenance, repair, or replacement to perform its intended function.

(15) "Replacement cost" means the current cost of replacing, repairing, or restoring a reserve component to its original functional condition.

(16) "Reserve component" means a common element whose cost of maintenance, repair, or replacement is infrequent, significant, and impractical to include in an annual budget.

(17) "Reserve study professional" means an independent person who is suitably qualified by knowledge, skill, experience, training, or education to prepare a reserve study in accordance with *RCW 64.34.380 and 64.34.382.

(18) "Residential real property" means any real property, the use of which is limited by law, covenant or otherwise to primarily residential or recreational purposes.

(19) "Significant assets" means that the current replacement value of the major reserve components is seventy-five percent or more of the gross budget of the association, excluding the association's reserve account funds.

(20) "Useful life" means the estimated time, between years, that major maintenance, repair, or replacement is estimated to occur.

Credits
[2011 c 189 § 7, eff. Jan. 1, 2012; 1995 c 283 § 2.]

West's RCWA 64.38.010, WA ST 64.38.010
Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

End of Document

EXHIBIT 3

EXHIBIT 3

Daisy Trust HOA Purchases
(August through September 2012)

Parcel Number	Recorded Date	Grantor	Amount
126-13-818-046	8/9/2012	Nevada Association Services	10,500.00
124-27-113-010	8/10/2012	ATC Coll Group, LLC	4,200.00
125-18-510-015	8/15/2012	Absolute Collection Services	7,700.00
190-06-412-079	8/15/2012	Nevada Association Services	11,300.00
140-23-712-036	8/15/2012	Nevada Association Services	5,700.00
126-13-616-036	8/15/2012	Absolute Collection Services	6,500.00
124-28-419-040	8/22/2012	Assessment Management Services	3,901.95
163-27-110-011	8/23/2012	Red Rock Financial Services	8,273.00
161-15-811-066	8/30/2012	Nevada Association Services	5,470.00
124-31-610-080	8/30/2012	Nevada Association Services	6,800.00
125-11-710-052	9/4/2012	Hampton & Hampton, P.C	5,146.00
124-27-412-045	9/7/2012	Nevada Association Services	4,650.00
138-08-611-076	9/11/2012	Alessi & Koenig, LLC	3,700.00
138-08-613-089	9/11/2012	Alessi & Koenig, LLC	8,600.00
138-04-412-005	9/11/2012	Alessi & Koenig, LLC	8,108.00
176-10-613-016	9/11/2012	Alessi & Koenig, LLC	6,300.00
161-26-314-020	9/20/2012	Nevada Association Services	7,100.00
164-25-713-018	9/20/2012	Nevada Association Services	8,100.00
176-21-811-012	9/25/2012	Alessi & Koenig, LLC	9,000.00
124-25-412-005	9/28/2012	Alessi & Koenig, LLC	6,900.00

EXHIBIT 2

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the INDYMAC INDX MORTGAGE TRUST 2007-AR15, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-AR15 under the Pooling and Servicing Agreement dated June 1, 2007, **Plaintiff,** **Vs.** **THE FOOTHILLS AT MACDONALD RANCH; NEVADA SSOCIATION SERVICES, INC.; DOES 1-10 CORPORATIONS; and DOES and ROES 1-10 individuals, partnerships, and anyone claiming an interest to the property described in this action,** **Defendants.**	**Case No. A-13-680505-C** Electronically Filed **Dept. No. XXII** 06/03/2013 09:44:33 AM CLERK OF THE COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter concerning Plaintiff's Motion for Preliminary Injunction filed April 23, 2013 came on for hearing, on an Order Shortening Time on the 30th day of April 2013 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY appeared by and through its attorney I-CHE LAI, ESQ. of the law firm, BROOKS BAUER; Defendant THE FOOTHILLS AT MACDONALD RANCH appeared by and through its attorney, SEAN L. ANDERSON, ESQ. of the law firm, LEACH JOHNSON SONG & BRUCHOW; and Defendant NEVADA ASSOCIATION SERVICES, INC. appeared by and through its attorney,

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

RICHARD VILKIN, ESQ. Having reviewed the papers and pleadings on file herein, heard oral arguments of counsel and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. CHRISTOPHER and DANIELLE ARNOLD are the record owners of certain real property located at 552 Regents Gate Drive in Henderson, Nevada. On or about May 27, 2005, the ARNOLDS obtained a mortgage loan from INDYMAC BANK in the amount of $1,276,000, which was secured by a deed of trust recorded against the subject property. The loan and deed of trust were thereafter modified, and both were assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011.[1]

2. The subject property is located within a common-interest community governed by a homeowners' association, Defendant THE FOOTHILLS AT MACDONALD RANCH, which was established pursuant to NRS Chapter 116. Defendant NEVADA ASSOCIATION SERVICES, INC. is alleged to be the collection agency retained and authorized by Defendant THE FOOTHILLS AT MACDONALD RANCH to pursue unpaid assessments, fines and other costs, by way of foreclosure or otherwise, from the association's delinquent owner-members.[2]

3. On June 17, 2011, Defendant NEVADA ASSOCIATION SERVICES, INC. recorded a Notice of Delinquent Assessment Lien on behalf of Defendant THE FOOTHILLS AT MACDONALD RANCH against the subject property, noting, as of June 14, 2011, $3,183.40 was owed. This amount included delinquent assessments, as well as late charges and collection fees and interest in the amount of $803.40.[3]

---

[1] *See* Exhibits 2 through 5 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[2] *See* Complaint filed April 19, 2013, p. 2, paragraphs 2 and 3.

[3] *See* Exhibit 6 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary

4. On November 2, 2011, Defendant NEVADA ASSOCIATION SERVICES, INC., on behalf of Defendant THE FOOTHILLS AT MACDONALD RANCH recorded a Notice of Default and Election to Sell Under Homeowners Association Lien against the subject property.[4] This Notice indicated the amount owing as of October 27, 2011 was $5,360.50, along with the caveat such would increase "until your account becomes current."[5] Thereafter, on December 7, 2012, Defendant NEVADA ASSOCIATION SERVICES, INC. recorded a Notice of Foreclosure Sale against the property. At that time, the unpaid balance due was $4,427.67.[6]

5. Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY claims it later discovered Defendant NEVADA ASSOCIATION SERVICES, INC. scheduled a non-judicial sale to foreclose the homeowners' association's lien to take place May 3, 2013. According to Plaintiff, it has requested Defendants NEVADA ASSOCIATION SERVICES, INC. and THE FOOTHILLS AT MACDONALD RANCH provide it the balance of the "super priority" portion of the association's lien[7] so it can arrange payment, and essentially avoid the necessity of a foreclosure sale.[8] Defendants have refused to provide that information as communication regarding a debt with any person other than the consumer (meaning the ARNOLDS) would violate the Federal Fair Debt Collection Practices Act. *See* Title 15 U.S.C. §1692(b) *and* NRS 649.370. Further, in Defendants' view, the association's lien interest can be reduced to a "super lien priority" amount after a foreclosure of "inferior" security interest, such as the First Deed of Trust held by Plaintiff

---

Injunction on Order Shortening Time filed April 23, 2013.

[4]*See* Exhibit 7 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[5]*Id.*

[6]*See* Exhibit 8 of Plaintiff's *Ex parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[7]The parties dispute what amounts can be included within the "super priority lien," whether it be only nine (9) months of assessments or include the association's costs of collection.

[8]Plaintiff's counsel indicated in his declaration attached to the *Ex Parte* Application filed April 23, 2013: "Based on my prior experiences with and knowledge of [NEVADA ASSOCIATION SERVICES, INC.'S] operations, [NEVADA ASSOCIATION SERVICES, INC.], upon sale of the foreclosed property, will convey title to the property free and clear of any liens and encumbrances[,]" which would include DEUTSCHE BANK NATIONAL TRUST COMPANY'S interest. *See* Declaration of I-Che Lai, paragraph 9.

DEUTSCHE BANK NATIONAL TRUST COMPANY. Likewise, absent foreclosure of the bank's First Deed of Trust or other "inferior" security interest, neither Plaintiff nor Defendants can properly calculate the amounts due and owing under NRS 116.3116(2). Plaintiff disagrees with Defendants' stance, noting, while homeowners' associations may have the right to foreclose upon properties for non-payment of its fees, assessments and even collection costs[9] within a non-judicial foreclosure proceeding, they must institute an "action" to establish their liens' "super priority" status over other encumbrances. As a consequence, Plaintiff has filed its Complaint, seeking declaratory relief and to quiet title in the subject property.

6. The crux of this matter hinges upon the effect of the non-judicial foreclosure sale by Defendants. Defendants propose the successful bidder at the non-judicial foreclosure sale will take the property free of security interests "inferior" or junior to the homeowners' association's "super priority lien," which would include Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY'S First Deed of Trust. Plaintiff does not share that view, but appreciates the non-judicial foreclosure sale would result in controversy and jeopardize its security interest in the property. As a consequence, Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY now moves this Court for preliminary injunction to:

a. Compel disclosure of the homeowners' association's lien secured by the real property located at 552 Regents Gate Drive, Henderson, Nevada;

b. Compel the homeowners' association and NEVADA ASSOCIATION SERVICES, INC. to accept "any payments from Deutsche Bank on the HOA's lien;"

. . .

. . .

[9]Again, as set forth in Footnote 7 above, the parties dispute what amounts can be included within the "super priority lien," whether it be only nine (9) months of assessments or include the association's costs of collection.

c. Enjoin any foreclosure sale of the property during the pendency of this action; and

d. Grant any other relief this Court deems just and proper.

CONCLUSIONS OF LAW

1. NRS 33.010(1) authorizes an injunction when it appears from the complaint the plaintiff is entitled to the relief requested, and at least part of the reprieve consists of restraining the challenged act. University and Community College System of Nevada v. Nevadans for Sound Government, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Before a preliminary injunction will issue, the applicant must show: "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." S.O.C., Inc. v. The Mirage Casino-Hotel, 117 Nev. 403, 408, 23 P.3d 243, 247 (2001), *citing* Dangberg Holdings v. Douglas County, 115 Nev. 129, 142-143, 978 P.2d 311, 319 (1999). In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, as well as the public interest. University and Community College System of Nevada, 120 Nev. at 721, 100 P.3d at 187, *citing* Clark County School District v. Buchanan, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).

2. Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion. Attorney General v. NOS Communications, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004). The district court's decision will not be disturbed absent an abuse or unless it is based upon an erroneous legal standard. *Id.* Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence; however, questions of law are reviewed *de novo.* S.O.C., Inc., 117 Nev. at 407, 23 P.3d at 246.

. . .

. . .

3. NRS 116.3116 discusses homeowner association liens against units or homes for unpaid or delinquent assessments. It states in pertinent part:

> 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessment under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit *except*:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration *during the 9 months immediately preceding institution of an action to enforce the lien,* .... (Emphasis added)

4. Notably, a lien under NRS 116.3116(2) is "prior" to "all other liens and encumbrances on a unit," without the requirement of an enforcement action, *except for, inter alia,* "[a] first security interest." *See* NRS 116.3116(2)(b). That exception specifies the association's lien is junior to the first security interest at least until an "action" is commenced. *See* NRS 116.3116(2)(c). Indeed, if the association's lien was anything but junior to the first security interest, there would be no reason to require an "action" be instituted in order to grant that lien "super priority" status.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

5. NRS Chapter 116 does not specifically define the term "action" with respect to one "enforc[ing] the lien," as described in NRS 116.3116(2)(c). In this case, each party appears to advance a different interpretation of the term "action." Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. propose they can seek enforcement of the lien at a non-judicial foreclosure sale to a bona fide purchaser, thereby extinguishing the interests of inferior or junior security interests including that asserted by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY.[10] Alternatively, they propose the amount of their "super priority lien" can be established by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY foreclosing upon its own security interest.[11] Plaintiff takes a different view, proposing the establishment or determination of the "super priority lien" must be through legal action.

6. While NRS Chapter 116 does not specifically define "action," this Court notes Rule 2 of the Nevada Rules of Civil Procedure (NRCP) does; it states: "'There shall be one form of action to be known as 'civil action.'" Further, NRCP 3 provides "[a] civil action is commenced by filing a complaint with the court." *Also see* Black's Law Dictionary, p. 26 (5th Ed. 1979)("Term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law."). In this Court's view, the definition of "action" as expressed in NRS 116.3116 was intended by the legislators enacting this statutory provision to be its ordinary meaning as expressed above, i.e. a suit brought in a court. That is, the "super priority" nature and extent of the homeowners' association lien over Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY'S First Deed of Trust will be defined or established when Defendants THE FOOTHILLS AT MACDONALD

---

[10]In so stating, Defendants appear to advance the position at least part of the homeowners' association lien would have "super priority" status over the First Deed of Trust.

[11]*See* The Foothills at MacDonald Ranch's Opposition to Plaintiff's Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction filed April 29, 2013, p. 8, lines 6-7.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

RANCH and NEVADA ASSOCIATION SERVICES, INC. institute "an action to enforce the lien." *See* NRS 116.3116(2)(c). Stating it a different way, the institution of an action or suit brought in a court is a condition precedent to elevating the status of the association's junior lien to "super priority." Further, the extent of the "super priority" is limited to that which would have become due in the absence of acceleration during the nine (9) months immediately preceding the institution of the action to enforce the lien.

7. In so stating, this Court is not suggesting a lawsuit is required before any lien for unpaid homeowners' association fees and assessments can be enforced or its "super priority" status can be found to exist. However, it is a step necessary to elevate the status of the lien to a position superior to first security interests other than real estate taxes and other governmental assessments.

8. With the aforementioned said, this Court disagrees with Defendants' position Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY could foreclose upon its security interest, and upon doing so, establish and then satisfy the "super priority" lien. Again, as set forth above, the elevation of the association's lien from junior to "super priority" must be instituted by an "action." *See* NRS 116.3116(2)(c). That is, a foreclosure sale by the bank—whether done judicial or non-judicially—will not result in any part of the association's lien achieving "super priority" status. If anything, a foreclosure by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY would extinguish any subordinate lien existing at the time, which could include the Association's lien for unpaid assessments and fees.[12] *See* Trustees of MacIntosh Condominium Association v. FDIC, 908 F.Supp. 58, 64 (D.C.Mass. 1995), *citing* Osborne v. Burke, 1 Mass.App.Ct. 838, 300 N.E.2d, 450, 451 (1973).

. . .

[12]While the bank's foreclosure would extinguish any existing subordinate or junior lien recorded against the property, such a statement is not meant to suggest it would eliminate the debt owed by the homeowners, who, in this case, are CHRISTOPHER and DANIELLE ARNOLD.

9. In light of the aforementioned, this Court concludes, until Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. institute an action to enforce, their lien has no "super priority" status. That is, their lien for unpaid association assessments, fees and the like are junior to the First Deed of Trust held by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY. As the Association's lien currently is "junior," and the extent of any "super priority" has not been established, this Court concludes Plaintiff has met its burden of showing a likelihood of success upon the merits. However, given this Court's conclusions set forth above, it likewise finds Plaintiff did not show a reasonable probability the non-moving parties' conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. It therefore denies Plaintiff's Motion for Preliminary Injunction as it seeks to compel Defendants to disclose the extent of their lien secured by the real property located at 552 Regents Gate Drive, Henderson, Nevada or to accept "any payments from Deutsche Bank on the HOA's lien." This Court further denies the Motion for Preliminary Injunction to enjoin any foreclosure sale of the property during the pendency of this action. With the latter said, the bona fide purchaser at any non-judicial foreclosure sale conducted by Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. takes the property subject to all liens and security interests that have priority or seniority over the Association's; such include, but are not necessarily limited to (1) the First Deed of Trust assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011, and (2) real estate taxes and other governmental assessments.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiff's Motion for Preliminary Injunction filed April 23, 2013 is denied. Again, as noted above, while this Court does not enjoin or prohibit Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA

ASSOCIATION SERVICES, INC. from conducting its non-judicial sale, the bona fide purchaser must take the property, to wit: 552 Regents Gate Drive in Henderson, Nevada, subject to all liens and security interests that have priority or seniority over the Association's, including, but not limited to the First Deed of Trust assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011, and real estate taxes and other governmental assessments.

DATED and DONE this 3rd day of June 2013.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify, on the 3rd day of June 2013, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel and parties of record, and that first-class postage was fully prepaid thereon:

MICHAEL R. BROOKS, ESQ.
BROOKS BAUER, LLP
1645 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
ilai@brooksbauer.com

SEAN L. ANDERSON, ESQ.
LEACH JOHNSON SONG & BRUCHOW
8945 West Russell Road, Suite 330
Las Vegas, Nevada 89148
Sanderson@leachjohnson.com

RICHARD VILKIN, ESQ.
LAW OFFICES OF RICHARD VILKIN, P.C.
1286 Crimson Sage Avenue
Henderson, Nevada 89012
richard@vilkinlaw.com

Laura Banks
Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

EXHIBIT 1

ORDR
BOB L. OLSON, ESQ.
Nevada Bar No. 3783
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Email: olsonb@gtlaw.com
Attorneys for Defendant Montesa, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

MARTIN CENTENO,

Plaintiff,

v.

MONTESA, LLC, et al.,

Defendants.

Case No. A-12-667397-C

Dept No. XXXII

ORDER GRANTING MOTION FOR: (1) DISMISSAL OF PLAINTIFF'S COMPLAINT WITH PREJUDICE; (2) IMMEDIATE CANCELLATION AND EXPUNGEMENT OF LIS PENDENS; AND (3) AWARD OF ATTORNEY'S FEES AGAINST PLAINTIFF ON ORDER SHORTENING TIME

Hearing Date: October 15, 2012

Hearing Time: 9:00 a.m.

This Court, having read and considered the Motion for: (1) Dismissal of Plaintiff's Complaint with Prejudice; (2) Immediate Cancellation and Expungement of Lis Pendens; and (3) Award of Attorney's Fees Against Plaintiff on Order Shortening Time ("Motion"), having heard and considered the argument of counsel with Bob L. Olson, Esq., appearing on behalf of Defendant Montesa, LLC, and with good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion is granted in its entirety and Plaintiff's Complaint against Defendant Montesa, LLC is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Notice of Lis Pendens Plaintiff recorded with the office of the Recorder of Records for Clark County, Nevada, on August 29, 2012, Book/Instr. No. 20120829-0003771, affecting property with Assessor's Parcel No. 124-31-114-005 and commonly known as 5444 Autumn Crocus Court, North Las Vegas, Nevada, and bearing the legal description contained in **Exhibit "A"** (the "Property"), attached hereto, is immediately cancelled and expunged of record.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall pay to Defendant attorney's fees in the amount of $____.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby prohibited and enjoined from recording any additional lis pendens against the Property.

Dated this 15 day of October, 2012.

DISTRICT COURT JUDGE

Prepared and submitted by:

GREENBERG TRAURIG, LLP

By: _____

BOB L. OLSON, ESQ.
Nevada Bar No. 3783
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Attorneys for Defendant Montesa, LLC

Greenberg Traurig LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
(702) 792-3773
(702) 792-9002 (fax)

EXHIBIT A

PARCEL I:

LOT FIVE (5) OF AMENDED PLAT OF ARBOR GATE II, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 88 OF PLATS, PAGE 56 IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

PARCEL II:

AN EASEMENT FOR INGRESS AND EGRESS OVER THE PRIVATE STREETS AND COMMON ELEMENTS AS DELINEATED ON THE PLAT OF FINAL MAP OF ARBOR GATE II.

IN THE SUPREME COURT FOR THE STATE OF NEVADA

DAISY TRUST, Plaintiff, vs. WELLS FARGO BANK, N.A.; MTC FINANCIAL, INC., dba TRUSTEE CORPS; DONALD K. BLUME and CYNTHIA S. BLUME, Defendants.	Supreme Court Case No.: 63611 District Ct. Case No.: A-13-679055-C **WELLS FARGO BANK, N.A.'S OPPOSITION TO APPELLANT'S MOTION FOR TEMPORARY INJUNCTION**

Amy F. Sorenson
Nevada Bar No. 12495
Richard C. Gordon
Nevada Bar No. 9036
Kelly H. Dove
Nevada Bar No. 10569
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
asorenson@swlaw.com
rgordon@swlaw.com
kdove@swlaw.com

Attorneys for Defendant Wells Fargo Bank, N.A.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NRS 116.3116 does not, and was never intended to, extinguish a properly recorded senior deed of trust. In fact, the express language of NRS 116.3116 makes clear that the first in time deed of trust is prior to the HOA lien. This express subordination provision was intended to encourage lenders to loan funds to borrowers for the purpose of purchasing homes. Plaintiff's proposed interpretation of the Statute undermines this intention and would wipe out millions, if not billions, of dollars of properly recorded security interests in Nevada.

Departments throughout the Eighth Judicial District, as well as the United States District Court for the District of Nevada, continue to dismiss identical complaints – and identical requests for injunctive relief – brought by similarly situated plaintiffs.[1] While the case law rejecting similar claims is substantial and growing, Plaintiff's business model – which clearly includes litigation costs as part of its business strategy – remains in full swing.

Because Plaintiff could not demonstrate a reasonable probability of success on the merits, the district court properly denied its motion for injunctive relief and

[1] *See e.g., Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.,* 2:12-CV-00949-KJD, 2013 WL 531092 (D. Nev. Feb. 11, 2013); *Weeping Hollow Ave. Trust v. Spencer,* 2:13-CV-00544-JCM, 2013 WL 2296313 (D. Nev. May 24, 2013); *First 100, LLC v. Wells Fargo Bank, N.A.*, 2:13-CV-00431-JCM, WL 3678111 (D. Nev. April 30, 2013; *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 2:13-CV-00164-RCJ, 2013 WL 2460452 (D. Nev. June 6, 2013); *Sanucci Ct. Trust v. Elevado,* Case No. A-12-670423, Dept. XXX; *Centeno v. Montesa, LLC*, Case No. A-12-667397, Dept. XXXII, Supreme Court No. 62506(attached hereto as **Exhibit 1**); *Centeno v. Maverick Valley Properties, LLC*, Case No. A-12-654878, Dept. XXIV, Supreme Court No. 60984; *Deutsche Bank National Trust Co. vs. The Foothills at Macdonald Ranch*, Case No. A-13-680505, Dept. XXII(attached hereto as **Exhibit 2**).

granted Wells Fargo's Countermotion to Dismiss.[2] There is no basis for Plaintiff's something-for-nothing windfall, for this case, for this appeal, or for this Court to enjoin foreclosure.

II. RELEVANT FACTUAL BACKGROUND

A. Loan History and Foreclosure Documents.

On or about September 21, 2007, Donald K. Blume and Cynthia S. Blume (the "Blumes") obtained a loan in the amount of $417,000 from Universal American Mortgage Company, LLC ("Universal") for the purchase of the real property located at 10209 Dove Row Avenue, Las Vegas, Nevada, APN 126-13-818-046 (the "Property").[3] Universal recorded its deed of trust on September 28, 2007 ("Deed of Trust" attached as Exhibit 4 to RJN.)[4]

At some point thereafter, the Blumes stopped making payments due under the Deed of Trust, and allegedly stopped paying their HOA dues as well. The Blumes' HOA, Westminster at Providence, recorded a lien on August 5, 2010 and a notice of default on September 30, 2010 – approximately three years after Universal recorded its Deed of Trust. ("HOA Lien" and "HOA Default" attached as Exhibits 5 and 6 to RJN.) On March 10, 2011, Wells Fargo recorded its Notice of Default and Election to Sell. ("Wells Fargo Notice of Default" attached as Exhibit 7 to RJN.) On January 31, 2012, Westminster at Providence recorded a notice of sale. ("HOA Notice of Sale" attached as Exhibit 8 to RJN.) Westminster at Providence conducted its foreclosure sale on August 3, 2012. ("HOA

[2] Wells Fargo has fully briefed and prevailed on these issues before the District Court and incorporates by reference its Opposition to Ex Parte Motion for Temporary Restraining Order, attached hereto as **Exhibit 3**.

[3] Universal is not a party to this action.

[4] Wells Fargo is the successor in interest to Universal, and is the current beneficiary and holder of the Deed of Trust at issue, a fact that Plaintiff does not contest. *See* Mot. 2:3-4, wherein Plaintiff acknowledges that Wells Fargo is the beneficiary.

Foreclosure Deed" attached as Exhibit 3 to RJN.) At the HOA foreclosure sale, Plaintiff purchased the Property for $10,500.00.

On March 26, 2013, Wells Fargo recorded the Nevada Foreclosure Mediation Certificate as well as its Notice of Trustee Sale, noticing the foreclosure sale for April 26 2013. ("Wells Fargo Notice of Sale" attached as Exhibit 10 to RJN.) On March 28 2013, Plaintiff filed its Complaint.

III. LEGAL ARGUMENT

A. Legal Standard for a Stay or Injunction on Appeal.

Under NRAP 8(c), in deciding whether to issue a stay or injunction, this Court "will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition."

Although, when moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Judicial District Ct. ex rel County of Clark* (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981)). Where a movant fails to do so, denial of an appellate injunction or stay is appropriate. *Id.*

Here, Plaintiff cannot demonstrate a likelihood of success on the merits or show irreparable harm. Accordingly, the pending motion should be denied in its entirety.

B. Plaintiff Will Not Prevail On the Merits of its Underlying Claim.

1. Plaintiff's claims for declaratory relief and quiet title fail as a matter of law because the express language of the Statute subordinates the HOA Lien to Wells Fargo's Lien.

Plaintiff's claims fail as a matter of law for one very basic reason – NRS 116.3116 does not allow for a first security interest to be extinguished as a result of an HOA's foreclosure of its super-priority lien. Plaintiff's suggestion that it does contradicts the express language of the Statute. "It is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit." *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). When interpreting a statute, this Court "must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'" *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (citing *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) overruled on other grounds).

Accordingly, "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme '*harmoniously with one another* in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *S. Nevada Homebuilders*, 117 P.3d at 173 (emphasis added) (citing *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

In this case, the Statute is clear and unambiguous in its requirement that an HOA lien "is ***prior to all other liens*** and encumbrances on a unit ***except***: . . . (b) A ***first security interest on the unit recorded before the date*** on which the assessment sought to be enforced became delinquent…." NRS 116.3116(2)(b)

(emphasis added.) Such is the case here. Because there is no ambiguity in the statutory language, the law must be complied with as written.

To prevail, Plaintiff must demonstrate that the HOA's notice of delinquent assessment was recorded before Wells Fargo's Deed of Trust. *See Centeno v. Mortgage Elec. Registration Sys., Inc.*, Case No. 2:11-cv-02105-GMN-RJJ, 2012 WL 3730528, at *3 (D. Nev. Aug. 28, 2012) (holding that without an allegation that the HOA lien "chronologically precedes" the deed of trust and without submission of the first in time lien, a claim under NRS 116.3116(2) fails.) Plaintiff has not, and cannot, allege that the HOA lien was recorded first. Because Plaintiff cannot allege any facts to support this central element, its claims for relief fail as a matter of law. *Centeno*, 2012 WL 3730528, at *3.

Under Plaintiff's strained construction, NRS 116.3116(2)(b) grants the holder of a first security interest priority over an HOA lien, only to take that priority away in the very next provision. If the Legislature intended such an absurd the result, it could have avoided any ambiguity by simply omitting subsection (2)(b) from that statute, stating that the HOA lien is senior to "all other liens and encumbrances on a unit." But the Legislature chose not to omit section (2)(b), and this Court is obligated to read the Statute so as not to render any provision meaningless. *TRW Inc.*, 534 U.S. at 31. Because Plaintiff's proffered interpretation of NRS 116.3116(2) produces an absurd result – the complete evisceration of an express statutory provision – it should not be given the force or effect in the pending action.

2. Plaintiff's claims for declaratory relief and quiet title fail as a matter of law because the legislative intent establishes that the super-priority is only a priority to payment, not to title.

In spite of an express provision subordinating an HOA lien to a first-in-time Deed of Trust, the parties nevertheless disagree on the Statute's basic

interpretation. When a statute is ambiguous, that is, it "is capable of being understood in two or more senses by reasonably informed persons," or when it does not address the issue at hand, we may look to reason and public policy to determine what the Legislature intended. *Pub. Employees' Benefits*, 179 P.3d at 548.

NRS 116.3116 is based on the Uniform Common Interest Ownership Act (the "Uniform Act"), which has been enacted in Nevada and seven other states. The drafters of the Uniform Act explained that the super-priority provision was intended to protect the security interest of lenders by stating: "priority for the assessment lien strikes an ***equitable balance between*** the need to enforce collection of unpaid assessments and the ***obvious necessity for protecting the priority of the security interests of lenders.***" Uniform Common Interest Ownership Act § 3-116 cmt. 2 (1994) (amended 2008) (emphasis added.) Not surprisingly, Plaintiff ignores this language. Instead, Plaintiff cites to commentary that notes that "as a practical matter, mortgage lenders will most likely pay the 6 month's assessments . . . rather than having the association foreclose on the unit." (Mot. 8:25-27.)[5] Upon closer inspection, this commentary actually supports Defendant's construction that the HOA priority is a priority to payment, not title. Moreover, the comment never states that an HOA foreclosure extinguishes the first in time deed of trust.

3. Plaintiff's claims fail as a matter of law because Plaintiff purchased the Property subject to Wells Fargo's Deed of Trust.

NRS 116.31166 states that: "The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 ***vests in the purchaser the title of the unit's owner*** without equity or right of redemption." (emphasis added.) This language

[5] Notably, this comment immediately follows the comment establishing the drafters express intent to protect lenders' security interests, which Plaintiff ignores. Uniform Common Interest Ownership Act, § 3-116 cmt. 2 (1994) (amended 2008).

establishes that the purchaser at an HOA lien sale, such as the sale at issue here, purchases the same title the prior owner held. In this case, Plaintiff purchased the identical ownership interest of the prior owners, the Blumes. As established by the recorded documents, the Blumes held title to the Property *subject to* Wells Fargo's Deed of Trust. (Wells Fargo's Deed of Trust, attached as Exhibit 4 to RJN.) In fact, the HOA Foreclosure Deed expressly states that the transfer is "without warranty expressed or implied." (HOA Foreclosure Deed, attached as Exhibit 3 to RJN.) Thus, Plaintiff cannot come to this Court in good faith, in an attempt to strip lenders and prior lienholders of their rights, when Plaintiff's own deed, on its face, does not guarantee a transfer free of other liens and encumbrances. As such, Plaintiff's claims for quiet title and declaratory relief fail as a matter of law.

4. Plaintiff's claims fail as a matter of law because Plaintiff is NOT a Bona Fide Purchaser.

To quiet title in its name, Plaintiff must do more than just challenge the title of another party – Plaintiff must establish that it has good title. *Breliant v. Preferred Equities Corp*., 918 P.2d 314, 318 (Nev. 1996). In order to claim rights and protections afforded to a bona fide purchaser for value, a purchaser must establish that "the purchase was made in good faith, for a valuable consideration; that the purchase price was wholly paid, and that the conveyance of the legal title was received before notice of the equities of [other parties]." *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.,* 15 Nev. 101, 106 (1880); *see also Hewitt v. Glaser Land & Livestock Co*., 97 Nev. 207, 208, 626 P.2d 268, 269 (Nev. 1981).

The Eighth Judicial District Court has already ruled that similarly situated plaintiffs cannot succeed on identical claims because they are not bona fide purchasers. *Design 3.2 LLC v. Bank of New York Mellon,* Case No. A-10-621628,

Dept. XV. ("*Design 3.2* Order" attached as Exhibit 15 to RJN.) In *Design 3.2*, the Court granted summary judgment in favor of the lender, holding that the plaintiff was not a bona fide purchaser. The Court found that because the plaintiff purchased the property "with actual or constructive knowledge of [the lender's] interest" and because plaintiff did not pay valuable consideration for the property , then summary judgment in favor of the lender was proper. (*Design 3.2* Order, Exhibit 15 to RJN.)

Here, Plaintiff cannot demonstrate that it is a bona fide purchaser. First, it cannot be disputed that Plaintiff had knowledge of the equities in this case. Plaintiff acquired the Property approximately five years after Wells Fargo's Deed of Trust was recorded, and approximately seventeen months after Wells Fargo's Notice of Default was recorded. Also, the purchase was not made for valuable consideration and the price paid was not commercially reasonable. Plaintiff purchased the Property for the sum of $10,500.00 when the original loan amount was $417,000.00 – almost forty times the amount Plaintiff paid for the Property.

C. <u>Plaintiff Cannot Demonstrate Irreparable Harm</u>.

As set forth above, Plaintiff cannot demonstrate a likelihood of success on the merits, and for that reason alone, injunctive relief should be denied. Even so, Plaintiff cannot establish irreparable harm, and has failed to even identify the irreparable harm it will allegedly suffer. Where there is an adequate remedy at law, injunctive relief cannot be granted. *Czipott v. Fleigh*, 87 Nev. 496, 498, 489 P.2d 681, 682-83 (1971) (injunctive relief is not an available remedy when a party has an adequate legal remedy whereby damages may be assessed and recovered) (citing *Sherman v. Clark*, 4 Nev. 138, 141 (1868); *Conley v. Chedic*, 6 Nev. 222 (1870); *Thorn v. Sweeney*, 12 Nev. 251 (1877); *State ex rel. Mongolo v. Second Judicial District Court*, 46 Nev. 410, 211 P. 105 (1953). Here, Plaintiff's alleged damages are monetary in nature and cannot serve as the basis for injunctive relief.

D. Granting Plaintiff's Request for Injunctive Relief Will Substantially Harm the Public Interest and Violates Public Policy.

This Court should consider that an injunction in Plaintiff's favor will create a dangerous precedent for similar ongoing litigation and will embolden real estate speculators to pursue future litigation in furtherance of their business model. As discussed throughout this Opposition, the detrimental effect on Nevada homeowners and citizens from Plaintiff's course of conduct is severe. The end result will be devastating to the public who will be unable to obtain residential mortgages because lenders will refuse to loan in Nevada. Moreover, sanctioning property sales for pennies on the dollar will only reduce overall property values at a critical point in Nevada's recovery, when properties are finally, albeit slowly, increasing in value.

V. CONCLUSION

For the reasons stated herein, Wells Fargo respectfully requests that the Court DENY Plaintiff's request for an injunction in its entirety.

Dated this 5th day of August, 2013.

SNELL & WILMER L.L.P.

By: /s/ ***Richard C. Gordon***
RICHARD C. GORDON
Nevada Bar No. 9036
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Attorneys for Defendant Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On August 6, 2013, I caused to be served a true and correct copy of the foregoing **WELLS FARGO BANK, N.A.'S OPPOSITION TO APPELLANT'S MOTION FOR TEMPORARY INJUNCTION** by the method indicated:

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY EMAIL:** by emailing a PDF of the document(s) listed above to the email addresses of the individual(s) listed below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Supreme Court of Nevada's Service List for the above-referenced case.

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn, Esq., Ltd.
376 E. Warm Springs Rd., Ste. 125
Las Vegas, NV 89119
Attorneys for Plaintiff

Richard J. Reynolds, Esq.
Burke, Williams & Sorensen, LLP
1851 E. First St., Ste. 1550
Santa Ana, CA 92705
Attorneys for MTC Financial Inc. dba Trustee Corps

Michael E Sullivan, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington St.
Reno, NV 89503
Attorneys for MTC Financial Inc. dba Trustee Corps

/s/ Julia Melnar
An employee of Snell & Wilmer L.L.P.

APPENDIX OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGE NOS.
1	*Centeno v. Montesa, LLC*, Order Granting Motion for: (1) Dismissal of Plaintiff's Complaint with Prejudice; (2) Immediate Cancellation and Expungement of Lis Pendens; (3) Award of Attorney's Fees Against Plaintiff on Order Shortening Time, dated October 15, 2012	1-3
2	*Deutsche Bank National Trust Company, et al. v. The Foothills at MacDonald Ranch, et al.*, Findings of Fact, Conclusions of Law and Order, dated June 3, 2013	4-13
3	Wells Fargo Bank, N.A.'s Combined Opposition to Ex Parte Motion for Temporary Restraining Order; Or Alternatively for Order to Show Cause and Countermotion to Dismiss, dated May 21, 2013	14-55

17669468