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SUPREME COURT

STATE OF NEVADA

DAISY TRUST

Appellant

vs.

WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS

Respondents.

No. 63611

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Counsel for plaintiff/appellant states that the plaintiff/appellant Daisy Trust is a Nevada trust. The trustee of the trust is Resources Group, LLC. The manager for Resources Group, LLC is Iyad Haddad.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The portion of the Order dismissing plaintiff's complaint is appealable under NRAP 3A(b)(1). The portion of the Order denying plaintiff's motion for preliminary injunction is appealable under NRAP3A(b)(3).

(B) The filing dates establishing the timeliness of the appeal:

The Order dismissing plaintiff's complaint and denying plaintiff's motion for preliminary injunction was filed on July 9, 2013. Notice of Entry of the Order was served on appellant by mail on July 11, 2013. The Notice of Appeal from the Order was filed on July 12, 2013.

(C) The appeal is from an Order dismissing plaintiff's complaint and denying plaintiff's motion for preliminary injunction.

ISSUES PRESENTED ON APPEAL

1. Whether the "super priority" homeowners association lien under NRS Chapter 116 takes priority over an outstanding first mortgage.

2. Whether a foreclosure of the "super priority" lien extinguishes the first mortgage.

3. Whether the District Court erred in granting defendant's motion to dismiss.

4. Whether the District Court erred in failing to grant plaintiff's motion for preliminary injunction.

5. The standard of review for the court's dismissal of plaintiff's complaint is rigorous and the court must construe the pleadings liberally and draw every fair intendment in favor of the plaintiff/appellant. The standard of review on the court's refusal to grant plaintiff's motion for a preliminary injunction is abuse of discretion, but questions of law are reviewed de novo.

STATEMENT OF THE CASE

A. Facts Pertinent to the Underlying Action

Daisy Trust (hereinafter "Plaintiff/appellant") is the owner of the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada (hereinafter "Property"). (APP. Pg. 2, ¶1) Plaintiff/appellant obtained title to the Property by way of a foreclosure deed recorded on August 9, 2012. (APP. Pgs. 20-23) The foreclosure deed arises from a delinquency in assessments due from the former owners, Donald K. Blume and Cynthia S. Blume to Westminster at Providence (hereinafter "the HOA") pursuant to NRS Chapter 116. (APP. Pg. 2, ¶3)

Wells Fargo Bank NA (hereinafter "Respondent") is the beneficiary of a deed of trust recorded as an encumbrance to the subject property on September 28, 2007 (App. Pg. 2, ¶4) See copy of deed of trust at App. Pgs. 24-42. MTC Financial dba Trustee Corps is the trustee of this deed of trust. (APP. Pg. 3, ¶5)

The agent for the HOA recorded a notice of delinquent assessment lien on August 5, 2010 (APP. Pgs. 258-259); recorded a notice of default and election to sell under homeowners association lien on September 30, 2010 (APP. Pgs. 261-263); and posted and published a notice of foreclosure sale scheduling a public auction on August 3, 2012. (APP. 270-272) As verified in the foreclosure deed, at the public auction held on August 3, 2012, the Daisy Trust was the highest bidder and paid the bid amount of $10,500.00for the property. (APP. Pgs. 20-22)

Plaintiff/appellant filed its Complaint on March 28, 2013 asserting three claims for relief: 1) entry of an injunction prohibiting Respondent from foreclosing it's deed of trust; 2) entry of a judgment pursuant to NRS Chapter 40 determining that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title,

interest or claim to the Property. (APP. Pgs. 1-7)

On March 29, 2013, Plaintiff/appellant filed an ex parte motion for temporary restraining order. (APP. Pgs. 6-63) On April 17, 2013, the court issued a temporary restraining order enjoining the trustee's sale scheduled by Respondent to take place on April 26, 2013. (APP. Pgs. 129-131) On May 21,2013, Respondent filed an opposition to Plaintiff/appellant's ex parte motion along with a countermotion to dismiss. (APP. Pgs. 177-218) On May 22, 2013, defendant MTC Financial, Inc. dba Trustee Corps' filed a joinder to Respondent's opposition and countermotion to dismiss. (APP Pgs. 395-397) Plaintiff/appellant filed its opposition to the motion to dismiss on June 3, 2013. (APP. Pgs. 401-479) Respondent filed a reply in support of the countermotion to dismiss on June 25, 2013. (APP. Pgs. 480-505) Defendant MTC Financial, Inc. dba Trustee Corps filed a joinder to this reply on June 27, 2013. (APP. Pgs. 549-551)

At the hearing held on July 9, 2013, the judge denied Plaintiff/appellant's application for a preliminary injunction and took the motion to dismiss under advisement. On July 9, 2013, the court entered a written decision granting Respondent's motion to dismiss. (APP. Pgs. 552-557) Notice of entry of this order was filed on July 11, 2013. (APP. Pgs. 564-573) Plaintiff/appellant filed its notice of appeal on July 12, 2013.

STANDARD OF REVIEW

For the order dismissing plaintiff's complaint, the Court's review is rigorous, and the court "must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]." Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

For an order denying motion for preliminary injunction, the Court's review is limited to the record to determine whether the lower court exceeded the permissible bounds of discretion, but questions of law are reviewed de novo. S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 407, 223 P.3d 243, 246 (2001).

ARGUMENT

1. NRS 116.3116 grants to the HOA a super priority lien that takes priority over the earlier recorded deed of trust held by Respondent.

NRS 116.3116 provides in part:

Liens against units for assessments.

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 assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must

> not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (emphasis added)

By its clear terms, NRS 116.3116 (2) provides that the super-priority lien for 9 months of charges is "prior to all security interests described in paragraph (b)." The deed of trust held by Respondent falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Additionally, courts must construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). A statute should be interpreted to give the terms their plain meaning, considering the 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. Southern Nevada Homebuilders v. Clark County, 121 Nev. 446, 117 P.3d 171 (2005). A statute should be construed so that no part is rendered meaningless. Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department, 124 Nev. 138, 179 P.3d 542 (2008). Statutes must be construed so as to avoid absurd results. In re Orpheus Trust, 124 Nev. 170, 179 P.3d 562 (2008); Hunt v. Warden, 111 Nev. 1284, 903 P.2d 826 (1995).

The 9 month period in which the associations' lien is granted priority is commonly referred to as the "super priority" lien. In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012) this Court stated in a footnote defining "super priority" that:

> Priority status over certain types of encumbrances is granted to liens against units for delinquent assessments. NRS 116.3116(2); NRS 116.093 (defining "unit").

The plain language of the statute is that this 9 months "super priority" lien of the association's has priority over trust deeds. The statute is written in the negative. It first lists three categories of liens and encumbrances which the association's lien is not prior to:

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

The statute then lists the three categories as

(a) liens recorded before the CC & R's,
(b) mortgage liens, and
(c) liens for taxes and other governmental assessments or charges.

In the same paragraph, the statute then states that the "super priority" lien takes priority over "all security interests" described in paragraph (b), which exactly describes the first mortgage lien asserted by Respondent. The relevant portion of the statute states:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit . . . .and to the extent of the assessments for common expenses . . . .which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien....

The statute specifies that the 9 month super priority lien is not "prior to" liens recorded before the CC&Rs or liens for real estate taxes and other governmental assessments or charges. The only liens which are subject to the "super priority" exception are mortgage liens like the one held by Respondent.

2. The HOA's foreclosure of it's super priority lien at the foreclosure sale extinguished the deed of trust held by Respondent.

It is hornbook law that foreclosure of a superior lien extinguishes all junior liens. See McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. 812, 818, 123 P.3d 748 (2005); Brunzell v. Lawyers Title Ins. Co., 101 Nev. 395, 705 P.2d 642 (1985); Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, 563 P.2d 82 (1977); and Erickson Construction Co. v. Nevada National Bank, 89 Nev. 359, 513 P.2d 1236 (1973). At the time the HOA foreclosed it's "super priority" lien, all junior liens, which would include Respondent's formerly first mortgage lien, were extinguished.

This interpretation is the only rational, logical interpretation that would not lead to absurd results. The only way to make sure that the HOA gets payment from the first is if the first is in danger of losing it's security. This is exactly the same situation as when a junior mortgage holder seeks to protect it's security interest from foreclosure by a senior mortgage holder.

The court's findings that "the home owner's association super-priority lien only creates a priority to payment from foreclosure proceeds" and that "NRS §116.3116 refers to a judicial foreclosure action and is not applicable when the home owner's association forecloses under the non-judicial foreclosure statutes" (APP. Pgs. 555-556) ignores the express language of NRS 116.31162(1) which empowers the HOA to foreclose it's lien using the procedure defined in NRS 116.31162 to 116.31168, inclusive. These sections contain absolutely no language limiting the HOA's foreclosure rights to "a priority to payment from foreclosure proceeds."

In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012), this court upheld an injunction prohibiting the State Department of Business and Industry, Financial Institutions Division from enforcing it's declaratory order and advisory opinion regarding the amount of HOA lien fees associations could collect. This court held that the Financial Institutions Division did not have jurisdiction or authority to interpret NRS Chapter 116, but that this jurisdiction and authority rested with the Real Estate Division. The decision states in part:

> The language of NRS 116.615 and NRS 116.623 is clear and unambiguous.
> . . . .
> Based on a plain, harmonized reading of these statutes, the responsibility of determining which fees may be charged, the maximum amount of such fees**, and whether they maintain a priority,** rests with the Real Estate Division and the CCICCH.
> . . . .
> **We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116.** Consequently, the Department lacked jurisdiction to issue an advisory opinion interpreting

> NRS Chapter 116. Therefore, the district court did not abuse its discretion in determining that NAS had a likelihood of success on the merits. (emphasis added)

This court specifically noted that the responsibility to determine whether the fees "maintain a priority" rests with the Real Estate Division. In response to this decision, the Real Estate Division issued it's opinion interpreting NRS 116.3116. This advisory opinion, dated December 12, 2012, was attached as Exhibit 3 to Plaintiff/appellant's ex parte motion for temporary restraining order (APP. Pgs. 102 - 121).

Section II of the opinion, cites to a portion of Section 2 to the commentary from the drafters of the Uniform Common-Interest Ownership Act (UCIOA).

The opinion letter from the Real Estate Division states, beginning on page 8:

> NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest. The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to distinguish it from the other portion of the association's lien that is subordinate to a first security interest.
>
> The ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. **An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security.** NRS 116.3116 is found in the Uniform Act at § 3-116. Nevada adopted the original language from § 3-116 of the Uniform Act in 1991. From its inception, the concept of a super priority lien was a novel approach. The Uniform Act comments to §3-116 state:
>
> > [A]s to prior first security interests, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months's assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required.

> This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. **There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association**. (emphasis added)
>
> (APP. Pgs. 109-110)

This court has repeatedly held that courts should attach substantial weight to an administrative body's interpretation of statutes which it is charged to enforce. Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy, 124 Nev. 701, 191 P.3d 1159 (Nev.2008); Folio v. Briggs, 99 Nev. 30, 656 P.2d 842 (1983); Sierra Pacific Power Co. v. Department of Taxation, 96 Nev. 295, 607 P.2d 1147 (1980); Clark County School District v. Local Government Employee Management Relations Board, 90 Nev. 442, 530 P.2d 114 (1974).

This court has frequently stated that when interpreting a statute, the court should review the legislative history to determine the Legislature's intent. State v. Tricas, 128 Nev. Ad. Op. 62, 290 P.3d 255 (2012); Gold Ridge Partners v. Sierra Pacific Power Co. 128 Nev. Adv. Op. 47, 285 P.3d 1059 (2012).

Chapter 116 of the Nevada Revised Statutes is derived from the Uniform Common-Interest Ownership Act (UCIOA). This court has referred to NRS Chapter 116 and to the Uniform Act in interpreting other provisions of NRS Chapter 116 in a number of cases. For example in Holcomb Condominium HOA v. Stewart Venture, LLC,129 Nev. Adv. Op. 18, 300 P.3d 294 (2013), this court stated "the term 'separate instrument' is not defined in NRS Chapter 116 or the Uniform Common-Interest Ownership Act (UCIOA)."

In Beazer Homes Holding Corp. v. District Court ,128 Nev. Adv. Op. 66, 291 P.3d 128 (2012), this court stated "the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3-102 of the Uniform Common-Interest Ownership Act, upon which NRS 116.3102 is based."

In Boulder Oaks Community Association v. B&J Andrews, 125 Nev. 397, 215 P.3d 27 (2009) , this court stated "...NRS Chapter 116 is Nevada's version of the Uniform Common-Interest Ownership Act (UCIOA).

Section 2 to the commentary from the drafters of the uniform act is the relevant portion pertaining to the "super priority" lien, and was cited in the opinion letter from the Real Estate Division. The entirety of section 2 reads:

> 2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the associations's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first Mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months's 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 mortgage lenders. **As a practical matter, mortgage lenders will most likely pay the 6months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.** (emphasis added)

This language clearly shows the intent for the HOA lien to have priority over the first mortgage holder. Why else would the mortgage lender pay the assessments rather than have the unit go to foreclosure? Simply because the holder of the first would lose it's priority to the HOA lien.

Carl Lisman, Esq., who was one of the drafters of the original model law, issued an opinion letter on May 29, 2013, which states, in part, that it was the intent of the drafters that the mortgage holder's lien would be extinguished by foreclosure of the "super-priority" lien. (APP. Pgs. 414-420)

On December 7, 2012, the Legislative Counsel Bureau issued an opinion letter stating that foreclosure on the "super-priority" lien by an HOA extinguishes the mortgage holder's lien. (APP. Pgs. 422-425)

As stated in it's Servicing Guide Announcement SVC-20120-05, dated April 11, 2012, Fannie Mae REQUIRES that mortgage lenders pay the association liens because it recognizes that the HOA lien has priority. (APP. Pgs. 427-429) The servicing guide provides in part:

> Currently, Fannie Mae requires servicers to advance funds when the servicer is notified by an HOA for a PUD or condo project that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association if necessary to protect the priority of Fannie Mae's mortgage lien. Fannie Mae provides for reimbursement to the servicer for up to six months of such advances in certain states.
>
> In addition, Fannie Mae currently requires servicers to ensure any priority liens for delinquent HOA dues and assessments on acquired properties are cleared immediately, but no later than 30 days, after the foreclosure sale or acceptance of a deed-in-lieu of foreclosure.
>
> For properties located in states providing priority for assessment liens over a previously-recorded mortgage document, servicers must take steps to protect the priority of the mortgage lien. When pursuing foreclosure, the servicer must determine the amount to be paid in order to clear the association's claim of lien and preserve the priority of the mortgage lien.

Fannie Mae certainly recognizes that a number of states have statutes which provide limited priority for HOA assessments and is requiring it's servicers to protect the priority of it's loans.

The comments from the drafters of the uniform act also state that the lender could provide for an escrow for assessments. This is commonly done for taxes and insurance. The language of the deed of trust in this case expressly requires that the borrower provide for the escrow of assessments for HOA obligations and that the borrower satisfy all HOA payments, and the deed of trust even contains a rider specifically because the loan is on a property governed by an HOA. A copy of the deed of trust in question was attached as Exhibit 2 to Plaintiff/appellant's ex parte motion for temporary restraining order (APP. Pgs. 82-100). Paragraph 3 at page 4 of the deed of trust (APP. Pg. 85) provides in part:

> **3. Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes

and assessments and **other items which can attain priority over this Security Instrument as a lien** or encumbrance on the Property; .... These items are called "Escrow Items." **At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees,**
and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. ... (emphasis added)

Paragraph 4 at page 5 of the deed of trust (APP. Pgs. 86-87) states:

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, **and Community Association Dues, Fees, and assessments, if any**. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4. (emphasis added)

On page 7 of the deed of trust (APP. Pgs.88-89) paragraph 9 reads in part:

Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) **there is a legal proceeding that might significantly affect Lender's interest in the Property** and/or rights under this Security Instrument (**such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations**), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) **paying any sums secured by a lien which has priority over this Security Instrument**; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding.....

> **Any amounts disbursed by Lender under this Section 9 shall become additional debt of borrower secured by this Security Instrument**. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment. (emphasis added)

Paragraph 22 on page 13 of the deed of trust (APP. Pg. 94) describes the lender's remedies, including foreclosure on the deed of trust.

The deed of trust also includes a "planned unit development rider." (APP. Pgs. 97-99) This rider repeats the borrower's obligations to pay assessments. Page 1 of the rider (APP. Pg. 97) begins:

> **PUD COVENANTS**. In addition to the covenants and agreements made in the Security instrument, Borrower and Lender further covenant and agree as follows:
>
> **A. PUD Obligations.** Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the: (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. **Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents**. (emphasis added)

Paragraph F on page 2 of the PUD Rider (APP. Pg. 98) states:

> **F. Remedies.** If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

As demonstrated by the language in these form documents, lenders have anticipated that HOA "super liens" would have priority and have provided protections for themselves in their own documents.

3. A reported decision supports the plaintiff/appellant's position

The court of appeals for the State of Washington in the case of Summerhill Village Homeowners Association v. Roughley, 289 P.3d 645 (Wash. App. 2012) has recently ruled that under the similar Washington state version of the UCIOA that foreclosure of the priority lien of an association extinguishes the outstanding deeds of trust.

The Washington State statute, RCW 64.34.364, provides in relevant part:

Lien for assessments

(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.

The biggest difference between the Nevada statute and the Washington state statute is that in Washington, the HOA has to conduct a judicial foreclosure to keep it's priority.

The Washington Court of Appeals ruled that the HOA lien was prior to the first mortgage holder and that the foreclosure sale of the HOA lien extinguished the security interest of the mortgage holder. The court stated:

The term "mortgage" includes a deed of trust. Thus, a condominium association's lien for common expense assessments has limited priority over deeds of trust recorded before the lien arises. This is often termed "super priority."

¶ 10 The official comments to RCW 64.34.364 reveal the expectation of the legislature: "As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien." [FN6]

> FN6. 2 SENATE JOURNAL, 51st Leg., Reg., 1st & 2nd Spec. Sess., at 2080 (Wash.1990); *see also* 1 SENATE JOURNAL, 51st Leg. Sess., Reg. Sess., at 376 (Wash.1990). It appears the Senate adopted the Washington State Bar Association comments, which are substantially identical to the official comments to the Uniform Condominium Act concerning this section.

¶ 11 Therefore, under the statute,[FN7] Summerhill's 2008 assessment lien had priority over the 2006 deed of trust to the extent of Summerhill's assessments for common expenses. Deutsche Bank's predecessor, MERS, was included in and notified of the foreclosure action, but GMAC, as the loan servicer, did not facilitate payment of the assessment lien prior to the sheriffs sale. **The sale extinguished the 2006 deed of trust**. The question now is whether Deutsche Bank can redeem. (emphasis added).

In a case involving an HOA lien from the state of Virginia, Board of Directors v. Wachovia Bank, 581 S.E. 2d 201 (Va. 2003), the court held that the bank's mortgage lien had priority over the lien held by the HOA. In that case, however, the Virginia statute specifically held that the mortgage lien had priority. The statute in question provides:

> 55-79.84. Lien for assessments
>
> A. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments. **The said lien, once perfected, shall be prior to all other liens and encumbrances except** (i) real estate tax liens on that condominium unit, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) **sums unpaid on any first mortgages or first deeds of trust recorded prior to the perfection of said lien for assessments and securing institutional lenders.** The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. (emphasis added)

If the Nevada legislature wanted to be clear that the bank's lien would survive the foreclosure of the HOA's super priority lien, it could have specifically stated so in the Nevada statute. Instead, the clear language of the Nevada statute is that the nine month "super priority lien" has priority over Respondent's first deed of trust.

The advisory opinion of the Real Estate Division is consistent with the plain language of the statute, the intent of the statute as demonstrated by the committee advisory notes, and the judicial decision from the state of Washington interpreting a substantially similar statute. The Plaintiff/appellant's title should be found to be free and clear of any lien or encumbrances asserted by Respondent.

4. The HOA was not required to file a civil action to enforce it's super priority lien.

The Summerhill case is cited for the proposition that the foreclosure of the HOA lien extinguishes the first mortgage lien. A number of district court judges have relied on the Summerhill case to claim that the HOA lien must be foreclosed upon by judicial foreclosure. Although the Summerhill case is not cited in the court's decision, the court found that "NRS §116.3116 refers to a judicial foreclosure action and is not applicable when the home owner's association forecloses under the non-judicial foreclosure statutes." (APP. Pg. 556)

By its terms, NRS 116.3116(2)(c) does not require the filing of a "judicial" action; it only requires "institution of an action to enforce the lien."

There is no provision for judicial foreclosure of HOA liens in NRS Chapter 116. Foreclosure of liens under NRS Chapter 116 is also specifically excepted from the statutory scheme for judicial foreclosures under Chapter 40.

NRS 40.433 states:

> **"Mortgage or other lien" defined**. As used in NRS 40.430 to 40.459, inclusive, unless the context otherwise requires, a "mortgage or other lien" includes a deed of trust, but **does not include a lien which arises pursuant to chapter 108 of NRS, pursuant to an assessment under chapter 116, 117, 119A or 278A of NRS or pursuant to a judgment or decree of any court of competent jurisdiction.** (emphasis added).

Also included in NRS Chapter 40 is the statute commonly referred to as the "one action rule, " NRS 40.430(1) which begins "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate...." The one action rule permits only one action for the recovery of any debt or the enforcement of any right secured by a mortgage or other lien. The statute defines a list of actions which a beneficiary may take which do not violate the one action rule, including non-judicial foreclosure. The non-judicial foreclosure is referred to as an "action," but it clearly is not a "civil action."

This court has already rejected the argument that an "action" must be a civil action. In the case of Hamm v. Arrowcreek Homeowners Association, 124 Nev. 290, 183 P.3d 895 (2008), this Court stated:

> NRS 116.3116(1) provides that liens exist when assessments are due, regardless of any classification. **Thus, an association is not required to commence a civil action to record or perfect the lien, which already exists once assessments are due, and, therefore, such association need not submit to mediation or arbitration before recording the lien**. We conclude that NRS 38.310 does not treat similarly situated individuals differently because it requires mediation or arbitration before civil actions are initiated by homeowners or homeowners' associations alike, without classification. Applying the rational basis test, we conclude that NRS 38.310's requirement of mediation or arbitration is rationally related to the legitimate governmental interest of assisting homeowners to achieve a quicker and less costly resolution of their disputes with homeowners' associations than if they had to initiate a civil action in the district court. Accordingly, we conclude that NRS 38.310 does not violate equal protection principles.

NRS Chapter 116 provides the requirements for a foreclosure sale of an HOA lien in NRS 116.31162 through 116.31168. The procedures are similar to foreclosure under the power of sale in a deed of trust as provided in NRS 107.080. There is no provision in these statutes for a judicial foreclosure process.

NRS 116.3116 is not the only statute providing a super priority. NRS 116.310312 allows an HOA to have a super priority lien that may be non-judicially foreclosed for maintenance or abatements costs. NRS 116.310312 provides in part:

> 4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. **The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.**
>
> 5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.
>
> 6. Except as otherwise provided in this subsection, **a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116**. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.
> (emphasis added).

The language in this statute makes it clear that the "super priority" lien status is to be achieved by the non-judicial foreclosure procedure outlined in NRS Chapter 116.

The Real Estate Division Advisory Opinion, attached as Exhibit 3 to Plaintiff/appellant's ex parte motion for temporary restraining order (APP. Pgs. 44-63) also addresses the meaning of the term "action" as used in the statute. The opinion begins by addressing 3 questions. The third one being:

> **QUESTION #3:**
>
> Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist? (APP. Pg. 44)

The opinion gives a short answer and a more detailed answer to the question. The short answer is:

> **SHORT ANSWER TO #3:**
>
> No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien. (APP. Pg. 45)

The detailed answer to the question in the opinion is:

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

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

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

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

NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. Thisprocess is started by the mailing of a notice of delinquent assessment as provided in NRS 116.31162(1)(a). At that point, the immediately preceding 9 months of assessments based on the association's budget determine the amount of the super priority lien. The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2). The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2). Associations should make the delinquent assessment known to the first security holder in an effort to receive the super priority lien amount from them as timely as possible. (APP Pgs. 60-61)

The argument that a judicial foreclosure must be instituted in order for the HOA lien to gain it's "super priority" status is contrary to Nevada law. The legislature set up a statutory scheme in which the liens are to be foreclosed upon in a non-judicial manner. There is no provision under chapter 116 for a judicial foreclosure similar to the statutory provisions providing for judicial foreclosure of trust deeds.

This was recognized in a recent decision issued by Judge Pro from the United

States District Court for the District of Nevada regarding the super-priority lien created by NRS 116.3116. In the case of 7912 Limbwood Court Trust v. Wells Fargo Bank, __ F. Supp.2d ____, 2013 WL 5780793 (D.Nev.), the court stated:

> Nevada's statutory scheme is clear. **Section 116.3116(2) unambiguously provides that the HOA super priority lien is prior to the first deed of trust. The statutory scheme also unambiguously provides for the HOA to resort to non judicial foreclosure procedures to enforce its lien.** The statute sets forth the order of priority by which the foreclosure sale proceeds must be distributed, and the association's lien must be satisfied before any other subordinate claim of record. The purchaser at an HOA foreclosure sale obtains the unit owner's title without equity or right of redemption, and a deed which contains the proper recitals "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." *Id.* § 116.31166(2). Compare Nev.Rev.Stat. § 107.080 (providing that a mortgage foreclosure sale "vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption"); Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317–18 (1867) (providing that such a sale vests absolute title in the purchaser). Consequently, a foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust. (emphasis added)
>
> . . . .
>
> The court went on to say:
>
> Moreover, the result in this case is neither novel nor unfair. Wells Fargo easily could have avoided this purportedly inequitable consequence by paying off the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of its junior interest. Additionally, Wells Fargo could have required an escrow for HOA assessments so that in the event of default, Wells Fargo could have satisfied the super priority lien amount without having to expend any of its own funds. See Uniform Common Interest Ownership Act § 3–116, cmt. 1 (1982).

The legislature provided for a non-judicial procedure for foreclosure of a homeowners association lien. A judicial foreclosure is therefore not required for the super-priority lien to extinguish the respondent's mortgage lien.

5. The statute takes priority over the provisions of any CC&R's.

The order by the district court does not refer to any recorded Declarations or CC&Rs affecting the Property. Some district courts, however, have relied on subordination provisions in the CC&Rs to hold that a deed of trust takes priority over the HOA's super priority lien. The record on appeal does not contain any evidence of such a subordination provision for the Property in this case. NRS 116.1104 provides:

> **Provisions of chapter may not be varied by agreement, waived or evaded; exceptions.** Except as expressly provided in this chapter, its

provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in paragraph (b) of subsection 2 of NRS 116.12075, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

NRS 116.1206 provides that any CC&R's which conflict with the statute will be deemed to conform with the chapter. The statute provides:

> **Provisions of governing documents in violation of chapter deemed to conform with chapter by operation of law; procedure for certain amendments to governing documents.**
>
> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.
>
> (b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

This court affirmed that the statutes control over the wording of the CC& R's. In the case of Boulder Oaks Community Association v. B& J Andrews Enterprises, LLC 125 Nev. 397, 406, 215 P.

> When NRS 116.003 is read in context with the UCIOA, **it is clear that when a term is defined in NRS Chapter 116, the statutory definition controls and any definition that conflicts will not be enforced. To read NRS 116.003 otherwise would lead to the absurd result of rendering the definitions provided in NRS 116.005 to 116.095 mere surplusage. See Speer v. State, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000). Further, any other reading of the statute would be contrary to the express purpose of NRS Chapter 116, which is to "make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2)**. If this court were to enforce any definition provided by a declaration, then the goal of making the laws concerning common-interest communities uniform would never be reached. See Speer, 116 Nev. at 679, 5 P.3d at 1064 (stating that statutes should not be read in a manner that violates the " 'spirit of the act' " (quoting Anthony Lee R., A Minor v. State, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997))).

If the subject CC&R's conflict with the priority contained in NRS 116.3116, the statute controls.

Certainly, if any CC&R's on any development violated any statute, public policy

or constitutional provision, no person could seriously claim that the CC&R's prevailed over the statute. There is no reason why the provisions of any CC&R's would take precedence over the statutes found in NRS Chapter 116.

6. The statutory notice provided to Respondent was adequate

The statutes outlining the procedures for the non-judicial foreclosure of the HOA lien provide for adequate notice to subordinate lien holders, including first lien mortgage holders.

Respondent is statutorily entitled to notice of the foreclosure sale so that it may protect it's interests. NRS 116.31168 provides in part;

> **Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.**
>
> 1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.

NRS 107.090 provides in part:

> **Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.**
>
> 1. As used in this section, "person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.
>
> . . . .
>
> 3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; and
>
> **(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**

The language of this statute makes it clear that all persons with an interest, whose interest are subordinate to the super priority lien, are entitled to notice.

The statutory scheme provided for foreclosures of trust deeds in NRS 107.080 mirrors the foreclosure procedures for HOA liens found in NRS Chapter 116. In the case

of Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), the federal appeals court ruled that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

The statutory requirements for the foreclosure procedures under both NRS 107.080 and NRS Chapter 116 are detailed in the following graph:

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement but required by terms of deed of trust
NRS 116.31162(1)(b)	Execute notice of default and election to sell (NOD) that describes the deficiency in payment	NRS 107.080(2)(b)
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168(incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(3)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)	Mail Notice of Sale (NOS) to interested parties who request notice	NRS 107.090(4)
NRS 116.311635(1)(b)(1)	Mail Notice of Sale (NOS) to subordinate claim holders	NRS 107.090(4)
NRS 116.311635(1)(b)(3)	Mail Notice of Sale (NOS) to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. The notices provided to claimants to the real property are the same under both Chapters 107 and 116, and the notices are adequate.

Respondent had adequate notice and procedural protections to protect its interests in the subject real property and failed to do so. Respondent's mortgage lien has therefore been extinguished.

7. Plaintiff/appellant is protected as a bona fide purchaser.

Authorities hold that a bona fide purchaser for value at a foreclosure sale takes title free and clear from the claims of the extinguished former lien holders.

In the case of Firato v. Tuttle, 48 Cal.2d 136, 308 P.2d 333 (1957), the California Supreme Court stated:

> Instruments which are wholly void cannot ordinarily provide the foundation for good title even in the hands of an innocent purchaser, as where a deed has been forged or has not been delivered. Trout v. Taylor, 220 Cal. 652, 656, 32 P.2d 968. It does not appear, however, that section 870 of the Civil Code should necessarily make the unauthorized reconveyance by a trustee void as to such a purchaser. Section 2243 of that code states: 'Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration.' (Emphasis added.) This section was also enacted in 1872 and has been treated as correlative to section 870. Chapman v. Hughes, 134 Cal. 641, 657, 58 P. 298, 60 P. 974, 66 P. 982.

> **The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose**, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civil Code, s 869. The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. **It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions.** Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478,
>
> 2 S.Ct. 814; Town of Carbon Hill v. Marks204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.
>
> As section 2243 of the Civil Code must be read with section 870 of the same code and because of the obvious desirability of protecting innocent purchasers for value who rely in good faith upon recorded instruments under the circumstances presented here, we conclude that plaintiffs were required to plead that respondents were not such innocent purchasers for value in order to state a cause of action against them. In the absence of such allegations, the trial court properly sustained respondents' demurrers to plaintiffs' first amended complaint. (emphasis added)

The bona fide doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

The bona fide purchaser doctrine was adopted by this court as far back as 1880, in the case of Moresi v. Swift, 15 Nev. 215 (1880). This court stated:

> The rule that a man who advances money bona fide and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate.

California's Civil Code §2924 is similar to Nevada's NRS 107.080 governing the procedures for non-judicial foreclosures of trust deeds. However, Civil Code §2924

includes a codification of the common law presumptions regarding the protections provided to a bona fide purchaser at a trustee's sale. Section (6)(c) states:

> A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Nevada has not codified the protections of a bona fide purchaser at a trustee's sale, but the Nevada case law is consistent with the holdings in California based on it's statutory codification of the bona fide purchaser doctrine.

NRS 116.31166 has language similar to California Civil Code §2924 (6)(c) regarding the recitals in the foreclosure deed. The Nevada statute reads:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
>
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
>
> (b) The elapsing of the 90 days; and
>
> (c) The giving of notice of sale,
>
> are conclusive proof of the matters recited.
>
> 2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.
>
> 3. 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.

In the case of Moore v. DeBernardi 47 Nev. 33, 220 P. 544 (1923), this court stated:

> The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, incumbrance, or otherwise, of which he has no notice, actual or constructive. Brophy M. Co. v. B. & D. G. & S. M. Co., 15 Nev. 108.
>
> . . .
>
> To entitle a party to the character of a bona fide purchaser, without notice, he must have acquired the legal title, and have actually paid the purchase money before receiving notice of the equity of another party. Moresi v. Swift, 15 Nev. 215.

Consistent with these holdings, in the case of Baily v. Butner 64 Nev. 1, 176 P.2d 226 (1947) this court stated:

> The authorities are practically unanimous in holding that, in a suit by one asserting a prior equity, unless exceptional circumstances exist, the duty devolves upon the defendant, who seeks to establish a superior equity upon the basis that he is a bona fide purchaser, to both allege and prove all of the essential elements constituting him such bona fide purchaser, that is to say, a purchaser for a valuable consideration without notice of the prior agreement and the equity resulting therefrom.

Although the procedures for the non-judicial foreclosures are similar in Chapter 116 for foreclosure on a homeowners association lien and under Chapter 107 for foreclosure under a deed of trust, there is one striking difference between the two chapters. NRS 107.080(6) permits a party that does not receive proper notice of the sale to file an action to set the sale aside within 60 days of receiving actual notice of the sale. There is no similar provision in Chapter 116. This court may presume that the legislature intended for ALL sales under Chapter 116 to be final and not subject to attack.

It is respectfully submitted that because of the similarities between the Nevada statutory and case law and the California statutory and case law, this court should adopt the reasoning in the Firato v. Tuttle case and apply the bona fide purchaser doctrine and confirm the title of the plaintiff/ appellant in the subject real property.

In it's motion to dismiss, Respondent cited the Vermont case of Will v. Mill Condominium Owners' Ass'n, 176 Vt. 380, 848 A.2d 336 (2004). App. Pg. 21, ll. 7-14, in support of it's argument that plaintiff's "purchase was not made for valuable consideration and the price paid was not commercially reasonable." (APP. Pg. 194)

The holding from the Vermont court is contrary to established Nevada law and should be disregarded. This court has stated on multiple occasions that mere inadequacy of price is not sufficient to set aside a foreclosure sale where there is no showing of fraud, unfairness, or oppression. Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969); Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963). Consequently, the fact that Plaintiff/appellant purchased the Property

for $10,500.00 does not create grounds to set aside the title held by plaintiff/appellant as a bona fide purchaser.

The Long v. Towne, case, Id., is notable because it involved a foreclosure sale of an association's lien for failure to pay assessments. Further, a distinguishing factor between each of these cited Nevada cases, as well as the Vermont case is that the complaining party in the complaint was the property owner, not an encumbrancer on the property, such as the Respondent here. At all times, from the time of the foreclosure proceedings through the foreclosure sale, the Respondent had the right to cure the default and maintain it's interest in the property, but failed to do so. The Respondent's failure to protect it's rights should not be a basis to deprive the plaintiff/appellant of it's rights.

8. Plaintiff/appellant is entitled to injunctive relief to prohibit Respondent from foreclosing the deed of trust that was extinguished by the foreclosure of the super priority HOA lien created under N.R.S. 116.3116

In it's opinion, the district court denied plaintiff/appellant's motion for preliminary injunction and found that "the home owner's association foreclosure sale of its lien, under NRS 116.3116, cannot extinguish Wells Fargo's deed of trust because it was recorded prior to the home owner association's lien and Plaintiff/appellant Daisy Trust purchased the property with notice of the first in time deed of trust." (APP. Pg. 556). Because this interpretation of NRS 116.3116 is incorrect, and because defendant/respondent's first deed of trust was extinguished by the HOA sale held on August 3, 2012, Plaintiff/appellant is likely to succeed on the merits of its action, and injunctive relief is appropriate in this case.

NRS 33.010 provides in part:

> **Cases in which injunction may be granted.** An injunction may be granted in the following cases:
>
> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
>
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

A preliminary injunction is 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. S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403; 23 P.3d 243 (2001); Dangberg Holdings v. Douglas Co., 115 Nev. 129, 978 P.2d 311(1999); Pickett v. Comanche Construction, Inc., 108 Nev. 422, 426, 836 P.2d 42, 44 (1992); Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987); Sobol v. Capital Management Consultants, 102 Nev. 444, 446, 726 P.2d 335 (1986); citing Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 780, 587 P.2d 1329,1330 (1978). The balance of hardships between the parties is also a factor to be considered. Ottenheimer v. Real Estate Division, 91 Nev. 338, 535 P .2d 1284 (1975).

This court has ruled that if real property is permitted to be sold at foreclosure sale, the plaintiff would suffer irreparable harm for which money damages would be inadequate. Pickett v. Comanche Construction, 108 Nev. 422, 836 P.2d 42 (1992).

Real property is considered unique and loss of property rights generally results in irreparable harm. Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987). As such, an injunction is proper to prohibit foreclosure when the Plaintiff/appellant has shown that it is entitled to relief.

Here, the Plaintiff/appellant is entitled to permanent injunctive relief because Respondent's deed of trust was extinguished by the foreclosure of the HOA lien.

CONCLUSION

The language in NRS 116.3116 created a super priority lien that extinguished Respondent's deed of trust when Plaintiff/apellant purchased the real property at the HOA foreclosure sale. The legislative history for NRS 116.3116 supports Plaintiff/appellant's position that foreclosure of the super priority lien has the normal effect of extinguishing all security interests that fall within the scope of NRS 116.3116(2)(b). This includes the deed of trust that Respondent seeks to foreclose in this case. Because Respondent's lien has been extinguished, a permanent injunction must be entered to prohibit Respondent from enforcing this extinguished lien.

As a result, this Court should enter its Order reversing the order by the district court granting Respondent's motion to dismiss and denying Plaintiff/appellant's motion for preliminary injunction. It is respectfully submitted that this court remand this case to the district court with directions to enter judgment in favor of the plaintiff quieting title to the real property in Plaintiff/appellant's name and enjoining Respondent from enforcing the deed of trust recorded on May 22, 2009.

DATED this 19th day of November, 2013.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 11,867 words.

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

DATED this 19th day of November, 2013.

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I HEREBY CERTIFY that on the 19th day of November 2013, I served a photocopy of the foregoing APPELLANT'S OPENING BRIEF by placing the same in a sealed envelope with first-class postage fully prepaid thereon and deposited in the United States mails addressed as follows:

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