SIXTH AFFIRMATIVE DEFENSE

(Misjoinder)

41. As a sixth, separate and affirmative defense to the Complaint on file, Defendant alleges that it has not been properly joined to this Complaint, as it is not a necessary party to this litigation, and should be dismissed.

WHEREFORE, Defendant prays for judgment as follows:

1. That the Complaint be dismissed;

2. For costs of suit; and

3. For such other and further relief as the Court deems just and proper.

AFFIRMATION

Pursuant to NRS 239B.030

* * * * *

The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

Dated: May 17th, 2013

ROBISON, BELAUSTEGUI, SHARP & LOW
a Professional Corporation
71 Washington Street
Reno, NV 89503

By: _____
Michael E. Sullivan, Esq.

Richard J. Reynolds, Esq.
Burke, Williams & Sorensen, LLP
1851 East First Street, Suite 1550
Santa Ana, CA 92705-4067

Attorneys for Defendant
MTC FINANCIAL INC. dba TRUSTEE CORPS

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true copy of the **ANSWER TO COMPLAINT BY DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS SUED AS MTS FINANCIAL, INC., dba TRUSTEE CORPS** on all parties to this action by the method(s) indicated below:

X by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Michael F. Bohn, Esq.
Michael F. Bohn, Esq., Ltd.
376 E. Warm Springs Road, Suite 125
Las Vegas, NV 89119
Attorneys for Plaintiff Daisy Trust

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

DATED: This 17th day of May, 2013.

CLAUDIA ZAEHRINGER

Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

NTSO
Amy F. Sorenson, Esq.
Nevada Bar No. 12495
Richard C. Gordon, Esq.
Nevada Bar No. 9036
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Nevada Bar No. 9891
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rgordon@swlaw.com
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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
DEPT. XXIII

NOTICE OF ENTRY OF STIPULATION AND ORDER TO SET HEARING ON ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

-AND-

SET BRIEFING SCHEDULE

-AND-

CONTINUE TEMPORARY RESTRAINING ORDER

PLEASE TAKE NOTICE that a Stipulation and Order to Set Hearing on Order to Show Cause Why a Preliminary Injunction Should not Issue and Set Briefing Schedule and Continue

///

///

///

Temporary Restraining Order was entered in the above-captioned matter on May 16, 2013. A copy of said Stipulation and Order is attached hereto as Exhibit 1.

DATED this 20 day of May, 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.

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 **NOTICE OF ENTRY OF STIPULATION AND ORDER TO SET HEARING ON ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND SET BRIEFING SCHEDULE AND CONTINUE TEMPORARY RESTRAINING ORDER** by the method indicated:

X	U.S. Mail
	U.S. Certified Mail
	Facsimile Transmission
	Overnight Mail
	Federal Express
	Hand Delivery
	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
Attorneys for Plaintiff

DATED this 30 day of May, 2013

An Employee of Snell & Wilmer LLP

17182051.1

EXHIBIT 1

EXHIBIT 1

SAO
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Nevada Bar No. 12495
Richard C. Gordon, Esq.
Nevada Bar No. 9036
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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
DEPT. XXIII

STIPULATION AND ORDER TO SET HEARING ON ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

-AND-

SET BRIEFING SCHEDULE

-AND-

CONTINUE TEMPORARY RESTRAINING ORDER

Plaintiff DAISY TRUST ("Plaintiff"), Defendant WELLS FARGO BANK, N.A. ("Wells Fargo"), and Defendant MTC FINANCIAL, INC., dba TRUSTEE CORPS ("MTC") by and through their respective counsel, and no other parties yet appearing in this case, hereby stipulate as follows:

1. The hearing on Plaintiff's Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause Why a Preliminary Injunction Should Not Issue (the

"Motion") shall be heard on June 11, 2013 at 11:00 a.m.;

2. Wells Fargo and MTC's opposition to Plaintiff's Motion and any countermotion shall be filed and served on all parties on or before close of business on May 21, 2013;

3. Plaintiff's reply in support of its Motion and any opposition to Wells Fargo and MTC's countermotion shall be filed and served on all parties on or before close of business May 28, 2013;

4. Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

5. The Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

Dated: May 24 2013

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: _____
Michael F. Bohn, Esq.
376 E. Warm Springs Rd., Suite 125
Las Vegas, NV 89119
Attorneys for Plaintiff

Dated: May ____, 2013

SNELL & WILMER L.L.P.

By: _____
Amy F. Sorenson, Esq.
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Robin E. Perkins, Esq.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169
Attorneys for Wells Fargo Bank, N.A.

Dated: May ____, 2013

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
Richard J. Reynolds, Esq.
1851 East First Street, Suite 1550
Santa Ana, CA 92705
Attorneys for MTC Financial Inc.

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5. The Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

Dated: May ___, 2013

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: _____
Michael F. Bohn, Esq.
376 E. Warm Springs Rd., Suite 125
Las Vegas, NV 89119
Attorneys for Plaintiff

Dated: May 10, 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 Wells Fargo Bank, N.A.

Dated: May ___, 2013

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
Richard J. Reynolds, Esq.
1851 East First Street, Suite 1550
Santa Ana, CA 92705
Attorneys for MTC Financial Inc.

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4. Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

5. The Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

Dated: May ___, 2013

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: _____
Michael F. Bohn, Esq.
376 E. Warm Springs Rd., Suite 125
Las Vegas, NV 89119
Attorneys for Plaintiff

Dated: May ___, 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 Wells Fargo Bank, N.A.

Dated: May 10th, 2013

ROBISON, BELAUSTEGUI, SHARP & LOW

By: _____
Michael E. Sullivan, Esq.
71 Washington Street
Reno, NV 89503
Attorneys for MTC Financial Inc.

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

ORDER

Based on the foregoing Stipulation and other good cause appearing therefor,

IT IS SO ORDERED that the hearing on Plaintiff's Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause Why a Preliminary Injunction Should Not Issue (the "Motion") shall be heard on June 11, 2013 at 11:00 a.m.;

IT IS FURTHER ORDERED that Wells Fargo and MTC's opposition to Plaintiff's Motion and any countermotion shall be filed and served on all parties on or before close of business on May 21, 2013;

IT IS FURTHER ORDERED that Plaintiff's reply in support of its Motion and any opposition to Wells Fargo and MTC's countermotion shall be filed and served on all parties on or before close of business May 28, 2013;

IT IS FURTHER ORDERED that Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

IT IS FURTHER ORDERED that the Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

DATED this 16 day of May, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

SNELL & WILMER L.L.P.

Amy F. Sorenson, Esq.
Nevada Bar No. 12495
Richard C. Gordon, Esq.
Nevada Bar No. 9036
Robin E. Perkins, Esq.
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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

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[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

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[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.

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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.

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> 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.

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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.

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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.

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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.").)

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.

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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

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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."

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[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.

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(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

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[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

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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]

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[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

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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. Plaintiff's Reliance Upon the *Summerhill* Case Is Likewise Misplaced.

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.

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[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.

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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.

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[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).

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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).)

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(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.

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[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

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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]

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[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

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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.

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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.

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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:

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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

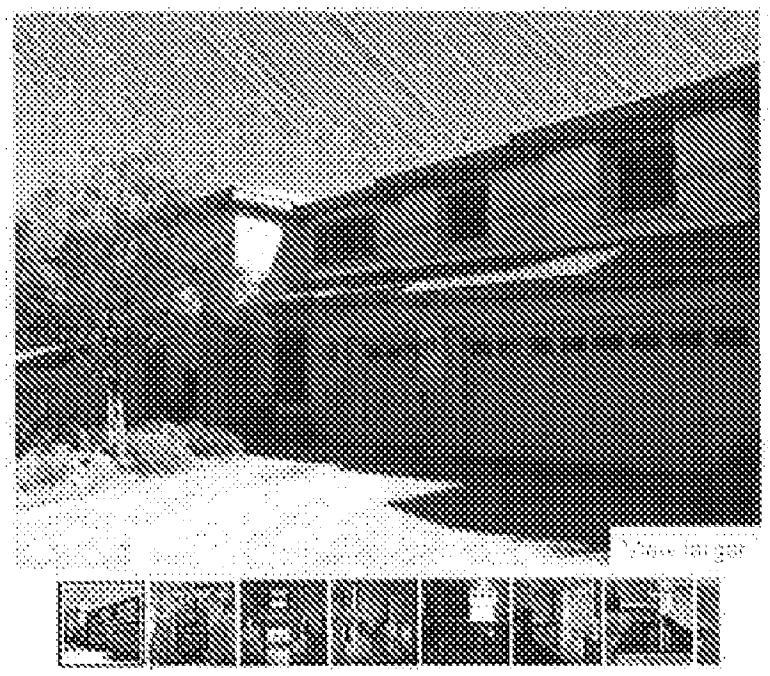
Est. Mortgage: $1,850/mo

See current rates on Zillow

Better Credo Could 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



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	$278K -- $495K	+$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 6.4% 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)
Call: (702) 900-6828

Billy Alt
(10 reviews)
Call: (702) 900-0424

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

Your Name

Phone

Email address

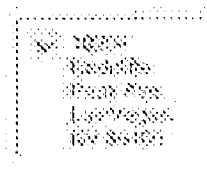
I would like advice about selling a home similar to 10209 Dove Row Ave, Las Vegas, NV 89166

I want to get pre-approved.

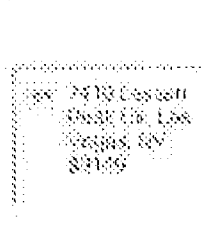
Contact Agent

Learn how to appear in this list

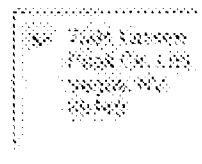
Similar Homes for Sale



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

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

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

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

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

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

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

NRS 116.3116(2) states:

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).[13]

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

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

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

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

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

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

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

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

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

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

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

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

Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:

First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien' – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.

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

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

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

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

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

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

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

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

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

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

ADVISORY CONCLUSION:

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

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

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

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

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

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[14] NRS 116.31164.

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

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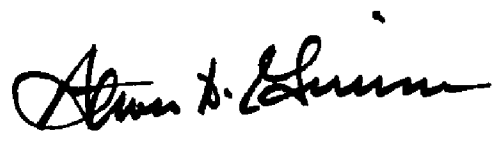
04/10/2013 11:53:23 AM



CLERK OF THE COURT

SUPP
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: A679095 DEPT NO.: XVIII

SUPPLEMENT TO EX PARTE MOTION

Attached hereto please find the notice of sale scheduling the foreclosure sale of the subject property for April 26, 2013.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: /s/ /Michael F. Bohn, Esq./
MICHAEL F. BOHN, ESQ.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiffs

Inst #: 201303260003611
Fees: $18.00
N/C Fee: $0.00
03/26/2013 02:44:47 PM
Receipt #: 1549294
Requestor:
LSI TITLE AGENCY INC.
Recorded By: CDE Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN 126-13-818-046

RECORDING REQUESTED BY:

WHEN RECORDED MAIL TO:

TRUSTEE CORPS
17100 Gillette Ave
Irvine, CA
92614

TS No: NV09006726-10-1S TO No: 120319231-NV-LMI

NOTICE OF TRUSTEE'S SALE
IMPORTANT NOTICE TO PROPERTY OWNER

YOU ARE IN DEFAULT UNDER A DEED OF TRUST AND SECURITY AGREEMENT DATED September 21, 2007. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDINGS AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

On April 26, 2013, at **09:00 AM**, **MTC FINANCIAL INC. dba TRUSTEE CORPS**, **as duly appointed Trustee WILL SELL AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH at the Front Entrance of Nevada Legal News, 930 S. Fourth St, Las Vegas, NV 89101**, all right, title and interest conveyed to and now held by it under and pursuant to Deed of Trust recorded on September 28, 2007, as Instrument No. 20070928-0003141, of the official records in the Office of the Recorder of Clark County, Nevada, executed by DONALD K BLUME AND CYNTHIA S BLUME, HUSBAND AND WIFE as Trustor, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as nominee for UNIVERSAL AMERICAN MORTGAGE COMPANY, LLC, its successors and/or assigns, as Beneficiary, all that certain property situated in said County and State, and more commonly described as: **AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST**

The property heretofore described is being sold "as is". The street address and other common designation, if any, of the real property described above is purported to be: **10209 DOVE ROW AVENUE, LAS VEGAS, NV 89166**

The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein. Said will be made, but without covenant or warranty express or implied, regarding title, possession or encumbrances, to pay the remaining unpaid balance of the obligations secured by the property to be sold and reasonably estimated costs, expenses and advances as of the first publication date of this Notice of Trustee's Sale, to wit: $455,484.08 estimated. Accrued interest and additional advances, if any, will increase the figure prior to sale. The property offered for sale excludes all funds held on account by the property receiver, if applicable.

Beneficiary's bid at sale may include all or part of said amount. In addition to cash, the Trustee will accept, all payable at time of sale in lawful money of the United States a Cashier's check drawn by a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in the applicable sections of the Nevada Administrative Code and authorized to do business in the State of Nevada, or other such funds acceptable to the Trustee.

The Beneficiary under the Deed of Trust heretofore executed and delivered to the undersigned, a written Declaration of Default and Demand for Sale. The undersigned caused said Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust to be recorded in the County where the real property is located and more than three months have elapsed since such recording.

If the Trustee is unable to convey title for any reason, the successful bidder's sole and exclusive remedy shall be the return of monies paid to the Trustee and the successful bidder shall have no further recourse.

SALE INFORMATION CAN BE OBTAINED ONLINE AT www.Auction.com
FOR AUTOMATED SALES INFORMATION PLEASE CALL:
AUCTION.COM at 800.280.2832

Dated: March 22, 2013

TRUSTEE CORPS
TS No. NV09006726-10-1S
17100 Gillette Ave, Irvine, CA 92614
949-252-8300

Paul Kim, Authorized Signatory

State of CALIFORNIA
County of ORANGE

On March 22, 2013 before me, David Miller, Notary Public, personally appeared PAUL KIM, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of CALIFORNIA that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Name

DAVID MILLER
Commission # 1893688
Notary Public - California
Orange County
My Comm. Expires Jun 25, 2014

To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, a secured party retains rights under its security instrument, including the right to foreclose its lien.

DEC
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: A679095 DEPT NO.: XVIII

DECLARATION OF MICHAEL F. BOHN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

MICHAEL F. BOHN, ESQ. states:

1. Declarant is the attorney for the plaintiff in this case and makes this declaration based upon personal knowledge.

2. I have not been able to make contact with counsel for Wells Fargo to discuss this motion for temporary restraining order.

3. As a result of the size of Wells Fargo and the large number of law firms representing Wells Fargo, it is impossible to determine who may the appropriate representative or attorney for Wells Fargo until after the bank is actually served and the case is assigned to the attorney or law firm.

4. If called upon to testify to the above facts, declarant could do so competently.

5. I declare under penalties of perjury under the law of the state of Nevada that the foregoing is true and correct.

DATED this 16th day of April 2013

/S/ /Michael F. Bohn, Esq. /
MICHAEL F. BOHN, ESQ.

AFFT
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: A679095 DEPT NO.: XVIII

AFFIDAVIT OF IYAD HADDAD IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

IYAD HADDAD being first duly sworn, deposes and says;

1. Affiant is the managing member of Resources Group, LLC, which is the trustee of the plaintiff Daisy Trust, the plaintiff in this case and makes this affidavit based upon personal knowledge.

2. The Daisy Trust is the owner of the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada.

3. The Daisy Trust obtained title by way of foreclosure deed recorded on August 9, 2012.

4. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Westminster at Providence Association, pursuant to NRS Chapter 116.

5. Defendant Wells Fargo Home NA is the assignee of a deed of trust which was recorded as an encumbrance to the subject property on September 28, 2007. Defendant MTC Financial dba Trustee Corps is the trustee on the deed of trust.

6. Defendants Donald K. Blume and Cynthia S. Blume are the former owner of the subject real property.

7. 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. Donald K. Blume and Cynthia S. Blume to the Westminster at Providence Association, pursuant to NRS Chapter 116.

8. Nonetheless, defendant Wells Fargo has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080.

9. Defendant Wells Fargo has failed to provide statutory notice of the foreclosure to the plaintiff.

10. The foreclosure sale is currently scheduled for April 26, 2013.

11. If called upon to testify to the above facts, affiant could do so competently.

IYAD HADDAD

SUBSCRIBED and SWORN to before me
this 17 day of April, 2013.

NOTARY PUBLIC in and for said
County and State

MAURIZIO MAZZA
Notary Public State of Nevada
No. 05-94588-1
My Appt. Exp. Feb. 1, 2017

TRO
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST

Plaintiff,

vs.

WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME

Defendants.

CASE NO.: A679095
DEPT NO.: XVIII

TEMPORARY RESTRAINING ORDER

The ex parte motion of plaintiff Daisy Trust, for a temporary restraining order to stop a foreclosure sale of it's property having come before the Court, and the Court having reviewed the motion and the ~~verified~~ complaint finds as follows:

1. Plaintiff is the owner of the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada.

2. Plaintiff obtained title by way of foreclosure deed recorded on August 9, 2012.

3. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Westminster at Providence Association, pursuant to NRS Chapter 116.

4. Defendant Wells Fargo Home NA is the assignee of a deed of trust which was recorded as an encumbrance to the subject property on September 28, 2007.

5. Defendant MTC Financial dba Trustee Corps is the trustee on the deed of trust.

6. Defendants Donald K. Blume and Cynthia S. Blume are the former owner of the subject real property.

7. The plaintiff contends 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, Donald K. Blume and Cynthia S. Blume to the Westminster at Providence Association, pursuant to NRS Chapter 116.

8. Defendant Wells Fargo has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080.

9. Defendant has also recorded a notice of sale on March 26, 2013, with a sale date of April 26, 2013

10. If the foreclosure sale were permitted to continue, the plaintiff would be irreparably harmed.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, Wells Fargo Bank, N.A., and MTC Financial dba Trustee Corps are prohibited from conducting a foreclosure sale on the property located at 10209 Dove Row Avenue, Las Vegas, Nevada, until otherwise ordered by this Court.

IT IS FURTHER ORDERED that a hearing shall be conducted on the 2nd day of May 2013, at the hour of 8:15 a .m, in Department XVIII, on the plaintiff's application for a preliminary injunction.

IT IS FURTHER ORDERED that this temporary restraining order will expire by it's own terms in 15 days from the date of it's issuance, unless extended by order of the court.

///

///

IT IS FURTHER ORDERED that the terms of this temporary restraining order shall become effective upon the plaintiff posting security in the sum of $ 500.00 with the Clerk of the Court.

DATED this 17th day of April, 2013, at the hour of 1:15 pm.

DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: _____
MICHAEL F. BOHN, ESQ.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiffs

/

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CLERK OF THE COURT

NPP
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: A679095 DEPT NO.: XVIII

NOTICE OF POSTING SECURITY

Plaintiff DaisyTrust, by and through it's attorney, Michael F. Bohn, Esq., hereby provides notice that it has posted security in the sum of $500.00 as required by the temporary restraining entered in this case. A copy of the receipt from the clerk's office is attached as Exhibit 1.

DATED this 19th day of April 2013.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
Nevada Bar No: 1641
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

OFFICIAL RECEIPT

District Court Clerk of the Court 200 Lewis Ave, 3rd Floor Las Vegas, NV 89101

Payor
L/O of Michael F. Bohn

Receipt No.
2013-48514-CCCLK

Transaction Date
04/19/2013

Description	Amount Paid
On Behalf Of Daisy Trust	
A-13-679095-C	
Daisy Trust, Plaintiff(s) vs. Wells Fargo Bank, Defendant(s)	
TEMPORARY RESTRAINING ORDER	
TEMPORARY RESTRAINING ORDER	500.00
SUBTOTAL	**500.00**

PAYMENT TOTAL **500.00**

Check (Ref #6168) Tendered	500.00
Total Tendered	**500.00**
Change	0.00

04/19/2013
09:22 AM

Cashier
Station AIKO

Audit
31368741

OFFICIAL RECEIPT

$20

FILED

2013 APR 25 P 3:40

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

****

DAISY TRUST, PLAINTIFF(S) VS. WELLS FARGO BANK, DEFENDANT(S)	CASE NO: A-13-679095-C DEPARTMENT 23

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Stefany Miley.

☒ This reassignment follows the filing of a Peremptory Challenge of Judge BARKER (DEPT 18).
☐ This reassignment is due to the recusal of Judge . See minutes in file.
☐ This reassignment is due to: Peremptory Challenge

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below:

Preliminary Injunction Hearing, on May 07, 2013, at 9:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: J. Arevalo
Jennifer Arevalo, Deputy Clerk of the Court

A-13-679095-C
NODR
Notice of Department Reassignment
2430001

CERTIFICATE OF MAILING

I hereby certify that: on this the 25th day of April, 2013

☒ I placed a copy of the foregoing NOTICE OF DEPARTMENT REASSIGNMENT in the appropriate attorney folder located in the Clerk of the Court's Office:

Michael F Bohn – LAW OFFICES OF BOHN
Amy Sorenson – SNELL & WILMER

J. Arevalo
Jennifer Arevalo, Deputy Clerk of the Court

RECEIVED
APR 25 2013
CLERK OF THE COURT

Electronically Filed
04/30/2013 02:21:32 PM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

****

DAISY TRUST,

Plaintiff(s),

-vs-

WELLS FARGO BANK,

Defendant(s).

CASE NO: A679095
DEPARTMENT XXIII

ORDER EXTENDING TEMPORARY RESTRAINING ORDER

This matter is set for hearing in Department 23 on Tuesday, May 7, 2013 at 11:00 A.M. on the Plaintiff's Application for a Preliminary Injunction. This case has been reassigned from Department 18, due to a Peremptory Challenge filed on April 25, 2013. Due to the untimely filing of the Peremptory Challenge that caused this case to be reassigned, IT IS HEREBY ORDERED that the Temporary Restraining Order that is due to expire on May 2, 2013 at 8:15 am is extended to May 7, 2013 at 11:00 A.M.

IT IS SO ORDERED.

Dated: April 30, 2013.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that on the 30th day of April, 2013, I faxed a copy of the foregoing Order Extending Temporary Restraining Order to: Michael F. Bohn, Esq. at (702) 642-9766 and to Amy F. Sorenson, Esq. at (702) 784-5252.

By:
Carmen Alper
Judicial Executive Assistant

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

RMFC
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
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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 DEPT. XXIII **NOTICE OF REMOVAL TO FEDERAL COURT**

TO: THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT, THE CLERK OF THE DISTRICT COURT, AND ALL PARTIES HERETO AND THEIR ATTORNEYS.

Please take notice that Defendant Wells Fargo Bank, N.A., through its undersigned counsel, has removed this action to the United States District Court, District of Nevada pursuant to 28 U.S.C. § 1332 (Diversity), § 1441, and § 1446.

///

///

A true copy of the Notice of Removal filed in the United States District Court, District of Nevada is attached as **Exhibit 1**.

DATED this 6 day of May, 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.

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 **NOTICE OF REMOVAL TO FEDERAL COURT** by the method indicated:

X	U.S. Mail
	U.S. Certified Mail
	Facsimile Transmission
	Overnight Mail
	Federal Express
	Hand Delivery
	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
Attorneys for Plaintiff

DATED this 6 day of May, 2013

An Employee of Snell & Wilmer LLP

17115503.1

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

EXHIBIT 1

EXHIBIT 1

Amy F. Sorenson, Esq.
Nevada Bar No. 12495
Richard C. Gordon, Esq.
Nevada Bar No. 9036
Robin E. Perkins, Esq.
Nevada Bar No. 9891
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asorenson@swlaw.com
rgordon@swlaw.com
rperkins@swlaw.com

Attorneys for Defendant Wells Fargo Bank, N.A.

IN THE UNITED STATES DISTRICT COURT

DISTRICT 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.

CASE NO.

NOTICE OF REMOVAL

TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Defendant WELLS FARGO BANK, N.A. ("Wells Fargo"), pursuant to 28 U.S.C. § 1332, hereby removes to this Court, Case No. A-13-679095-C, currently pending in Department XVIII of the Eighth Judicial District Court, Clark County, Nevada (the "Action"). The removal of this Action is based on the following grounds.

I. SUMMARY OF PLEADINGS

On March 28, 2013, Plaintiff Daisy Trust ("Plaintiff") filed a Complaint initiating the Action. On March 29, 2013, Plaintiff filed an Ex Parte Motion for Temporary Restraining Order, or Alternatively Order to Show Why a Preliminary Injunction Should Not Issue. On or about

April 10, 2013, Plaintiff filed a Supplement to Ex Parte Motion. The Court entered a Temporary Restraining Order on April 17, 2013.

Wells Fargo was served on April 19, 2013. On April 25, 2013, Wells Fargo filed a Peremptory Challenge. On April 30, 2013, an Order Extending Temporary Restraining Order was entered, extending the TRO to May 7, 2013. Currently, a hearing on Plaintiff's motion for preliminary injunction is scheduled for May 7, 2013. A copy of all process, pleadings, briefings, and orders served upon Defendant is attached pursuant to 28 U.S.C. § 1446. (See Exhibit A.)

II. NATURE OF COMPLAINT

Plaintiff's Complaint seeks title to the real property at issue (the "Property") pursuant to its purchase of the Property at a homeowners' association non-judicial foreclosure sale and Nevada Revised Statute ("NRS") 116.3116 *et seq*. The claims asserted in the Complaint are: (1) injunctive relief; (2) declaratory relief that Plaintiff is the rightful owner; and (3) declaratory relief that title is vested in Plaintiff free and clear of all liens.

III. STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1441(a), "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." As discussed herein, this action is removable under 28 U.S.C. §1441(a) because the district court has original jurisdiction under 28 U.S.C. § 1332 (diversity), venue is proper in the District of Nevada, and this Notice of Removal is timely filed.

A. Complete Diversity Exists Among the Parties.

There is complete diversity between the parties because, as set forth in detail below, none of the properly joined Defendants are citizens of Nevada. At the time Plaintiff's Complaint was filed, upon information and belief, Plaintiff was a citizen of the State of Nevada, because the trustee of Daisy Trust, Iyad Haddad, is a citizen of Nevada. "A trust has the citizenship of its trustee or trustees." *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (citing *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980)).

Wells Fargo is, and was at the time this action commenced, a citizen of South Dakota, the state listed on Wells Fargo's organization certificate. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006) (holding that "a national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of association, is located."). MTC Financial, Inc. d/b/a Trustee Corps ("MTC") is, and was at the time this action commenced, a California corporation, with its principal place of business in California. Plaintiff has additionally named Donald K. Blume and Cynthia S. Blume as individual defendants (collectively the "Blume Defendants"). While the Blume Defendants are, upon information and belief, Nevada citizens, their citizenship should not be considered because: (1) they have no ownership interest in or right to the Property; (2) they have not asserted any interest in the Property or recorded any encumbrance against the Property; (3) they cannot provide Plaintiff the relief it seeks; and (4) they were purposefully and fraudulently joined solely to defeat diversity, as detailed below.

1. Legal standard to disregard citizenship for purposes of diversity.

A fraudulently joined defendant will not defeat removal on diversity grounds. *Silon v. American Home Assurance Company*, 2009 WL 1090700, * 4 (D. Nev. 2009) (citing *Ritchey v. Upjohn Drug Co.*, 139 F. 3d 1313, 1318 (9th Cir. 1998) ("fraudulently joined defendants will not defeat removal on diversity grounds.") "[A] defendant must have the opportunity to show that the individuals joined in the action cannot be liable on any theory." *Ritchey*, 139 F. 3d at 1318. In determining fraudulent joinder, "the Court may 'pierce the pleadings' and consider 'summary judgment-type evidence such as affidavits and deposition testimony.'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001) (citing *Cavallini v. State Farm Mut. Auto. Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995).) "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F. 2d 1336, 1339 (9th Cir. 1987.)

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2. The claims asserted against the Blume Defendants fail as a matter of law.

While Plaintiff has identified the Blume Defendants as parties to this action, the specific allegations and requests for relief are addressed to Wells Fargo alone. The only specific allegation in the Complaint as to the Blume Defendants is that "Defendants Donald K. Blume and Cynthia S. Blume are the former owner [sic] of the subject real property." (Compl. ¶ 8.) This is a statement of fact, not a claim of misconduct. All other allegations are directed to Wells Fargo, asserting that Wells Fargo is the beneficiary of the deed of trust at issue. (Compl. ¶ 4.) That "Wells Fargo has recorded a notice of default and election to sell under it's deed of trust." (Compl. ¶ 10.) That "Wells Fargo has failed to provide statutory notice of the foreclosure to the plaintiff." (Compl. ¶ 11.) And that "Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding." (Compl. ¶ 12.) All of the specific alleged wrongdoing, and specific allegations upon which this Complaint are based, are related to Wells Fargo, not the Blume Defendants. Moreover, the Complaint is drafted on the basis that the Blume Defendants do not have and cannot assert any interest in the property, even calling them the "former owner" of the Property. (Compl. ¶ 8.) Plaintiff's three causes of action fail, as a matter of law, as to the Blume Defendants, thus they should not be considered for purposes of diversity.

Plaintiff's first cause of action is injunctive relief from Wells Fargo's pending foreclosure sale. (Compl. ¶ 12.) This is not a cognizable cause of action, but a claim for relief, and thus dismissal is proper as a matter of law. Moreover, this claim is related to Wells Fargo and its pending foreclosure sale; not the Blume Defendants. Thus dismissal as a matter of law as to the Blume Defendants is appropriate.

Plaintiff's second claim is declaratory relief for a finding that Plaintiff is the rightful owner of the Property and defendants have no right, title, or interest in the Property. (Compl. ¶ 15.) This is essentially a quiet title claim. Pursuant to Nevada Revised Statute ("NRS") 40.010, a quiet title action "may be brought by any person *against another who claims an estate or interest in real property, adverse to the person bringing the action*, for the purpose of determining such adverse claim." (emphasis added.) To succeed on its quiet title claim, Plaintiff must allege that the Blume Defendants have asserted an adverse ownership interest in the Property. "A quiet title

claim requires a plaintiff to allege that the defendant is unlawfully asserting an adverse claim to title to real property." *Turbay v. Bank of Am., N.A.*, 2:12-CV-1367 JCM PAL, 2013 WL 1145212, at *4 (D. Nev. Mar. 18, 2013); *Kemberling v. Ocwen Loan Servicing, LLC*, 2:09–CV–00567–RCJ LRL, 2009 WL 5039495, at *2 (D. Nev. Dec. 15, 2009). Plaintiff's Complaint does not allege that the Blume Defendants have asserted any claim to the Property. Without such an allegation, or any basis to support such an allegation (which has not been made), dismissal is proper as to Plaintiff's quiet title claim against the Blume Defendants.

Plaintiff's third claim is declaratory relief finding that Plaintiff is vested with title free and clear of all liens and encumbrances. (Compl. ¶ 18.) Again, as detailed above, the Blume Defendants have recorded no lien or encumbrance against the Property, and have asserted no claim against the Property. Only Wells Fargo has asserted an ownership interest with the recording of its Deed of Trust and Notice of Default and Election to Sell. This claim cannot be asserted against the Blume Defendants, and fails as a matter of law, because they recorded no lien or encumbrance against the Property.

Moreover, Plaintiff's Complaint is based upon the assertion that the HOA foreclosure sale pursuant to NRS 116.3116 *et seq.* was proper and valid, as against the former owners, the Blume Defendants. Plaintiff relies upon NRS 116.31166 which states that the sale of a unit per NRS 116.3116 *et seq.* "vests in the purchaser the title of the unit's owner without equity or right of redemption." Plaintiff's own contention that the Blume Defendants' ownership interest was extinguished at the HOA foreclosure sale precludes it from also asserting that the Blume Defendants have any ownership interest in the Property. Plaintiff cannot have it both ways.

Since the HOA foreclosure sale at issue, the Blume Defendants have not asserted any ownership interest or right to title of the Property; presumably no longer reside in the Property; have done nothing to indicate an intent to assert an ownership interest in the Property; and have recorded no encumbrances against the Property. Notably, Plaintiff has not filed an affidavit of service of the Blume Defendants, thus it appears Plaintiff has not even elected to serve them. The Blume Defendants' own conduct, or more importantly lack thereof, plus Plaintiff's own

allegations and basis for this entire suit, establish that the Blume Defendants are not proper parties to this action, and have been fraudulently joined solely in an attempt to prevent removal.

B. The Amount in Controversy Requirement Is Satisfied.

The jurisdictional amount required for removal based on diversity is also met because Plaintiff's Complaint establishes that the amount in controversy exceeds the sum of $75,000.00. 28 U.S.C. § 1332(a). "In a suit to quiet title, or to remove a cloud therefrom, it is not the value of the defendant's claim which is the amount in controversy, but it is the whole of the real estate to which the claim extends." *Allum v. Mortgage Elec. Registration Sys., Inc.*, 2:12-CV-00294-GMN, 2012 WL 4746927 (D. Nev. Oct. 3, 2012) (citing *Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th Cir.1973) (treating entire value of real property as amount in controversy in action to enjoin foreclosure sale)).

Plaintiff seeks to quiet title in its own name, and obtain a finding of exclusive ownership free of all liens and encumbrances. (Compl. ¶ ¶ 15, 18.) Accordingly, Plaintiff seeks title to the property free of the obligation to repay the loan secured by Wells Fargo's Deed of Trust. Wells Fargo's Notice of Sale identifies the approximate total balance due under the original note and deed of trust to be $455,484.08. (See Notice of Sale attached to Plaintiff's Supp. to Ex Parte Motion.) Additionally, www.zillow.com publishes the estimated value of the Property to be $375,239.00. (See zillow.com data sheet attached hereto as Exhibit B.)[1]

"If either party can gain or lose the jurisdictional amount," the amount in controversy requirement is satisfied. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996). Accordingly, Plaintiff's unspecified alleged damages, the value of the real property it seeks to take from Wells Fargo, and the value of the loan Plaintiff wishes to be relieved of are each well in excess of $75,000.00. Consequently, the Action satisfies the amount in controversy requirement under 28 U.S.C. § 1332.

[1] 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.

For this reason, and because this Action is between citizens of different states, this Court has original jurisdiction over Plaintiff's claims under 28 U.S.C. § 1332(a), and this case is properly removed to this Court pursuant to 28 U.S.C. § 1441(a).

IV. TIMELINESS OF AND CONSENT TO REMOVAL

A defendant must remove the case to federal court within 30 days of receipt of the complaint or "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *See* 28 U.S.C. § 1446(b). The thirty-day period for removal does not begin to run until a party has received a copy of the complaint and been properly served. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999). Upon information and belief, Wells Fargo was served on April 19, 2013. This Notice of Removal is timely filed under 28 U.S.C. § 1446(b)(1) as the thirty days in which to remove does not expire until May 19, 2013.

As a general rule, removal requires the consent of all co-defendants. Defendant MTC Financial, Inc. d/b/a Trustee Corps has consented to removal and will be filing a joinder to this Notice of Removal. "In cases involving alleged improper or fraudulent joinder of parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical, as removal in those cases is based on the contention that no other proper defendant exists." *Jernigan v. Ashland Oil*, 989 F.2d 812, 815 (5th Cir. La. 1993); *see also Simpson v. Union Pac. R.R. Co.*, 282 F. Supp. 2d 1151, 1157 (N.D. Cal. 2003) (holding that "[f]raudulent joinder provides an exception to the unanimity requirement, in that the consent of a fraudulently joined defendant is not required to remove a case.") As the Blume Defendants are fraudulently joined, are not proper parties, and have not made an appearance, their consent to removal is not required.

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V. CONCLUSION

Because Wells Fargo has timely filed a notice of removal for which this Court has original, diversity jurisdiction, the Action is properly removed to this Court.

Dated: May 3, 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.

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 **NOTICE OF REMOVAL** by the method indicated:

X U.S. Mail

_____ U.S. Certified Mail

_____ Facsimile Transmission

_____ Overnight Mail

_____ Federal Express

_____ Hand Delivery

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
Attorneys for Plaintiff

DATED: May 3, 2013

An Employee of Snell & Wilmer LLP

17093360

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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST

Plaintiff,

vs.

WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME

Defendants.

CASE NO.: A679095
DEPT NO.: XVIII

NOTICE AND JUDGMENT OF DISMISSAL

The Defendant, **Cynthia S. Blume**, not having filed or served an answer, motion for summary judgment or otherwise having appeared herein; the plaintiff in the above entitled action requests, authorizes and directs the Clerk of the court to enter a judgment of dismissal as to **Cynthia S. Blume**

DATE: 4-24-13

Attorney for plaintiff

On application of the plaintiff, no answer, motion for summary judgment or other appearance having been filed or served by the Defendant named below, a notice of the dismissal of this action having been duly signed, the above entitled action as to Defendant. **Cynthia S. Blume,** is hereby dismissed.

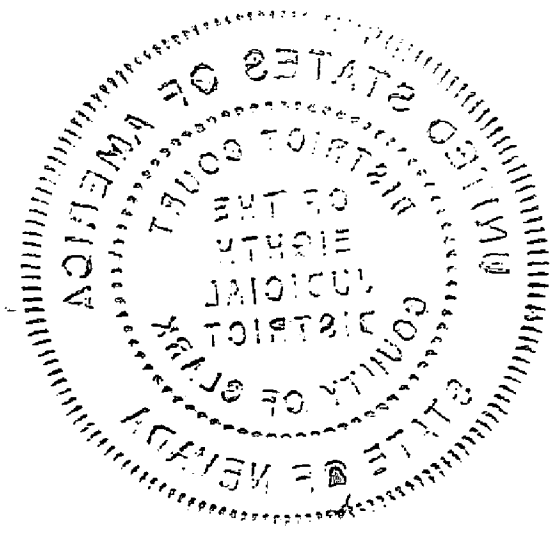
CLERK OF COURT

STEVEN D. GRIERSON
CLERK OF THE COURT

By: _____
DEPUTY CLERK

Michelle McCarthy

DATE
APR 26 2013


UNITED STATES OF AMERICA
STATE OF NEVADA
DISTRICT COURT
OF THE
EIGHTH
JUDICIAL
DISTRICT
COUNTY OF CLARK

35

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAISY TRUST,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.; MTC FINANCIAL, INC., *doing business as* TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME,

Defendants.

A-13-679095-C

Case No.: 2:13-cv-00777-GMN-VCF

ORDER

I. BACKGROUND

This case arises from a dispute over the ownership of real property located at 10209 Dove Row Avenue, Las Vegas, Nevada ("Subject Property"). (Compl ¶ 1, ECF No. 1-2.) Plaintiff claims that it obtained title to the Subject Property by way of a foreclosure deed stemming from "a delinquency in assessments due from the former owner to the Westminster at Providence Association, pursuant to NRS Chapter 116." (*Id.* ¶ 3.) Plaintiff's Complaint recognizes that Defendant Wells Fargo Bank NA ("Wells Fargo") is the assignee of a deed of trust that was recorded as an encumbrance on the Subject Property (*id.* ¶ 4), Defendant MTC Financial *doing business as* Trustee Corps ("MTC") is the trustee on the deed of trust (*id.* ¶ 5), and Defendants Donald K. Blume and Cynthia S. Blume ("Blume Defendants") are the former owners of the Subject Property (*id.* ¶ 8). However, Plaintiff's Complaint further alleges that "[t]he 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 . . . pursuant to NRS Chapter 116." (*Id.* ¶ 9.)

After the alleged passage of title to Plaintiff, Wells Fargo "recorded a notice of default

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and election to sell under it's [sic] deed of trust pursuant to NRS 107.08." (*Id.* ¶ 10.) In response, Plaintiff filed the instant action in Nevada state court seeking (1) an injunction prohibiting the foreclosure sale from proceeding (*id.* ¶ 12); (2) "a determination from this [C]ourt, pursuant to NRS 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 subject property (*id.* ¶ 15); and (2) a declaration from this [C]ourt, pursuant to NRS 40.010, that title in the property 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" (*id.* ¶ 18). Subsequently, pursuant to 28 U.S.C. § 1441(a), Wells Fargo removed the action to this Court claiming that this Court has subject matter jurisdiction under 28 U.S.C. § 1332(a). (*See* Notice of Removal 2:15-20, ECF No. 1.) Specifically, Wells Fargo claims that complete diversity exists among the parties because Plaintiff is a citizen of Nevada and because "none of the properly joined Defendants are citizens of Nevada." (*Id.* at 2:22-28.) Additionally, Wells Fargo asserts that the amount in controversy requirement is met because the value of the Subject Property exceeds $75,000. (*Id.* at 6:4-18.)

II. DISCUSSION

If a plaintiff files a civil action in state court, the defendant may remove that action to a federal district court if the district court has original jurisdiction over the matter. 28 U.S.C. § 1441(a). Removal statutes are strictly construed against removal jurisdiction. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1317 (9th Cir. 1998). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (quoting *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)). The defendant always has the burden of establishing that removal is proper. *Gaus*, 980 F.2d at 566.

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). District courts have jurisdiction in two instances. First, district courts have subject matter jurisdiction over civil actions that arise under federal law. 28 U.S.C. § 1331. Second, district courts have subject matter jurisdiction over civil actions where no plaintiff is a citizen of the same state as a defendant and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332(a). In this case, Wells Fargo asserts only that this Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). District courts have subject matter jurisdiction over civil actions where no plaintiff is a citizen of the same state as a defendant and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332(a).

Here, neither party disputes that the amount in controversy requirement is met. However, Wells Fargo has failed to establish diversity of citizenship between the Plaintiff and all of the Defendants. In its Notice of Removal, Wells Fargo recognized that both Plaintiff and the Blume Defendants are citizens of Nevada. (Notice of Removal 2:23-25, 3:6-8, ECF No. 1.) Nevertheless, Wells Fargo argues that the citizenship of the Blume Defendants should not be considered in the diversity calculus because they are fraudulently joined defendants. (*Id.* at 3:11-12.)

It is well established that "fraudulently joined defendants will not defeat removal on diversity grounds." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). There are two ways to establish fraudulent joinder: (1) the defendant may facially attack plaintiff's complaint by showing the inability of the plaintiff to establish a cause of action against the non-diverse defendant based on the plaintiff's allegations or (2) the defendant may attempt to disprove jurisdictional facts alleged in the plaintiff's pleadings. *See Hunter v. Philip Morris USA,* 582 F.3d 1039, 1044 (9th Cir.2009) (citing *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc)).

Here, Wells Fargo asserts that each of the three claims fail as a matter of law as asserted against the Blume Defendants. As to Plaintiff's first cause of action for injunctive relief, the Court agrees that it fails as a matter of law. First, injunctive relief is a remedy and not a cognizable cause of action. Second, even if it was a cognizable cause of action, this claim is directed solely at enjoining Wells Fargo from conducting the pending foreclosure sale. In contrast, Wells Fargo has not carried its burden in establishing that Plaintiff's second and third causes of action fail as to the Blume Defendants. Plaintiff's second cause of action is essentially a quiet title claim and Plaintiff's third cause of action seeks a declaration that Plaintiff is vested with title to the Subject Property free and clear of all liens and encumbrances. The Blume Defendants owned the property prior to Plaintiff's alleged acquisition of the property through the foreclosure that resulted due to the Blume Defendants' delinquency on assessments. Accordingly, in order to quiet title to the Subject Property, the Blume Defendants are an important party. The fact that Plaintiff asserts in its Complaint that the Blume Defendants no longer have an ownership interest is irrelevant in determining whether they are fraudulently joined defendants. This statement is merely an allegation that is consistent with Plaintiff's claim that it holds title to the Subject Property.

For these reasons, Wells Fargo has failed to carry its burden of establishing that this Court has subject matter jurisdiction over this case.

III. CONCLUSION

IT IS HEREBY ORDERED that this case is remanded to the Eighth Judicial District Court.

DATED this 7th day of May, 2013.

MAY - 7 2013

I hereby attest and certify on _____ that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By _____ Deputy Clerk

Gloria M. Navarro
United States District Judge

CLOSED

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:13-cv-00777-GMN-VCF

Daisy Trust v. Wells Fargo Bank, N.A. et al
Assigned to: Judge Gloria M. Navarro
Referred to: Magistrate Judge Cam Ferenbach
Case in other court: District Court, Clark County, A-13-679095-C
Cause: 28:1444 Petition for Removal- Foreclosure

Date Filed: 05/03/2013
Date Terminated: 05/07/2013
Jury Demand: None
Nature of Suit: 220 Real Property: Foreclosure
Jurisdiction: Diversity

Plaintiff

Daisy Trust

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

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Defendant

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doing business as
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LEAD ATTORNEY
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Defendant

Donald K. Blume

Defendant

Cynthia S. Blume

Date Filed	#	Docket Text
05/03/2013	1	PETITION FOR REMOVAL from District Court, Clark County, Case Number A-13-679095-C, (Filing fee $ 400 receipt number 0978-2803567), filed by Wells Fargo Bank, N.A.. Proof of service due by 7/26/2013. Certificate of Interested Parties due by 5/13/2013. (Attachments: #1 Appendix, #2 Exhibit A, part 1, #3 Exhibit A, part 2, #4 Exhibit A, part 3, #5 Exhibit B, #6 Civil Cover Sheet) **(Notice: There are unresolved motions or issues that require the court's immediate attention.)** (Perkins, Robin) (Entered: 05/03/2013)
05/03/2013		Case assigned to Judge Gloria M. Navarro and Magistrate Judge Cam Ferenbach. (MAJ) (Entered: 05/03/2013)
05/03/2013	2	NOTICE PURSUANT TO LOCAL RULE IB 2-2: In accordance with 28 USC § 636(c) and FRCP 73, the parties in this action are provided with a link to the "AO 85 Notice of Availability, Consent, and Order of Reference - Exercise of Jurisdiction by a U.S. Magistrate Judge" form on the Court's website - www.nvd.uscourts.gov. **Consent forms should NOT be electronically filed.** Upon consent of all parties, counsel are advised to manually file the form with the Clerk's Office. A copy of form AO 85 has been mailed to parties not receiving electronic service. **(no image attached)** (MAJ) (Entered: 05/03/2013)
05/03/2013	3	MINUTE ORDER IN CHAMBERS of the Honorable Judge Gloria M. Navarro, on 5/3/2013. Statement regarding removed action is due by 5/21/2013. Joint Status Report regarding removed action is due by 6/5/2013. (Copies have been distributed pursuant to the NEF - MAJ) (Entered: 05/03/2013)
05/06/2013	4	MINUTE ORDER IN CHAMBERS of the Honorable Judge Gloria M. Navarro, on 5/6/2013. By Deputy Clerk: Michael Zadina. This case has been assigned to the Honorable Gloria M. Navarro. Judge Navarro's Chambers Practices, which are posted on the U.S. District Court, District of Nevada public website, may also be accessed directly via this hyperlink: www.nvd.uscourts.gov **(no image attached)** (Copies have been distributed pursuant to the NEF - MJZ) (Entered: 05/06/2013)
05/06/2013	5	JOINDER to 1 Petition for Removal,, ; filed by Defendant MTC Financial Inc.. (Reynolds, Richard) (Entered: 05/06/2013)

05/06/2013	6	CERTIFICATE of Interested Parties filed by MTC Financial Inc.. There are no known interested parties other than those participating in the case . (Reynolds, Richard) (Entered: 05/06/2013)
05/06/2013	7	STATEMENT of Corporate Disclosure by Defendant MTC Financial Inc.. (Reynolds, Richard) (Entered: 05/06/2013)
05/07/2013	8	ORDER that this case is remanded to the Eighth Judicial District Court. Signed by Judge Gloria M. Navarro on 5/7/13. (Copies have been distributed pursuant to the NEF – MMM) (Entered: 05/07/2013)

I hereby attest and certify on MAY - 7 2013 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By Molly Morrison Deputy Clerk

SAO
Amy F. Sorenson, Esq.
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Richard C. Gordon, Esq.
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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 DEPT. XXIII **STIPULATION AND ORDER TO SET HEARING ON ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE** **-AND-** **SET BRIEFING SCHEDULE** **-AND-** **CONTINUE TEMPORARY RESTRAINING ORDER**

Plaintiff DAISY TRUST ("Plaintiff"), Defendant WELLS FARGO BANK, N.A. ("Wells Fargo"), and Defendant MTC FINANCIAL, INC., dba TRUSTEE CORPS ("MTC") by and through their respective counsel, and no other parties yet appearing in this case, hereby stipulate as follows:

1. The hearing on Plaintiff's Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause Why a Preliminary Injunction Should Not Issue (the

"Motion") shall be heard on June 11, 2013 at 11:00 a.m.;

2. Wells Fargo and MTC's opposition to Plaintiff's Motion and any countermotion shall be filed and served on all parties on or before close of business on May 21, 2013;

3. Plaintiff's reply in support of its Motion and any opposition to Wells Fargo and MTC's countermotion shall be filed and served on all parties on or before close of business May 28, 2013;

4. Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

5. The Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

Dated: May 14 2013

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: _____
Michael F. Bohn, Esq.
376 E. Warm Springs Rd., Suite 125
Las Vegas, NV 89119
Attorneys for Plaintiff

Dated: May ___, 2013

SNELL & WILMER L.L.P.

By: See next page
Amy F. Sorenson, Esq.
Richard C. Gordon, Esq.
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3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169
Attorneys for Wells Fargo Bank, N.A.

Dated: May ___, 2013

BURKE, WILLIAMS & SORENSEN, LLP

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"Motion") shall be heard on June 11, 2013 at 11:00 a.m.;

2. Wells Fargo and MTC's opposition to Plaintiff's Motion and any countermotion shall be filed and served on all parties on or before close of business on May 21, 2013;

3. Plaintiff's reply in support of its Motion and any opposition to Wells Fargo and MTC's countermotion shall be filed and served on all parties on or before close of business May 28, 2013;

4. Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

5. The Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

Dated: May ___, 2013

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

By: See previous page
Michael F. Bohn, Esq.
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Attorneys for Plaintiff

Dated: May 10, 2013

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By: Robin E. Perkins
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Richard C. Gordon, Esq.
Robin E. Perkins, Esq.
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Attorneys for Wells Fargo Bank, N.A.

Dated: May ___, 2013

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By: _____
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Attorneys for Plaintiff

Dated: May ___, 2013

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Dated: May 10th, 2013

ROBISON, BELAUSTEGUI, SHARP & LOW

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Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 (702) 784-5200

ORDER

Based on the foregoing Stipulation and other good cause appearing therefor,

IT IS SO ORDERED that the hearing on Plaintiff's Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause Why a Preliminary Injunction Should Not Issue (the "Motion") shall be heard on June 11, 2013 at 11:00 a.m.;

IT IS FURTHER ORDERED that Wells Fargo and MTC's opposition to Plaintiff's Motion and any countermotion shall be filed and served on all parties on or before close of business on May 21, 2013;

IT IS FURTHER ORDERED that Plaintiff's reply in support of its Motion and any opposition to Wells Fargo and MTC's countermotion shall be filed and served on all parties on or before close of business May 28, 2013;

IT IS FURTHER ORDERED that Wells Fargo and MTC's reply in support of their countermotion shall be filed and served on all parties on or before June 4, 2013; and

IT IS FURTHER ORDERED that the Temporary Restraining Order shall remain in effect until the hearing on the Motion and the Order to Show Cause Why Preliminary Injunction Should Not Issue scheduled for June 11, 2013.

DATED this 16 day of May, 2013.

DISTRICT COURT JUDGE

JUDGE STEFANY A MILEY

Respectfully submitted by:

SNELL & WILMER L.L.P.

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Attorneys for Defendant
MTC FINANCIAL INC. dba TRUSTEE CORPS
(erroneously sued herein as MTC FINANCIAL, INC., dba TRUSTEE CORPS

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST,

Plaintiff,

v.

WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME,

Defendants.

Case No. A-13-679095-C

Dept.: XXIII

ANSWER TO COMPLAINT BY DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS SUED AS MTC FINANCIAL, INC., dba TRUSTEE CORPS

ANSWER

Defendant, MTC Financial Inc. dba Trustee Corps, a California corporation, responds to the Complaint as follows:

1. Defendant admits the allegations contained in paragraph 1.

2. Defendant admits the allegations contained in paragraph 2.

3. Defendant lacks sufficient information and belief in which to respond to paragraph 3 and therefore denies same.

4. Defendant admits the allegations contained in paragraph 4.

5. Defendant admits the allegations contained in paragraph 5.

6. There are no allegations contained in paragraph 6.

7. There are no allegations contained in paragraph 7.

8. Defendant admits the allegations contained in paragraph 8.

9. Answering the allegations contained in paragraph 9, Defendant alleges that it does not have an interest in the property, as it is only a foreclosure trustee, and therefore denies the allegations. In addition, Defendant admits that the former owner's interest has been extinguished but not that of Wells Fargo.

10. Defendant admits the allegations contained in paragraph 10 except that it was recorded by Trustee Corps.

11. Defendant denies the allegations contained in paragraph 11.

12. Defendant denies the allegations contained in paragraph 12.

13. Defendant denies the allegations contained in paragraph 13 and further denies that Plaintiff is entitled to any award.

14. Answering the allegations contained in paragraph 14, Defendant repeats its responses to the previous paragraphs.

15. Defendant denies the allegations contained in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16 and further denies that Plaintiff is entitled to any award.

17. Answering the allegations contained in paragraph 17, Defendant incorporates by reference its previous responses.

18. Answering the allegations contained in paragraph 18, Defendant admits that Plaintiff seeks such a declaration and denies that Plaintiff is entitled to one.

19. Defendant denies the allegations contained in paragraph 19, and further denies that Plaintiff is entitled to any funds.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

20. As a first, separate affirmative defense, to the complaint on file, Defendant alleges that the complaint fails to state a claim for relief against this Defendant.

SECOND AFFIRMATIVE DEFENSE

(Lack of Standing or Capacity)

21. As a second, separate affirmative defense, the complaint on file, Defendant alleges that litigation may not be filed in the name of the trust, but must be filed by the trustee, acting as trustee of the trust.

THIRD AFFIRMATIVE DEFENSE

(Agent for Disclosed Principal)

22. As a third, separate and affirmative defense to the Complaint on file, Defendant alleges that it was an agent for a disclosed principal, i.e., the lender/beneficiary, and therefore cannot be sued for damages. Further, it is not a necessary party.

FORTH AFFIRMATIVE DEFENSE

(Statutory Immunity From Damages)

23. As a fourth, separate and affirmative defense to the Complaint on file, Defendant alleges that the Nevada Foreclosure Statutes effectively immunize this Defendant, as the only remedy for a "wrongful foreclosure" is to set aside the foreclosure, not to award damages.

FIFTH AFFIRMATIVE DEFENSE

(Unconstitutionality of Statute; Preemption)

24. As a fifth, separate and affirmative defense to the Complaint on file, Defendant alleges that if one would interpret the Nevada Foreclosure Statutes in the manner sought by the Plaintiff, the statute would be unconstitutional, both as an abrogation of contract and as a taking by the State through the creation of a statute which does not provide due process notice. Further it would create a statutory reprioritizing which can only be done pursuant to the Bankruptcy provisions in the United States Constitution. Thus the field has been preempted.

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).[13]

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

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

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

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

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

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

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

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

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

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

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

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

Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:

First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien' – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.

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

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

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

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

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

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

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

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

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

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

ADVISORY CONCLUSION:

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

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

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

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

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

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[14] NRS 116.31164.

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

EXMT
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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: A679095 DEPT NO.: XVIII

EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; or ALTERNATIVELY, FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Plaintiff Daisy Trust, by and through it's attorney, Michael F. Bohn, Esq., moves this court for a temporary restraining order to prohibit a foreclosure sale. This motion is based upon the points and authorities contained herein.

FACTS

Plaintiff is the owner of the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada. Plaintiff obtained title by way of foreclosure deed recorded on August 9, 2012. A copy of the deed is attached as Exhibit 1. The plaintiff's title stems from a foreclosure deed arising

from a delinquency in assessments due from the former owner to the Westminster at Providence Association, pursuant to NRS Chapter 116.

Defendant Wells Fargo Home NA is the assignee of a deed of trust which was recorded as an encumbrance to the subject property on September 28, 2007. A copy of the trust deed is Exhibit 2. Defendant MTC Financial dba Trustee Corps is the trustee on the deed of trust. Defendants Donald K. Blume and Cynthia S. Blume are the former owner of the subject real property.

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, Donald K. Blume and Cynthia S. Blume to the Westminster at Providence Association, pursuant to NRS Chapter 116.

Defendant Wells Fargo has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080. Defendant has also recorded a notice of sale on March 26, 2013, but the document is not available yet on line.

Additionally, defendant Wells Fargo has failed to provide statutory notice of the forclosure to the plaintiff . The plaintiff now seeks an injunction to prohibiting the foreclosure sale from proceeding.

POINTS AND AUTHORITIES

A. An injunction is an appropriate remedy

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.

NRCP 65, involving Temporary Restraining Orders provides in part:

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 15 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

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, 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).

The Supreme 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 are considered unique

and loss of property rights generally result in irreparable harm. Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987) as such, an injunction is proper to prohibit foreclosures when the plaintiff has shown that it is entitled to relief. Here, the plaintiff is entitled to relief because the defendants deed of trust was extinguished by the foreclosure on the HOA lien.

B. The defendants deed of trust has been extinguished by the foreclosure on the HOA lien

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.

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 Employee's Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008). Statutes must 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 (2012) the 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 of the statute is 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 which the associations' 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 only takes priority over the "liens described in subsection (b), which is the mortgage lien. 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 charges or charges. The only liens which are subject to the "super priority" exception are mortgage liens.

It is hornbook law that foreclosure of a superior lien extinguishes all junior liens. See Aladdin Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977). Once the HOA forecloses on it's "super priority" lien, the junior liens, which would include the mortgage lien, is 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 priority. This is exactly the same situation as a junior mortgage which seeks to protects it's security interest.

In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34 (2012), the 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. The court held that the Financial Institutions Division did not have jurisdiction or authority to interpret NRS Chapter 116. The court stated:

> 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.
> . . . .

> 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.. . . (emphasis added)

The court specifically noted that the Real Estate Division had 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. Attached as Exhibit 3 is the advisory opinion dated December 12, 2012.

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 in part, beginning on page 8 (Bates stamped DT000030):

> 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 associations 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 mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant department 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 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. 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.

> 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.

The Supreme Court has repeatedly held that courts should attach substantial weight to an administrative body's interpretation of statutes which it is charged to enforce. 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).

The Supreme 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). 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 un-paid 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 imposes 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 department 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 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. 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? Why else would the various state statutes have to be amended when necessary? Simply because the holder of the first would lose it's priority to the HOA lien.

The committee notes also notes that the lender could provide for escrow for assessments. This is commonly done for taxes and insurance.

The language of the trust deed requires the borrower itself makes provision for the escrow of assessments for HOA obligations, requires the borrower to satisfy all HOA payments, and even contains a rider specifically because the loan is on a property governed by an HOA. A copy of the trust deed in question is Exhibit 2.

> Page 5 of the trust deed, bates stamped DT000009 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)
>
> On page 5 of the trust deed, paragraph 4 begins at Bates DT000009:
>
> **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 mannere 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.

On page 7 (Bates number DT000011) , paragraph 9 begins:

Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agremeents 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 whate ver is reasonable or appropriate to protect Lender's intereset 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 21 on page 12 (Bates stamp DT000016) describes the lender's remedies, including foreclosure on the trust deed.

The trust deed also has a "Planned Unit Development Rider." (Bates stamped DT000021) This repeats the borrowers obligations to pay assessments. Page 2 of the rider provides in part:

CONDOMINIUM COVENANTS. In addition to the covenants and agreements made in the Security instrument, Borrower and Lender further covenant and agree as follows:

A. CONDOMINIUM OBLIGATIONS. Borrower shall perform all of Borrower's obligations under the Condominium Project's Constituent Documents. The "Constituent Documents" are the (i) Declaration or any other document which creates the Condominium Project; (ii)by-laws (iii) code of regulation; and (iv) other equivalent documents. **Borrower shall promptly pay, when due, all dues and assessments imposes pursuant to the Constituent Documents**. (emphasis added)

Paragraph F on page 2 of the Condominium Rider, Bates DT000022 states:

F. Remedies. If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrowere 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, the lenders have anticipated that

HOA "super liens" would have priority, and have provided protections for themselves in their own documents.

The court of appeals for the state of Washington in the case of Summerhill Village Homeowners Association v. Roughly, 166 Wash.App. 625, 270 P.3d 639 (2012), modified at 289 P.3d 645 (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, 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 Nevada statute is wordier, and includes fines as part of assessments as part of the lien.

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 out the security interest of the mortgage holder. The court stated:

> As a general rule, the priority of competing lien claims depends on the order in which those claims attached to the encumbered property, subject to recording requirements. There are exceptions to this "first in time, first in right" rule. One of those is found in the Condominium Act, chapter 64.34 RCW:
>
> . . . .
>
> 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, 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 sheriff's 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 out of 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 had priority, it could have specifically stated so in the Nevada statute. Instead the clear language of the Nevada statute is that the nine month "super lien" has priority over the bank's mortgage.

CONCLUSION

The language of NRS 116.3116, is clear that the 9 month HOA "super priority" lien has precedence over the mortgage lien. 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 interpretation a substantially similar statute. The plaintiffs title should be found to be free and clear of any mortgage lien or encumbrances asserted by the defendants.

The real property is unique and injunctions are commonly issued to stop foreclosures pending the outcome of litigation. Accordingly, the court should grant injunctive relief to the plaintiff and stop the pending foreclosure.

DATED this 28th day of March 2013.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

EXHIBIT 1

Inst #: 20120809000673
Fees: $18.00 N/C Fee: $0.00
RPTT: $53.55 Ex: #
08/09/2012 08:52:05 AM
Receipt #: 1265766
Requestor:
NORTH AMERICAN TITLE SUNSET
Recorded By: MSH Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

Please mail tax statement and
when recorded mail to:
Daisy Trust
900 S. Las Vegas Blvd. #810
Las Vegas, NV 89101

FORECLOSURE DEED

APN # 126-13-818-046
North American Title #45010-10-28070

NAS # N60547

The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the Westminster at Providence), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded August 5, 2010 as instrument number 0003460 Book 20100805, in Clark County. The previous owner as reflected on said lien is Donald K Blume & Cynthia S Blume. Nevada Association Services, Inc. as agent for Westminster at Providence does hereby grant and convey, but without warranty expressed or implied to: Daisy Trust (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: Cliffs Edge POD 115 116 & 117 Unit 1B, Plat book 133, Page 56, Lot 46, Block A Clark County

AGENT STATES THAT:
This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Westminster at Providence governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 9/30/2010 as instrument # 0001822 Book 20100930 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of Westminster at Providence at public auction on 8/3/2012, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $10,500.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: August 7, 2012

Misty Blanchard

By Misty Blanchard, Agent for Association and Employee of Nevada Association Services

STATE OF NEVADA)
COUNTY OF CLARK)

On August 7, 2012, before me, Elissa Hollander, personally appeared Misty Blanchard personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

(Seal) (Signature)

ELISSA HOLLANDER
Notary Public, State of Nevada
Appointment No. 05-101835-1
My Appt. Expires Nov. 5, 2013

Elissa Hollander

State of Nevada
Declaration of Value

FOR RECORDERS OPTIONAL USE ONLY
Document/Instrument #_____
Book:_____ Page:_____
Date of Recording:_____
Notes:_____

1. **Assessor Parcel Number(s)**
   a) 126-13-818-046
   b) _____
   c) _____
   d) _____

2. **Type of Property:**
   a) ☐ Vacant Land b) ☑ Single Fam. Res.
   c) ☐ Condo/Twnhse d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg. f) ☐ Comm'l/Ind'l
   g) ☐ Agricultural h) ☐ Mobile Home
   i) ☐ Other _____

3. **Total Value/Sales Price of Property:** $ 10,500.00
   Deed in Lieu of Foreclosure Only (value of property) $ _____
   Transfer Tax Value per NRS 375.010, Section 2: $ 10,500.00
   Real Property Transfer Tax Due: $ 53.55

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption, per NRS 375.090, Section: _____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month.

Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature Misty Blanchard Capacity Agent

Signature _____ Capacity _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	BUYER (GRANTEE) INFORMATION (REQUIRED)
Print Name: Nevada Association Services	Print Name: Daisy Trust
Address: 6224 W. Desert Inn Road	Address: 900 S. Las Vegas Blvd # 810
City: Las Vegas	City: Las Vegas
State: Nevada Zip: 89146	State: Nevada Zip: 89101

COMPANY REQUESTING RECORDING
(REQUIRED IF NOT THE SELLER OR BUYER)

Print Name: North American Title Escrow # N 60547
Address: 8485 W. Sunset #111
City: Las Vegas State: NV Zip: 89113

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

EXHIBIT 2

20070928-0003141

Fee: $32.00
N/C Fee: $0.00

09/28/2007 14:21:28
T20070174444
Requestor:
NORTH AMERICAN TITLE COMPANY

Debbie Conway DHG
Clark County Recorder Pgs: 19

19

Assessor's Parcel Number:
126-13-818-046
Return To:
Universal American Mortgage Company, LLC
Secondary Marketing Ops
15550 Lightwave Drive, Suite 200
Clearwater, FL 33760

Prepared By: Clarise M O'Connor
Universal American Mortgage Company, LLC
1725 West Green Tree Drive
TEMPE, ARIZONA 85284

~~Recording Requested By:~~ 52
Clarise M O'Connor
Universal American Mortgage Company, LLC
1725 West Green Tree Drive
TEMPE, ARIZONA 85284

45002-07-10681

[Space Above This Line For Recording Data]

A2699

DEED OF TRUST

MIN 100059600067676515

Loan # 0006767651

DEFINITIONS
Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.
(A) **"Security Instrument"** means this document, which is dated September 21, 2007 , together with all Riders to this document.
(B) **"Borrower"** is DONALD K BLUME AND CYNTHIA S BLUME, HUSBAND AND WIFE

Borrower is the trustor under this Security Instrument.
(C) **"Lender"** is Universal American Mortgage Company, LLC

Lender is a limited liability company
organized and existing under the laws of Florida

Lender's address is 700 NW 107th Avenue 3rd Floor, Miami, FL 33172-3139

(D) "Trustee" is Stewart Title Company

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated September 21, 2007 . The Note states that Borrower owes Lender Four Hundred Seventeen Thousand and 00/100 Dollars (U.S. $ 417,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than October 01, 2037 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☒ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to

time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the **County** [Type of Recording Jurisdiction]
of **CLARK** [Name of Recording Jurisdiction]:
SEE ATTACHED LEGAL DESCRIPTION

Parcel ID Number: **126-13-818-046** which currently has the address of
10209 DOVE ROW AVENUE [Street]
LAS VEGAS [City], Nevada **89166** [Zip Code]
("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances

of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

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; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. 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. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives

Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 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.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. 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. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although 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.

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.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be

one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

Initials: CB DKB

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. $ 0.00 .

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

_____ _____ (Seal)
DONALD K BLUME -Borrower

_____ _____ (Seal)
CYNTHIA S BLUME -Borrower

_____ (Seal) _____ (Seal)
-Borrower -Borrower

_____ (Seal) _____ (Seal)
-Borrower -Borrower

_____ (Seal) _____ (Seal)
-Borrower -Borrower

Loan # 0006767651 A2699

STATE OF NEVADA
COUNTY OF Clark

This instrument was acknowledged before me on 9/27/07 by
DONALD K BLUME, CYNTHIA S BLUME

Mail Tax Statements To:

Universal American Mortgage Company, LLC
Loan Servicing Department
700 NW 107th Avenue 3rd Floor, Miami, FL 33172-3139

G. YOUNG
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 04-89137-1
My Appt. Expires May 6, 2008

Loan # 0006767651 3150/FNMA

PLANNED UNIT DEVELOPMENT RIDER

MIN # 100059600067676515

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 21st day of September, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to Universal American Mortgage Company, LLC, a Florida limited liability company

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at: 10209 DOVE ROW AVENUE, LAS VEGAS, NEVADA 89166

[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in

Declaration of Restrictions and Protective Covenants, as recorded in, OF RECORD

(the "Declaration"). The Property is a part of a planned unit development known as WESTMINSTER

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

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.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

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.

Initials: CB

0 KB

Loan # 0006767651 **3150/FNMA**

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.

Donald K. Blume (Seal)
DONALD K BLUME -Borrower

Cynthia S Blume (Seal)
CYNTHIA S BLUME -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

EXHIBIT A

PARCEL ONE (1):

LOT FORTY-SIX (46) IN BLOCK "A" OF FINAL MAP OF CLIFF'S EDGE POD 115, 116, AND 117 UNIT 1B (A COMMON INTEREST COMMUNITY), AS SHOWN ON BY MAP IN BOOK 133 OF PLATS, PAGE 56 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

RESERVING THEREFROM A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS AND ENJOYMENT IN AND TO THE COMMON ELEMENTS AS DELINEATED ON SAID MAP REFERRED TO ABOVE AND FURTHER DESCRIBED IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR WESTMINSTER AT PROVIDENCE, RECORDED NOVEMBER 3, 2006 IN BOOK 20061103 AS DOCUMENT NO. 4921, OF OFFICIAL RECORDS.

PARCEL TWO (2):

A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS AND ENJOYMENT IN AND TO THE COMMON ELEMENTS AS DELINEATED ON SAID MAP REFERRED TO ABOVE AND FURTHER DESCRIBED IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR WESTMINSTER AT PROVIDENCE, RECORDED NOVEMBER 3, 2006 IN BOOK 20061103 AS DOCUMENT NO. 4921, OF OFFICIAL RECORDS..

EXHIBIT 3

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

Subject: The Super Priority Lien	Advisory No. **13-01**	21 pages
	Issued By: Real Estate Division	
	Amends/ Supersedes N/A	
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01	Issue Date: December 12, 2012	

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

> The association has a lien on a unit for **any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines** imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. **Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments** under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

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

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

---

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

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

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

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

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

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

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

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

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

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

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

(1) The reasonable expenses of sale;

---

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

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

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

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

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

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

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SUPREME COURT COURT

STATE OF NEVADA

DAISY TRUST

Appellant

vs.

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

Respondent.

CASE NO.: 63611

JOINT APPENDIX 1

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CIVIL COVER SHEET

A-13-679095-C

CLARK County, Nevada XVIII

Case No. _____
(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
DAISY TRUST	WELLS FARGO BANK, NA, MTC FINANCIAL INC., dba TRUSTEE CORPS, DONALD K. BLUME AND CYNTHIA S. BLUME
Attorney (name/address/phone):	Attorney (name/address/phone):
MICHAEL F. BOHN, Esq.	
376 E. Warm Springs Road Suite 125	
Las Vegas, NV 89119	
(702) 642-3113	

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☒ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

Torts

Negligence

- ☐ **Negligence -- Auto**
- ☐ **Negligence -- Medical/Dental**
- ☐ **Negligence -- Premises Liability** (Slip/Fall)
- ☐ **Negligence -- Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair competition

Probate

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

Other Civil Filing Types

- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** *(also check applicable civil case box)*
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment - Civil
  - ☐ Other Personal Property
  - ☐ Recover of Property
  - ☐ Stockholder Suit
  - ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; *for Clark and Washoe Counties only.*)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

MARCH 28, 2013
Date

Signature of initiating party or representative

See other side for family-related case filings.

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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST

Plaintiff,

vs.

WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME

Defendants.

CASE NO.: A-13-679095-C
DEPT NO.: XVIII

EXEMPTION FROM ARBITRATION:
Title to real property

COMPLAINT

Plaintiff, Daisy Trust, by and through it's attorney, Michael F. Bohn, Esq. alleges as follows:

1. Plaintiff is the owner of the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada.

2. Plaintiff obtained title by way of foreclosure deed recorded on August 9, 2012.

3. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Westminster at Providence Association, pursuant to NRS Chapter 116.

4. Defendant Wells Fargo Home NA is the assignee of a deed of trust which was recorded as an encumbrance to the subject property on September 28, 2007.

5. Defendant MTC Financial dba Trustee Corps is the trustee on the deed of trust.

8. Defendants Donald K. Blume and Cynthia S. Blume are the former owner of the subject real property.

9. 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, Donald K. Blume and Cynthia S. Blume to the Westminster at Providence Association, pursuant to NRS Chapter 116.

10. Nonetheless, defendant Wells Fargo has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080.

11. Defendant Wells Fargo has failed to provide statutory notice of the forclosure to the plaintiff .

12. Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding.

13. The plaintiff is entitled to an award of attorneys fees and costs.

SECOND CLAIM FOR RELIEF

14. Plaintiff repeats the allegations contained in paragraphs 1 through 13.

15. Plaintiff is entitled to a determination from this court, pursuant to NRS 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 subject property.

16. The plaintiff is entitled to an award of attorneys fees and costs.

THIRD CLAIM FOR RELIEF

17. Plaintiff repeats the allegations contained in paragraphs 1 through 16.

18. Plaintiff seeks a declaration from 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.

19. The plaintiff is entitled to an award of attorneys fees and costs.

WHEREFORE, plaintiff prays for Judgment as follows:

1. For injunctive relief;

2. For a determination and declaration that plaintiff is the rightful holder of title to the property, free and clear of all liens, encumbrances, and claims of the defendants.

3. For a determination and declaration that the defendants have no estate, right, title, interest or claim in the property.

4. For a judgment forever enjoining the defendants from asserting any estate, right, title, interest or claim in the property; and

5. For such other and further relief as the Court may deem just and proper.

DATED this 28th day of March 2013.

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By: / s / Michael F. Bohn, Esq. /
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DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. WELLS FARGO BANK NA, MTC FINANCIAL, INC., dba TRUSTEE CORPS, DONALD K. BLUME and CYNTHIA S. BLUME Defendants.	CASE NO.: DEPT NO.:

INITIAL APPEARANCE FEE DISCLOSURE

Pursuant to NRS Chapter 19, filing fees are submitted for the party appearing in the above-entitled action as indicated below:

Daisy Trust Plaintiff	$270.00
TOTAL REMITTED:	$270.00

DATED this 28th day of March 2013.

LAW OFFICES OF
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DISTRICT COURT

CLARK COUNTY, NEVADA

DAISY TRUST Plaintiff, vs. CITIMORTGAGE, INC., NORTHWEST TRUSTEE SERVICES, and JAMAINE T. SMITH Defendants.	CASE NO.: A679113 DEPT NO.: X

EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; or ALTERNATIVELY, FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Plaintiff Daisy Trust, by and through it's attorney, Michael F. Bohn, Esq., moves this court for a temporary restraining order to prohibit a foreclosure sale. This motion is based upon the points and authorities contained herein.

FACTS

Plaintiff is the owner of the real property commonly known as 6732 Fort Benton Road, Las Vegas, Nevada. Plaintiff obtained title by way of foreclosure deed recorded on September 20, 2012. A copy of the deed is Exhibit 1. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Copper Creek Estates, pursuant to NRS

Chapter 116.

Defendant Citimortgage, Inc. is the assignee of a deed of trust which was recorded as an encumbrance to the subject property on May 22, 2009. Defendant Northwest Trustee Services is the substituted trustee on the deed of trust. A copy of the trust deed is Exhibit 2. Defendant Jamaine T. Smith is the former owner of the subject real property.

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, Jamaine T. Smith to the Copper Creek Estates pursuant to NRS Chapter 116.

Defendant Citimortgage, Inc. has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080, and has recorded a notice of sale. The notice of sale was recorded on March 27, 2013, and a copy is not yet available.

The plaintiff now moves for an injunction to stop the foreclosure.

POINTS AND AUTHORITIES

A. An injunction is an appropriate remedy

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.

NRCP 65, involving Temporary Restraining Orders provides in part:

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the

> applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 15 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

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, 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).

The Supreme 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 are considered unique and loss of property rights generally result in irreparable harm. Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987) as such, an injunction is proper to prohibit foreclosures when the plaintiff has shown that it is entitled to relief. Here, the plaintiff is entitled to relief because the defendants deed of trust was extinguished by the foreclosure on the HOA lien.

B. The defendants deed of trust has been extinguished by the foreclosure on the HOA lien

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.

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 Employee's Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008). Statutes must 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 (2012) the 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 of the statute is 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 which the associations' 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 only takes priority over the "liens described in subsection (b), which is the mortgage lien. 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 charges or charges. The only liens which are subject to the "super priority" exception are mortgage liens.

It is hornbook law that foreclosure of a superior lien extinguishes all junior liens. See Aladdin

Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977). Once the HOA forecloses on it's "super priority" lien, the junior liens, which would include the mortgage lien, is 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 priority. This is exactly the same situation as a junior mortgage which seeks to protects it's security interest.

In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34 (2012), the 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. The court held that the Financial Institutions Division did not have jurisdiction or authority to interpret NRS Chapter 116. The court stated:

> 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.
> . . . .
> 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.. . . (emphasis added)

The court specifically noted that the Real Estate Division had 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. Attached as Exhibit 3 is the advisory opinion dated December 12, 2012.

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 in part, beginning on page 8 (Bates

stamped DT000030):

> 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 associations 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 mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant department 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 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. 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.
>
> 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.

The Supreme Court has repeatedly held that courts should attach substantial weight to an administrative body's interpretation of statutes which it is charged to enforce. 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).

The Supreme 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). 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 un-paid 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 imposes 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 department 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 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. 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? Why else would the various state statutes have to be amended when necessary? Simply because the holder of the first would lose it's priority to the HOA lien.

The committee notes also notes that the lender could provide for escrow for assessments. This is commonly done for taxes and insurance.

The language of the trust deed requires the borrower itself makes provision for the escrow of assessments for HOA obligations, requires the borrower to satisfy all HOA payments, and even contains a rider specifically because the loan is on a property governed by an HOA. A copy of the trust deed in question is Exhibit 2.

Page 4 of the trust deed, bates stamped DT000007 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)

On page 5 of the trust deed, paragraph 4 begins at Bates DT000008:

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 mannere 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.

On page 7 (Bates number DT000010) , paragraph 9 begins:

Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agremeents 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 whate ver is reasonable or appropriate to protect Lender's intereset 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 123 (Bates stamp DT000016) describes the lender's remedies, including foreclosure on the trust deed.

The trust deed also has a "Planned Unit Development Rider." (Bates stamped DT000019) This repeats the borrowers obligations to pay assessments. Page 1 of the rider provides in part:

> 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 Project's Constituent Documents. The "Constituent Documents" are the (i) Declaration or any other document which creates the Condominium Project; (ii)by-laws (iii) code of regulation; and (iv) other equivalent documents. **Borrower shall promptly pay, when due, all dues and assessments imposes pursuant to the Constituent Documents**. (emphasis added)

Paragraph F on page 2 of the PUD Rider, Bates DT000020 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 Borrowere 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, the lenders have anticipated that HOA "super liens" would have priority, and have provided protections for themselves in their own documents.

The court of appeals for the state of Washington in the case of Summerhill Village Homeowners Association v. Roughly, 166 Wash.App. 625, 270 P.3d 639 (2012), modified at 289 P.3d 645 (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, 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 Nevada statute is wordier, and includes fines as part of assessments as part of the lien. 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 out the security interest of the mortgage holder. The court stated:

> As a general rule, the priority of competing lien claims depends on the order in which those claims attached to the encumbered property, subject to recording requirements. There are exceptions to this "first in time, first in right" rule. One of those is found in the Condominium Act, chapter 64.34 RCW:
>
> . . . .
>
> 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, 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 sheriff's 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 out of 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 had priority, it could have specifically stated so in the Nevada statute. Instead the clear language of the Nevada statute is that the nine month "super lien" has priority over the bank's mortgage.

/ / /

/ / /

/ / /

CONCLUSION

The language of NRS 116.3116 is clear that the 9 month HOA "super priority" lien has precedence over the mortgage lien. 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 interpretation a substantially similar statute. The plaintiffs title should be found to be free and clear of any mortgage lien or encumbrances asserted by the defendants.

The real property is unique and injunctions are commonly issued to stop foreclosures pending the outcome of litigation. Accordingly, the court should grant injunctive relief to the plaintiff and stop the pending foreclosure.

DATED this 28th day of March 2013.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

EXHIBIT 1

Inst #: 201209200001821
Fees: $18.00 N/C Fee: $0.00
RPTT: $38.25 Ex: #
09/20/2012 09:34:48 AM
Receipt #: 1313970
Requestor:
NORTH AMERICAN TITLE COMPAN
Recorded By: MAT Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

9-1

Please mail tax statement and
when recorded mail to:
Daisy Trust
900 S. Las Vegas Blvd. Ste 810
Las Vegas, Nevada 89101

FORECLOSURE DEED

APN # 161-26-314-020
North American Title #45010-11-35098

NAS # N67084

The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the Copper Creek Estates), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded June 17, 2011 as instrument number 0000047 Book 20110617, in Clark County. The previous owner as reflected on said lien is Jamaine T Smith. Nevada Association Services, Inc. as agent for Copper Creek Estates does hereby grant and convey, but without warranty expressed or implied to: Daisy Trust (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: Copper Creek Est, Plat Book 130, Page 16, Lot 37 Clark County

AGENT STATES THAT:
This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Copper Creek Estates governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 11/14/2011 as instrument # 0001337 Book 20111114 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of Copper Creek Estates at public auction on 5/11/2012, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $7,100.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: September 17, 2012

Misty Blanchard

By Misty Blanchard, Agent for Association and Employee of Nevada Association Services

STATE OF NEVADA)
COUNTY OF CLARK)

On September 17, 2012, before me, Elissa Hollander, personally appeared Misty Blanchard personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

(Seal) (Signature)

ELISSA HOLLANDER
Notary Public, State of Nevada
Appointment No. 05-101835-1
My Appt. Expires Nov. 5, 2013

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 161-26-314-020
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

FOR RECORDERS OPTIONAL USE ONLY
Book_____ Page:_____
Date of Recording: _____
Notes:

3.a. Total Value/Sales Price of Property $ 7100.00
b. Deed in Lieu of Foreclosure Only (value of property) (_____)
c. Transfer Tax Value: $ 7100.00
d. Real Property Transfer Tax Due $ 38.25

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section_____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature Misty Blanchard Capacity: Agent

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Nevada Association Services	Print Name: Daisy Trust
Address: 6224 W. Desert Inn Road	Address: 900 S. Las Vegas Blvd. Ste 810
City: Las Vegas	City: Las Vegas
State: Nevada Zip: 89121	State: Nevada Zip: 89101

COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)

North American Title Company
8485 W. Sunset Road, Suite 111
Las Vegas, Nevada 89113

Escrow # 35098 / N67084

State: Zip:

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

EXHIBIT 2

Loan Number: 250000171

APN#: 161-26-314-020

Return to

~~**Recording Requested by:**~~

Name: FIRST STATE BANK

Address: 9777 PYRAMID CT SUITE 150

City/State/Zip: ENGLEWOOD, COLORADO 80112

Mail Tax Statements to:

Name: FIRST STATE BANK

Address: 9777 PYRAMID CT SUITE 150

City/State/Zip: ENGLEWOOD, COLORADO 80112

09-05-0109-CG

20090522-0004187

Fee: $32.00 RPTT: $0.00
N/C Fee: $25.00
05/22/2009 13:49:35
T20090180897
Requestor:
NEVADA TITLE LAS VEGAS
Debbie Conway KGP
Clark County Recorder Pgs: 19

Please complete Affirmation Statement below:

☒ I the undersigned hereby affirm that this document submitted for recording does not contain the social security number of any person or persons. (Per NRS 239B.030)

-OR-

☐ I the undersigned hereby affirm that this document submitted for recording contains the social security number of a person or persons as required by law: _____
(State specific law)

CG E/O

Signature (Print name under signature) Cindy guadagno Title

Deed of Trust

(Insert Title of Document Above)

NEVADA COVER PAGE
NEV. REV. STAT. §239B.030
NVCP.MSC 11/14/07

DocMagic eForms 800-649-1362
www.docmagic.com

Assessor's Parcel Number: 161-26-314-020

~~Recording Requested By~~:
FIRST STATE BANK

And When Recorded Return To:
FIRST STATE BANK
9777 PYRAMID CT SUITE 150, ENGLEWOOD, COLORADO 80112
Loan Number: 250000171
Case Number: 45-45-6-2747431

Mail Tax Statements To:
FIRST STATE BANK, 9777 PYRAMID CT SUITE 150, ENGLEWOOD, COLORADO 80112

09-05-0109 G [Space Above This Line For Recording Data]

DEED OF TRUST

THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 10, 12, 17, 19 and 20. Certain rules regarding the usage of words used in this document are also provided in Section 15.

(A) "**Security Instrument**" means this document, which is dated MAY 18, 2009 , together with all Riders to this document.

(B) "Borrower" is JAMAINE T SMITH , AN UNMARRIED MAN

Borrower is the trustor under this Security Instrument.
(C) "Lender" is FIRST STATE BANK

Lender is a NEBRASKA BANKING CORPORATION organized and existing under the laws of NEBRASKA
Lender's address is 9777 PYRAMID CT SUITE 150, ENGLEWOOD, COLORADO 80112

Lender is the beneficiary under this Security Instrument.
(D) "Trustee" is NEVADA TITLE COMPANY
2500 NORTH BUFFALO SUITE 150, LAS VEGAS, NEVADA 89128

(E) "Note" means the promissory note signed by Borrower and dated MAY 18, 2009 .
The Note states that Borrower owes Lender TWO HUNDRED FORTY-SEVEN THOUSAND SIXTY-THREE AND 00/100 Dollars (U.S. $ 247,063.00) plus interest.
Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JUNE 1, 2039 .
(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Planned Unit Development Rider
☐ Balloon Rider	☐ Biweekly Payment Rider
☐ 1-4 Family Rider	☐ Second Home Rider
☐ Condominium Rider	☒ Other(s) [specify] ASSUMPTION RIDER

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY of CLARK :
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A".
A.P.N.: 161-26-314-020

which currently has the address of 6732 FORT BENTON ROAD
[Street]

LAS VEGAS , Nevada 89122 ("Property Address"):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 14. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

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; (b) leasehold payments or ground rents on the Property, if any; and (c) premiums for any and all insurance required by Lender under Section 5. 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. Borrower shall promptly

furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 14 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 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.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 21 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. 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. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although 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.

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.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate

as provided in Section 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

12. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 17, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 19) and benefit the successors and assigns of Lender.

13. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

14. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice

address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

15. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

16. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

17. Transfer of the Property; Acceleration; Assumption. This loan may be declared immediately due and payable upon transfer of the property securing such loan to any transferee, unless the acceptability of the assumption of the loan is established pursuant to Section 3714 of Chapter 37, Title 38, United States Code. The acceptability of any assumption shall also be subject to the following additional provisions:

(a) Funding Fee: A fee equal to one-half of 1 percent of the balance of this loan as of the date of transfer of the property shall be payable at the time of transfer to the loan holder or its authorized agent, as trustee for the Department of Veterans Affairs. If the assumer fails to pay this fee at the time of transfer, the fee shall constitute an additional debt to that already secured by this instrument, shall bear interest at the rate herein provided, and at the option of the payee of the indebtedness hereby secured or any transferee thereof, shall be immediately due and payable. This fee is automatically waived if the assumer is exempt under the provisions of 38 U.S.C. 3729(c).

(b) Processing Charge: Upon application for approval to allow assumption of this loan, a processing fee may be charged by the loan holder or its authorized agent for determining the creditworthiness of the assumer and subsequently revising the holder's ownership records when an approved transfer is completed. The amount of this charge shall not exceed the maximum established by the Department of Veterans Affairs for a loan to which Section 3714 of Chapter 37, Title 38, United States Code applies.

(c) Indemnity Liability Assumption: If this obligation is assumed, then the assumer hereby agrees to assume all of the obligations of the veteran under the terms of the instruments creating and securing the loan. The assumer further agrees to indemnify the Department of Veterans Affairs to the extent of any claim payment arising from the guaranty or insurance of the indebtedness created by this instrument.

If the acceptability of the assumption of this loan is not established for any reason, and Lender exercises its option to declare all sums secured by this Security Instrument immediately due and payable, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 14 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 17.

19. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 14) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 21 and the notice of acceleration given to Borrower pursuant to Section 17 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 19.

20. Hazardous Substances. As used in this Section 20: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 17 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lenders' election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

22. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

23. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

24. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. $300, plus the actual cost of any credit report.

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NOTICE TO BORROWER

Department of Veterans Affairs regulations at 38 C.F.R. 36.4334 provide as follows:

"Regulations issued under 38 U.S.C. Chapter 37 and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereunder, shall govern the rights, duties, and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto."

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

JAMAINE T SMITH _____ (Seal) -Borrower

Jamaine T. Smith

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

Witness:

_____

Witness:

_____

[Space Below This Line For Acknowledgment]

State of NEVADA

County of CLARK

This instrument was acknowledged before me on May 18, 2009

by JAMAINE T SMITH

Cindy Guadagno

CINDY GUADAGNO
Notary Public State of Nevada
No. 02-74482-1
My appt. exp. Mar. 28, 2010

02-74482-1

3/28/10

(Seal)

Cindy Guadagno

Signature of notarial officer

Title

My commission expires: 3/28/10

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL I:

LOT THIRTY-SEVEN (37) OF COPPER CREEK ESTATES (A COMMON INTEREST COMMUNITY), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 130, OF PLATS, PAGE 16, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II:

A NONEXCLUSIVE EASEMENT OF ACCESS, INGRESS, EGRESS, USE AND ENJOYMENT OF, IN AND TO THE COMMON ELEMENTS AS PROVIDED FOR IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS RECORDED JUNE 26, 2006 IN BOOK 20060626 AS DOCUMENT NO. 0005304 AND ANY AMENDMENTS THERETO OF OFFICIAL RECORDS.

Loan Number: 250000171
Case Number: 45-45-6-2747431

VA ASSUMPTION POLICY RIDER

THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.

THIS ASSUMPTION POLICY RIDER is made this 18th day of MAY, 2009 , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Deed to Secure Debt ("Instrument") of the same date herewith, given by the undersigned ("Mortgagor") to secure the Mortgagor's Note ("Note") of the same date to FIRST STATE BANK

("Mortgagee") and covering the property described in the Instrument and located at:

6732 FORT BENTON ROAD, LAS VEGAS, NEVADA 89122

(Property Address)

Notwithstanding anything to the contrary set forth in the Instrument, Mortgagee and Mortgagor hereby acknowledges and agrees to the following:

GUARANTY: Should the Department of Veterans Affairs fail or refuse to issue its guaranty in full amount within 60 days from the date that this loan would normally become eligible for such guaranty committed upon by the Department of Veterans Affairs under the provisions of Title 38 of the U.S. Code "Veterans Benefits", the Mortgagee may declare the indebtedness hereby secured at once due and payable and may foreclose immediately or may exercise any other rights hereunder or take any other proper action as by law provided.

TRANSFER OF THE PROPERTY: If all or any part of the Property or any interest in it is sold or transferred, this loan shall be immediately due and payable upon transfer ("assumption") of the property securing such loan to any transferee ("assumer"), unless the acceptability of the assumption and transfer of this loan is established by the Department of Veterans Affairs or its authorized agent pursuant to section 3714 of Chapter 37, Title 38, United States Code.

An authorized transfer ("assumption") of the property shall also be subject to additional covenants and agreements as set forth below:

(a) ASSUMPTION FUNDING FEE: A fee equal to one-half of 1 percent (.50%) of the unpaid principal balance of this loan as of the date of transfer of the property shall be payable at the time of transfer to the mortgagee or its authorized agent, as trustee for the Secretary of Veterans Affairs. If the assumer fails to pay this fee at the time of transfer, the fee shall constitute an additional debt to that already secured by this instrument, shall bear interest at the rate herein provided, and, at the option of the mortgagee of the indebtedness hereby secured or any transferee thereof, shall be immediately due and payable. This fee is automatically waived if the assumer is exempt under the provisions of 38 U.S.C. 3729 (b).

(b) ASSUMPTION PROCESSING CHARGE: Upon application for approval to allow assumptions and transfer of this loan, a processing fee may be charged by the mortgagee or its authorized agent for determining the creditworthiness of the assumer and subsequently revising the holder's ownership records when an approved transfer is completed. The amount of this charge shall not exceed the maximum established by the Department of Veterans Affairs for a loan to which section 3714 of Chapter 37, Title 38, United States Code applies.

(c) ASSUMPTION INDEMNITY LIABILITY: If this obligation is assumed, then the assumer hereby agrees to assume all of the obligations of the veteran under the terms of the instruments creating and securing the loan, including the obligation of the veteran to indemnify the Department of Veterans Affairs to the extent of any claim payment arising from the guaranty or insurance of the indebtedness created by this instrument.

IN WITNESS WHEREOF, Mortgagor(s) has executed this Assumption Policy Rider.

_____ (Seal)
JAMAINE T SMITH Mortgagor
Jamaine T. Smith

_____ (Seal)
Mortgagor

_____ (Seal)
Mortgagor

_____ (Seal)
Mortgagor

_____ (Seal)
Mortgagor

_____ (Seal)
Mortgagor

EXHIBIT 3

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

Subject: The Super Priority Lien	Advisory No. **13-01**	21 pages
	Issued By: Real Estate Division	
	Amends/ Supersedes N/A	
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01		Issue Date: December 12, 2012

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

> The association has a lien on a unit for **any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines** imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. **Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments** under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

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

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

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

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

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

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

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

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

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

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

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

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

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

(1) The reasonable expenses of sale;

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

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

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

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

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

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

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

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

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

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

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

NRS 116.3116(2) states:

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

(emphasis added)

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