IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST

Appellant,

vs.

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

Respondents.

Case No. 63611

District Court #A-13-679095-C

APPEAL
From the Eighth Judicial District Court
The Honorable David Barker, District Judge

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DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Wells Fargo Bank National Association a/k/a Wells Fargo Bank, N.A.;
- Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Equity;
- Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. d/b/a America's Servicing Company;

There are no other known interested parties.

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INTRODUCTION

This appeal is about a serious misconstruction of a Nevada statute – the request by speculators that courts misread NRS 116.3116(2) ("the Staute") and turn tiny homeowners' association liens into lottery tickets, trampling on the U.S. and Nevada Constitutions in the process by invalidating mortgage contracts that predated those liens. This Court should clarify that NRS 116.3116(2) does not grant holders of homeowners' association liens the right to wipe out mortgages. By doing so, this Court would not only deny Appellant Daisy Trust an undeserved windfall, but would also shut down the cottage industry of speculating on homeowners' association liens that has quickly sprung up in Nevada as a result of a few bad decisions.

Thankfully, most state and federal courts reject the extreme and unreasonable interpretation of NRS 116.3116(2) that Daisy Trust advances.[1] Yet

[1] See, e.g., *LVDG Series 125 v. Welles*, 3:13-cv-00503-LRH-WGC, 2013 WL 6175813 (D. Nev. Nov. 25, 2013); *RLP-Ferrell Street, LLC v. Franklin American Mortgage Co.*, 2:13-cv-1470-RCJ-GWF, 2013 WL 6120047 (D. Nev. Nov. 19, 2013); *LN Mgmt. LLC Series 5664 Divot v. Dansker*, 2:13-cv-1420-RCJ-GWF, 2013 WL 6174679 (D. Nev. Nov. 18, 2013); *LVDG Series 114 v. Wright*, 2:13-cv-1775-JCM-NJK, 2013 WL 6027989 (D. Nev. Nov. 13, 2013); *Beverly v. Weaver-Farley*, 3:13-CV-0348-LRH-VPC, 2013 WL 5592332 (D. Nev. Oct. 9, 2013); *Premier One Holdings, Inc. v. BAC Home Loans Servicing, LP*, 2:13-CV-895-JCM-GWF, 2013 WL 4048573 (D. Nev. Aug. 9, 2013); *First 100, LLC v. Wells Fargo Bank, N.A.*, 2:13-CV-431-JCM-PAL, 2013 WL 3678111 (D. Nev. July 11, 2013); *Kal-Mor-USA, LLC v. Bank of Am., N.A.*, 2:13-CV-0680-LDG-VCF, 2013 WL 3729849 (D. Nev. July 8, 2013); *Salvador v. Nat'l Default Servicing Corp.*, 2:13-CV-1011-JCM-GWF, 2013 WL 3049084 (D. Nev. June 13, 2013); *Bayview*

unfortunately, while the question remains unsettled, Daisy Trust's business model remains in full swing. Following that model, Daisy Trust and other speculators buy 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 to turn a quick profit by renting the property to unsuspecting tenants. Finally, they sue the lender (whose lien they still refuse to pay) to "quiet title," on the alleged ground that the HOA foreclosure sale "wiped out" the lenders' first priority liens. Once in a while, they win. Needless to say, this particular brand of real estate investment is equally bad law and policy.

The statute the speculators distort to their improper ends – and which this Court needs to construe to set Nevada law right – is Nevada Revised Statute

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Loan Servicing, LLC v. Alessi & Koenig, LLC, 2:13-CV-00164-RCJ, 2013 WL 2460452 (D. Nev. June 6, 2013); *Weeping Hollow Ave. Trust v. Spencer*, 2:13-CV-00544-JCM, 2013 WL 2296313 (D. Nev. May 24, 2013); *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2:12-CV-00949-KJD, 2013 WL 531092 (D. Nev. Feb. 11, 2013); *Shining Sand Avenue Trust v. Stonesifer*, Case No. A-12-671168, Dept. IV, entered July 12, 2013; *Daisy Trust v. Wells Fargo*, Case No. A-13-679095, Dept. XXIII, entered on July 9, 2013; *Deutsche Bank Nat'l Trust Co. v. The Foothills at MacDonald Ranch*, Case No. A-13-680505, Dept. XXII, entered on June 3, 2012 (attached hereto as Exhibit 3); *SFR Investments Pool 1, LLC v. First Horizon Home Loans*, Case No. A-13-674958, entered on May 29, 2013; *SBW Investments, LLC v. Elsinore, LLC*, Case No. A-13-675541, Dept. XVII, entered on May 9, 2013; *Sanucci Ct. Trust v. Elevado*, Case No. A-12-670423, Dept. XXX, entered on February 21, 2013; *Centeno v. Montesa, LLC*, Case No. A-12-667397, Dept. XXXII, entered on October 15, 2012 (attached hereto as Exhibit 8); *Centeno v. Maverick Valley Properties, LLC*, Case No. A-12-654878, Dept. XXIV, entered on May 12, 2012; *Design 3.2 LLC v. Bank of New York Mellon*, Case No. A-10-621628, Dept. XV, entered on June 15, 2011.

("NRS") 116.3116(2). The history of NRS 116.3116 shows why the law is not a gateway to the improper windfall Daisy Trust seeks. The Statute was modeled after the Uniform Common Interest Community Act (the "Uniform Act"), which has been adopted by Alaska, Colorado, Connecticut, Delaware, Minnesota, Vermont, and West Virginia, and which Nevada adopted in 1991. The statute merely grants an 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. It states:

> 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.

NRS 116.3116(2) (emphasis added). Thus, NRS 116.3116(2) specifically places the HOA lien in a junior position subordinate to a "first security interest" such as a properly recorded deed of trust. Nevertheless, Daisy Trust asks this Court to ignore the express subordination provision and instead relies 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" – a limited entitlement *to payment* over a first-recorded deed of trust. The claim to payment as a super-priority 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. To allow the homeowners' association lien to thus be paid is a legislative judgment that makes sense, as the limited priority amount is typically less than $1,000.00. In this way, the homeowners' associations are made whole, enabling them to support Nevada neighborhoods, and the rights of mortgage-holders are preserved.

Yet, 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, an amount 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 usually equates to less than five percent of the value of the property being sold. Using this case as an example, the foreclosure deed to Daisy Trust indicates that it paid only $10,500.00 for the Property. Appellant's Appendix[2] ("AA") 233-35. Simply for illustrative purposes, 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 Daisy Trust paid for the Property. AA 209.[3]

The speculators' games – which find no support in the statute at issue – have to end. This Court should affirm the district court's dismissal of Daisy Trust's suit, explain the proper interpretation of NRS 116.3116, and restore Nevada's law of HOA liens to its proper and intended function.

STATEMENT OF THE ISSUES

1. Whether issue preclusion bars Daisy Trust's action, because it previously litigated the exact legal issues raised in this case against Wells Fargo and lost.

2. Whether the district court correctly ruled that the HOA foreclosure did not extinguish Wells Fargo's first deed of trust, and relatedly, whether the district court correctly determined that Daisy Trust is not a bona fide purchaser.

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[2] Though Appellant's Appendix is titled "Joint Appendix," Wells Fargo refers to it as "Appellant's Appendix" because it was not consulted in its preparation as to form or content.

[3] This estimate was at the time of Wells Fargo's Counter-Motion.

3. Whether Daisy Trust's proposed interpretation of NRS 116.3116(2) would effect a violation of Wells Fargo's constitutional rights.

STATEMENT OF THE CASE

I. Nature of the Case

This case arises from Daisy Trust's purchase of an interest in real property via an HOA foreclosure sale. Daisy Trust now argues that its acquisition of the HOA's interest extinguished Wells Fargo's prior deed of trust on the property. Daisy Trust brought suit to quiet title and for declaratory relief.

II. Proceedings Below

On March 28, 2013, Daisy Trust filed its Complaint in the Eighth Judicial District Court. On March 29, 2013, in an effort to enjoin Wells Fargo from protecting its first priority secured interest and quieting title in its own name, Daisy Trust moved for injunctive relief. Wells Fargo opposed Daisy Trust's motion for injunctive relief and counter-moved to dismiss the Complaint. The district court denied Daisy Trust's motion for injunctive relief, and granted Wells Fargo's counter-motion to dismiss. This appeal followed.

FACTUAL BACKGROUND

On or about September 21, 2007, Donald K. 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 (the "Property").

Universal recorded its deed of trust on September 28, 2007. AA 238-56. Wells Fargo is the successor in interest to Universal, and Daisy Trust does not dispute that Wells Fargo is the current beneficiary and holder of the Deed of Trust. *See* AA 65 (acknowledging that Wells Fargo is the beneficiary).

Thereafter, the Blumes stopped paying under the Deed of Trust, and also stopped paying their HOA dues. AA 274-79. The Blumes' HOA, Westminster at Providence ("Westminster"), 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. AA 258-63. On March 10, 2011, Wells Fargo recorded its Notice of Default and Election to Sell. AA 265-68.

On January 31, 2012, Westminster recorded a Notice of Sale. AA 270-72. Notably, neither the HOA Default nor the HOA Notice of Sale mention or otherwise indicate that they are foreclosing on only the super-priority portion of the HOA's lien. AA 256-58, 270-72. Instead, the HOA foreclosed upon its entire lien in violation of NRS 116.3116(b)(2). Daisy Trust's action thus fails on the alternative basis that the HOA foreclosure sale was invalid under NRS 116.3116(b)(2).

Westminster conducted its foreclosure sale on August 3, 2012. AA 233-36. At the HOA foreclosure sale, Daisy Trust bought the Property for $10,500.00, and recorded the HOA Foreclosure Deed on August 9, 2012. AA 233-36. Daisy Trust

knew 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 Daisy Trust's purchase of the Property, Daisy Trust has failed to make any mortgage payments due to Wells Fargo pursuant to its Deed of Trust, a fact it does not dispute.

Thus, on March 26, 2013, Wells Fargo recorded the Nevada Foreclosure Mediation Certificate that authorizes Wells Fargo to proceed with its foreclosure sale. AA 274-75. That same day, Wells Fargo recorded its Notice of Trustee Sale, noticing the foreclosure sale for April 26, 2013. AA 277-79. Daisy Trust then sued, seeking to quiet title and stop the foreclosure. Wells Fargo won. Daisy Trust appeals.

SUMMARY OF THE ARGUMENT

Issue preclusion bars Daisy Trust's entire suit. The parties litigated the same legal questions immediately before Daisy Trust filed this suit. Wells Fargo won. Daisy Trust's later-filed suit is barred and should be dismissed on that basis alone.

Moreover, NRS 116.3116 does not extinguish a properly recorded senior deed of trust, and was never meant to do any such thing. To the contrary, the express language of NRS 116.3116 makes clear that the first-in-time deed of trust has priority over the HOA lien, except as to a limited super-priority to collect

several months of assessments. 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 so they could buy homes. Daisy Trust's proposed interpretation of the statute disserves this wise policy goal and would wipe out millions, if not billions, of dollars of properly recorded security interests in Nevada. If Daisy Trust's speculator-friendly view of the statute prevails, lenders will have an incentive not to make loans in Nevada, harming the ability of middle-class Nevadans to buy homes. What lender would ever make a loan, and take a first security interest, if that interest would be completely wiped out without notice, by an HOA super-priority lien under NRS 116.3116? Such an absurd result would lead to a second collapse of Nevada's fragile real estate market.

Yet, Daisy Trust comes to this Court seeking a judicial blessing of its business model and approval of its tortured statutory construction. As shown more fully below, Daisy Trust's claims fail as a matter of law. Daisy Trust purchased the Property subject to Wells Fargo's deed of trust, failed to tender all amounts due under the deed of trust, and is thus not entitled to quiet title in its name or to object to the pending foreclosure sale. Because the district court correctly determined that Wells Fargo's deed of trust was in no way extinguished by the HOA foreclosure sale, this Court should affirm.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions in granting a motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

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). 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*, 181 P.3d at 672; *Morris v. Bank of America*, 110 Nev. 1274, 1277, 886 P.2d 454, 456 (1994). In considering the motion, the court must accept all factual allegations as true 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 (1986); *see also Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995) (holding that only factual allegations must be accepted as true).

ARGUMENT

I. Daisy Trust Already Lost These Same Issues To Wells Fargo the First Time, Such That Issue Preclusion Bars This Suit.

Because Daisy Trust and Wells Fargo have already litigated these identical issues and obtained a final judgment, issue preclusion bars Daisy Trust from bringing the same claims in the instant action.

"'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 *Univ. 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); *see also United States v. Stauffer Chem. Co.,* 464 U.S. 165, 171-72 (1984); *Rizzolo v. Henry,* 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 Daisy Trust from re-litigating these rehashed claims. Daisy Trust'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. Daisy Trust 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). 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." AA 385, 391. Daisy Trust's first claim for injunctive relief in both complaints asserts "Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding." AA 385, 391.

The claims for declaratory relief are likewise the same. Daisy Trust'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." AA 385, 391. The 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." AA 385, 391.

These identical contentions – purely legal issues involving interpretation of the same statute, between the same parties – have already been rejected by the Eighth Judicial District Court. Daisy Trust is thus barred from re-litigating them now. It has not only had the chance to litigate, but actually has litigated this exact issue, and the court already rejected them in the form of a final and appealable judgment – which Daisy Trust failed to appeal. Enough is enough. Wells Fargo should not be made to re-fight a battle it already won. Issue preclusion provides an independent and sufficient basis to affirm the dismissal of Daisy Trust's Complaint in its entirety.

II. The District Court Correctly Held that Daisy Trust's Claims for Declaratory Relief and To Quiet Title Fail as a Matter of Law Because NRS 116's Plain Language Subordinates the HOA Lien to Wells Fargo's Lien.

Daisy Trust's claims also fail as a matter of law for one very basic and fundamental reason: NRS 116.3116 does not allow a first security interest to be extinguished as a result of a HOA's foreclosure of its super-priority lien. Daisy Trust's suggestion that it does contradicts the express language of the statute, and leads to absurd results.

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 Program v. Las Vegas Metro. Police Dep't,* 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) (holding that statutes must be construed as a whole, so that no part is rendered meaningless). "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*, 124 Nev. at 147, 179 P.3d at 548 (holding that "when a statute is facially clear, [the Court] will generally not go beyond its language in determining the Legislature's intent.")

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. Nev. 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 (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")).

Here, 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(b)(2) (emphasis added). Because the statutory language is not ambiguous, this Court must apply the law as the Legislature wrote it.

Given the law's plain meaning, Daisy Trust must demonstrate that the HOA's notice of delinquent assessment was recorded before Wells Fargo's Deed of Trust, in order to prevail. NRS 116.3116(b)(2); *see also Centeno v. Mortgage Elec. Registration Sys., Inc.*, 2012 WL 3730528, at *3 (D. Nev. Aug. 28, 2012) (holding that absent 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). Yet Daisy Trust has never suggested, and cannot assert, that the HOA lien was recorded first. Instead, it admits 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. AA 65. Because Daisy Trust

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.

A. Daisy Trust's Proposed Interpretation of NRS 116.3116(2), if Adopted, Would Create Absurd Results.

Daisy Trust's interpretation of NRS 116.3116(2) creates an absurd result by rendering a portion of the statute meaningless and incompatible with its plain intent. Specifically, Daisy Trust's interpretation effectively eliminates an express statutory provision. Under Daisy Trust'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 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 included 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 Daisy Trust'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.

Daisy Trust's interpretation fails to interpret the statute's provisions harmoniously 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*). This Court must not adopt it. Rather, 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 here 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 interpretation satisfies the Legislature's intent - creating a limited super-priority to *payment*, not to title of the Property – and avoids absurd results.

Indeed, the District of Nevada concluded that, under the interpretation Daisy Trust advocates, "[t]he exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless if its operation were not limited in a way that permits the exception to have some application.." *Bayview Loan Servicing v. AlessI & Koenig, LLC*,
--- F. Supp. 2d ----, 2013 WL 2460452, at *5 (D. Nev. June 6, 2013). In other words, "[r]eading the super-priority rule to affect extinguishment would read the first mortgage rule out of the statutes almost entirely." *Id.* The *Bayview* decision further held that "[i]t is clear to the Court that the legislative intent was to ensure

that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security." *Id.* That court reasoned, however, that it "does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien." *Id.*

The *Bayview* decision rejecting Daisy Trust's interpretation "also gives each section of the statute significant application and avoids an extreme result that was almost certainly not intended by the state legislature, i.e., that the foreclosure of a small lien for even $1000 of delinquent HOA dues could extinguish an earlier-recorded security interest on the order of hundreds of thousands of dollars, when the purpose behind the super-priority statute was simply to ensure that HOA's are made whole up to a certain amount." *Bayview Loan Servicing*, 2013 WL 2460452, at *7.

Daisy Trust's interpretation is likewise completely at odds with the Legislature's many actions to protect homeowners' interests. First, should Daisy Trust's interpretation prevail, lenders would be forced to foreclose as early as possible to protect their interests, and do so before the HOA. Such conduct directly contravenes the Nevada Legislature's strong policy requiring mediation through the Nevada Foreclosure Mediation Program, and encouraging lenders to

work with homeowners to find resolutions short of foreclosure when possible. "[C]ourts should not incentivize banks to foreclose on property at the first sign of distress. Banks should be encouraged to work with homeowners so that the bank may recoup as much of its loan as possible and the homeowner can remain in the home." *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, 2013 WL 4048573, at *5 (D. Nev. Aug. 9, 2013). The United States District Court for the District of Nevada recognized:

> Banks have considerations that an HOA does not have when considering foreclosure, such as: if the property value on the market is fluctuating; the homeowner's long term ability to pay back the loan; and, whether the bank should allocate resources first to foreclosing on property owners with no chance at paying back their mortgage versus working with home owners that may merely be struggling to pay back their mortgages. An HOA has none of these considerations and merely wants to collect its statutorily entitled fees in the easiest manner possible.

Id. Daisy Trust's position calls for banks to foreclose quickly upon default as the appropriate way to avoid the harsh and unreasonable result Daisy Trust advocates. This again contradicts Nevada's strong public policy in favor of exploring options short of foreclosure where possible.

Moreover, it makes little sense that the Legislature would require lenders with deeds of trust on properties to strictly comply with the Foreclosure Mediation Program and withstand years of resulting litigation before they can foreclose on a residential deed of trust, but would give HOAs *carte blanche* to take title free and

clear, and then evict homeowners with no comparable process over amounts in arrears of often only hundreds of dollars.

That Daisy Trust's interpretation cannot be the law is clear in the near-unanimous train of decisions rejecting its self-serving and illogical interpretation of the statute at issue. In addition to the district court's dismissal of Appellant's claims, departments throughout the Eighth Judicial District, as well as the United States District Court for the District of Nevada, have repeatedly dismissed identical complaints brought by similarly situated plaintiffs and reaching a near-consensus against Appellant's position. *See e.g., Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.,* 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (Dawson, J.); *Sanucci Ct. Trust v. Elevado,* Case No. A-12-670423, Dept. XXX (Judge Wiese granting 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 (Judge Bare granting 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 holding 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 (dismissing plaintiff's complaint, entered on

June 15, 2011).

Courts have continued to issue similar decisions more recently. *Greenstreet Holdings v. Reynolds*, Case No. CV13-00240, Dept. IX, "Order" entered on December 10, 2013 (granting a lender's motion to dismiss, finding that the lender's deed of trust was not extinguished by the HOA foreclosure sale). In that case, the court held that "[n]owhere in the statute does it state that a super priority lien takes a senior position to a first deed of trust in a manner that would wholly eliminate the deed of trust; rather, the statute clearly provides an HOA with only a priority of payment of the 'super priority' amount prior to payment of a foreclosing first security interest lienholder." *Id.* at 6. (emphasis in original.) The court noted that to "hold otherwise would essentially render the language of NRS 116.3116(2)(b) meaningless and produce 'absurd or unreasonable results.'" *Id.* at 7.

Notably, the Honorable Judge Tao of the Eighth Judicial District Court recently issued an opinion holding that "the simplified foreclosure mechanism set forth in NRS 116.31162 through 116.31168 is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object. Therefore, any foreclosure conducted in accordance with solely these provisions is null and void." *Paradise Harbor Place Trust v. Deutsche Bank National Trust Co., et al.*, Case No. A-13-687846, Dept. XX, "Order on

Defendant's Motion to Dismiss Or, In the Alternative, Motion for Summary Judgment." (Tao, J., entered on January 3, 2014).

Finally, the United States District Court for the District of Nevada has issued five recent opinions, all holding that the foreclosure of an HOA super-priority lien does not extinguish a first recorded deed of trust. *Daisy Trust v. JPMorgan Chase Bank, N.A.*, 2013 WL 6528467 (D. Nev. Dec. 11, 2013) (stating that: "[d]uring recent months, this district has faced a deluge of plaintiffs seeking to quiet title after acquiring a property, for a paltry sum, at an HOA foreclosure sale. Each plaintiff relies on an identical, albeit incorrect, interpretation of NRS § 116.3116 for the proposition that the HOA foreclosure sale extinguished defendants' first position security interest in the subject property", and further the Court acknowledged that almost every department in the District of Nevada had agreed that the HOA foreclosure does not extinguish the first-recorded deed of trust, stating that "[t]he resounding majority has concluded that while NRS § 116.3116 creates a limited super-priority lien for nine months of HOA assessments leading up to the foreclosure of the first mortgage, it does not alter or extinguish a first position security interest."); *LVDG Series 125 v. Welles*, 2013 WL 6175813 (D. Nev. Nov. 25, 2013); *RLP-Ferrell Street, LLC v. Franklin Am. Mortgage Co.*, 2013 WL 6120047 (D. Nev. Nov. 19, 2013); *LN Management LLC Series 5664 Divot v. Dansker*, 2013 WL 6174679 (D. Nev. Nov. 18, 2013); *LVDG Series 114 v.*

Wright, 2013 WL 6027989 (D. Nev. Nov. 13, 2013).

The accumulated weight of this authority underscores how unreasonable Daisy Trust's reinvention of the statute at issue truly is. This Court should reject it, and affirm the decision below.

B. Daisy Trust's Claims For Declaratory Relief and To Quiet Title Fail as a Matter of Law Because the Legislative History Establishes that the Super-Priority Is Only a Priority To Payment, Not To Title.

Despite 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.*

As noted above, NRS 116.3116 is based on the Uniform Common Interest Ownership Act (the "Uniform Act") drafted by the National Conference of Commissioners on Uniform State law and enacted in 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, Daisy Trust ignores this language. Instead, it 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." Opening Br. at 9, AA 71. Upon closer inspection, this commentary actually supports Wells Fargo's construction that the HOA priority is a priority to payment – not title. The comment never states that an HOA foreclosure extinguishes the first in time deed of trust – and it follows immediately after 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).

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 – rejecting a proposal to increase the period to 2 years. *See* Assembly Bill 204, Seventy-fifth Nevada Legislative Session (2009). 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." AA 301-06. At no point does the legislative history indicate that the expanded super-priority was meant to help speculators take title to property worth hundreds of thousands of dollars, for pennies on the dollar, free and clear of the deed of trust to which the HOA's lien is expressly subordinated.

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.

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

Daisy Trust's interpretation of the statute defies common sense and nullifies the drafters' express intent to protect first security interests. Daisy Trust 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. Daisy Trust 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 homebuyers in good faith reliance upon NRS 116.3116's express subordination provisions.

It defies logic and common sense for Daisy Trust to suggest that the 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 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 (for the first time in years) values are actually beginning to increase, albeit slowly. Such drastic reductions in value are the precise opposite of the rising values that Nevada desperately needs. They frustrates long-overdue economic recovery, and if unchecked, will prove devastating not only to homeowners, but all Nevadans.

C. Daisy Trust's Claims Fail as a Matter of Law Because It Purchased the Property Subject to Wells Fargo's Deed of Trust.

Nevada Revised Statute 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, Daisy Trust bought the ownership interest of the prior owners, the Blumes. And, as the recorded documents establish, the Blumes held title to the Property *subject to* Wells Fargo's Deed of Trust. AA 238-56. Consistently, the HOA Foreclosure Deed expressly states that the transfer is "without warranty expressed or implied." AA 233-36. Thus, Daisy Trust cannot in good faith ask this Court to strip lenders and prior lienholders of their rights, when Daisy Trust's own deed – on its very face – does not guarantee a transfer free of other liens and encumbrances.

Pursuant to NRS 116.31166 and the HOA Foreclosure Deed itself, Daisy Trust's title, like the Blumes' title before it, is subject to Wells Fargo's Deed of

Trust. Daisy Trust 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 Daisy Trust's. As such, Daisy Trust's request to quiet title and its claim for declaratory relief fail as a matter of law.

D. Daisy Trust's Claims Fail as a Matter of Law Because It Is Not a Bona Fide Purchaser.

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

Though not yet decided by this Court, the Eighth Judicial District Court has repeatedly ruled that parties similarly situated to Daisy Trust 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.[4] In *Design 3.2*, the court granted summary judgment in the lender's favor, holding that the plaintiff was not a bona fide purchaser. That 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. AA 308-10. Additionally, the 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." AA 308-10.

Daisy Trust is not a bona fide purchaser. First, Daisy Trust knew the equities present here. It bought the Property approximately five years after the recording of Wells Fargo's Deed of Trust and approximately seventeen months after the recording of Wells Fargo's Notice of Default. As such, Daisy Trust had 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. Indeed, "[e]very such conveyance or

[4] Wells Fargo acknowledges that this and other unpublished orders it cites are not precedential. It does believe that this order – addressing the identical issue – may provide authority persuasive to this Court as it addresses the issue for the first time.

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 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). In light of this constructive notice, Daisy Trust cannot maintain that it lacked notice of the "equities" and of Wells Fargo's interest.

Second, the purchase was not made for valuable consideration and the price paid was not commercially reasonable. Daisy Trust purchased the Property for $10,500.00. AA 233-36. The original loan amount was $417,000.00 – almost forty times the amount Daisy Trust paid. AA 238-56. Moreover, zillow.com estimates the current value at $381,883 – approximately thirty-six times the amount Daisy Trust paid.

Notably, Vermont, which also 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."[5] (emphasis added). The Vermont Supreme Court voided an HOA 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*, 848 A.2d 336 (Vt. 2004). As in *Will*, Daisy Trust's purchase is commercially unreasonable as it is not valuable consideration where the fair market value is approximately thirty-six times the amount Daisy Trust paid. Daisy Trust cannot be a bona fide purchaser – the purchase price it paid was grossly inadequate and it took its interest with knowledge of Wells Fargo's first security interest. Daisy Trust therefore cannot quiet title in its name on that basis, and its claims fail as a matter of law.

Indeed, the HOA foreclosure sale should be invalidated for inadequate consideration. Daisy Trust's purchase price is inadequate and grossly unfair, especially where Daisy Trust 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

[5] 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.

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 fraud, unfairness, oppression, or other bad conduct, may be sufficient to set aside a sale); *Will v. Mill Condominium Owners' Ass'n*, 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, LLC*, Case No. A-10-621628, Dept. XV.

E. Daisy Trust's Reliance On the Real Estate Division's Advisory Opinion Is Misplaced.

To support its proposed statutory construction, Daisy Trust relies on 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"). AA 102-21. Reliance on the Advisory Opinion is inappropriate for the following reasons.

First, the Advisory Opinion's statement on the matter is mere dictum. 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)). Dicta are not controlling. *Argentena Consol.,* 216 P.3d at 785; *Kaldi v. Farmers Ins. Exch.*, 117

Nev. 273, 282, 21 P.3d 16, 22 (2001).

Here, the issue of whether a first priority deed of trust is extinguished by an HOA foreclosure sale under the statute was neither 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.[6] The Real Estate Division did not consider and did not determine the issue of lien extinguishment. The statements from the Advisory Opinion upon which Daisy Trust relies are unnecessary to determine the three issues presented to the Real Estate Division. Not only are those statements dicta, but the fact that the issues were not even presented in that dispute makes them gratuitous. The Court should be wary of a statement about an issue that was neither presented nor briefed, and which is not material to the decision. Because any commentary on that point is a mere dictum, and is indeed gratuitous, it is not binding and should be disregarded.

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 or governmental agency do not

[6] 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." AA 102.

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." *Nev. 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). 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, "a lay body in the executive department of government … 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 has good company in holding that opinions of government or administrative agencies do not bind courts. 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 (1944) (where the agency at issue was 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, and under the circumstances of this Advisory Opinion should be viewed with particular skepticism.

Daisy Trust correctly notes that the Nevada Real Estate Division of the Department of Business and Industry is responsible for issuing advisory opinions related to the amounts of fees and priority of the HOA super-priority lien. Opening Br. at 7 (citing *State Dep't of Bus. & and Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 294 P.3d 1223, 1227-28 (Nev. 2012). While true, that in no way implies that a court should follow those opinions. Rather, it addressed only 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 preempt or prohibit a Nevada court from interpreting NRS 116. The Nevada Supreme Court and the United States Supreme Court made clear: advisory opinions on administrative or governmental agency issues are not binding authority.

While the Court may consider these types of advisory opinions, the issue in this appeal is a significant one of first impression. Moreover, the district courts have issued many decisions already ruling on this identical issue and rejecting the Real Estate Division's Advisory Opinion, as explained above in footnote 1. In the face of these thoughtful opinions, any reliance on the non-binding Advisory Opinion would be ill-advised.

F. Daisy Trust's Reliance on the *Summerhill* Case Is Misplaced.

Though Daisy Trust touts the Washington case of *Summerhill Village Homeowners Association v. Roughly* as a "published decision" working in its favor here, Daisy Trust is wrong for many reasons. *See* 289 P.3d 645 (Wash. 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 could not have determined, whether the lender's first security deed of trust was extinguished – the issue presented here – making any commentary there on the extinguishment issue dicta. *Id.* at 645. Moreover, even if that court had ruled on the extinguishment issue, which it did not, the opinion is of limited value to a Nevada state court interpreting a different statute. This appeal does not raise any issue concerning

Wells Fargo's right of redemption under Nevada law; indeed NRS 116.3116 does not even include a right of redemption.

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. 287 P.3d at 646. As this Court is aware, the procedures and requirements for judicial and non-judicial foreclosure differ starkly. In particular, the notice requirements under judicial foreclosure are much more stringent in that the defendant must actually be personally served with the summons and complaint. They contrast sharply with NRS 116.31163, which requires notice to the lender only under specific and limited circumstances. 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.*"

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 Daisy Trust attempts, but fails, to analogize to NRS 116.3116) if an HOA elects to foreclose *non-judicially*, the HOA loses it super-priority status.[7] Thus, the statute at issue in

[7] RCW 64.34.364(5) states that: "If the association forecloses its lien under this section *nonjudicially* pursuant to chapter 61.24 RCW, as provided by subsection

Summerhill actually contradicts Daisy Trust's position in cases of non-judicial foreclosure. Because a judicial foreclosure action cannot be analogized to a non-judicial action, Daisy Trust'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*."[8] RCW 64.38.010(11). That the relevant association here is a homeowners association, and not a condominium association, provides yet another reason *Summerhill* does not apply.

G. Wells Fargo's Choice Not To Pay the HOA Lien Amount Is Irrelevant.

Daisy Trust argues that Wells Fargo had adequate opportunity to protect its

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(9) of this section, the association *shall not be entitled to the lien priority* provided for under subsection (3) of this section." AA 211-13.

[8] 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).

interest, but failed to do so. It asserts that because Wells Fargo elected not to pay the HOA Lien amount, Wells Fargo has waived its right to assert these defenses. Not only is Daisy Trust misquoting a provision of Wells Fargo's Deed of Trust, Daisy Trust provides no legal support for its position. The deed of trust provision Daisy Trust relies on expressly states that the beneficiary "*may* do and pay for whatever is reasonable or appropriate to protect Lender's interest . . ." AA 244-45. But of course, "may" is permissive − not mandatory. *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)).

Tellingly, Daisy Trust also fails to include the last sentence of the operative provision, 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." AA 245. Daisy Trust's contention is therefore baseless and fails as a matter of law. Wells Fargo has not waived any rights or defenses.

H. Daisy Trust's Interpretation of the Statute Would Effect a Due Process Violation.

Even if the Court were inclined to find Daisy Trust's proffered statutory interpretation of NRS 116 plausible, it should reject it because the Statute's failure to require notice to the deed of trust's beneficiary violates constitutional due

process rights and renders the statute void and unenforceable.

NRS 116.3116 *et seq.* does not expressly require that a HOA provide actual notice to the lender of the delinquent assessment, or the notice of default and election to sell, or provide an opportunity for the lender to contest any HOA claim. The Statute therefore fails to comply with the affirmative notice requirements set forth by the United States Supreme Court. Rather, the statute only requires notice to the lender if the "holder of a recorded security interest encumbering the unit's owner's interest [] has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." NRS 116.31163(2); see also NRS 116.31165(1)(b)(2). In other words, the Statute only entitles a lender or beneficiary to notice if it first affirmatively requests notice; there is no requirement to provide affirmative notice.

This point cannot be overstated since a deed of trust is a substantive property right entitled to protection under the due process clause of the Fourteenth Amendment. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590 (1935); *see also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983). Additionally, the United States Supreme Court expressly set out the minimum notice required to a party faced with a potential loss of its security interest as a result of foreclosure by an entity that claims a priority interest. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional

precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice…." *See id.* at 800. Thus, the statute directly violates Wells Fargo's constitutionally protected due process rights to notice before deprivation of its property rights, and is therefore void and unenforceable.

Such defective notice requirements highlight the constitutional infirmity of NRS 116.3116. The United States Supreme Court made this point particularly clearly in *Mennonite Board of Missions v. Adams*, holding that any party with an interest in real property subject to deprivation must receive actual notice of the event that causes the deprivation. 465 U.S. 791 (1983). Additionally, the Supreme Court holds that "at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "An elementary and fundamental requirement of due process in any preceding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

Additionally, the Nevada federal courts and the courts of the Eighth Judicial District have recently addressed the constitutionality of the Statute and the serious

due process concerns in the context of these HOA super-priority foreclosures. Nevada's federal court has held that extinguishing a lender's first-in-time deed of trust under the Statute "would be a violation of [the lender's] State and Federal due process rights." *First 100, LLC v. Wells Fargo Bank, N.A.*, 2:13-CV-00431-JCM, Doc. 29, 3:7 (April 30, 2013); *see also Premier One Holdings, Inc. v. BAC Home Loans Servicing, LP*, 2013 WL 4048573, at *4 (D. Nev. Aug. 9, 2013) (Mahan, J., stating that extinguishment of the deed of trust "potentially violate[s] due process"). And numerous opinions from the Eighth Judicial District Court likewise hold that lack of notice in the HOA foreclosure context is a constitutional violation. *See, e.g., SFR Investments Pool 1 LLC v. US Bank et al.*, Case No. A-12-673671-C, Dept. XXVII, Minute Order, entered Jan. 30, 2013 (holding that due process guarantees are offended "without notice to the otherwise senior interest mortgagee, and if an opportunity is not provided to the mortgagee to argue its position"); *SFR Investments Pool 1, LLC v. Nationstar Mortgage, LLC*, Case No. A-13-684596-C, Dept. XXXI, Order Denying Application for Temporary Restraining Order n.8, entered on August 5, 2013 (holding that any assertion that notice is not required "would be a violation of Defendant's due process rights . . . [and] would be Unconstitutional and hence unenforceable").

Because the Nevada statute does not provide adequate notice – or an opportunity to preserve its interest – Daisy Trust's interpretation, if given effect,

surely violates Wells Fargo's rights to due process.

III. Daisy Trust's Interpretation of NRS 116, If Given Effect, Also Violates the Takings Clauses of the United States and Nevada Constitutions.

The Fifth Amendment to the United States Constitution prohibits "private property be[ing] taken for public use without just compensation." U.S. Const. amend. V. ; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 228-29 (1897). The Nevada Constitution likewise provides that "Private property shall not be taken for public use without just compensation having been first made." Nev. Const., art. I., Section 8. As this Court has taught, the Takings Clause of the Nevada Constitution is more protective of property rights than is that in the United States Constitution. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006).

Daisy Trust's construction of NRS 116, which purports to extinguish a first-recorded deed of trust in favor of a homeowners' association's lien to recover several months of assessments, is a taking that violates both Constitutions. This Court explained in *Sisolak* that "a *per se* regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010 fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation." 122 Nev. at 670, 137 P.3d at 1127. Yet that is exactly what Daisy Trust's interpretation of NRS 116 would do, if given effect. The foreclosure process does not purport to follow NRS

Chapter 37 procedures on eminent domain. Under Daisy Trust's construction, it would effect a transfer of property from the party otherwise entitled to it – here, a beneficiary under a deed of trust – to the speculative purchaser of an HOA super-priority lien interest. That effects a taking of property without just compensation.

A lien is undeniably "property" within the meaning of the Clause. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 76-77 (1982). As such, the extinguishment or destruction of a lien can be a taking under the Clause. *Id.* at 77-78. Underscoring the taking present here, the Supreme Court struck down as prohibited a regulatory taking a law that, like Daisy Trust's interpretation of NRS 116, took banks' security interest in their collateral. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). The *Radford* Court held the Frazier-Lemke Act, which let farmers buy their property at its current appraised value on a deferred payment plan unconstitutional. *Id.* at 580-81. The Act's infringement of a mortgagee's right to recover full payment before giving up its security interest was impermissible because that is "the essence" of a mortgage. *Id.* The Court held that that the Act impaired substantive property rights and held that Fifth Amendment eminent domain proceedings and compensation were required to alter the mortgagee's interest in that way. *Id.* The Court concluded:

> For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual morgagees in order to

> relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Id. at 601-02. Decided during the Great Depression, *Radford* remains the law. *See Sec. Indus. Bank*, 459 U.S. at 78 (citing *Radford* with approval); *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (same).

A later Supreme Court case involving liens shows the taking present here. *Armstrong v. United States*, 364 U.S. 40, 48 (1960). In *Armstrong*, where materialmen delivered materials to a contractor for use in constructing navy boats and obtained liens in the vessels under state law, the Court held that the government committed a taking when it took title to and possession of the property and made it impossible for the materialmen to enforce their liens. *Id.* The Supreme Court explained that the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'…." *Id.* In other words, the lienholders had compensable property, but "[i]mmediately afterwards, they had none." *Id.* And, "[t]his was not because their property vanished into thin air," but rather because the value of the liens had been destroyed. *Id.*

Though in *Armstrong*, the government classically and physically acquired the liened property, the Court subsequently clarified that this fact was not material in determining that a taking had occurred. *Sec. Indus. Bank*, 459 U.S. at 77-78.

Rather, the government's "simply impos[ing] a general economic regulation," which "in effect transfers the property interest from a private creditor to a private debtor" is a taking. *Id.* at 78. A "takings analysis is not necessarily limited to outright acquisitions by the government for itself." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

Daisy Trust's construction of NRS 116 thus effects a taking by completely extinguishing Wells Fargo's property right. There is no question that the taking is for public use. The Legislature, by allowing HOAs to have priority for payment, is following a policy concerning the funding of HOAs and the maintenance of common interest communities. Under Daisy Trust's interpretation, there is no compensation for the mortgage-holder when this public purpose is served. Daisy Trust's extreme construction of the relevant statute would deprive Wells Fargo of its interest in the property, and convey a windfall to a party who purchased the HOA's lien interest for pennies on the dollar. This cannot stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Daisy Trust's action.

DATED: January 21, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENTS' ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 11,702 words.

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

Rules of Appellate Procedure.

Dated this 21st day of January, 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the foregoing RESPONDENTS' ANSWERING BRIEF with the Clerk of Court for the Supreme Court of Nevada by using the appellate CM/ECF system on January 21, 2014.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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