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. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff/appellant

SUPREME COURT

STATE OF NEVADA

DAISY TRUST,

Appellant,

vs.

WELLS FARGO BANK NA,

Respondent.

No. 63611

APPELLANT'S REPLY BRIEF

Michael F. Bohn, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
376 East Warm Springs Rd., Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 Fax
Attorney for Appellant

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ARGUMENT

1. The record on appeal does not support Wells Fargo's argument that issue preclusion applies in this case.

At page 10 of Respondent's Answering Brief, Wells Fargo asserts that "[b]ecause 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." In making this argument, Wells Fargo ignores the difference between "issue" preclusion and "claim" preclusion identified by this Court in the case of University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994).

For issue preclusion to apply, an "identical" issue of fact or law must have been "actually and necessarily litigated" and determined by a valid and final judgment. Id. This Court also stated: "To give preclusive effect to an issue, it must be clear that the issue was actually adjudicated." Id. Once a court determines that issue preclusion is available, "the actual decision to apply it is left to the discretion of the court." University & Community College System v. Sutton, 120 Nev. 972, 103 P.3d 8, 16 (2004).

In making this argument, Wells Fargo compares the three claims for relief raised by the Daisy Trust in its complaint filed in this case on March 28, 2013 relating to the real property located at 10209 Dove Row Avenue, Las Vegas, Nevada (APP. Pgs. 383-387) with the three claims for relief raised by the Daisy Trust in its complaint filed in Daisy Trust v. Wells Fargo Bank, N.A., Case No. A-13-675183-C, on January 16, 2013 relating to the real property located at 8302 Bowman Woods, Las Vegas, Nevada. (APP. Pgs. 390-393) Exhibit 1 to the Request for Judicial Notice filed by Wells Fargo on May 21, 2013 consists of the Order entered by the district court on April 22, 2013 in Case No. A-13-675183-C. (APP. Pgs. 227-229) No other pleadings or documents or evidence presented in Case No. A-13-675183-C are contained in the record on appeal.

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Although the claims for relief asserted by plaintiff in the two cases are similar, the two cases relate to different parcels of property located at different addresses purchased for different amounts at different sales held by different agents for different HOAs on different dates. Because of these differences, and because Wells Fargo did not produce the pleadings filed in the two actions, the record on appeal contains no evidence supporting Wells Fargo's claim that the "issues" decided in the two cases are "identical."

Wells Fargo has also failed to demonstrate that the district court abused its discretion by choosing not to apply issue preclusion in this case and instead enter its own decision on the issues presented to it.

2. The HOA's foreclosure of its super priority lien extinguished Wells Fargo's deed of trust.

At pages 4 to 6 of Appellant's Opening Brief, plaintiff/appellant established that NRS 116.3116(2) granted to Westminster at Providence (hereinafter "the HOA") a super priority lien that was "prior" to Wells Fargo's deed of trust.

At pages 6 to 13 of Appellant's Opening Brief, plaintiff/appellant established that foreclosure of the HOA's super priority lien at the public auction held on August 3, 2012 extinguished all junior liens including Wells Fargo's formerly first mortgage lien.

At pages 17 of Respondent's Answering Brief, however, Wells Fargo argues that the super priority lien granted to the HOA must be ignored because it "effectively eliminates" and produces "the complete evisceration" of the priority granted to Wells Fargo's deed of trust by NRS 116.3116(2)(b). At page 18 of Respondent's Answering Brief, Wells Fargo argues that the super priority lien granted to the HOA should be interpreted as "creating a limited super-priority to *payment*, not to title of the Property."

Wells Fargo cites the decision in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222 (D. Nev. 2013), and several unpublished decisions by judges of the U.S. District Court, District of Nevada, and the Eighth Judicial District Court, as support for its argument. These decisions, are only persuasive authority and are not binding on this court. Additionally, these decisions ignore the clear language of

NRS 116.3116(2) and judicially create a lien that functions unlike any other lien recognized by Nevada law.

First, NRS 116.3116 does not contain any language that can be interpreted as limiting the HOA's "prior" lien to be only a "limited super-priority to *payment*" and not a stand-alone lien. NRS 116.3116(2) expressly states that "[t]he lien is also prior to all security interests described in paragraph (b)" to the extent of the assessments incurred "during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(4) provides that "[r]ecording of the declaration constitutes record notice and perfection of the lien" and that "[n]o further recordation of any claim of lien for assessment under this section is required."

As noted by Judge Pro in the case of 7912 Limbwood Court Trust v. Wells Fargo Bank, , ___ F. Supp. 2d ___, 2013 WL 5780793 (D. Nev. 2013):

> **Nothing in the statute suggests that anything other than normal foreclosure principles apply to an HOA foreclosure sale**, nor is it inconsistent with Chapter 116 to apply the usual principle that foreclosure of a senior interest extinguishes junior interests. Rather, this result is consistent with the statutory purpose of the super priority lien to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments." Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982); see also Nev. Rev. Stat. § 116.1109(2)("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.") Moreover, the Nevada Legislature presumably was aware of the normal operation of foreclosure law when it enacted Chapter 116 in 1991. **If the Legislature intended a different rule to apply to an HOA foreclosure sale, it could have said so.** (emphasis added)

Second, applying normal foreclosure principles to the HOA's super priority lien will not "eviscerate a first priority deed of trust" as claimed by Wells Fargo at page 18 of Respondent's Answering Brief. To the contrary, NRS 116.31164(3)(c)(4) specifically provides that once the HOA's super priority lien has been satisfied, Wells Fargo is entitled to receive from the sales proceeds "[s]atisfaction in order of priority of any subordinate claim of record."

Third, NRS 116.31162 to NRS 116.31168 defines the procedure to be used by the HOA to enforce its lien. The statute provides for non-judicial foreclosure of the lien, and

the statute does not contain any language that requires action by the holder of a security interest before the HOA can enforce its lien. Wells Fargo seeks to impose conditions on the HOA's lien rights that do not exist in the statutory language.

Fourth, at page 22 of Respondent's Answering Brief, Wells Fargo quotes from an Order entered by Judge Tao in Paradise Harbor Place Trust v. Deutsche Bank National Trust Co., Case No. A-13-687846 (2014), 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." As set forth in the graph at pages 23 to 24 of Appellant's Opening Brief, the foreclosure requirements in NRS 116.31162 through NRS 116.31168 are not "simplified," but in fact mirror the requirements in Chapter 107 for the non-judicial foreclosure of a deed of trust.

Regarding notice to holders of "subordinate interests," the procedures for HOA foreclosures and deed of trust foreclosures are **identical** because NRS 116.31168(1) expressly incorporates the notice requirements contained in NRS 107.090.

NRS 116.31168 provides in part:

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

NRS 107.090 provides in part:

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

(a) Each person who has recorded a request for a copy of the notice; and
(b) **Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**

4. The trustee or person authorized to make the sale **shall, at least 20 days before the date of sale,** cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to **each person described in subsection 3**. (emphasis added)

This Court has recognized that there is a general presumption that statutes will be interpreted in compliance with the constitution. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 180 (1998). This Court has also stated that "statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality." Foley v. Kennedy, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994). Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, the court is obliged to construe the statute so that it does not violate the constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 878 P.2d 913, 919 (1994), citing Sheriff v. Wu, 101 Nev. 687, 708 P.2d 305 (1985).

By applying the provisions of NRS 107.090 to the HOA foreclosure process (as is required by NRS 116.31168(1)), the statute does require that the HOA provide notice to "all junior or subordinate stakeholders whose interests in the property may be extinguished by a foreclosure" as Judge Tao stated is necessary in the Order entered on January 3, 2014 in Case No. A-13-687486. Because Judge Tao's Order ignores the express provisions of NRS 116.31168(1) and NRS 107.090, Judge Tao's finding that the statute is unconstitutional should not be adopted by this Court.

The plain language of NRS 116.3116(2) provides that the HOA's super priority lien has priority over a "first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." This exactly describes Wells Fargo's deed of trust in this case. Wells Fargo seeks to add conditions to the enforcement of the HOA's super priority lien that are not contained in the statute and that have never been applied to any other lien recognized by Nevada law.

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3. The legislative history for NRS 116.3116 does not support Wells Fargo's interpretation of the statute as a limited priority to payment and not to title.

At page 25 of Respondent's Answering Brief, Wells Fargo argues that comment 2 to Section 3-116 of the Uniform Common Interest Ownership Act does not expressly state that foreclosure of the HOA's super priority lien extinguishes a lender's first deed of trust. However, if Wells Fargo's interpretation is accepted, there would be no "equitable balance" between the HOA's "need to enforce the collection of unpaid assessments" and "the obvious necessity for protecting the priority of security interests of mortgage lenders." Wells Fargo's interpretation would instead place the HOA at the mercy of the mortgage lender because the HOA would have to wait until the lender forecloses before the HOA's "priority to payment" could accrue. Meanwhile, the HOA would bear the cost of maintaining the community containing the lender's collateral without any contribution by the lender.

The fact that the HOA's super priority lien takes priority over the lender's deed of trust is emphasized by the statement in the comment to Section 3-116 of the UCIOA that "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." This language demonstrates the clear intent that the HOA holds a priority lien and not just a priority to "payment" when the lender forecloses its subordinate deed of trust.

At page 26 of Respondent's Answering Brief, Wells Fargo argues that the legislative history for Assembly Bill 204 in 2009 does not 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." First, the language creating the HOA's super priority lien rights does not subordinate the HOA's lien to the lender's first security interest. The language provides exactly the opposite – the "first security interest" described in NRS 116.3116(2)(b) is expressly subordinated to the HOA's super priority lien. Second, if the HOA cannot take action on its own and compel a lender to pay the super priority amount when a unit owner defaults, the legislature's stated objectives of

helping "common-interest communities mitigate the adverse effects of the mortgage/foreclosure crisis" and helping "homeowners avoid special assessments resulting from revenue shortfalls due to fellow community members who did not pay required fees" would not be achieved. (APP. Pg. 305)

At pages 26 and 27 of Respondent's Answering Brief, Wells Fargo quotes from a law review article by Andrea J. Boyack. As support for her interpretation of the HOA's lien as a "payment priority," however, Professor Boyack includes no citations to Nevada law. Instead, footnote 217 at page 99 of Professor Boyack's article cites Minn. Stat. Ann. § 515A.3-115, which is a provision in Minnesota's Uniform Condominium Act that does not include language like that in NRS 116.3116(2) creating a super priority lien. Minn. Stat. Ann. § 515B.3-116, which is Minnesota's version of Article 3-116 of the UCIOA, is not cited by Professor Boyack and is materially different from NRS 116.3116.

In footnote 218 at page 99 of her article, Professor Boyack cites only the Georgia case of First Federal Savings Bank of Georgia v. Englewood Court Condominium Association, Inc., 186 Ga. App. 605, 367 S.E.2d 876 (1988), as support for the foreclosure repayment "waterfall" mentioned in her article. Georgia, however, is not one of the states cited by Professor Boyack as having adopted the UCIOA, and O.C.G.A. § 44-3-80(f) expressly provides that a foreclosing first mortgagee shall not be chargeable for any assessments on account of any period prior to the acquisition of title.

Most telling, however, is Professor Boyack's statement in footnote 219 at page 99 of her article where she states that "[t]he effect depends on a state's interpretation of the provision."

At page 27 of Respondent's Answering Brief, Wells Fargo argues that "[i]t 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." This is not plaintiff's argument. Plaintiff's argument is that the super priority lien was intentionally designed to give the

HOA a mechanism to force a lender to pay a specific portion of the HOA assessments, so that the HOA is not forced to bear the entire burden of maintaining a community without the lender having to pay any amount for the benefit that it receives from this service. The "massive disruption" that Wells Fargo complains about is not caused by the HOA's super priority lien rights. It is caused by Wells Fargo's refusal to pay the super priority lien amount to avoid the extinguishment of its subordinated deed of trust.

As Judge Pro stated in the case of 7912 Limbwood Court Trust v. Wells Fargo Bank, ___ F. Supp. 2d ___, 2013 WL 5780793 (D. Nev. 2013):

> Moreover, the result in this case is neither novel nor unfair. Wells Fargo easily could have avoided this purportedly inequitable consequence by paying off the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of its junior interest. Additionally, Wells Fargo could have required an escrow for HOA assessments so that in the event of default, Wells Fargo could have satisfied the super priority lien amount without having to expend any of its own funds. See Uniform Common Interest Ownership Act § 3–116, cmt. 1 (1982).

This same observation was made by the Nevada Real Estate Division in its advisory opinion, dated December 12, 2012:

> 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. (emphasis added)

(APP. Pg. 110)

4. Plaintiff acquired fee simple title that is not subject to equity or right of redemption by the foreclosed interests.

At page 28 of Respondent's Answering Brief, Wells Fargo argues that the prior owners, Donald K. Blume and Cynthia S. Blume, "held title to the Property *subject to* Wells Fargo's Deed of Trust." Wells Fargo then highlights the words "*vests in the purchaser the title of the unit's owner* without equity or right of redemption" contained

in NRS 116.31166(3) to suggest that plaintiff's title is somehow subject to Wells Fargo's extinguished deed of trust.

As noted by the court in the case of 7912 Limbwood Court Trust v. Wells Fargo Bank, __ F. Supp.2d ____, 2013 WL 5780793 (D. Nev. 2013):

> The purchaser at an HOA foreclosure sale obtains the unit owner's title without equity or right of redemption, and a deed which contains the proper recitals "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. § 116.31166(2). Compare Nev. Rev. Stat. § 107.080 (providing that a mortgage foreclosure sale "vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption"); Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317–18 (1867) (providing that such a sale vests absolute title in the purchaser). Consequently, a foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust.

This Court has recognized many times that foreclosure of a superior lien extinguishes all junior liens. McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC 121 Nev. 812, 123 P.3d 748 (2005); Brunzell v. Lawyers Title Ins. Co., 101 Nev. 395, 705 P.2d 642 (1985); Aladdin Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977); Erickson Construction Co. v. Nevada National Bank, 89 Nev. 359, 513 P.2d 1236 (1973). Consequently, Plaintiff did not purchase the property "subject to" an "extinguished" deed of trust.

5. The amount paid by plaintiff at the HOA sale does not prevent plaintiff from being a bona fide purchaser.

At pages 29 and 30 of Respondent's Answering Brief, Wells Fargo claims that plaintiff cannot be a bona fide purchaser and relies upon an unpublished order in the case of Design 3.2 LLC v. Bank of New York Mellon, Case No. A-10-621628 (2011), where the court found that the plaintiff had purchased the property "with actual or constructive notice of [the lender's] interest" and "did not pay valuable consideration" to qualify as a bona fide purchaser for value because the amount owed on the deed of trust was $576,000 and the plaintiff paid only $3,743.84 at the HOA sale. (APP. Pg. 309)

As noted above, because the HOA foreclosure sale in this case extinguished Wells Fargo's deed of trust, any knowledge by plaintiff of this deed of trust prior to the sale is irrelevant.

With respect to the purchase price of $10,500.00 paid by plaintiff at the public auction held on August 3, 2012 (See foreclosure deed at APP. Pgs. 233-235), this Court has stated on multiple occasions that mere inadequacy of price is not sufficient to set aside a foreclosure sale where there is no showing of fraud, unfairness, or oppression. Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969); Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963).

At page 32 of Respondent's Answering Brief, Wells Fargo cites the case of Will v. Mill Condominium Owners' Association, 848 A.2d 336 (Vt. 2004), where the Vermont Supreme Court voided an HOA sale attended by a single bidder where the attorney conducting the sale informed the bidder "that the minimum acceptable bid for this property would be $3510.50." Id. at 343. The Court observed that "giving this information to the only bidder was certainly not a way to maximize the value of the collateral; rather, it was an assurance that the condominium would be sold for exactly that low amount." Id.

Wells Fargo also quotes from Runkle v. Gaylord, 1 Nev. 123, 129 (1865), that allowing a mortgagee to sell an estate for less than one-third of its value "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." The record on appeal contains no evidence that this occurred in the present case.

Wells Fargo produced no evidence to the district court of any defect in the method, advertising, time, date, place, and terms of the public auction held on August 3, 2012. Wells Fargo also produced no evidence that plaintiff was the only bidder or that the HOA's agent did anything to reduce the amount bid. Wells Fargo's objection to the sale

is based entirely on the price paid, which this Court has recognized is not a sufficient basis to set aside the sale.

6. This Court should adopt the reasoning in the advisory opinion by the Nevada Real Estate Division and not the reasoning in the unpublished decisions cited at page 1, footnote 1, of Respondent's Answering Brief.

At pages 33 to 37 of Respondent's Answering Brief, Wells Fargo argues that this Court should ignore the legal analysis contained in the Advisory Opinion by the Nevada Real Estate Division (APP. Pgs. 102-121) because "it is mere dictum" and it does not "constitute binding law." Instead, at page 37 of Respondent's Answering Brief, Wells Fargo asks this Court to follow the unpublished decisions identified in footnote 1 at pages 1 and 2 of Respondent's Answering Brief.

Wells Fargo offers no analysis of why these decisions more accurately interpret NRS 116.3116 than the Advisory Opinion by the Nevada Real Estate Division. At pages 8 to 10 of Appellant's Opening Brief, plaintiff demonstrated how the interpretation in the Advisory Opinion accurately reflects the intent of the drafters of the UCIOA regarding the super priority lien granted to the HOA. The unpublished decisions cited by Wells Fargo, on the other hand, either ignore the existence of the HOA's super priority lien or impose limits and conditions on the super priority lien that are not based on any statutory language or recognized principles of law.

In footnote 4 at page 30 of Respondent's Answering Brief, Wells Fargo acknowledges that these "unpublished orders" are "not precedential." Because Wells Fargo has not demonstrated or examined the soundness of the logic or reasoning in any of these orders, they should not be considered by this Court in reaching its decision in this case.

7. The Summerhill case supports plaintiff's position that the HOA sale extinguished Wells Fargo's deed of trust.

At page 37 of Respondent's Answering Brief, Wells Fargo argues that this Court

should not adopt the findings by the Washington court in the case of Summerhill Village Homeowners Association v. Roughley, 289 P.3d 645 (Wash. App. 2012), because the opinion focused upon the lender's attempt to redeem the real property after a sheriff's sale of the property. The issue of redemption after sale would not exist, however, without the court's finding that the sheriff's sale to foreclose the HOA's super priority lien had "extinguished the 2006 deed of trust." 289 P.2d at 648.

Wells Fargo also attempts to distinguish the Summerhill case by arguing that "the notice requirements under judicial foreclosure are much more stringent" than in cases of non-judicial foreclosure. In this regard, Wells Fargo claims at page 38 of its Answering Brief that NRS 116.31163 "requires notice to the lender only under specific and limited circumstances." This argument ignores that NRS 116.31168(1) expressly incorporates the notice requirements in NRS 107.090 and requires that copies of both the notice of default and election to sell and the notice of sale be mailed to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust" regardless of whether that person has recorded a request for a copy of the notice. Because this is the exact same notice provided by Wells Fargo when it forecloses its deed of trust, Wells Fargo cannot dispute that it received sufficient notice of the HOA sale in this case.

At page 38 of Respondent's Answering Brief, Wells Fargo argues that RCW 64.34.364(5) provides that "if an HOA elects to foreclose *non-judicially*, the HOA loses it super-priority status." This was pointed out at page 14, lines 23-24, of Appellant's Opening Brief. Because Nevada's version of Section 3-116 of the UCIOA does not contain any provision similar to RCW 64.34.364(5), and because NRS 116.31162 to 116.31168 specifically provides for non-judicial foreclosure of an HOA lien, Nevada's version of the UCIOA expressly provides that an HOA foreclose its super priority lien non-judicially.

8. Wells Fargo's failure to pay the super priority lien amount prior to the HOA's foreclosure sale means that its deed of trust has been extinguished.

At pages 39 and 40 of Respondent's Answering Brief, Wells Fargo argues that the provisions in its deed of trust allowing it to require that the borrower deposit funds in escrow to ensure payment of the HOA's priority lien are merely optional. In Appellant's Opening Brief, plaintiff did not argue that such an escrow account is mandatory. Plaintiff instead argued that these provisions in Wells Fargo's deed of trust prove that Wells Fargo knew that "Community Association Dues, Fees, and assessments" could attain priority over its deed of trust. See Appellant's Opening Brief, pgs. 11-13.

Plaintiff does not claim that Wells Fargo's deed of trust was extinguished because Wells Fargo failed to require an escrow account for HOA assessments. Wells Fargo lost its security interest in the Property because it failed to cure the priority assessments owed to the HOA before the HOA's foreclosure sale took place.

9. Because NRS 116.31168 incorporates the same notice requirements for holders of "subordinate" interests that apply when a deed of trust is foreclosed, Wells Fargo was provided with due process.

At page 41 of Respondent's Answering Brief, Wells Fargo states that NRS 116.31163(2) and NRS 116.311635(1)(b)(2) entitle a lender to receive notice of the HOA foreclosure only if the lender first affirmatively requests notice. At page 44 of Respondent's Answering Brief, Wells Fargo claims that because the statute does not provide adequate notice, the statute "surely violates Wells Fargo's rights to due process." This argument, however, ignores the provisions of NRS 116.31168(1).

As set forth in the graph at pages 23 and 24 of Appellant's Opening Brief, Chapter 116 contains a counterpart for every notice required for the non-judicial foreclosure of a deed of trust under Chapter 107. As noted at page 22 of Appellant's Opening Brief and at pages 4 and 5 of this Reply Brief, NRS 116.31168(1) expressly incorporates the exact same notices required by NRS 107.090 to be provided to persons with "subordinate" interests when foreclosing a deed of trust. Because NRS 107.090 requires that copies of the notice of default and the notice of sale be provided to holders of "subordinate"

interests even if they make no request for notice, the HOA's agent was required to provide copies of both notices to Wells Fargo even without Wells Fargo making a request for notice.

Wells Fargo has never claimed or proved that the HOA's agent failed to provide it with the required notices for the foreclosure sale held on August 3, 2012. As provided by NRS 116.31166(1), the recitals in a deed made pursuant to NRS 116.31164 of default, the mailing of the notice of delinquent assessment, the recording of the notice of default and election to sell, the elapsing of the 90 days, and the giving of notice of sale "are conclusive proof of the matters recited," and a deed containing these recitals "is conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added)

The foreclosure deed in this case specifically states: "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." (APP. Pg. 233)

Wells Fargo's due process argument ignores the provisions of NRS 116.31168(1). Wells Fargo has not even attempted to explain why it would be entitled to receive better notice when an HOA forecloses its super priority lien than the notice that Wells Fargo provides to "subordinate" interests when it forecloses its deed of trust.

10. Plaintiff's interpretation of NRS 116.3116(2) does not violate the United States and Nevada constitutions.

At pages 44 to 47 of Respondent's Answering Brief, Wells Fargo argues that plaintiff's construction of NRS Chapter 116 would be a "taking" that violates the Fifth Amendment to the U.S. Constitution and Article I, Section 8, of the Nevada Constitution. This issue was not raised by Wells Fargo before the district court and need not be considered by this Court. Emeterio v. Clint Hurt & Associates, Inc., 114 Nev. 1031, 967 P.2d 432, 437 (1998); Ferreira v. P.C.H. Inc., 105 Nev. 305, 774 P.2d 1041, 1043 (1989);

Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Furthermore, this case does not involve a taking of private property "for public use." The Ninth Circuit Court of Appeals has also recognized that the statutory source of a power of sale "does not necessarily transform a private, nonjudicial foreclosure into state action." Charmicor v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978).

In the case of Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003), the Ninth Circuit Court of Appeals cited the decision in Charmicor while rejecting the plaintiff's due process challenge to Hawaii's nonjudicial foreclosure statute. Affirming the dismissal of the plaintiff's action, the court stated: "We conclude that there has been no legal or historical development in the intervening years that would require a departure from prior authority." Id. at 1092. The court also noted that "in cases involving foreclosures or seizures of property to satisfy a debt, the Supreme Court has held that the procedures implicate the Fourteenth Amendment only where there is at least some direct state involvement in the execution of the foreclosure or seizure." Id. at 1093.

In the case of Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978), when a creditor enforced a lien through a nonjudicial sale, the Supreme Court held that there was no state action even though the lien was authorized by the state of New York's enactment of the Uniform Commercial Code. The court noted that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." 436 U.S. at 161-162.

CONCLUSION

By reason of the foregoing, this Court should enter its Order reversing the Decision by the District Court denying plaintiff's motion for preliminary injunction and granting Wells Fargo's countermotion to dismiss with joinder by MTC Financial Inc.

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It is respectfully submitted that this Court remand this case to the District Court with instructions to reverse the dismissal of plaintiff's complaint and to enjoin Wells Fargo from enforcing its deed of trust.

DATED this 23rd day of April, 2014.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 5,920 words.

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

DATED this 23rd day of April, 2014.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff/appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of April 2014, I served a photocopy of the foregoing APPELLANT'S REPLY BRIEF by placing the same in a sealed envelope with first-class postage fully prepaid thereon and deposited in the United States mails addressed as follows:

Amy F. Sorenson, Esq.
Andrew M. Jacobs, Esq..
Richard C. Gordon, Esq.
SNELL & WILMER, L.L.P.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169

/s/ /Marc Sameroff/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.