Case No. 63614

In the Supreme Court of Nevada

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Appellant,

vs.

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4,

Respondent.

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable SUSAN SCANN, District Judge
District Court Case No. A-13-678814-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURES

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 in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-appellant SFR Investments Pool 1, LLC is a privately held company that is wholly owned by SFR Investments, LLC, a privately held company. SFR Investments, LLC is the parent corporation of plaintiff-appellant SFR Investments Pool 1, LLC.

Plaintiff/Appellant has been represented throughout the litigation and appeal by Howard Kim & Associates.

INTRODUCTION

This case concerns NRS 116.3116(2) and lien priority as between a homeowners association's super-priority lien for unpaid common assessments and a first security interest. Specifically, it raises the question of whether non-judicial foreclosure of an association's super-priority lien extinguishes the first security interest in the subject property when the lender fails to pay the limited amounts required to maintain its priority over the association lien.

Appellant SFR Investments Pool 1, LLC ("SFR") purchased a house in a Henderson common-interest community for $14,000.00 at a homeowners association's foreclosure auction. The original owner had stopped paying association dues and defaulted on a $331,500.00 note, purportedly owned by Respondent US Bank, N.A. ("Bank"). For almost two years neither the Bank nor the owner paid the community. Contrastingly, after buying the house, SFR paid assessments, made repairs, and keeps the property occupied. Subsequently, the Bank tried to foreclose, prompting SFR to sue the Bank for quiet title and injunctive relief. Citing NRS 116.3116(2) and defining "action to enforce the lien" as requiring a lawsuit, the court ruled for the Bank, denying SFR's requested preliminary injunction and ordering dismissal of claims against the Bank. In doing so, the district court erred because (i) NRS 116.3116(2)'s plain text and Nevada real property law principles establish that the Bank's junior interest in the property

was extinguished through the association's non-judicial foreclosure and (ii) even if NRS 116.3116(2) were ambiguous, authorities this Court relies on and public policy support extinguishment through non-judicial foreclosure. This Court should reverse dismissal and instruct the district court to enjoin the Bank's foreclosure.

JURISDICTIONAL STATEMENT

This is an appeal from orders (1) denying plaintiff SFR Investments Pool 1, LLC's motion for preliminary injunction ("PI Order") (5JA 791-794) and (2) granting defendant US Bank, N.A.'s NRCP 12(b)(5) motion to dismiss and motion to expunge *lis pendens* ("Dismissal Order") (5JA 802-804). Notices of entry occurred on June 11, 2013 and June 12, 2013 (5JA 795-801, 805-810). This Court's questions regarding jurisdiction were resolved pursuant to an Order entered on October 4, 2013, following resolution of SFR's Rule 59(e) motion. The order granting in part and denying in part, SFR's motion to alter or amend pursuant to NRCP 59(e) was entered on The order denying the injunction is independently appealable pursuant to NRAP 3A(b)(3) and the Dismissal Order is appealable pursuant to NRAP 3A(b)(1).

ISSUES PRESENTED

1. Whether a homeowners association's non-judicial foreclosure sale extinguishes a first security interest under NRS 116.3116(2), which expressly provides that a portion of the association's lien is "also prior to" a first security interest, the plain language of NRS 116, and numerous sources, including, but not limited to principles of real property law, the Nevada Real Estate Division, the Legislature's intent, the UCIOA, and public policy all support extinguishment of all junior liens, including the first security interest, through non-judicial foreclosure.

2. Whether SFR took title to the Property free and clear of the Bank's first deed of trust when it purchased the Property at the Association's non-judicial foreclosure auction held pursuant to NRS 116 and the resulting foreclosure deed stated that the Association complied with all requirements of law.

STATEMENT OF THE CASE

SFR purchased a house through a homeowners association foreclosure sale and sued the Bank for quiet title, injunctive relief, and, in the alternative, unjust enrichment. The district court denied SFR's preliminary injunction motion and granted the Bank's motions to dismiss and to expunge *lis pendens.* The district court concluded that (1) a judicial foreclosure was required both to trigger and enforce the Association's super-priority lien; (2) that the foreclosure sale did not extinguish the Bank's first deed of trust; and (3) the foreclosure sale may have given the Association a "payment priority." This appeal followed.

FACTUAL AND PROCEDURAL BACKGROUND

I.
FACTUAL BACKGROUND

A. The Property: CC&Rs Recorded in 1997, First DOT Recorded in 2005

The house at issue in this case (the "Property")[1] is part of the Copper Ridge Homeowners Association (the "Association") common-interest community. On December 30, 2005, Lucia Parks ("Parks") purchased the Property granting a deed of trust in favor of lender Wells Fargo Bank, N.A., in the amount of $331,500.00 ("First DOT"). (1JA 095-124.[2]) The Association recorded its declaration of

[1]The Property is located at 2270 Nashville Avenue, Henderson, Nevada 89052; Parcel No. 178-19-712-012.

[2] Joint Appendix ("JA"). Appellant has also provided an NRAP 28(f) Statutory Addendum ("AA").

CC&Rs before the First DOT was recorded, which perfected its assessment lien. (*See* 1JA 146.) Wells Fargo Bank acknowledged that the Property was located in a common-interest community, was subject to that that community's covenants, and specifically required Parks to pay dues and assessments imposed by such covenants. (1JA 119-121.)

B. The Bank Accepts Assignment After Defaults on Loan

Respondent U.S. Bank, N.A. ("Bank") purports to be the current beneficiary of the First DOT, by assignments recorded July 12, 2010 (1JA 130) and June 7, 2012 (1JA 148). According to a Notice of Default and Election to Sell recorded by the Wells Fargo Bank on February 24, 2010, Parks stopped paying principal and interest on the mortgage starting on November 1, 2009. (1JA 126 – 128.) This means that before the Bank accepted the first assignment of the First DOT on July 12, 2010, Parks was delinquent on mortgage payments. (1JA 098-99; 2JA 214.)

C. Parks Defaults on Her Assessments and Association Foreclosure Process Begins

On July 19, 2012, the Association recorded a Notice of Default and Election to Sell under Homeowners Association Lien (Accommodation) stating that Parks was behind in association payments, owing $1,912.50 as of July 16, 2012, and that the Property would be sold unless she paid the amounts owed. (1JA 150-151.)

On February 7, 2013 the Association recorded a Notice of Foreclosure Sale

which stated "you are in default under delinquent assessment lien" dated May 21, 2012 and provided notice that the Property would be sold at auction scheduled to take place on March 1, 2013 unless the outstanding amounts were paid. (1JA 153-154.)

D. The Bank Fails to Pay Super-Priority Lien and SFR Makes the Winning Bid at Auction

After neither Parks nor the Bank paid the owed association fees, the Association sold the Property at auction held on March 1, 2013 to appellant SFR Investments Pool 1, LLC ("SFR") for $14,000.00 (1JA 156-157.) The resulting foreclosure deed states that SFR was the highest bidder at the sale and that the sale "complied with all requirements of law. . . ." (1JA 156-157.) Unlike Parks and the Bank, SFR has maintained the Property. (*See, e.g.*, 1JA 003:¶7, 008:¶45.)

The relevant events and dates are set forth in the below timeline:

TABLE 1 – TIMELINE

DATE	FACTS
1991	Nevada adopted UCIOA as NRS 116, including NRS 116.3116(2) (AA549)
July 1, 1997	Association perfected and gave notice of its lien by recording its Declaration of CC&Rs (*See* 1JA 146)
December 30, 2005	First DOT executed by Lucia Parks in favor of Wells Fargo Bank, N.A. recorded on January 5, 2006 (1JA 099-124)
November 1, 2009	Parks defaulted on loan (1JA 126-128)

February 24, 2010	Notice of Default and Election to Sell under Deed of Trust recorded by Well Fargo Bank, NA. (1JA 126-128)
July 12, 2010	"Corporation Assignment of Deed of Trust" recorded transferring all interest in the First DOT Bank. (1JA 130)
July 12, 2010	Bank's agent recorded a Notice of Trustee's Sale stating the Property would be sold on August 3, 2010. (1JA 136-139)
May 24, 2012	Association's agent recorded Notice of Delinquent Assessment Lien (Accommodation) dated May 21, 2012. (1JA 146)
June 7, 2012	Assignment of Mortgage recorded transferring beneficial interest in the December 2005 Note and First DOT Bank. (1JA 148)
July 19, 2012	Association's Notice of Default and Election to Sell under Homeowners Association Lien (Accommodation) recorded (1JA 150-151)
February 7, 2013	Association's Notice of Foreclosure Sale recorded scheduling auction for March 1, 2013 (1JA 153-154)
March 1, 2013	Association foreclosure sale held. SFR as highest bidder purchased the Property for $14,000.00 (1JA 156-157)
March 6, 2013	Association foreclosure deed vesting title in SFR recorded, including recitals that the sale "complied with all requirements of law . . ." (1JA 156-157)
March 11, 2013	Bank's agent National Default Servicing Corporation recorded Notice of Trustee's Sale stating Property would be sold on April 1, 2013 (1JA 159-160)
March 22, 2013	SFR filed its complaint to quiet title (1JA 001-009)

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II.

PROCEDURAL BACKGROUND

A. SFR's Complaint and Motion for Preliminary Injunction

On March 22, 2013, after learning that the bank intended to sell the Property at a trustee's sale, SFR filed a complaint stating causes of action for Declaratory Relief/Quiet Title Pursuant to NRS 30.010 *et seq.* and NRS 116.3116 *et seq*., Unjust Enrichment, and Preliminary and Permanent Injunction. (1JA 001–011.) SFR named the Bank and the Parks as defendants. SFR recorded a Notice of Lis Pendens on the Property on March 26, 2013. (1JA 012-013.) SFR filed an application for temporary restraining order ("TRO") and motion for preliminary injunction ("PI Motion"). (JA014-028.) The district court granted the TRO and set the hearing and briefing schedule for the PI Motion. (1JA 029-031.)

Following full briefing and hearing argument of counsel, the court denied the PI Motion without making findings of fact or conclusions of law. (5JA 791-795; 6JA 1024-1045.)

B. The Bank's Motions to Dismiss and Expunge Lis Pendens

The Bank also filed an NRCP 12(b)(5) Motion to Dismiss with Prejudice the Plaintiff's Complaint (2JA 228-247) based on its interpretation of NRS 116.3116 *et seq*. arguing: (1) pursuant to NRS 116.3116(2)(b) the Bank's lien was superior to the Association's lien (2JA 232); (2) pursuant to 116.3116(2)(c) an association is entitled to 9 months worth of unpaid fees and assessments when the first

mortgage is foreclosed or when an association conducts a judicial foreclosures (2JA 234-234); and (3) the successful bidder at an association foreclosure sale "merely [holds] a temporary, possessory interest which [is] based on the eventual foreclosure by" the holder of a first deed of trust (2JA 245.) The Bank further argued that the NRS 116.3116(2) super-priority lien should be treated as a payment priority which survives a bank initialed foreclosure. (2JA 235.)

Regarding SFR's unjust enrichment claim, the Bank argued that it has not "retained the funds paid by the Plaintiff at the HOA sale nor does [the Bank] retain a benefit belonging to the Plaintiff in this case." (2JA 246.) Concluding "[a]ny additional money paid by [SFR] at the time of the HOA sale needs to be directed to the HOA who retained the funds paid by [SFR] and not towards [the Bank]." (2JA 246.)

The Bank also filed a Motion to Expunge Lis Pendens, arguing that SFR could not establish the elements required by NRS 14.015 (3). (2JA 248-254).

Parks joined in both of the Bank's motions prior to the hearings. (2JA 378-384.)

C. SFR's Opposition to the Bank's Motions

SFR opposed the Motion to Dismiss. (4JA 507-526.) SFR argued the motion should be denied because the Association's non-judicial foreclosure of its lien for delinquent assessments pursuant to NRS 116.3116 *et seq*. extinguished the Bank's

First DOT due to the Bank's failure to pay the super-priority portion of the lien. (*See, generally,* 4JA 507-526.)

In the alternative, SFR argued that its unjust enrichment cause of action should not be dismissed as the complaint alleges that SFR expended funds and resources acquiring and maintaining the Property. (4JA 525.) Thus, should the district court rule that the association foreclosure was invalid, the Bank would be unjustly enriched by the funds SFR invested in the property. (4JA 525.)

SFR also opposed the Bank's motion to expunge lis pendens. (3JA 495-500.) SFR argued that it had a fair chance of success on the merits and that the injury SFR would suffer if the lis pendens were expunged would outweigh any potential hardship to the Bank. (3JA 495-500.)

D. The Bank's Reply in Support of its Motion to Dismiss

The Bank's reply consists mainly of repeating the arguments made in its motion and claiming that SFR's interpretation of NRS 116.3116 *et seq*. set forth in its opposition is incorrect. (5JA JA658-756)

E. The Order Granting the Bank's Motions to Dismiss and Expunge

The Bank's motions to dismiss and expunge were heard on June 4, 2013. (6JA 1046-1054.) After hearing argument, the district court granted both of the Bank's motions. (5JA 802-804). In the Order, the district court made the following findings:

(1) “NRS 116.3116 governs homeowners’ association liens. It states in part that an assessment lien by a homeowners' association ‘is prior to all other liens and encumbrances on a unit except . . . (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . .’ NRS 116.3116(2)(b)” (5JA 803, ¶ 8);

(2) “the first security interest Deed of Trust was first in time and prior to the assessment lien of the homeowner’s association.” (5JA 803, ¶ 9);

(3) NRS 116.3116 super-priority lien provisions were not applicable to the Association’s lien because the Association did not conduct a judicial foreclosure (5JA 803, ¶ 10); and

(4) the Association “may have a priority for payment of its lien, but the first security interest Deed was not extinguished by the foreclosure sale conducted by the [Association]” (5JA 803, ¶ 11.)

The district court further found that SFR cannot quiet title or obtain declaratory relief extinguishing the Bank’s deed of trust. (5JA 804, ¶12.) Finally, the district court ruled that SFR failed to state a claim for relief against the Bank and did not present a viable claim for unjust enrichment. (5JA 804, ¶ 14.)

Based on its findings, the district court dismissed SFR’s complaint without leave to amend and granted the Bank’s motion to expunge lis pendens. (5JA 804.) The district court also granted Parks’ joinders and dismissed with prejudice the

claims against her. (5JA 804.)

F. SFR's Rule 59(e) Motion

On June 26, 2013, SFR filed an NRCP 59(e) Motion to Alter or Amend Judgment based on (1) new evidence and persuasive authority not available at the time of briefing on the motion to dismiss; (2) improper dismissal of the complaint as to Parks; and (3) improper expungement of the *lis pendens* as it applies to Parks. (*See generally* 5JA 811-874.)

After hearing the argument on July 30, 2013, by order entered on September 25, 2013, the district court partially granted SFR's Rule 59 motion ordering that the dismissal against Parks be without prejudice. (6JA 1017-1018.)

This appeal followed.

SUMMARY OF ARGUMENT

Construing the lien priorities created in NRS 116.3116 is an issue of first impression before this Court. The Court's ruling on this issue will have a far reaching impact on the vast majority of Nevada homeowners.

NRS 116.3116 through 116.31168 establish that appellant SFR purchased the Property free and clear of the Bank's security interest. The plain text of NRS 116.3116(2) grants associations a super-priority lien for a portion of delinquent assessments which has priority over a first secured interest. Next, the plain text of NRS 116.31162 through 116.31168 authorizes associations to non-judicially

foreclose on a super-priority lien by auctioning the property.

Further, the principles of Nevada real property law are expressly incorporated into NRS 116 under the plain text of NRS 116.1108. Thus, the foreclosure of the super-priority lien which is a senior lien extinguishes all junior interests including a first secured interest. "Prior" means prior, nothing less.

Even if ambiguous, the above interpretation of the NRS 116 provisions related to non-judicial foreclosure of super-priority liens is supported by: (1) the legislative history of Chapter 116 (the Nevada Uniform Common Interest Ownership Act ("UCIOA")); (2) the Nevada Real Estate Division ("NRED"); and (3) the drafters of the UCIOA and the panel advising the drafters. Each of these contemplates that the lender would step in and pay the limited amount of the super-priority lien rather than have their interest in the property lost to an association's foreclosure sale.

Further, public policy and reason support the extinguishment of the first security interest by non-judicial foreclosure. Without the threat of extinguishment, first security interest holders have no incentive to pay even the limited amount comprising the super-priority lien for delinquent assessments. And without a cost effective, practical mean of non-judicial foreclosure, extinguishment of a first secured interest becomes an empty threat. Even Fannie Mae and Freddie Mac understand this concept and have developed policies to pay the super-priority

liens. The concept is neither new nor unique. This Court should not rewrite the law simply because the Bank chose to sit on its rights and allow its collateral to be sold at auction.

Regarding unjust enrichment, SFR's complaint alleges facts sufficient to state a claim for that cause of action. As such, the district court erred in dismissing that cause of action.

The order granting the Bank's motions to dismiss and to expunge *lis pendens* must be reversed because the district court's interpretation of NRS 116.3116 violates the statute's plain meaning. There is no support for the conclusion that the NRS 116.3116(2) super-priority lien merely entitles an association to a payment priority. Such treatment would financially cripple associations.

Accordingly, this Court should reverse and instruct the district court to (a) vacate the order dismissing SFR's claims against the Bank and expunging SFR's lis pendens, (b) enjoin the Bank's foreclosure, and (c) conduct all further litigation arising out of NRS 116.3116 in light of the proper construction of the statute.

ARGUMENT

I.
STANDARD OF REVIEW

This Court reviews de novo an order granting a motion to dismiss for failure to state a claim, applying a rigorous standard, accepting the plaintiff's factual

allegations as true and drawing every intendment in favor of the non-moving party. *Pack v. LaTourette*, 128 Nev. ___, ___, 277 P.3d 1246, 1248 (2012). Liberal pleading standards apply equally to declaratory relief and other civil claims. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260-61 (1993). "[A] complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle him to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). This Court reviews district court orders denying a preliminary injunction and cancelling a lis pendens for abuse of discretion. *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises*, LLC, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (preliminary injunction); *Zhang v. Dist. Ct.*, 120 Nev. 1037, 1043, 103 P.3d 20, 24 (2004) (lis pendens), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). Finally, this Court reviews de novo a district court's statutory interpretation, even in the context of a preliminary injunction. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 738 (2007); Boulder Oaks, 125 Nev. at 403, 215 P.3d at 31.

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II.
THE PLAIN LANGUAGE OF NRS 116.3116 GIVES ASSOCIATION LIENS PRIORITY OVER FIRST SECURITY INTERESTS

A. This Court's Analysis Must Start with the Plain Language of the Statute

Nevada rules of statutory construction govern the meaning of Nevada statutes. *See In re First T.D. & Inv., Inc*., 253 F.3d 520, 527 (9th Cir. 2001). Under Nevada law, courts construe statutes to give effect to the legislature's intent. *Richardson Constr., Inc. v. Clark Cty. Sch. Dist*., 123 Nev. 61, 156 P.3d 21, 23 (2007). If the statute's plain language is unambiguous, that language controls. *Id.*

NRS Chapter 116, enacted in 1991, codified the Uniform Common-Interest Ownership Act ("UCIOA") and sets forth the statutory framework for common-interest communities and their governing bodies. *See* NRS 116.001; A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). (AA445.) This appeal requires examination of the plain language of NRS 116.

B. NRS 116.3116(4)3 Establishes that an Association's Lien is "First in Time"

Pursuant to NRS 116.3116(1), an association has a statutory lien against a unit owner's real property for delinquent assessments. The plain language of NRS 116.3116(4) grants an association lien priority from the date an association's

[3] NRS 116.3116 was amended, effective October 1, 2013. The former NRS 116.3116(4) has been renumbered and is now NRS 116.3116(5). *See* 2013 Nev. Stat., ch. 552, § 7, at 3788. Because the prior version of the statute was in effect at the time, SFR is using the prior version and subsections as set forth in its Statutory Addendum ("AA") unless otherwise indicated.

CC&Rs are recorded, stating that the recordation of an association's declaration of CC&Rs "constitutes record notice and perfection of the lien." "No further recordation or any claim for assessments [under NRS 116.3116] is required." *Id.* (AA 091.)

Because the Association's declaration was recorded before Bank's First DOT, the Association's lien is first in time and, therefore, first in right.[4] *See* George L. Bum, J.D., 51 AM. JUR. 2D LIENS § 68 Priorities (2012).

C. The NRS 116.3116(2)(b) Exception for the First Security Interest

NRS 116.3116(1) provides that an association's lien is senior to nearly all other liens and encumbrances on a property by virtue of being first in time. NRS 116.3116(2)(b) provides an exception to that general rule for a first security interest:

> A lien under this section 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 or, in a cooperative, the first security interest encumbering only the unit's

[4] When A.B. 221 was enacted in 1991, the Legislature decided that following UCIOA by granting an HOA lien priority from the recording of the declaration instead of the notice of delinquent assessments best served public policy. *See* Nevada State Bar Business Law Committee's UCIOA Report, attached as Ex. D to Minutes of March 20, 1991 Hearing of the Assembly Committee on Judiciary, p. 53 of AB 221 Legislative History (noting concern over the change, but, based on policy considerations, recommending that the UCIOA should be followed). (AA493.)

> owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> * * *

NRS 116.3116(2)(b). This exception, however, does not end the analysis.

D. The Super-Priority Lien: the NRS 116.3116(2) Exception to the NRS 116.3116(2)(b) Exception

Obviously, if the statute had stopped here the Bank's interest would always be prior to the Association's lien, as the district court mistakenly concluded.[5] But NRS 116.3116(2) continues, creating an exception to the exception, and limits the priority of a first security interest granted in the subsection (2)(b) as follows:[6]

> ➥ **The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses** based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the **9 months immediately preceding institution of an action to enforce the lien**. . . .

(Emphasis added.)

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[5] NRS 116.3116(2)(b) cannot be read in isolation without the text following the flush line ("➥"). NRS 0.025(2); *see J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC*, 127 Nev. ____, 249 P.3d 501, 506 (2011)(a flush line symbol does not create ambiguity where none otherwise exists). It was this reading of subsection (2)(b) in isolation that caused the district court to mistakenly conclude that "[h]ere the first security interest Deed of Trust was first in time and prior to the assessment lien of the homeowner's association." (5JA 803:¶9.)

[6] In contrast, NRS 116.3116(2)(a) and (c) provide that prior recorded liens, taxes, and governmental liens have absolute priority over an association lien. (AA091.)

In other words, during the time period in which there are delinquent common assessments or abatement charges, the first security interest loses the benefit of the mortgage exception rule provided in the section (2)(b) and the association's assessment lien becomes prior to the first security interest. This means that an association can foreclose on its lien and extinguish the first security interest, which is no longer prior to the association's lien. Thus, during this time period, unless it pays the super-priority portion of the association's lien before an association foreclosure, a lender will lose its security interest.

E. NRS 116.1108 Expressly Incorporates Nevada Real Property Law into NRS 116: Foreclosure of a Senior Lien Extinguishes All Junior Liens

After establishing how and when an association's lien can be prior to the first security interest, the Legislature explicitly required that the laws of real property supplement NRS 116. NRS 116.1108. Under settled Nevada real property law foreclosure principles, foreclosure of a superior lien extinguishes junior security interests. *See Citibank Nevada, N.A. v. Wood*, 104 Nev. 93, 94, 753 P.2d 341, 341-42 (1988) (following senior lienor's foreclosure sale, junior lienor loses security in property but retains right to claim an interest in the sale proceeds); *Aladdin Heating Corp. v. Trustees of Central States*, 93 Nev. 257, 262, 563 P.2d 82, 86 (1977); *Erickson Constr. Co. v. Nev. Nat'l Bank*, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973) (non-judicial foreclosure sales automatically extinguish

junior liens by operation of law); *see also* RESTATEMENT (THIRD) OF PROPERTY (Mortgages)(1996), §7.1("A valid foreclosure of a [lien] terminates all interests in the foreclosed real estate that are junior to the [lien] being foreclosed and whose holders are properly joined or notified under applicable law."). This settled principle far predates the enactment of NRS 116 by the Legislature. The Legislature presumably knew this principle of Nevada real property law when it enacted NRS 116 in 1991. *7912 Limbwood Court Trust.*, ___ F.Supp.2d ___, 2013 WL 5780793, at *7, (D.Nev. Oct. 28, 2013) (order denying motion to dismiss in a similar case); *see State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000).

Because there is nothing in NRS 116.3116 indicating otherwise, and because it is not inconsistent with Chapter 116, settled Nevada real property foreclosure principles apply to an association super-priority lien foreclosure sale conducted pursuant to NRS 116: such sale extinguishes all junior interests including a first deed of trust. *7912 Limbwood Court Trust.*, 2013 WL 5780793, at *7. Any other interpretation improperly reads into the statute a difference that does not actually exist. "If the Legislature intended to apply a different rule or outcome to an [association] foreclosure sale, it could have said so." *Id.* As one Nevada state court judge has found,

> [If] foreclosures conducted pursuant to NRS 116.3116 are unique under Nevada law, then there must exist something in the text or legislative history of NRS 116.3116 that says so. Under settled rules of statutory interpretation, the Court cannot read NRS 116.3116 as a unique, unprecedented, and *sui generis* departure from long-established norms relating to foreclosure sales in Nevada unless there is some indication . . . that the Legislature intended this to be the case. There is not. Quite to the contrary, the complete absence of anything within NRS Chapter 116 regarding the question of extinguishment suggests that the Legislature intended that Chapter 116 foreclosures would be handled as any other type of foreclosure.

Order, *First 100 LLC v. Burns,* Case No. A677693 (Nev. Eighth Jud. Dist. Ct. May 31, 2013) (5JA 640-641, 804-822 and ¶32).[7]

In fact, where the Legislature wanted the association statute to differ from other foreclosure statutes, it included such language. For example, unlike NRS 116, NRS 40 and 107 do not include the idea of a limited "super-priority" lien amount. A legislature's choice to include language designed to deviate from established foreclosure practices in some ways, but declining to deviate from it in others must be considered deliberate. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (employing the maxim of statutory construction "*expressio unius est exclusio alterius.")*; *see also In re Estate of Prestie*, 122 Nev.

[7] The *First 100* Order is also attached as Exhibit 2 to *Citimortgage, Inc. v. Liberty at Mayfield Community Ass'n*, No. 2:13-cv-02033-gmn-gwf, 2013 WL 6388727 (D.Nev. Dec. 5, 2013)(granting preliminary injunction in case filed by lender to prevent an association from foreclosing while amount of super-priority lien is in dispute).

807, 814, 138 P.3d 520, 524 (2006) ("We have previously recognized the fundamental rule of statutory construction that '[t]he mention of one thing implies the exclusion of another.'").

By expressly incorporating real property law into NRS 116, the Legislature made clear that so long as there were delinquent assessments or abatement charges in the lien, an association foreclosure would extinguish a first security interest if those charges were not paid prior to the sale.

III.
HARMONIZING NRS 116.3116(2) WITH THE REMAINDER OF NRS 116 PROVIDES A CLEAR RESULT: NON-JUDICIAL FORECLOSURE OF AN ASSOCIATION'S SUPER-PRIORITY LIEN EXTINGUISHES A FIRST SECURITY INTEREST

In determining the meaning of NRS 116.3116(2), the statute should be interpreted "'in harmony with other rules and statutes.'" *Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022,* 1028 (2006) (quoting *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)); "This court considers the statute's multiple legislative provisions as a whole . . . [and will] not render any part of a statute meaningless," or read it "'to produce absurd or unreasonable results.'" *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quoting *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)). Thus, when construing NRS 116.3116(2)'s language creating the super-priority portion of the lien—which reads in relevant part,

emphasis added: **"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 <u>the lien</u>**. . . ."—this Court must consider the plain language in light of the other relevant provisions.

A. <u>NRS 116 Explicitly Allows Associations to Enforce Their Liens Through Non-Judicial Foreclosure</u>

The district court granted the Bank's motion to dismiss based in part on its erroneous conclusion that the NRS 116.3116 super-priority lien provisions require an association to foreclose judicially. (5JA 803, ¶10.)

If read in isolation, the word "action" as used in NRS 116.3116(2) might be misconstrued to mean judicial foreclosure. However, "action" must be read in the context of the phrase "action to enforce a lien."

In Nevada, "action to enforce lien" is not limited to filing a judicial foreclosure: An association may "enforce" its lien by filing a civil suit against the unit owner for unpaid assessments, or it may non-judicially foreclose on an NRS 116.3116 lien. *See* NRS 116.3116(6) ("This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure."); NRS 116.31162(1) (granting power of sale);

NRS 116.31162-31168 (setting forth procedures to foreclose by sale).[8]

Nothing in NRS 116.3116(2) limits the association's ability to enforce the super-priority portions of its lien through non-judicial foreclosure. In fact, the only restrictions on foreclosure are in NRS 116.31162(4),[9] which prohibits an association from foreclosing on a lien based solely for fines or penalties of the CC&Rs. The Legislature put no such limitation on any other portion of the lien.

Therefore, as used in NRS 116.3116(2), "action to enforce a lien" simply means taking some action to enforce the lien including initiating the non-judicial foreclosure process by sending a notice of delinquent assessment lien. This reading of "action" in the phrase "action to enforce a lien" is consistent with this Court's previous determination that a civil action is not required to record or perfect an association's lien:

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[8] Before the Legislature enacted NRS 116 in 1991, NRS 117 governed condominium associations. In NRS 117, the Legislature incorporated requirements of NRS 107.030, NRS 107.080 and NRS 107.090 when associations foreclosed on their liens. NRS 117.070; *compare* NRS 117.075 *with* pre-2003 NRS 107.080, which reflects the NRS 107.080 in effect when NRS 116 was adopted. (AA146-147, 160).

When the Legislature enacted NRS 116, the Nevada Supreme Court had already determined that an association's non-judicial foreclosure pursuant to NRS 107.080 was valid. *Long*, 98 Nev. at 14, 639 P.2d at 530. The provisions of NRS 107.080 at the time that *Long* was decided are the provisions that were incorporated into NRS 116 in 1991. According to the Nevada Supreme Court's recent opinion, *McKnight Family LLP v. Adept Mgmt. Services, Inc.*, 129 Nev.___, 310 P.3d 555 (2013), *Long* remains binding authority when evaluating association foreclosure sales.

[9] NRS 116.31162 has likewise been amended with new language inserted into subsection 4 and the prior subsection 4 becoming subsection 5. 2013 Nev. Stat., ch. 552, § 8, at 3790.

> NRS 116.3116(1) provides that liens exist when assessments are due, regardless of any classification. Thus, **an association is not required to commence a civil action to record or perfect the lien**, which already exists once assessments are due, and, therefore, such association need not submit to mediation or arbitration before recording the lien.

Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. 290, 301, 183 P.3d 895, 903 (2008) (emphasis added).

Furthermore, as a practical matter, it does not make sense to require associations to expend the resources required to file and prosecute a lawsuit if an association could only recover nine months of assessments. Therefore, requiring an association to initiate a judicial foreclosure to trigger its super-priority lien for this limited amount would be absurd. Additionally, if a lawsuit is required for the super-priority lien to be triggered, associations would receive nothing if the holder of a first security interest were to foreclose before the association filed a costly lawsuit. Again, that result would not advance the purpose of the statute.

If the Legislature had intended the super-priority lien to be limited merely to situations where an association has filed a lawsuit, if could have required judicial foreclosure. Instead, the Legislature specifically designed the NRS 116 foreclosure provisions to follow existing, constitutionally-proven provisions for non-judicial foreclosure found in NRS 117 and NRS 107. *See* n.7, *supra*; *compare* 1991 Nev. Stat., ch. 245, §§ 101- 103, at 569-70 *with* 2003 Nev. Stat., ch. 465, §11, at 2893;

see also AA 541.[10]

Thus, this Court should not read "action" to mean a judicial foreclosure.

B. NRS 116 Details the Procedures Associations Must Follow to Foreclose Non-Judicially

NRS 116 requires that the property owner and any holder of a junior recorded security interest receive association foreclosure notices in advance of the sale. *See* Sec. III(D), *infra.*

A foreclosure sale following these procedures "vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3). In Nevada, "sales without equity or right of redemption vest the purchaser with absolute title." *In re Grant*, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) (emphasis added). As this Court has stated:

> [T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchaser; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court.

[10] A.B. 221 §§ 102-103 expressly incorporated the existing provisions of NRS 117.070(3) (requiring the sale to be conducted in accordance with the provisions of NRS 107.090) and 107.030(6)-(8) (incorporating the covenants as to deeds issued upon foreclosure by sale. *Id.*; (AA146, 155-56.) The reference to NRS 107.090 for noticing requirements to other lienholders, including subordinate claimholders such as the Bank, was also included in NRS 116 and remains unchanged to this day. NRS 116.3116. (AA 146.)

Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317–18 (1867)) (emphasis added); *see also Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. ___, ___, 294 P.3d 1228, 1234 (2013) ("'right of redemption' language ensures that purchasers at nonjudicial foreclosure sales receive the 'title of the grantor,' unencumbered by a judicial-foreclosure debtor's 'right of redemption.'"). This is the same title granted in a sale under NRS 107. NRS 107.080(5). Thus, where all junior liens, including the first security interest, are extinguished by an association foreclosure sale, the purchaser takes free and clear of those interests.

C. Abatement Provisions in NRS 116.310312 Support Extinguishment of a First Security Interest Through Non-Judicial Foreclosure

In addition to the 9 months of common assessments, an association's super-priority lien may include charges for abatement as defined in NRS 116.310312. NRS 116.3116(2). (AA 091). Based on the plain language of the statute, both parts of the super-priority lien may be foreclosed and both parts can extinguish a first security interest.[11] All an association need do is follow the non-judicial foreclosure

[11] The priority language for delinquent assessments has been part of NRS 116.3116(2) since it was first adopted in 1991. *See* 1991 Nev. Stat., ch. 245, § 100, at 567-568. In 2009, the Legislature passed, and the governor signed into law, A.B. 361 as amended which became NRS 116.310312. *See* 2009 Nev. Stat., ch. 248, § 1, at 1007-1008. (*See* AA702.)

NRS 116.310312 provides Associations with the power to enter the grounds of a unit to abate nuisances and to lien for the costs of abatement. When questioned about the provision that became 116.310312(6) during the Senate

procedures set forth in NRS 116.31162-116.31168:

> 4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3 . . . **The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.**

NRS 116.310312(4) (emphasis added). (AA047-48.)

Construing NRS 116.3116 such that non-judicial foreclosure of an association's lien with super-priority amounts can never extinguish a first security interest renders the last sentence in NRS 116.310312(4) meaningless. Alternatively, it would require the same words in the same sentence of NRS 116.3116(2) to have two completely different meanings: **"<u>also prior to</u> all**

Judiciary Committee's hearing on A.B. 361, Michael Buckley, Chairman of the Commission for Common-Interest Communities and Condominium-Hotels, stated that "the intent was to follow the language in NRS 116.3116. . . ." Hearing on A.B. 361, before the Senate Judiciary Comm., 75th Leg. (Nev. May 11, 2009) (Assemblyman Richard McArthur, proponent of A.B. 361, stated that he "deferred a lot to Mr. Buckley in his technical changes [to the bill]." Hearing on A.B. 361 Before the Senate Judiciary Comm., 75th Leg. (Nev. May 6, 2009), at p. 18 (AA 666). During the hearings, the Committee Chair noted that he had received an e-mail asking why subsection (b) was not included in the types of interests to which the abatement lien would not be prior to, because **"[o]therwise, the Association lien will take precedence over the first security interest lien."** *Id.* (May 11, 2009), at p.15 (AA673-74.) The Legislature went on to specifically exclude subsection (b), thereby allowing the abatement charges to have super-priority over the first security interest. The Legislature knew that foreclosing on the abatement lien could extinguish the first security interest as a junior lien, **just like an assessment lien.** As discussed above, it also added language to NRS 116.3116(2) to harmonize the two statutes. The Legislature provided that the association's super-priority abatement amounts, like the super-priority assessment amounts, could be foreclosed by sale. *See* 2009 Nev. Stat., Chap. 248, §1 (4), at p. 1008 ("The lien may be foreclosed under NRS 116.31162 to 116.31168 inclusive.") (AA703).

security interests described in paragraph (b)" when referring "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312" would mean that an association has a super-priority lien for abatement charges that can be non-judicially foreclosed and can extinguish a first security interest. At the same time, when referring "to the extent of the assessments for common expenses" would mean that the association must file a lawsuit to recover delinquent assessments. This dual result is not contemplated by the plain language of the statute.

D. Nevada Non-Judicial Foreclosure Statutes Satisfy Any Due Process Considerations: No Lawsuit is Required

The Bank argued that non-judicial foreclosure of an NRS 116.3116 super-priority line would "be in direct violation of [its] due process rights. . ." (1JA 070.) While the district court did not address due process, any underlying considerations that first security interests are denied due process are without merit. First, due process is not implicated because the Association's foreclosure did not involve state actors. Even if it did, however, the noticing requirements and plain language of NRS 116 give first secureds ample notice and opportunity to be heard.

1. Due Process is Not Implicated in an Association Foreclosure

Due process is not implicated here because the foreclosure of a lien created by agreement or contract between a homeowner and an association based on the

association's rights under the CC&Rs, and conducted by a private agent of the Association, is not a state action. *See Apao v. Bank of New York*, 324 F.3d 1091, 1093 (9th Cir. 2003)(even a lien authorized by statute does not convert a "private, non-judicial sale" to a state action where "there is no state action in either the availability of such private remedies or their enforcement") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729 (1978); *Charmicor, Inc, v. Deaner*, 572 F.2d 694, 696 (9th Cir. 1978) (finding no state action involved in non-judicial foreclosure pursuant to NRS 107)). Even if due process were implicated, the Bank's predecessor waived its ability to challenge the statute when it chose to lend money in a community subject to CC&Rs *after* the Legislature adopted NRS 116 along with its super-priority provisions. Similarly, the Bank waived any due process argument when it took an interest in the First DOT.

2. NRS 116 Non-Judicial Foreclosure Procedures Satisfy Due Process

"Due process is satisfied where interested parties were given an "opportunity to be heard at a meaningful time and in a meaningful manner." *J.D. Construction v. IBEX Int'l Group*, 126 Nev. ___, ___, 240 P.3d 1033, 1041 (2010).

Here, the foreclosure procedures in NRS 116.31162-116.31168 give first secureds time and ample opportunity to protect their interests in a meaningful

manner.[12] The non-judicial foreclosure requirements found in NRS 116.31162-116.31168 closely track the requirements of NRS 107.080[13] in place at the time NRS 116 was enacted and through 2005 when the Legislature began making significant changes to the requirements to address predatory lending and robo-signing by the banks. This Court has already determined that an association's non-judicial foreclosure pursuant to NRS 107.080 is valid. *Long v. Towne*, 98 Nev. 11, 14, 639 P.2d 528, 530 (1982). As shown in the table below, the Legislature included almost the same requirements for an association non-judicial foreclosure sale as it did for bank non-judicial foreclosure sales before banks were perceived to be abusing the system.

TABLE 2 – STATUTORY NOTICING

Association Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162 (1)(a)	Mail notice of delinquency to homeowner	No statutory requirement; generally required by terms of deed of trust
NRS 116.31162(1)(b)	Execute Notice of Default and Election to Sell (NOD) that describes deficiency in performance or payment	NRS 107.080(2)(b)

[12] As set forth above, because the super-priority amount of the Association's lien is prior to the first security interest, the first secured is a junior lienholder.

[13] *See* n. 8, 10, and 11, *supra*.

NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168 (incorporating NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(4)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)
NRS 116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)	Mail NOS to interested parties who request notice	NRS 107.090(4)
NRS 116.311635(1)(b)(1) (incorporating NRS 107.090)	Mail NOS to subordinate claim holders	NRS 107.090(4)
NRS 116.311635(1)(b)(3)	Mail NOS to Ombudsman	No statutory requirement

NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

Most importantly, the 1991 Legislature included specific language in NRS 116 incorporating the noticing requirements of NRS 107.090 to an association foreclosure: **"The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed."** NRS 116.31168(1). NRS 107.090(3)(a)-(b) requires notice to all subordinate claim holders:

> 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.**

(Emphasis added).

Additionally**,** NRS 116.41095 requires that anytime a property is sold within a common-interest community, purchasers receive a document explaining **that an association can foreclose on its lien non-judicially and the way to be heard if they dispute the obligation or its amount:**

> 4. IF YOU FAIL TO PAY OWNERS' ASSESSMENTS, YOU COULD LOSE YOUR HOME?
>
> **If you do not pay these assessments when due, the association usually has the power to collect them by selling your property in a**

> **nonjudicial foreclosure sale.** If fees become delinquent, you may also be required to pay penalties and the association's costs and attorney's fees to become current. **If you dispute the obligation or its amount, your only remedy to avoid the loss of your home may be to file a lawsuit and ask a court to intervene in the dispute.**

(emphasis added).

This warning is designed to inform interested parties of what sophisticated lenders like the Bank already know—a non-judicial sale will extinguish their interests in the property unless they take action.

Finally, NRS 116.31166 states that the recitals in the foreclosure deed are conclusive proof of the matters recited, against "the unit's former owner, his or her heirs and assigns, **and all other persons**." NRS 116.31166(1)-(2) (emphasis added). Thus, SFR is entitled to rely on the recitals and any noticing deficiencies will not invalidate the sale, but would provide the Bank reason to seek recourse against the Association's agent that held the sale.

a. The multiple notices required by NRS 116 provide first secureds time to cure and time to be heard

A foreclosure sale is not complete until the gavel drops. It can be stopped any time prior to that moment. *See In re Grant*, 303 B.R. 205, 210 (Bankr. D.Nev. 2003) (citing *Dazet v. Landry*, 21 Nev. 291, 297, 30 P. 1064, 1067 (1892), *overruled on other grounds by Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963). In a nonjudicial foreclosure under NRS 116, the opportunity to be heard is

provided by: (a) the **thirty days** between mailing the notice of delinquent assessments and recording and mailing of the notice of default and election to sell; (b) the **ninety days** between recording and mailing the notice of default and recording and mailing the notice of sale; and (c) the **twenty-one days** notice between the notice of sale and the actual sale. *See* NRS 116.31162(1)(b)-(c), 116.31163, 116.311635, 116.31168, and NRS 21.130(1)(c).

Read together, the statutory non-judicial foreclosure noticing requirements found in NRS 107.090 and NRS 116 provide lenders notice and time to seek judicial intervention if necessary. If it believes an association's foreclosure is wrongful, a lender may seek relief in a court to enjoin the foreclosure, just as SFR has had to do here against the Bank.[14] These statutes also form the foundation for the conclusive presumption of proper notice that arises from the recitals in the Association's foreclosure deed. NRS 116.31166(1)-(2); *see Limbwood*, at *6.

b. <u>The multiple notices required by NRS 116 give first secured interests the information needed to protect their interests</u>

<u>The Notice of Delinquent Assessments</u>

The Association's notices provided the Bank with sufficient information to protect its interest. The notices provided the what, who, when, and where necessary to meet the due process requirements for any affected party to stop the

[14] s *See CitiMortgage, Inc.*, 2013 WL 6409951(lender filed quiet title and sought preliminary injunction to stop association foreclosure sale).

foreclosure sale, including the unit owner **and all potential subordinate lienholders**. Only the first security interest has the additional option to simply pay the super-priority amount to protect its interest. NRS 116.3116(2). All others must pay the full lien amount or be extinguished. Since the amount due to prevent the sale from occurring is not the same for all parties it is reasonable for the Association to simply list the entire outstanding debt on its notices and for the party in interest to contact the Association for the super-priority amount.

The Notice of Default and Election to Sell

Like the Notice of Delinquent Assessments, the NRS 116.31162 Notice of Default and Election to Sell provides an explicit and clear warning that the Bank's security interest is in jeopardy:

> WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(1JA 150.)

Like a foreclosure sale under NRS 107, NRS 116 provides notice to the unit owner and subordinate lienholders that there is at least ninety days in which they can contact the Association, through the information provided in the notice, to arrange for payment. NRS 116.31162(1)(c).

The Notice of Trustee's Sale

Finally, in addition to the bold warnings given in the two prior notices,

pursuant to NRS 116.311635(3)(b), the Association's Notice of Trustee's Sale provides the following warning, including contact information for the association:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL NEVADA ASSOCIATION SERVICES, INC. AT (702) 804-8885. IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT 1-877-829-9907 IMMEDIATELY.

(1JA 154.).

c. The Bank was on notice that the Property could be auctioned but failed to take any action to protect its interest. The Bank therefore waived any due process based claim.

The notices provided by the Association in compliance with NRS 116.31162-116.31168 more than meet the minimum requirements of due process. "[D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right." *In re Medaglia*, 52 F.3d 451, 455-56 (2d Cir. 1995) (emphasis added). Because the declaration was recorded before the First DOT, the Bank "was on notice that by operation of [NRS 116.3116], the [association's] CC&Rs might entitle the association to a super-priority lien at some future date which would take priority over" its later recorded First DOT. *7912 Limbwood*

Court Trust., ___ F.Supp.2d ___, 2013 WL 5780793, at *10, (D.Nev. Oct. 28, 2013) (denying a motion to dismiss and concluding that the lender's due process rights were not violated). Thus, when reviewing due process for statutorily driven self-help remedies, a sophisticated party like the Bank has no basis to complain that the noticing requirements of NRS 116 are insufficient.

Here, the Bank does not claim that did not have notice of the Association's lien foreclosure sale. However, rather than attend the foreclosure and purchase the Property itself or pay the relatively miniscule super-priority amount prior to the auction, the Bank chose not to protect its interest in the Property.

E. Nothing in the Plain Language of the Whole of the NRS Permits Payment to an Associations as a "Payment Priority"

In its order dismissing SFR's complaint and expunging its lis pendens, the district court ruled that the Association "may have a priority for payment of its lien" but that the association foreclosure did not extinguish the Bank's First DOT. (5JA 803, ¶11.) The district court's order did not identify the statutory or other basis for this ruling.

The Bank argued that reading NRS 116.3116(2)(b) and NRS 116.3116(2)(c) together mandates the conclusion that an association's super-priority lien is solely a payment priority lien with the power to sell the Property and immediately collect on arrears owed to the association. (2JA 235). A "payment priority" theory is not supported by the plain language of the statute. Neither the Bank, nor the non-

binding authorities it cited to give any explanation as to why "prior" does not mean "prior" when referring to the super-priority portion of an association lien. (*See* 2JA 234-242.) This contradicts the plain language of NRS 116.1108 which mandates that the provisions of NRS 116 be supplemented by Nevada real property law.

If the super-priority potion of the lien is merely a "payment priority", the language "an action to enforce the lien" in NRS 116.3116(2) could only mean the non-judicial foreclosure of a bank's first deed of trust. Yet, at the beginning of that same sentence, "the lien" obviously refers to an association's lien. The Bank's construction creates ambiguity where none exists and ignores the plain language of the statute. Further, the district court's interpretation that "an action to enforce the lien" requires a lawsuit and the statute creates a "payment priority" cannot be supported by the plain language. "Action" cannot mean both "non-judicial foreclosure" for banks and "lawsuit" for associations.

Many of the unpublished decisions the Bank relies on suggest that pursuant to NRS 116.3116(2) associations enjoy payment priority from the proceeds of a bank's foreclosure sale. However, NRS 40.462, the statute setting forth the distribution of proceeds after a bank foreclosure sale, demonstrates that this interpretation cannot be true. NRS 40.462(2) does not mention associations or NRS 116 and does not provide any mechanism to pay the super-priority lien. Rather, under NRS 40.462(2)(b), after paying the foreclosure related expenses, the bank is

the next one to get paid. If the association lien enjoyed payment priority over the first security interest, the Legislature would have provided a specified order in which the super-priority lien would be paid in NRS 40.462(2). This Court should put to rest any suggestion that the Association's super-priority portion of its lien is merely a "payment priority."

IV.
AUTHORITIES THIS COURT RELIES ON TO INTERPRET NRS 116 SUPPORT EXTINGUISHMENT OF A FIRST SECURITY INTEREST THROUGH NON-JUDICIAL FORECLOSURE AND REJECT A "PAYMENT PRIORITY" INTERPRETATION

Even if this Court determines that NRS 116.3116 is ambiguous, which it is not, the result remains the same. If "a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, this court will construe a statute by considering reason and public policy to determine legislative intent." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009). "Courts can determine the legislative intent for enacting a particular statute by looking at the entire act and construing the statute as a whole in light of its purpose." *Colello v. Administrator of Real Estate Div.*, 100 Nev. 344, 347, 683 P.2d 15, 16 (1984). Further, when the Legislature expressly states the purpose for a specific act, the courts must consider that purpose in interpreting the statute. *Id.* "This court also assumes that, when enacting a statute, the Legislature is aware of related statutes." *D.R. Horton, Inc.*, 125 Nev. at 456, 215 P.3d at 702. "The purpose of NRS Chapter 116 is to 'make uniform the law with respect to the

subject of this chapter among states enacting it.' NRS 116.1109(2)." *Id.* The Legislature recognized that the UCIOA would create uniformity in how the growing number of Nevada homeowners associations would operate, including assessing, collecting assessments, and dealing with members. A.B. 221, Summary of Legislation, at p. 35-36. (AA477-78.)

When this Court interprets provisions of NRS 116, in addition to the legislative history, it turns to the remainder of the Chapter, to the Uniform Common Interest Ownership Act ("UCIOA") and its comments, and to the RESTATEMENT (THIRD) OF PROPERTY and its commentary to determine the Legislature's intent. *D.R. Horton, Inc.*, 125 Nev. at 456, 215 P.3d at 702*; Boulder Oaks Cmty Ass'n v. B&J Andrews Enterprises, LLC,* 125 Nev. 397, 405, 215 P.3d 27, 32 (2009).

A. The Legislature has Gone Out of Its Way to Keep Associations Out of Court

The Legislature has consistently endorsed non-judicial foreclosure as a remedy in Nevada.[15] It has also enacted ADR legislation to keep associations from

[15] When the Legislature addresses a lien and the ability to foreclose, it provides the procedure to foreclose, whether judicially, non-judicially or both. *See* NRS 108.239 (mechanic's liens); NRS 444.520(3) (municipal solid waste management liens); NRS 107.080 and NRS 40.4303 (mortgages and deeds of trust); NRS 21 (judgment liens); and NRS 116.31162-NRS 116.31168 (association liens).

being forced to litigate in courts.[16] Thus, requiring an association to file a lawsuit to trigger its super-priority lien, let alone enforce it, where the statutes provide specifically for non-judicial foreclosure, is not supported in the plain language of NRS 116. Further, to the extent that there was ever any confusion as to how the super-priority lien could be triggered and enforced, the Legislature charged NRED with the interpretation and implementation of NRS Chapter 116 and it has opined that no judicial foreclosure is necessary.

B. The Agency Tasked with Interpreting NRS 116 Construes NRS 116.3116 to Mean Non-Judicial Foreclosure Extinguishes a First Security Interest

On December 12, 2012 the Nevada Real Estate Division of the Department of Business and Industry ("NRED") issued an advisory opinion interpreting NRS 116.3116 to mean that non-judicial foreclosure on an association super-priority lien extinguishes all junior liens, including the first deed of trust. 13-01 Adv. Op. Dep't of Business and Industry, Real Estate Division, *The Super Priority Lien* (December 12, 2012).[17] (2JA 270-289.)

NRED was asked whether an "association must institute a 'civil action' as defined by [NRCP] 2 and 3 in order for the super-priority lien to exist." (2JA 270.) NRED answered that no lawsuit was required and that an association need only

[16] In 1995, AB 152, now NRS 38.300 *et seq*, was adopted for the express purpose of limiting litigation for matters involving associations.

[17] *Also available at* http://red.state.nv.us/cic/Publications/13-01-116.pdf.

initiate the steps to foreclose set forth in NRS 116.3116(2):

> **No.** The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint.

(2JA 271 (emphasis added and in original).)

Further, NRED examined the priority of an association lien under NRS 116.3116(2), concluding that an "association can use the super priority lien to force the first security interest holder to pay that amount[ ]" because the first security interest would be extinguished by the association non-judicial foreclosure sale. (2JA 288.)

> 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."

(2JA 278.) NRED opined that it was "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association." (*Id.*) NRED reaffirmed its position in testimony before the Legislature during this past session, stating that:

> The super priority lien comes into play in two situations—when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. **The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the**

> **association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.**

Summary of NRED Advisory Opinion 13-01, Gail Anderson, Administrator, Presentation to Senate Committee on Judiciary, May 6, 2013. (4JA 598 (emphasis added).)

NRED has authority to interpret Chapter 116. NRS 116.623(1)(a); *see State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. ___, ___, 294 P.3d 1223, 1227-28 (2012); *see* also NRS 116.043; NRS 116.615; NRS 116.623. The district court erred in failing to give weight to NRED's opinion, as this Court gives deference to NRED's interpretation of statutes in the areas it oversees. *See Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); *Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983) (stating the Nevada Supreme Court "attach[es] substantial weight" to the interpretation of a state agency "clothed with the power to construe the statutes under which it operates").

C. Extinguishment of a First Security Interest Through Non-Judicial Foreclosure of an NRS 116.3116 Lien is Consistent with the UCIOA

NRS 116.3116 was modeled after Section 3-116 of the 1982 version of the UCIOA, originally drafted by the National Conference of Commissioners of

Uniform State Laws.[18] *Boulder Oaks*, 125 Nev. at 404, 215 P.3d at 31. (*See* AA 233.) NRS 116 "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." NRS 116.1109(2); *Boulder Oaks*, 125 Nev.at 404, 215 P.3d at 31. Comments from the UCIOA drafters and interpretations from other states are thus relevant to a Nevada interpretation of NRS 116.3116.

1. UCIOA § 3-116 Contemplates Use of Non-Judicial Foreclosure

> UCIOA §3-116(b) provides in pertinent part:
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except . . . (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent. . . . The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding **institution of an action to enforce the lien. . . .**

See UCIOA §3-116(b)(emphasis added).(4JA 612-13.)

UCIOA §3-116(j) provides state legislatures with language to include in their statutes regarding foreclosure of an association's lien. This provision includes a place for each legislature to insert a reference to that state's non-judicial foreclosure statute and then states that the association must give notice of its "action:"

[18] Nevada expanded the time period from 6 months to 9.

> [(4) In the case of foreclosure under [**insert reference to state power of sale statute**], the association shall give reasonable notice of its **action** to all lien holders of the unit whose interest would be affected.]

UCIOA (1982), Section 3-116 (j)(4) (emphasis added). (*Id.* at 614.)

If the drafters of the UCIOA intended that an "action to enforce a lien" meant only judicial foreclosure, they would not have included non-judicial foreclosure statutes in Section 3-116 (j)(4). **The UCIOA intended "action" to be flexible enough to cover judicial foreclosure, non-judicial foreclosure, or both.** This Court should reverse the district court's conclusion that a lawsuit is required to trigger and enforce a super-priority lien.

2. Extinguishment was Intentionally Included in the UCIOA to Incentivize Lenders to Pay the Super-Priority Portion of an Association Lien

Comments to the UCIOA support NRED's interpretation of NRS 116.3116. Official Comment 1 to Section 3-116 describes the purpose of the super-priority lien provision as "ensur[ing] prompt and efficient enforcement of the association's lien for unpaid assessments." UCIOA § 3-116, cmt. 1 (1982). (4JA 617.) The super-priority lien was intended to "strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity of protecting the priority of the security interests of lenders." (*Id.*)

The drafters of the UCIOA anticipated that lenders would protect their first security interests in the face of the association super-priority lien:

> mortgage lenders will most likely pay the 6 [in Nevada, 9] months assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required."

(*Id.*) If an association foreclosure could never extinguish a first security interest, it would make no sense for a lender to make such a payment or establish such an escrow account. In other words, the statute was drafted in such a way that lenders would have incentive to prevent the loss of their security interest, thereby insuring the associations' ability to recoup at least some of the delinquent assessments.

In 2013, because the Legislature was considering amendments to NRS 116, the Common-Interest Committee of the Real Property Section of the Nevada State Bar sought guidance on the proper interpretation of NRS 116.3116 from a drafter of the UCIOA, Carl H. Lisman. When specifically asked whether an association's foreclosure of its assessment lien extinguishes a first security interest, Lisman responded that

> [The super-priority amount] puts the association ahead of the first security interest—and that means that foreclosure by the association extinguishes the first security interest and all junior interests.

Letter to Co-Chairs of Common-Interest Committee, Nevada State Bar Real Property Section (May 29, 2013)("Lisman Letter") (5JA 788)[19] The drafters intended to protect the association's need to be funded, and sought to avoid two

[19] The Lisman Letter is also available at https://www.nvbar.org/sites/default/files/RP_Lisman%20on%20Super%20Priority%20May%202013.pdf

possible, and impractical results: (a) that "a foreclosing association would take subject to the first security interest;" or (b) that the association's lien would be foreclosed by the holder of a first security interest. (5JA 787.) Consistent with Nevada law the drafters anticipated that customary rules of foreclosure and real property law would apply to the association liens created by UCIOA 3-116. (5JA 787-88 and n.8.) In a later affidavit, Lisman affirmed his opinions. (5JA 842-52.) He further confirmed that the drafters never meant "institution of an action" to mean lawsuit but, rather, deliberately used "institution" rather than "commencement" "to ensure that the triggering event not is [sic] limited to the initiation of a judicial action." (5JA 850, ¶20.) In discussing the priority rule under §3-116, Lisman made clear that "[h]ad we intended that the priority be only for payment, we would have said so. A payment priority would not serve the goal we were seeking." (5JA 848, ¶17.)

3. The Advisory Board to the UCIOA Supports Extinguishment by Non-Judicial Foreclosure of an Association Lien

The Joint Editorial Board for Uniform Real Property Acts (the "Board"), the governing body that oversees the drafting of the UCIOA and provides guidance to the Uniform Law Commission and others regarding laws such as the UCIOA, also concurs with NRED. In a report regarding the Six-Month "Limited Priority Lien" for Association Fees under the Uniform Common Interest Ownership Act

("UCIOA Report"),[20] the Board expressly rejected two Nevada federal court interpretations of the UCIOAwhere the courts concluded that non-judicial foreclosure of an association's super-priority lien did not extinguish the first security interest:

> Two recent Nevada federal decisions interpreting Nevada's limited priority lien statute, Nev. Rev. Stat. § 116.3116(2)(c), rejected the reasoning of *Summerhill Village* and concluded that an association's nonjudicial foreclosure of its assessment lien did not extinguish the lien of the senior mortgage lender. *See Weeping Hollow Avenue Trust v. Spencer*, 2013 WL 2296313 (D. Nev. May 24, 2013; ***Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2013 WL 531092 (D. Nev. Feb. 11, 2013).** For example, in *Weeping Hollow*, the court held that the limited priority lien provision did not create a true lien priority, but instead merely provided that the association's lien would continue to encumber the property following a foreclosure sale by the first mortgagee, to the extent of the assessments unpaid during the preceding nine months. Weeping Hollow, 2013 WL 2296313, at *5 ("Read in its entirety, NRS 116.31162 (c) states that an HOA's unpaid charges and assessments incurred during the nine months prior to the foreclosure of a first position mortgage continue to encumber the property after the foreclosure of the first position deed of trust. . . . However, the super priority lien does not extinguish the first position deed of trust."). **These decisions misread and misinterpret the Uniform Laws limited priority lien provision**, which provides the association with priority to the extent of assessments accruing in the period immediately prior to the association's enforcement of its lien. As discussed in the text, this constitutes a true lien priority, and thus **the association's proper enforcement of its lien would thus extinguish the otherwise senior mortgage lien.**

UCIOA Report, at p.9, n.9 (emphasis added).

[20]UCIOA Report, *available at*: http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf.

The Board confirmed Lisman's explanation of the intent of the UCIOA: to provide the associations with power to encourage lenders to pay the delinquent assessments to protect their security interests. In addition, the Board repeated that "an association may foreclose its lien by nonjudicial proceedings if the state permits nonjudicial foreclosure." *Id.* at p. 9, n. 8.

V.
REQUIRING A SMALL PAYMENT FROM LENDERS TO AVOID EXTINGUISHMENT FURTHERS NEVADA PUBLIC POLICY BY PROTECTING HOMEOWNERS AND THE ASSOCIATIONS WHICH PROVIDE THEM SERVICES

Nevada public policy also supports extinguishment of a first security interest via non-judicial foreclosure of an association's super-priority lien.

A. Non-Judicial Foreclosure of Super-Priority Liens Relieves Non-Defaulting Homeowners of the Added Burden of Paying Budget Shortfalls Caused by Lenders' Failure to Pay Super-Priority Amounts

Associations are non-profit organizations and the assessments they levy are merely the hard costs they incur in order to provide necessary services, such as property taxes for the common areas, to the homeowners within the community. *See, e.g.,* NRS 116.3107; NRS 116.31073; NRS 116.3115. Therefore, if homeowners fail to pay their share of the fees and assessments, the association will not collect enough to cover its projected budget. In the face of shortfalls, the association must (1) deplete its reserves, (2) raise assessments on non-delinquent members, or (3) stop providing required services. *See* NRS 116.3115-116.31153;

see also James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 359-360, 362 (1992) ("*Meaner Lienor*"). (*See* 4JA 508 n.1, 528, 534-535.) This is one of the principal reasons why the Legislature adopted the Uniform Act: to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments. . . ." UCIOA § 3-116, cmt. 1 (4JA 617.) AB 221 Hearings (Nev. Feb. 20, 1991), at p. 7-8 (AA477-78). In current troubled economic times, caused in large part by banks lending more money to individuals than they could afford, many of the homes in the communities are vacant. When lenders and their borrowers fail to pay assessments, the burden to maintain the collateral falls to their non-delinquent neighbors to prevent a decline in property values due to disrepair of common elements. *Meaner Lienor*, at 359-60. (4JA 534-535.)

B. Non-Judicial Foreclosure of the Super-Priority Lien Balances the Needs of an Association with the Rights of First Secured Interests by Limiting the Amount Subject to a Super-Priority Lien

Requiring lenders to pay a nominal amount of assessment dues does not impose an unfair burden on the lenders. Both Fannie Mae and Freddie Mac instituted policies requiring payment of the super-priority amount. Fannie Mae's servicing guidelines actually require servicers to protect its priority by paying the super-priority amounts in states that grant super-priority liens to associations. *See*

Fannie Mae Servicing Guide Announcement SVC-2012-05 (April 11, 2012).[21] (5JA 755-757.) Similarly, Freddie Mac requires servicers to pay any association "assessments prior to the foreclosure sale date if they are, or may become, a First Lien priority on [the property]. . . ." Freddie Mac Bulletin, No. 2013-15 (Aug. 15, 2013).[22] In fact, Henry L. Judy, former General Counsel for Freddie Mac, expressly acknowledged that foreclosure, preferably by sale, of the super-priority lien extinguishes a first security interest. *See* Henry J. Judy and Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 480, 484, 515-516 (1978) ("Judy").[23]

C. An Innocent Purchaser Should Not Bear the Brunt of the Harm Caused by an Ambiguous Statute

Nevada law requires that if two interpretations of an ambiguous statute are both potentially unfair to someone, an innocent third party should not bear the brunt of the harm. *See NC-DSH Inc. v. Ganrer*, 125 Nev. 647, 656, 218 P.3d 853, 859 (2009) ("ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt"); *see also Tri-County Equipment & Leasing v. Klinke*, 128 Nev. ___, ___, 286 P.3d 599, 597 (2012)

[21] *Available at* https://www.fanniemae.com/content/announcement/svc1205.pdf.

[22] *Available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1315.pdf.

[23] This article discusses the super-priority provisions of the Uniform Condominium Act, one of the Uniform Acts from which the UCIOA was developed. (JA 207-212.) The language of UCIOA § 3-116 is almost identical to UCA § 3-115, discussed in the article. See UCIOA § 3-116 (JA 213-218) with UCA § 3-115, Judy, at 534.

(Gibbons, J. concurring) (if someone is likely to receive a windfall, it should be the party that does not bear responsibility for the situation) (internal citations omitted). Here, the Bank had the ability to stop the foreclosure and protect its interests. That was not the responsibility of the purchaser, SFR. Yet, only SFR would suffer under the district court's construction of the statute since SFR would be stripped of both the Property and its monetary investment. This would be an absurd result and cannot be what the Legislature intended.

D. Any Perceived "Unfairness" Arising from Non-Judicial Foreclosure of a Super-Priority Lien Will Be Resolved with a Ruling from this Court

The perceived "unfairness" arises only because the sales price is relatively small compared to the banks' security interest. It is important to remember that while a bank's security interest is extinguished by an association's foreclosure sale, the security interest attaches to the sales proceeds. *See* NRS 116.31164(a)(4). After paying off any liens prior to the association's lien, the first security holder would receive the rest of the sales proceeds. Under the current market condition, created in part by the lenders' attempts to foreclose on an ineffective deed of trust, the sale price received at the foreclosure auction is low due to the uncertainty of the law and the inevitable fact that the purchaser will be forced to litigate clear title.[24] As such, the bank rarely receives anything from the sales proceeds. If, however, the

[24] The result in an NRS 107 sale would be similar if the holder of a second deed of trust refused to recognize its inability to foreclose following foreclosure by the first secured, and every purchaser had to litigate to quiet title.

sales price reflected the fair market value of the property, which it will once this court clarifies that title vests in the purchaser free and clear of the first deed of trust, the bank would receive relatively the same amount from the association's foreclosure sale as if it had foreclosed on the property itself.

E. In the Final Analysis, Nevada Statutory Law Must Govern

Nevada's statutory and common law principles of priority, not the monetary value of the respective liens, control. Under NRS 116's unambiguous statutory language, an association super-priority lien is prior to a first deed of trust. Thus, foreclosure of this lien extinguishes all junior security interests, including the first deed of trust. Even if the statute is considered ambiguous, persuasive and influential sources dictate the same outcome.

Moreover, the result in this case is neither novel nor unfair. A lender can easily avoid this purportedly inequitable result by paying off the relatively small association super-priority lien amount to preserve its priority. *See Carrillo v. Valley Bank of Nev.*, 103 Nev. 157, 734 P.2d 724, 725 (1987) (recognizing that junior lienholders can preserve their security interests by buying out the senior lienholder's interest); *Carrillo v. Valley Bank of Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 611 P.2d 1079, 1083 (1980). This would secure the lender's priority position, provide the association with much needed funds, and prevent the extinguishment of the first deed of trust. In the end,

the Legislature is the sole arbiter of the fairness of any public policy. Here, where the Legislature is presumed to know Nevada's general policy regarding the extinguishment of junior liens upon foreclosure, and where it adopted a uniform statute designed by its drafters to use this priority to protect an association's right to collect assessments, the Legislature has already made its determination on fairness. The district court was not free to disregard that determination and substitute its own judgment for that of the Legislature.

VI.
THE DISTRICT COURT IMPROPERLY DISMISSED SFR'S UNJUST ENRICHMENT CAUSE OF ACTION

When reviewing an NRCP 12(b)(5) motion to dismiss, this Court presumes that all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Stubbs v. Strickland*, 129 Nev. ___, 297 P.3d 326, 329 (2013.) Dismissal is appropriate when it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Id*. Unjust enrichment arises whenever a person has and retains a benefit which in equity and good conscience belongs to another. *In re Amerco Derivative Litigation*, 127 Nev. ___, 252 P.3d 681, 703 (2011.)

In its complaint, SFR alleges that it expended money and other resources maintaining the Property. (1JA 003, ¶7, 008, ¶45.) If it is determined that SFR purchased the Property subject to the Bank's deed of trust, the Bank will unjustly

retain the benefit conferred by SFR's payment to maintain the property. (1JA 008, ¶47.) In its Order granting the Bank's motion to dismiss, the district court's only discussion of SFR's unjust enrichment cause of action was to state "The Plaintiff has failed to state a viable claim for Unjust Enrichment." (5JA 804, ¶14.)

Given these factual allegations and the standard of review for motions to dismiss, the district court improperly dismissed SFR's unjust enrichment cause of action.

VII.
THE DISTRICT COURT ABUSED ITS DISCRETION IN EXPUNGING SFR'S LIS PENDENS AND DENYING SFR'S MOTION FOR PRELIMINARY INJUNCTION

This Court reviews district court orders denying a preliminary injunction and cancelling a lis pendens for abuse of discretion, but reviews questions of law associated with an injunction de novo. *Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31 (preliminary injunction); *Zhang*, 120 Nev. at 1043, 103 P.3d at 24 (lis pendens), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits. NRS 33.010; *Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31. This Court has always recognized that loss of real property to foreclosure constitutes

irreparable harm. *See, e.g. Pickett v. Comanche Canst.*, Inc., 108 Nev. 422, 430,836 P.2d 42,47 (1992); *Nevada Escrow Service, Inc. v. Crockett* 91 Nev. 201, 201-203, 533 P.2d 471, 472 (1975).

In an action to foreclose on real property or affecting the title or possession of real property, the plaintiff is required to record a notice of the pendency of the action. NRS 14.010(1). Upon 15 days notice, a party who recorded a notice of pendency of action must appear before the court and provide evidence demonstrating that: (a) the action affects the title or possession of the real property described in the notice; (b) the action was not brought in bad faith or for an improper motive; (c) the party who recorded the notice is able to perform any conditions precedent to the relief sought in the action; and (d) the party who recorded the notice would be injured by any transfer of an interest in the property before the action is concluded. NRS 14.015(2). The party who recorded the notice must also establish: (a) that the party who recorded the notice is likely to prevail in the action; or (b) that the party who recorded the notice has a fair chance of success on the merits in the action and the injury described in NRS 14.015(2)(d) would be sufficiently serious that the hardship on him or her in the event of a transfer would be greater than the hardship on the defendant resulting from the notice of pendency. NRS 14.015(3).

///

As detailed in the above sections, SFR established the requirements demonstrating it was entitled to a preliminary injunction preventing the Bank from foreclosing on its extinguished First DOT. SFR similarly established that it met the requirements of NRS 14.010 and NRS 14.015 and was therefore entitled to record and maintain a lis pendens on the Property during the pendency of its case and appeal against the Bank. Thus, the district court's orders denying SRF's motion for preliminary injunction and granting the Bank's motion to expunge lis pendens constitute abuses of discretion which should be overturned.

CONCLUSION

The district court erred in denying SFR's motion for preliminary injunction and erred in granting the Bank's motion to dismiss and motion to expunge *lis pendens* based on its mistaken construction of NRS 116.3116. SFR asks this Court to hold that NRS 116.3116 provides associations with super-priority liens that, if foreclosed non-judicially, will extinguish a first security interest that fails to pay the super-priority amount prior to the foreclosure sale. Further, this Court should hold that the successful bidder at an association foreclosure auction purchases the property free and clear of all junior liens, including a first security interest.

///

Accordingly, this Court should reverse and instruct the district court to (a) vacate the order dismissing SFR's claims against the Bank and expunging SFR's lis pendens, (b) enjoin the Bank's foreclosure, and (c) conduct all further litigation arising out of NRS 116.3116 in light of the proper construction of the statute.

DATED this 2nd day of January 2014.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the pares of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 13,768 words.

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), 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.

/ / /

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of January 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January, 2013, I served the Appellant's Opening Brief, Appellant's Statutory Addendum and Joint Appendix filed the same day, via the Supreme Court electronic notification system to the following parties:

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