file herein, and determining that good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Preliminary injunction is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a stay of thirty (30) days is imposed from the date of service of the Notice of Entry of the Order Denying Plaintiff's Motion for Preliminary Injunction, during which time Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, its successors, assigns, and agents, are restrained and enjoined from foreclosing on, selling, transferring, or otherwise conveying the real property commonly known as 2270 Nashville Avenue, Henderson, Nevada 89052, Parcel No. 178-19-712-012.

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IT IS HEREBY ORDERED ADGJUDGED AND DECREED that Defendant, Lucia Park's, Notice of Joinder is hereby granted.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

Reviewed by:

HOWARD KIM & ASSOCIATES

Diana S. Cline, Esq.
Nevada Bar No. 10580
400 N. Stephanie St, Suite 160
Henderson, Nevada 89014
Attorney for Plaintiff, SFR Investments Pool 1,LLC

Approved by:

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. Chris Albright, Esq.
Nevada Bar No. 4904
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorney for Defendant, Lucia Parks

IT IS HEREBY ORDERED ADGJUDGED AND DECREED that Defendant, Lucia Park's, Notice of Joinder is hereby granted.

IT IS SO ORDERED.

Dated this 7th day of ~~May,~~ June 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

Reviewed by:

HOWARD KIM & ASSOCIATES

Diana S. Cline, Esq.
Nevada Bar No. 10580
400 N. Stephanie St, Suite 160
Henderson, Nevada 89014
Attorney for Plaintiff, SFR Investments Pool 1,LLC

Approved by:

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. Chris Albright, Esq.
Nevada Bar No. 4904
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorney for Defendant, Lucia Parks

TAB 35

NEOJ
WRIGHT, FINLAY & ZAK, LLP
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
(702) 475-7964; Fax: (702) 946-1345
ccrowton@wrightlegal.net
Attorney for Defendant,
U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **NOTICE OF ENTRY OF ORDER**

TO ALL INTERESTED PARTIES:

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PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion for Preliminary Injunction was entered in the above-entitled Court on the 10th day of June, 2013, a copy of which is attached hereto.

DATED this 10th day of June, 2013.

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

AFFIRMATION

Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **NOTICE OF ENTRY OF ORDER** filed in Case No. A-13-678814-C **does not** contain the social security number of any person.

DATED this 10th day of June, 2013.

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **NOTICE OF ENTRY OF ORDER** was made on the 10th day of June, 2013, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Howard C. Kim, Esq.
Diana S. Cline, Esq.
Victoria L. Hightower, Esq.
HOWARD KIM & ASSOCIATES
400 N. Stephanie St., Suite 160
Henderson, NV 89014
Attorneys for Plaintiff

/s/ Ashley Renteria
An Employee of WRIGHT, FINLAY & ZAK, LLP

ORDR
WRIGHT, FINLAY & ZAK, LLP
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
(702) 475-7964; Fax: (702) 946-1345
ccrowton@wrightlegal.net
Attorney for Defendant,
U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiff's Motion for Preliminary Injunction having come on for hearing in the above-entitled Court on May 16, 2013 at the hour of 8:15 A.M. The Plaintiff, SFR Investments Pool 1, LLC, appearing by and through its counsel of record, Diana S. Cline, Esq., of Howard Kim & Associates; the Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, appearing by and through its counsel of record, Chelsea A. Crowton, Esq., of Wright, Finlay & Zak, LLP, and the Court having considered all arguments presented, the pleadings on

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file herein, and determining that good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Preliminary injunction is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a stay of thirty (30) days is imposed from the date of service of the Notice of Entry of the Order Denying Plaintiff's Motion for Preliminary Injunction, during which time Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, its successors, assigns, and agents, are restrained and enjoined from foreclosing on, selling, transferring, or otherwise conveying the real property commonly known as 2270 Nashville Avenue, Henderson, Nevada 89052, Parcel No. 178-19-712-012.

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IT IS HEREBY ORDERED ADGJUDGED AND DECREED that Defendant, Lucia Park's, Notice of Joinder is hereby granted.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

Reviewed by:

HOWARD KIM & ASSOCIATES

Diana S. Cline, Esq.
Nevada Bar No. 10580
400 N. Stephanie St, Suite 160
Henderson, Nevada 89014
Attorney for Plaintiff, SFR Investments Pool 1,LLC

Approved by:

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. Chris Albright, Esq.
Nevada Bar No. 4904
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorney for Defendant, Lucia Parks

IT IS HEREBY ORDERED ADGJUDGED AND DECREED that Defendant, Lucia Park's, Notice of Joinder is hereby granted.

IT IS SO ORDERED.

Dated this 7th day of ~~May,~~ June 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

Reviewed by:

HOWARD KIM & ASSOCIATES

Diana S. Cline, Esq.
Nevada Bar No. 10580
400 N. Stephanie St, Suite 160
Henderson, Nevada 89014
Attorney for Plaintiff, SFR Investments Pool 1,LLC

Approved by:

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. Chris Albright, Esq.
Nevada Bar No. 4904
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorney for Defendant, Lucia Parks

TAB 36

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ORDM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC,

Plaintiff,

vs.

U.S. BANK, N.A., LUCIA PARKS,

Defendants.

CASE NO. A-13-678814-C
DEPT NO. XVIII

ORDER FOR DISMISSAL AND CANCELLATION OF NOTICE OF PENDENCY OF ACTION

Defendant U.S. Bank N.A.'s Motion to Dismiss with Prejudice Plaintiff's Complaint, and Motion to Expunge Lis Pendens, and Defendant Lucia Parks' Joinders thereto came on for a hearing before the above-entitled Court on June 4, 2013, with Judge David Barker presiding. The Court, having considered all of the pleadings on file herein, and having considered the arguments of counsel, hereby finds as follows:

1. This matter concerns property commonly known as 2270 Nashville Avenue, Henderson, Nevada, 89052, Parcel No. 178-19-712-012 (the "Property").

2. On or about January 5, 2006, Defendant Lucia Parks obtained title to the Property through a Grant Bargain Sale Deed from Albert Brandelli and Mary Brandelli which was recorded in the Clark County Recorder's Office. Parks executed a Deed of Trust and Note whereby Wells Fargo Bank, N.A. was stated as the Lender and United Title of Nevada as the Trustee under the Deed of Trust.

3. On or about February 24, 2010, a Notice of Default and Election to Sell under Deed of Trust was recorded in the Clark County Recorder's Office.

4. On or about May 24, 2012, a Notice of Delinquent Assessment Lien was recorded in the Clark County Recorder's Office.

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 18

5. On or about June 7, 2012, Wells Fargo Bank, N.A. recorded an Assignment of Deed of Trust against the Property to U.S. Bank National Association ("U.S. Bank, N.A."), as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through, Certificates Series 2006-AR4 in the Clark County Recorder's Office.

6. On or about February 7, 2013, Nevada Association Services, Inc., agent for Copper Ridge Community Homeowners Association ("HOA") recorded a Notice of Trustee's Sale in the Clark County Recorder's Office.

7. On or about March 6, 2013, Plaintiff acquired the Property in a foreclosure sale and the Foreclosure Deed was recorded in the Clark County Recorder's Office.

8. 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).

9. Here the first security interest Deed of Trust was first in time and prior to the assessment lien of the homeowner's association.

10. While NRS 116.3116 provides that the assessment lien is prior to the first security interest Deed "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," this provision refers to a judicial foreclosure "action" and is not applicable when the HOA foreclosed its lien under NRS 116.31162-NRS 116.31168, the nonjudicial foreclosure statutes.

11. The HOA 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 HOA.

12. Plaintiff cannot quiet title or obtain declaratory relief seeking to extinguish the first security interest Deed.

13. Plaintiff has not presented a viable basis upon which the Court could grant a preliminary or permanent injunction.

14. Plaintiff has not presented a viable claim for Unjust Enrichment.

IT IS THEREFORE ORDERED that Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And, it is further

ORDERED, that Defendant Lucia Parks' Joinder in Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And it is further

ORDERED, that Defendant U.S. Bank, N.A.'s Motion to Expunge Lis Pendens, joined by Defendant Lucia Parks, is GRANTED. And, it is further

ORDERED, that the notice of pendency of action is hereby cancelled, and this cancellation has the same effect as an expungement of the original notice. And it is further

ORDERED, that Plaintiff shall record with the Clark County Recorder a copy of this order of cancellation of the notice of pendency of action. And, it is further

ORDERED, that this case is dismissed in its entirety.

DATED this 11th day of June, 2013

DISTRICT JUDGE

I hereby certify that on the date filed, I mailed or placed a copy of this Order in the Attorney's folder in the Clerk's Office to:

Chelsea Crowton, Esq.	(Wright, Finlay & Zak)
Diana Cline, Esq.	(Howard Kim & Associates)
D. Chris Albright, Esq.	(Albright, Stoddard, Warnick & Albright)

DIANE SANZO , Judicial Assistant

TAB 37

NEOJ
WRIGHT, FINLAY & ZAK, LLP
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
(702) 475-7964; Fax: (702) 946-1345
ccrowton@wrightlegal.net
Attorney for Defendant,
U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **NOTICE OF ENTRY OF ORDER**

TO ALL INTERESTED PARTIES:

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PLEASE TAKE NOTICE that an Order for Dismissal and Cancellation of Notice of Pendency of Action was entered in the above-entitled Court on the 11th day of June, 2013, a copy of which is attached hereto.

DATED this 12th day of June, 2013.

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

AFFIRMATION

Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **NOTICE OF ENTRY OF ORDER** filed in Case No. A-13-678814-C **does not** contain the social security number of any person.

DATED this 12th day of June, 2013.

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **NOTICE OF ENTRY OF ORDER** was made on the 12th day of June, 2013, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Howard C. Kim, Esq.
Diana S. Cline, Esq.
Victoria L. Hightower, Esq.
HOWARD KIM & ASSOCIATES
400 N. Stephanie St., Suite 160
Henderson, NV 89014
Attorneys for Plaintiff

_____/s/ Ashley Renteria_____
An Employee of WRIGHT, FINLAY & ZAK, LLP

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CLERK OF THE COURT

ORDM

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC,

Plaintiff,

vs.

U.S. BANK, N.A., LUCIA PARKS,

Defendants.

CASE NO. A-13-678814-C
DEPT NO. XVIII

ORDER FOR DISMISSAL AND CANCELLATION OF NOTICE OF PENDENCY OF ACTION

Defendant U.S. Bank N.A.'s Motion to Dismiss with Prejudice Plaintiff's Complaint, and Motion to Expunge Lis Pendens, and Defendant Lucia Parks' Joinders thereto came on for a hearing before the above-entitled Court on June 4, 2013, with Judge David Barker presiding. The Court, having considered all of the pleadings on file herein, and having considered the arguments of counsel, hereby finds as follows:

1. This matter concerns property commonly known as 2270 Nashville Avenue, Henderson, Nevada, 89052, Parcel No. 178-19-712-012 (the "Property").

2. On or about January 5, 2006, Defendant Lucia Parks obtained title to the Property through a Grant Bargain Sale Deed from Albert Brandelli and Mary Brandelli which was recorded in the Clark County Recorder's Office. Parks executed a Deed of Trust and Note whereby Wells Fargo Bank, N.A. was stated as the Lender and United Title of Nevada as the Trustee under the Deed of Trust.

3. On or about February 24, 2010, a Notice of Default and Election to Sell under Deed of Trust was recorded in the Clark County Recorder's Office.

4. On or about May 24, 2012, a Notice of Delinquent Assessment Lien was recorded in the Clark County Recorder's Office.

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 18

5. On or about June 7, 2012, Wells Fargo Bank, N.A. recorded an Assignment of Deed of Trust against the Property to U.S. Bank National Association ("U.S. Bank, N.A."), as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through, Certificates Series 2006-AR4 in the Clark County Recorder's Office.

6. On or about February 7, 2013, Nevada Association Services, Inc., agent for Copper Ridge Community Homeowners Association ("HOA") recorded a Notice of Trustee's Sale in the Clark County Recorder's Office.

7. On or about March 6, 2013, Plaintiff acquired the Property in a foreclosure sale and the Foreclosure Deed was recorded in the Clark County Recorder's Office.

8. 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).

9. Here the first security interest Deed of Trust was first in time and prior to the assessment lien of the homeowner's association.

10. While NRS 116.3116 provides that the assessment lien is prior to the first security interest Deed "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," this provision refers to a judicial foreclosure "action" and is not applicable when the HOA foreclosed its lien under NRS 116.31162-NRS 116.31168, the nonjudicial foreclosure statutes.

11. The HOA 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 HOA.

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 18

12. Plaintiff cannot quiet title or obtain declaratory relief seeking to extinguish the first security interest Deed.

13. Plaintiff has not presented a viable basis upon which the Court could grant a preliminary or permanent injunction.

14. Plaintiff has not presented a viable claim for Unjust Enrichment.

IT IS THEREFORE ORDERED that Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And, it is further

ORDERED, that Defendant Lucia Parks' Joinder in Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And it is further

ORDERED, that Defendant U.S. Bank, N.A.'s Motion to Expunge Lis Pendens, joined by Defendant Lucia Parks, is GRANTED. And, it is further

ORDERED, that the notice of pendency of action is hereby cancelled, and this cancellation has the same effect as an expungement of the original notice. And it is further

ORDERED, that Plaintiff shall record with the Clark County Recorder a copy of this order of cancellation of the notice of pendency of action. And, it is further

ORDERED, that this case is dismissed in its entirety.

DATED this 11th day of June, 2013

DISTRICT JUDGE

I hereby certify that on the date filed, I mailed or placed a copy of this Order in the Attorney's folder in the Clerk's Office to:

Chelsea Crowton, Esq. (Wright, Finlay & Zak)
Diana Cline, Esq. (Howard Kim & Associates)
D. Chris Albright, Esq. (Albright, Stoddard, Warnick & Albright)

DIANE SANZO , Judicial Assistant

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 16

TAB 38

MAMJ
HOWARD C. KIM, ESQ.
Nevada Bar No. 10386
E-mail: howard@hkimlaw.com
DIANA S. CLINE, ESQ.
Nevada Bar No. 10580
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: diana@hkimlaw.com
HOWARD KIM & ASSOCIATES
400 N. Stephanie St, Suite 160
Henderson, Nevada 89014
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Plaintiff, 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, a Nevada non-profit corporation and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **MOTION TO ALTER OR AMEND JUDGMENT**

SFR INVESTMENTS POOL 1, LLC ("SFR") hereby submits its Motion to Alter or Amend Judgment ("Motion"). This Motion is made pursuant to Rule 59(e) of the Nevada Rules of Civil Procedure ("NRAP"), the following Memorandum of Points and Authorities, and

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any oral argument that may be made by counsel at the time this matter is heard.

DATED this 26th day of June, 2013.

HOWARD KIM & ASSOCIATES

/s/ Jacqueline A. Gilbert
Howard C. Kim, Esq.
Nevada Bar No. 10386
Diana S. Cline, Esq.
Nevada Bar No. 10580
Jacqueline A. Gilbert, Esq.
Nevada Bar No. 10593
400 N. Stephanie St., Suite 160
Henderson, Nevada 89014
Phone: (702) 485-3300
Fax: (702) 485-3301
Attorneys for Plaintiff

HOWARD KIM & ASSOCIATES
400 N. STEPHANIE ST, SUITE 160
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

NOTICE OF HEARING

PLEASE TAKE NOTICE that on 30 day of July, 2013, in Department 18 of the above-entitled Court, at the hour of 8:15 a.m./~~p.m.~~, or as soon thereafter as counsel may be heard, the undersigned will bring Plaintiff's Motion to Alter or Amend Judgment before this Court for hearing.

DATED June 26th, 2013.

HOWARD KIM & ASSOCIATES

/s/ Jacqueline A. Gilbert
Howard C. Kim, Esq.
Nevada Bar No. 10386
Diana S. Cline, Esq.
Nevada Bar No. 10580
Jacqueline A. Gilbert, Esq.
Nevada Bar No. 10593
400 N. Stephanie St., Suite 160
Henderson, Nevada 89014
Phone: (702) 485-3300
Fax: (702) 485-3301
Attorneys for Plaintiff

/ / /

HOWARD KIM & ASSOCIATES
400 N. STEPHANIE ST, SUITE 160
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION and LEGAL STANDARD

Rule 59(e) of the Nevada Rules of Civil Procedure allows a district court to alter or amend its judgment for a number of reasons. Basic grounds for altering or amending pursuant to Rule 59(e) include "'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law.'" *AA Primo Builders, LLC v. Washington*, 126 Nev. ___, ___, 245 P.3d 1190, 1193 (2010), quoting Coury v. Robison, 115 Nev. 84, 124-27, 976 P.2d 518. So long as a motion to reconsider, vacate, set aside, or reargue [a final judgment]" is made in writing within ten days of entry of the judgment, it will be given "NRAP 59(e) status, with tolling effect under NRAP 4(a)(4)(C)." *Id.* at ___, 245 P.3d at 1194-95.[1]

Here, there are at least three reasons why amendment or alteration is appropriate both to correct manifest error and injustice and for newly discovered evidence and. First, SFR requests this Court consider newly discovered evidence not available at the time of briefing which support SFR's construction of the statute that "action" does not require a judicial foreclosure and that the statute is not intended to create a mere "payment priority." Second, the Order's dismissal of SFR's claims against defendant Lucia Parks ("Parks"), the former homeowner, and expunging the lis pendens constitutes manifest error and injustice against SFR, because the HOA's foreclosure sale divested any interest Parks had in the Property "without equity or right of redemption." *See* NRS 116.31166(2). Finally, if this Court grants this motion, the lis pendens should remain in place, and if the Court denies the motion, the litigation continues and will continue through appeal. Thus, despite the unsettled state of the law, expunging the lis pendens causes manifest injustice to SFR as SFR will lose its property to a buyer at a foreclosure sale who will not have notice fo the continuing dispute as to the validity of U.S.Bank's lien.

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[1] A motion to alter or amend must be filed no later than 10 days after service of the written notice of entry of the judgment. NRCP 59(e). Here, the Order was entered on May 11, 2013 and was served in open Court at a hearing on May 12. 2013. Notice of entry of order was filed on May 12, 2013. Thus, pursuant to NRCP 59(e) and NRCP 4(a), this Motion is timely filed.

HOWARD KIM & ASSOCIATES
400 N. STEPHANIE ST, SUITE 160
HENDERSON, NEVADA 89014
(702) 485-3300 FAX (702) 485-3301

II. FACTUAL BACKGROUND

Parks Acquires the Property but Defaults on Association Assessments: SFR Purchases the Property at the Association Foreclosure Sale

In 2006, Parks purchased a property at 2270 Nashville Avenue, Henderson, Nevada 89052, Parcel No. 178-19-712-012 (the "Property"), which is located in a common interest community governed by a common-interest association, Copper Ridge Community Association (the "Association"), and the Declaration (CC&R's) recorded in 1997. In 2006, Parks executed a note secured by a Deed of Trust recorded against the Property, the beneficial interest in which was transferred to U.S. Bank, N.A. ("U.S. Bank") through one of two assignments recroded in July of 2010 or June of 2012. Parks defaulted on his monthly assessments to the Association. On July 19, 2012, the Association recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. On February 7, 2013, the Association recorded a Notice of Foreclosure Sale. SFR purchased the Property at the Association's public-held foreclosure sale on March 1, 2013, and the Foreclosure Deed was recorded on March 6, 2013. As recited in the HOA Foreclosure Deed, the HOA foreclosure sale complied with all requirements of law, including but not limited to, the elapsing of 90 days, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale. U.S. Bank failed to cure the default before the superpriority portion of the lien before the sale.

Notices of Default by the First Security Interest

In the meantime, on February 24, 2010, a Notice of Default and Election to Sell was recorded against the Property by the alleged trustee under the Deed of Trust for amounts due as of November 1, 2009. Three Notices of Trustee's Sale were recorded in 2010, 2011, and again on March 11, 2013. This final notice stated that the Property would be sold at public auction pursuant to the First Deed of Trust on March 26, 2013. U.S.Bank failed to mail a copy of the Ntoice of Trustee's Sale to SFR, despite the Association's Foreclosure Deed having been recorded on almost a week earlier.

The Ensuing Litigation

Subsequently, SFR filed a Complaint seeking to quiet title in its favor, a declaration that

Defendants have no right, title or interest in the Property, and a preliminary and a permanent injunction preventing Defendant U.S. Bank from continuing foreclosure proceedings on the Property. SFR also applied for a temporary restraining order ("TRO") and preliminary injunction on March 27, 2013. This Court granted the TRO and set the hearing for the motion for preliminary injunction. On May 16, 2013, defendant Parks joined SFR's motion. For a variety of reasons, the Court continued the hearing on the motion for preliminary injunction, which was eventually heard on May 16, 2013, and on May 17, 2013 issued a minute order denying the preliminary injunction but staying the determination for thirty days from the notice of entry of order. The order was entered on June 10, and the notice of entry was entered on June 11, 2013.

In the interim, on April 30, 2013, U.S.Bank filed a motion to expunge lis pendens on and motion to dismiss. The motion to expunge was to be heard on May 16, 2013. SFR filed its opposition to the expungment motion on May 15, 2013. On May 16, 2013, Parks filed a joinder in the motion to expunge. The Court continued the hearing until June 4, 2013, the same day as the motion to dismiss. Again, on the day of the hearing, Parks filed a joinder in the motion to dismiss. SFR filed its opposition to the motion to dismiss on May 24, 2013. On May 31, 2013, SFR supplemented its opposition with a copy of the order entered by the Hon. J. Tao in *First 100, LLC v. Burns*, Case No. A677693 (May 30, 3013) and with a letter dated May 29, 2013, from Carl Lisman, one fo the drafters of the UCIOA, to Michael Buckley and Karen Dennison, co-chairs of the Common-Interest Committee of the Real Property Section of the Nevada State Bar (the "Lisman Letter"). After the hearing, the Court continued the matter to its Chamber Calendar for decision. On June 10, 2013, the Court issued its Order for Dismissal and Cancellation of Notice of Pendancy of Action (the "Order") and the notice of entry was filed on June 11, 2013.

The Legislative Session Ends, Having Considered and Rejected Significant Changes to NRS 116.3116

On June 3, 2013, the regular 77th Nevada Legislative Session ended, in which NRS

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116.3116 was considered and, ultimately amended, but without any abrupt changes.[2] At a May 17, 2013 hearing, Chairman Frierson announced that the current language in S.B. 280 would be replaced with an amendment originally proposed for A.B. 98.[3] He outlined an oral amendment to the **proposed replacement language that completely eliminated an association's ability to foreclose on the super priority portion of its lien.**

After the amendment passed out of the Assembly,[4] the Common-Interest Committee of

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[2] *See* April 1, 2013 Senate Committee on Judiciary hearing, available at http://nvleg.granicus.com/MediaPlayer.php?publish_id=2de721d1-ec60-1030-b4c5-84d7a9c8f15d starting at 00:46:18 (hearing on S.B. 332); April 30, 2013 Senate Committee on Judiciary hearing, available at http://nvleg.granicus.com/MediaPlayer.php?publish_id=865a44ee-03d3-1031-bce9-7f882e4cf4e2 at 01:46:12 (hearing on A.B. 98, noting additional testimony needed on NRS 116.3116); May 6, 2013 Senate Committee on Judiciary, available at http://nvleg.granicus.com/MediaPlayer.php?publish_id=42086428-07df-1031-8b21-673bf20d68e3 starting at 00:16:49 (hearing on A.B. 98 including testimony from Gail Anderson, Administrator of the Nevada Real Estate Division); May 17, 2013 Senate Committee on Judiciary, available at http://nvleg.granicus.com/MediaPlayer.php?publish_id=030b4b2f-1dd0-1031-8b21-673bf20d68e3 at 01:36:27 (work session adopting Amendment 4 to A.B. 98, with Chairman Segerblom acknowledged that issues relating to NRS 116.3116 needed further attention).

SFR requests this Court take judicial notice of legislative history of S.B. 332, S.B. 280 and A.B. 98 referenced and attached herein. Pursuant to FRCP 201, this Court may take judicial notice of facts "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The legislative history, is publicly available from sources whose accuracy cannot reasonably be questioned.

[3] *See* Assembly Committee on Judiciary, May 17, 2013 http://nvleg.granicus.com/MediaPlayer.php?publish_id=547583bc-12c4-1031-8b21-673bf20d68e3.

[4] In the Legislative Counsel Digest of the Second Reprint of S.B. 280, the Legislative Counsel Bureau summarized existing law in this way:

> Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. **The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)**

S.B. 280, Second Reprint, p. 1 (May 24, 2013) (emphasis added), attached hereto as **Exhibit 1.**

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the Nevada State Bar Real Property Section sought counsel from Carl Lisman, one of the drafters of the Uniform Common Interest Ownership Act ("UCIOA") and other uniform acts. Mr. Lisman provided an opinion letter setting forth the meaning and purpose behind UCIOA and specifically the evolution of the super priority lien, which was provided to the Assembly and Senate Judiciary committee members on June 1, 2013. *See* Lisman Letter, attached to SFR's Supplement to Opposition to Motion to Dismiss as Ex. 2. Mr. Buckley was also one of the principal drafters of the bill adopting the UCIOA in Nevada in 1991. Mr. Lisman has authenticated his opinions set forth in the Lisman Letter in an affidavit dated June 17, 2013. Affidavit of Carl Lisman (June 17, 2013), attached hereto as **Exhibit 2.** After considering the testimony of the Nevada Real Estate Division and information provided by the Common-Interest Committee of the Nevada State Bar Real Property Section, including the Lisman Letter, the Legislature rejected amendments to NRS 116.3116 that would have changed the super priority portion of an association's lien to a mere payment priority.[5] *See* S.B. 280, As Enrolled, attached hereto as **Exhibit 3**.

Because SFR had already filed its opposition and supplement, the Lisman Affidiavit was

——————————— (continued)

> The Legislative Counsel Digest of the Second Reprint of S.B. 280 makes it clear that the proposed amendments to NRS 116.3116 represent a change to the association's lien and the association's ability to foreclose:
>
> **This bill <u>revises</u> provisions governing the association's lien on a unit and the foreclosure of the association's lien. <u>Section 10 of this bill provides that the association does not have a priority lien over the first security interest when the association forecloses its lien, and thus, the foreclosure of the association's lien does not extinguish the first security interest on the unit.</u>** However, under **section 7** of this bill, if the holder of the first security interest forecloses on a unit, the association has a lien on the unit which is prior to the first security interest.

Id.

[5] The Legislature's passing of S.B. 280, which authorizes the holder of a first security interest to create an escrow or impound account "for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115" mirrors the suggestion in Comment 1 to Section 3-116 of UCIOA. *Compare* S.B. 280, As Enrolled, Sec. 7, ¶ 3) *with* UCIOA 3-116, Comment 1, p. 155. Changes to NRS 116 through S.B. 280 will not be effective until October 1, 2013. No provision in S.B. 280 suggests that the Legislature intended it to be retroactive.

not yet available and this Court did not have the most recent Legislative history or additional analysis on the UCIOA and NRS 116.3116 before issuing its ruling. Further, this Court misapplied the law in dismissing SFR's claims against Parks, whose interest in the Property transferred to SFR with the Association's foreclosure sale. Finally, SFR believes that espunging the lis pendens while the case is still pending, via this Motion or through a subsequent appeal, is both an error of law and manifestly unjust to SFR, given the widely disparate decisions interpreting NRS Chapter 116 and the fact that the Nevada Supreme Corut has yet to weigh in on the issues. SFR brings this Motion to Alter of Amend Judgment based on new evidence, on errors in law, and to avoid manifest injustice.

III. ARGUMENT

A. NEWLY DISCOVERED EVIDENCE SUPPORTS ALTERING OR AMENDING THE JUDGMENT

The June 11, 2013 Order concluded that non-judicial foreclosure of an Association Lien including super-priority amounts does not extinguish the first security interest's lien. *See* Order, at ¶ 11. Specifically, the Order stated that the language ""institution of an action ot enforece the lien" as used in NRS 116.3116, refers to a "judicial foreclosure 'action' and is not applicable when the HOA foreclosed its lien under . . . the nonjudicial foreclosure statutes." *Id.* at ¶ 10. Thus, as stated in the Order, "[t]he HOA may have a priority for payment of its lien, but the first security interst was not exintguished by the foreclosure sale conducted by the HOA." *Id.* at ¶ 11. Based on these conclusions, the Court ordered SFR's complaint dismissed as to US Bank.

Pursuant to Rule 59(e), as discussed supra, amendment or alteration of a court order is appropriate if the court is presented with newly discovered evidence. SFR's opposition to U.S. Bank's motion to expunge lis pendens and motion to dismiss were filed on May 15, 2013 and May 24, 2013 respectively. SFR filed a supplement to its opposition to motion to dismiss on May 31, 2013, including the Lisman Letter dated May 29, 2013. As discussed more fully below, information from the Nevada Legislature's 2013 77th Legislative Session including the Lisman Affidavit provide guidance and opinions interpreting the meaning and effect of NRS 116.3116. The Legislative Session ended on June 4, 2013 and the Lisman Affidavit authenticating the

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statements in his letter was obtained on June 17, 2013. The Order was entered on June 11, 2013. Thus, the above-referenced evidence was not available at that time. This Court should amend or alter its June 11, 2013 Order after considering the Legislative history from this current session, and the Lisman Affidavit, which support or conclude that a first security interest can be extinguished by an Association's foreclosure sale pursuant to NRS 116.3116.

Lissman Explains that The Intent of the UCIOA is that an Association's Foreclosure is Intended to Extinguish a First Security Interest that does not Cure the Super-Priority Portion of the Lien

As this Court is aware, in 1991, Nevada adopted, almost whole-cloth, the Uniform Common Interest Ownership Act ("UCIOA") in NRS Chapter 116. As the Nevada Supreme Court recognized, this was done to "'make uniform the law with respect to the subject of this chapter among states enacting it.'" *Boulder Oaks Community Ass''n v. B. & J Andrews Enterpises, LLC*, 215 P.3d 27, 31 (Nev. 2009), quoting NRS 116.1109(2). By doing so, courts can also rely on the comments to the UCIOA in interpreting NRS Chapter 116. *See id.* at 32 (relying on the comments to the UCIOA in construing NRS 116.003).

Because the Nevada Legislature was considering a number of amendments to NRS Chapter 116 during this 2013 Legislative Session,[6] Michael Buckley[7] and Karen Dennison, co-

[6] During the 77th (2013) Session of the Nevada Legislature, the NRS 116.3116 was the subject of several proposed bills. One of the amendments to a Senate Bill considered changing the existing law to preserve the first security even after an association forecloses on the super priority portion of its lien. *See* Ex. 1. Under the amendment, an association's super priority lien would be only a payment priority and would not extinguish the first security interest. Ultimately, the Legislature rejected making abrupt changes to NRS 116.3116. *Id.* In the end, the Legislature passed Senate Bill 280 and Assembly Bill 273, neither of which affected the language in NRS 116.3116 that give associations' liens super priority for both abatement charges and up to nine months of assessments.

These bills were passed after the Legislature held several hearings on the super priority portion of homeowners associations' liens and the ability of an association to foreclose. The Legislature took testimony from various people and groups, including the Nevada Real Estate Division and the Common-Interest Committee of the Nevada State Bar Real Property Section (State Bar). The testimony and supporting documentation provided to the Legislature by both the Nevada Real Estate Division and the State Bar support SFR's interpretation of NRS 116.3116. The legislation passed during the 2013 Legislative Session is consistent with the Real Estate Division's advisory opinion and interpretation of existing law.

[7] Mr. Buckley was one of the proponents of the legislation that adopted the UCIOA in Nevada and was relied on extensively by Assemblyman Richard McArthur, who proposed AB 361 in 2009, which added abatement charges to the super-priority lien. *See* AB 361; *see also* Hearing on A.B. 361 Before the Senate Judiciary Comm., 75th Leg. (Nev. May 6, 2009) ("I deferred a lot to Mr. Buckley in his technical changes [to the bill]."

chairs of the Common-Interest Committee of the Real Estate Property Section of the Nevada State Bar, sought clarification of the very issue at hand—whether an Association's foreclosure of its assessment lien extinguishes a first security interest—from Carl H. Lisman, one of the original authors of the UCIOA.[8] In his May 29, 2013 answering letter, Mr. Lisman answered "Yes."[9] He has since authenticated his opinions in an affidavit (Ex. 3). He explains that one of the most important conclusions the drafting committee reached was to empower the association and "address[] the need of the association to be funded." Lisman Letter, at p. 5. To provide this power, the drafters of the UCIOA determined that the power would arise in the form of a statutory lien. *See* Lisman Affidavit at ¶15. The drafters then addressed the priority of the association's lien. Id. at ¶ 16. He further explains that if the lien for assessments arose after the first security interest, as would most likely be the case, and is the case here, foreclosure of the Association's lien would be junior to the first security interest. *Id.* "As a result, a foreclosing association [or the purchaser at the foreclosure sale] would take subject to the first security interest – not a practical result – **or, worse, be foreclosed by the holder of the first security interest.**" *Id.* To remedy this problem, the drafters created "**a priority rule, not a payment rule:** 'A lien under this section is prior to all other liens and encumbrances on a unit.'" Id. at ¶ 17. As Mr. Lisman avers, "Had 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." *Id.* In order to balance the needs of the first priority interest holders and the associations, "Fannie Mae and Freddie Mac that proposed the solution that exists today, "Give the association a limited priority

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[8] Mr. Lisman provided a summary of his experience and background in the letter. He was a member of the drafting committee of the UCIOA and chaired the committee that amended the UCIOA in 1994 and in 2008. *See* Ex. 2. He has firsthand knowledge of the intent of the provisions of the UCIOA.

[9] In a presentation given to the Maryland Talk Force on Common Ownership Communities of the the Maryland Department of Housing and Community Develoment on January 23, 2006, Mr. Lisman provided the same conclusions that he provided in his May 29, 2013 letter. *See* BACKGROUND ON THE FORMATION [1975] & BIRTH [1982*] OF: THE UNIFORM COMMON INTEREST OWNERSHIP ACT, available at http://epohoa.org, search for lisman. A true and accurate copy of the article is attached hereto as **Exhibit 4.** In this article, Mr. Lisman explained that the drafters of the UCIOA analogized assessments with taxes for purposes of the super priority portion of the lien, because an Association provides services that must be paid for from its budget, therefore every unit owner must pay so the Association can function. See Ex. 4, at p. 5-6.

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ahead of the first security interest . . . equal to six months of assessments under the annual budget. . . .'" *Lisman Letter*.

> Citing to the Official Comments, Mr. Lisman continued:
>
> as to prior first security interests the association's lien does have priority for six [in Nevada, nine] months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lender.

Id. at 5-6.

In analyzing how the super-priority portion of the lien works, Mr. Lisman states that it is not merely a payment priority with first right to proceeds from a foreclosure sale. Rather, he explains that "**[i]t also 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**." *Id.* at 6 (emphasis added); Lisman Affidavit at ¶ 22. His reasoning is that the customary rules of foreclosure and priority in real property law apply: "foreclosure of a lien entitled to priority extinguishes that lien and all subordinate liens," with the lien attaching to the proceeds of the sale. Lisman Affidavit at ¶ 23 and n.17. Thus, to protect its interest, the holder of the first security interest should pay the priority amount by (1) paying the itself; (2) requiring its borrower to pay the priority amount, or should require the nine months assessments [in Nevada] be escrowed, or to the Association. Lisman Letter, at 6; *see* Lisman Affidavit at ¶ 23-24. Based on this intent behind the UCIOA and, by extension, the Nevada Legislature, his Court should alter or amend its Order accordingly.

C. THE ORDERS GRANTING DISMISSAL TO DEFENDANT PARKS AND EXPUNGING THE LIS PENDENS SHOULD BE VACATED AS MANIFEST ERROR AND TO PREVENT MANIFEST INJUSTICE

Pursuant to Rule 59(e), amendment or altering an order or judgment is appropriate to correct manifest error or law and to prevent manifest injustice. *AA Primo Builders, LLC v. Washington*, 126 Nev. ___, ___, 245 P.3d 1190, 1193 (2010). Here, dismissing defendant Parks was clear error because, even under the Court's construction of NRS 116.3116, SFR took Park's

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interest. Further, expunging the lis pendens creates manifest injustice towards SFR, especially where the construction of the NRS 116.3116 remains uncertain and unresolved by the Nevada Supreme Court.

1. *NRS 116.31166 Requires Vacating the Order Dismissing SFR's Claims Against the Former Homeowner*

Without comment or analysis, the Order dismissed not only the claims against U.S. Bank with prejudice, but also granted Lucia Parks' Joinder, thereby dismissing with prejudice SFR's claims against Parks. Granting dismissal of SFR's claims against Parks, the former homeowner, constitutes legal error. Foreclosure of deed of trust or an Association's lien against real property divests the property owner of any interest in the property. *See Buiding Energetix Corp. v. EHE, LP*, 129 Nev. ___, ___, 294 P.3d 1228, 1232 (2013) (analyzing the meaning of "without equity or right of redemption" as used in NRS 107.050(5)); see also NRS 116.31166(2). NRS 116.31164 provides the procedures for an Association's foreclosure sale and the subsequent delivery of the foreclosure deed "which conveys to the grantee all title of the unit's owner to the unit[.]" NRS 116.31164(3)(a). **A foreclosure deed made pursuant to NRS 116.31164** and containing recitals of the default, mailing of the notice of delinquent assessment, and recording of the notice of default and election to sell, the elapse of 90 days, and the giving of notice of sale **is "conclusive of the matters recited against the unit's former owner**, his or her heirs and assigns, and all other persons." NRS 116.31166(2) (emphasis added).

Here, SFR purchased the Property at the Association's non-judicial foreclosure sale on March 1, 2013, and the Foreclosure Deed was recorded on March 6, 2013. See Foreclosure Deed, attached to Exhibits to TRO filed May 9, 2013, as Ex. 1. The Forclosure Deed includes the recitals required pursuant to NRS 116.31166(1):

> This conveyance is made pursuant to the powers conferred upon agent by Nevada Resivsed Statutes, the Copper Ridge Community governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 7/19/2012. . . .Nevada Association Serves, Inc. has complied with all requirements of law including, but not limted to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice fo Default and the posting and publication of the Notice of Sale. . . .

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Id.

Accordingly, the HOA sale divested Parks of his interest in the Property "without equity or right of redemption." NRS 116.31166(3). All of Parks's interest vested in SFR, the purchaser. Based on the foregoing, this Court should vacate its order granting Parks's joinder and dismissing with prejudice SFR's complaint against Parks.

2. *The Lis Pendens Should Not Be Expunged so long as Litigation Continues and the Law Remains Unsettled*

Even if this Court will not amend or alter its judgment as to dismissing SFR's claims against U.S. Bank, it should vacate the Order's expungment of the lis pendens. Because, as set forth above, litigation continues in this case, at least against Parks, therefore expunging the lis pendens constitutes error so long as SFR's claims against Parks remain, as they should.

The lis pendens should remain in place even against U.S. Bank, however, so as to prevent manifest injustice.

"The purpose of recording the lis pendens is to give constructive notice to purchasers or encumbrancers that a dispute involving title or liens is ongoing." *In re Bradshaw*, 315 B.r. 875, 888 (Bankr. D.Nev. 2004), citing NRS 14.101(3); *see Coury v. Tran*, 111 Nev. 652, 655, 895 P.2d 650, 652 (1995) (same). The lis pendens should not be expunged if the action was not brought in bad faith or for an improper motive. *See* NRS 14.015(2)(b). Additionally, the party recording the notice must show it has a fair chance of success on the merits and its injury would be greater than that of the defendant. NRS 14.015(3). Further, when determining whether to expunge a lis pendens, the court should consider the plaintiff's motives and ability to obtain success not only in the litigation, but on appeal. *See Peery v. Super. Court*, 633 P.2d 198, 201 (Cal. 1981) (construing California statute with similar requirements to Nevada law).

Here, SFR is the rightful owner of the property. The dispute regarding liens is ongoing, as SFR will be exercising its right to an appeal if this Court denies the relief requested in this Motion. Leaving the lis pendens in place does not prevent U.S. Bank from proceeding with foreclosure. Its buyer will simply be taking with notice of the ongoing dispute. If, as SFR believes, the Nevada Supreme Court agrees with its interpretation of NRS Chapter 116, then U.S.

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Bank will have wrongfully foreclosed on a Property in which it no longer had an interest; unnecessariy involving third-parties in the ongoing dispute. Such would create a manifest injustice for SFR. It would force SFR to litigate against persons who, without the notice provided by the lis pendens, may argue bona fide purchaser status.

Furthermore, on appeal, the standard that SFR must meet to keep the lis pendens in place is not showing a probability of success on the merits: rather, SFR must "'present a substantial case on the merits when a serious legal question is involved and show that the balance of equitites weighs heavily in favor fo granting the stay.'" Cf *Hansen v. Eighth Judicial Dist. Ct.*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000) (setting forth the standard for granting a stay or injunction pending appeal), quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981). As this Court is aware, the law on the interpretation of NRS 116.3116 and the effect of an Association's non-judicial foreclosure on the first security interest, is far from settled. Courts across the Eighth Judicial District have reached a myriad of decisions, both in favor of the first security interests and of SFR. Even those courts deciding in favor of the first security interests do not agree on the interpretation of NRS 116.3116.

U.S. Bank will suffer little, if any, harm, if the lis pendens remains in place. As discussed above, it could still foreclose and sell the Property if this Court denies the request to vacate the order dismissing the complaint. It will simply be selling the Property subject to the ongoing dispute. Without the relief requested by this Motion, however, SFR is in grave danger of losing the Property, even if the Nevada Supreme Court reverses. SFR should not be subject to such manifest injustice. The Order expunging lis pendens should be amended and denied.

IV. CONCLUSION

Based on the foregoing, SFR respectfully requests that the Court amend or alter the Order entered June 11, 2013 as follows:

1. Deny U.S. Bank's Motion to Dismiss;

2. Deny Lucia Parks's Joinder and vacate the order dismissing SFR's Complaint

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against Parks;

3. Deny U.S.Bank's Motion to Expunge Lis Pendens and Parks's joinder therein;

4. Order the Complaint reinstated;

5. Vacate the order that Plaintiff record a copy of the June 11, 2013 order with the Clark County Recorder; and

5. Reinstate the trial.

DATED June 25, 2013.

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EXHIBIT 1

SENATE BILL NO. 280–SENATOR KIHUEN

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-863)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to common-interest communities; revising provisions governing an association's lien on a unit; revising provisions governing the payment of financial obligations to an association; revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

This bill revises provisions governing the association's lien on a unit and the foreclosure of the association's lien. **Section 10** of this bill provides that the association does not have a priority lien over the first security interest when the association forecloses its lien and, thus, the foreclosure of the association's lien does not extinguish the first security interest on the unit. However, under **section 7** of this bill, if the holder of the first security interest forecloses on a unit, the association has a lien on the unit which is prior to the first security interest. This priority lien consists of the amounts included in the "super-priority lien" under

existing law and the costs of collecting the assessments included in the "super-priority lien," unless the federal regulations adopted by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association or the Department of Veterans Affairs require a shorter period of priority or prohibit the inclusion of collection costs in the "super-priority lien." **Section 7** also limits the amount of the costs of collecting included in the lien upon the foreclosure of the first security interest.

Under **section 8** of this bill, the association may not foreclose its lien by sale based on unpaid collection costs. **Section 9** of this bill requires that certain notice of the foreclosure of the association's lien be provided by certified or registered mail, return receipt requested, rather than by first-class mail.

Section 3 of this bill: (1) sets forth the order in which an association must apply a payment made by a unit's owner who is delinquent in the payment of assessments, unless a contract between the association and the unit's owner provides otherwise; and (2) prohibits the association or its agent from refusing to accept a partial payment from a unit's owner or any holder of a first security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Section 11 of this bill authorizes a unit's owner or the authorized agent of a unit's owner to request from the association a statement concerning certain amounts owed to the association. Under **section 11**, the association may charge certain fees for such a statement. **Section 11** also revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 116 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. ***As used in this section and NRS 116.3116 to 116.31168, inclusive, and section 3 of this act, unless the context otherwise requires, "first security interest" means a first security interest described in paragraph (b) of subsection 2 of NRS 116.3116.***

Sec. 3. ***1. Unless the parties agree otherwise, the association shall apply any sums paid by a unit's owner who is delinquent in paying assessments in the following order:***

(a) Unpaid assessments;

(b) Charges for late payment of assessments;

(c) Costs of collecting past due assessments charged to the unit's owner pursuant to NRS 116.310313; and

(d) All other unpaid fees, charges, fines, penalties, costs of collecting charged to a unit's owner pursuant to NRS 116.310313, interest and late charges.

2. The association or its agent shall not refuse to accept a partial payment from a unit's owner or any holder of a first

security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Sec. 4. NRS 116.1203 is hereby amended to read as follows:

116.1203 1. Except as otherwise provided in subsections 2 and 3, if a planned community contains no more than 12 units and is not subject to any developmental rights, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable.

2. The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, apply to a residential planned community containing more than 6 units.

3. Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, the provisions of NRS 116.3101 to 116.350, inclusive, ***and sections 2 and 3 of this act*** and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, apply to a residential planned community containing more than 6 units.

Sec. 5. NRS 116.12075 is hereby amended to read as follows:

116.12075 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:

(a) This entire chapter applies to the condominium;

(b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, ***and sections 2 and 3 of this act*** apply to the condominium; or

(c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, ***and sections 2 and 3 of this act*** apply to the condominium.

2. If this entire chapter applies to a nonresidential condominium, the declaration may also require, subject to NRS 116.1112, that:

(a) Notwithstanding NRS 116.3105, any management, maintenance operations or employment contract, lease of recreational or parking areas or facilities and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(b) Notwithstanding NRS 116.1104 and subsection 3 of NRS 116.311, purchasers of units must execute proxies, powers of attorney or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

Sec. 6. NRS 116.31068 is hereby amended to read as follows:

116.31068 1. Except as otherwise provided in subsection 3, an association shall deliver any notice required to be given by the

association under this chapter to any mailing or electronic mail address a unit's owner designates. Except as otherwise provided in subsection 3, if a unit's owner has not designated a mailing or electronic mail address to which a notice must be delivered, the association may deliver notices by:

(a) Hand delivery to each unit's owner;

(b) Hand delivery, United States mail, postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(c) Electronic means, if the unit's owner has given the association an electronic mail address; or

(d) Any other method reasonably calculated to provide notice to the unit's owner.

2. The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

3. The provisions of this section do not apply:

(a) To a notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive ~~,~~ ***, and sections 2 and 3 of this act;*** or

(b) If any other provision of this chapter specifies the manner in which a notice must be given by an association.

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

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

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

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

~~[~~

3. The ***association has a*** lien ***which*** is ~~[also]~~ prior to ~~[all security interests described in paragraph (b)]~~ ***the first security interest*** to the extent of ~~[any]~~ ***:***

(a) Any charges incurred by the association on a unit pursuant to NRS 116.310312 ***;*** and ~~[to the extent of]~~

(b) Except as otherwise provided in this paragraph, the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding ~~[institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien.]~~ ***a trustee's sale or foreclosure sale of the unit to enforce the first security interest and the costs of collecting those assessments which are charged to a unit's owner pursuant to NRS 116.310313.*** If federal regulations adopted by the Federal Home Loan Mortgage Corporation , ~~[or]~~ the Federal National Mortgage Association ***or the Department of Veterans Affairs*** require a shorter period of priority for the lien ~~[.]~~ ***or prohibit the inclusion of costs of collecting in the lien,*** the ~~[period during which]~~ ***amount of*** the lien ***which*** is prior to ~~[all security interests described in paragraph (b)]~~ ***the first security interest pursuant to this paragraph*** must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding ~~[institution of an action to enforce the lien. ~~This subsection does~~]~~ ***a trustee's sale or foreclosure sale of the unit to enforce the first security interest. The amount of the costs of collecting included in the lien pursuant to this paragraph must not exceed the amounts set forth in the regulations adopted by the Commission pursuant to NRS 116.310313, except that the amount included in the lien to recover the actual costs charged to the association or a person acting on behalf of the association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, must not exceed $500.***

4. The provisions of subsections 2 and 3 do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~[3.]~~ ***5. The holder of the first security interest or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of the first security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.***

6. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~[4.]~~ ***7.*** Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

~~[5.]~~ ***8.*** A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

~~[6.]~~ ***9.*** 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.

~~[7.]~~ ***10.*** A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[8.]~~ ***11.*** The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

~~[9.]~~ ***12.*** In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

~~[10.]~~ *13.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

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

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

➥ whichever date occurs later.

4. The association may not foreclose a lien by sale based on ~~[(a)]~~ *:*

(a) The costs of collecting charged to a unit's owner pursuant to NRS 116.310313.

(b) A fine or penalty for a violation of the governing documents of the association unless:

~~[(a)]~~ ***(1)*** The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or

~~[(b)]~~ ***(2)*** The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(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, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~[first-class mail]~~ ***certified or registered mail, return receipt requested,*** to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

> 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 (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. NRS 116.31164 is hereby amended to read as follows:

116.31164 1. The sale must be conducted in the county in which the common-interest community or part of it is situated, and may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State, except that the sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not. The association or other person conducting the sale may from time to time postpone the sale by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale.

2. On the day of sale originally advertised or to which the sale is postponed, at the time and place specified in the notice or postponement, the person conducting the sale may sell the unit at public auction to the highest cash bidder. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

3. After the sale, the person conducting the sale shall:

(a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign; and

(c) Apply the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

4. The foreclosure by sale of the association's lien does not extinguish the rights of the holder of the first security interest.

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner. ~~[The statement remains effective for the period specified in the statement, which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.]~~

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges

or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~[at no charge]~~ to the unit's owner . ~~[or, if]~~ ***The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If*** the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner or the authorized agent of the unit's owner may request a statement of demand from the association. Not later than 10 days after receipt of a written request from a unit's owner or the authorized agent of the unit's owner for a statement of demand, the association shall furnish a statement of demand to the unit's owner or the authorized agent. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner or authorized agent of the unit's owner.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the unit's owner or the authorized agent of the unit's owner who requested the statement of demand. Unless the unit's owner or the authorized agent of the unit's owner who requested the statement of demand receives a replacement statement of demand, the unit's owner or authorized agent may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

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EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BAYVIEW LOAN SERVICING, LLC	)	
Plaintiff	)	
	)	
v.	)	**2:13-cv-00164-RCJ-NJK**
	)	
ALESSI & KOENIG, LLC et al.	)	

AFFIDAVIT

I, Carl H. Lisman, being first duly sworn, do hereby swear under penalty of perjury as follows:

My Experience and Background

1. I am a lawyer admitted to practice in the State of New York in 1970 and in the State of Vermont in 1971; my New York status is inactive and my Vermont status is active.

2. ***Uniform Law Commissioner.*** I have served as a Uniform Law Commissioner without interruption since 1976. I have been involved, almost continuously, in the drafting of substantially all of the uniform and model laws relating to condominiums, planned communities and cooperatives, time-shares, partition of real estate, land security interests and foreclosure. The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws or the "ULC") was established in 1892. It provides States with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

3. My initial involvement in common interest ownership law was as a member of the ULC's 1976 review committee on the Uniform Condominium Act ("UCA"). Thereafter, I was a

member of the drafting committees that produced the 1980 Uniform Planned Community Act ("UPCA") and the 1982 Uniform Common Interest Ownership Act ("1982 UCIOA"). I was a member of and chaired the committee that amended the Uniform Common Interest Ownership Act in 1994 ("1994 UCIOA").

4. I was a member of and chaired the drafting committee that produced both the 2008 amended Uniform Common Interest Ownership Act ("2008 UCIOA") and the Uniform Common Interest Owners Bill of Rights Act.

5. ***Educator.*** I taught a course on real estate transactions for 18 years as an adjunct professor at Vermont Law School, with an emphasis on common interest ownership law.

6. I have been on the faculty of numerous courses and classes for lawyers and others involved in real estate, including chairing the American Law Institute-American Bar Association's annual course on condominium, planned community and mixed use projects (since 1990) as well as serving on the faculty of the ALI-ABA annual course on resort real estate (since 1990). In those courses, I emphasize the benefits and burdens of the Uniform Laws for developers and their lenders; lenders to unit owners and associations; merchant builders; unit purchasers and sellers; associations; and managers.

7. ***Speaker.*** I've addressed legislative committees in a number of States (including California, Maryland and North Carolina) on the subject of the real property Uniform Laws as well as been an invited speaker at symposia and similar events.

8. ***Peer Organizations.*** I have been a member of and chaired the Common Interest Committee of the American College of Real Estate Lawyers and the Condominium and Planned Community Committee of the ABA Real Property Section.

9. I chaired, until recently, the Joint Editorial Board on Real Property, jointly sponsored by the American College of Real Estate Lawyers, the ABA Real Property Section, the Uniform Law Commission, the Community Association Institute, the American Land Title Association, the American College of Mortgage Attorneys and the American Land Title Association.

UCIOA and NUCIOA

10. Our goals in promulgating the 1982 UCIOA[1] were many, but we believe that we achieved at least two of them:

- We consolidated, into a single statute, the law applicable to the creation and termination of the condominium, planned community and real estate cooperative forms of real estate;[2] the operation of common interest community associations; and protections of consumers in purchases from the declarant and in resale transactions.
- We eliminated substantially all of the variations applicable to common interest communities attributable solely to the legal form of the community and, as to the remainder, we "harmonized" the differences.

11. UCIOA was, as promulgated in 1982 and, as amended and revised thereafter is,

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[1] The ULC has subsequently amended 1982 UCIOA: First, in 1994, to address minor changes and, second, in 2008, to significantly revise Part 3 to expand governance rights for owners and increase transparency of board actions, as well as other changes throughout the rest of the Act. Those changes do not affect my opinions.

[2] The important distinction among these three forms of ownership is who owns what: In a condominium, unit owners own their units individually and, together, they own the common elements, which their association (in which they are mandatory members) manages; in a planned community, unit owners own their units but their association (in which they are mandatory members) owns the common elements; and in a real estate cooperative, the association owns both the units and common elements but owners, by virtue of their membership in the association, have exclusive rights to particular units.

In each, the association has a lien to enforce its assessment authority.

divided into five parts:

- Article 1 contains definitions and general provisions.
- Article 2 provides for the creation, alteration and termination of common interest communities.
- Article 3 concerns the administration of the community association.
- Article 4 deals with consumer protection for purchasers.
- Article 5 is an optional Article which establishes an administrative agency to supervise developers' activities.

12. Nevada enacted NUCIOA in 1991. At that time, Nevada adopted, with variations not relevant in this Affidavit, 1982 UCIOA's Section 3-116. The Nevada version is NRS 116.3116.

13. Roughly half the States have enacted one or more of the Uniform Condominium Act, the Uniform Planned Community Act or one of the iterations of UCIOA.[3]

Priorities

14. The first of the uniform laws addressing common interest communities was the Uniform Condominium Act. It was initially designed to deal with a wide range of issues including flexibility for developers, abuses by developers, the need to protect developer lenders

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[3] UCIOA: Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, West Virginia, Vermont.

Uniform Condominium Act: Alabama, Arizona, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, Washington.

Uniform Planned Community Act: Pennsylvania.

Uniform Common Interest Owners Bill of Rights: Kansas.

after developer failure, separating title documentation from purchaser disclosure, appropriate disclosure for purchasers, and the powers and responsibilities of the association.[4]

15. UCA recognized that the ability of the association to fund itself from assessments required that the association have the ability to protect itself from non-paying owners.[5] It – and the subsequent UPC and 1982 UCIOA – determined that the protection should be in the form of a statutory lien[6] on each unit to secure payment of assessments against the unit or fines against

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[4] Although nothing in the Uniform Condominium Act prohibits a "horizontal" condominium, the presumption that guided its drafting was that a condominium would be vertical, as with mid- and high-rise buildings.

The Uniform Planned Community Act was initially designed to deal with the "multi-unit residential 'planned community' served by common area facilities owned and operated by a homeowner association." Although nothing in the Uniform Planned Community Act prohibits a "vertical" plamed community, the presumption that guided its drafting was that a planned community would be horizontal, as with traditional subdivisions in which the association owned common land.

When we were comparing Uniform Condominium Act and the Uniform Planned Community Act during the 1982 UCIOA drafting process, we immediately recognized that the condominium and planned community forms of ownership were interchangeable, so that a condominium could be created as a traditional "homes association" neighborhood and a planned community could be a high-rise building. With that recognition, we sought to eliminate variations.

[5] The role of the association is critical to the success or failure of the great majority of common interest communities. In that regard, one of the most important conclusions that was reached addressed the need of the association to be properly funded.

Most common interest associations raise funds for their operations by assessing their members; some associations have amenities or other assets that generate income from third parties, but they are few in comparison. Similarly, most associations begin their budgeting process by identifying their expenses and then match up total expenses with assessment revenue. The consequence of this process is that if a single unit owner fails to pay her assessment obligations, the association is forced to cut back its expenses in the same amount – to the end that not all budgeted services can be provided.

In this respect, the association is similar to a involuntary creditor; it is required by statute and its governing documents to provide services even to owners who do not pay their assessments.

[6] UCA § 3-116(a), 1982 UCIOA § 3-116(a) and NUCIOA § 116.3116(a) each provide that the association "has a lien...." 1994 UCIOA amended this subsection to add "statutory" (The association has a statutory lien....") in order to ensure that the association's rights in bankruptcy are protected.

the unit owner.[7] The mere existence of the lien was believed to be sufficient leverage to ensure the association's ability to collect and, if not so, then the association was given the statutory authority to foreclose its lien in the same manner as a security interest.

16. Having decided that the association ought to have a lien to secure payment, the drafters then proceeded to consider the priority to be accorded to the association's lien. There are, generally speaking, five categories of potentially competing liens: Governmental charges and assessments; mortgages and deeds of trust; judgment liens; mechanic's and materialmen's liens; and homestead rights, dower and curtesy rights. These interests are inherently different:

- Governmental charges and assessments include municipal real estate taxes and special assessments; federal tax liens; and state and municipal income tax liens.
- Statutes and judicial decisions differentiate among purchase money mortgages and mortgages that are not purchase money mortgages.
- Judgment liens can arise against individual units or the association.
- Mechanics and materialmen can have claims against the declarant, the association or a unit owner.
- The laws of the States vary significantly relating to homestead rights, dower and curtesy.

If the association's only realistic remedy is foreclosure,[8] the association's lien – for

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[7] Fees, charges, late charges, fines and interest are included in "assessment" for purposes of the lien. 2008 UCIOA added reasonable attorney's fees and other sums due the association under the declaration or as a result of an administrative, arbitration, mediation or judicial decision.

[8] That would be true if pursuit of a money judgment against the unit owner would be futile or impractical.

assessments arising after the unit owner's mortgage or deed of trust was recorded in the office of the recorder – would ordinarily be junior to governmental charges and assessments and the first security interest (and might be subject to prior judgment liens, prior mechanic's and materialmen's liens and homestead, dower and curtesy rights). As a result, a foreclosing association would take subject to the first security interest – not a practical result – or, worse, be foreclosed by the holder of the first security interest.

17. UCA created – and each of UPCA and 1982 UCIOA repeated – a priority rule, not a payment rule: "A lien under this section is prior to all other liens and encumbrances on a unit." UCA §3-116(b), UPCA § 3-116(b), UCIOA § 3-116(b), NUCIOA § 116.3116(2). Had we intended that the priority be only for payment, we would have said so.[9] A payment priority would not serve the goal we were seeking.[10]

18. This priority principle has become the law not only in States that enacted one or more of the Uniform Laws but in a half dozen other States by specific legislation.

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[9] As explained in the Official Comments,

> "To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. ... [A]s to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."

Indeed, until recently I had never heard of a "payment priority" as different from a priority rule

[10] Similarly, 1982 UCIOA § 1-104 (and NUCIOA 116.1104) prohibit a declaration provision that varies the term of the priority rule. Although there are some sections in both laws that allow the drafter of a declaration or bylaws to change a default rule, neither 1982 UCIOA Section 3-116 nor NUCIOA 116.3116 permits a declaration to "undo" the priority rule by, for example, eliminating it or subordinating it. The sections for which variation is permitted are listed in Official Comment 4 to UCIOA. (Both do allow the declaration to provide that fines, late charges and other fees are not treated as assessments.)

19. The association's lien is divided into two parts: One part, sometimes referred to as the "super lien," is ahead of all other interests except real estate taxes and other governmental assessments and charges. It is also superior to "a first security interest on the unit," even if the security interest was recorded before the date on which the assessment sought to be enforced became delinquent. 1982 UCIOA § 3-116(b), NUCIOA § 116.3116(2)(b). The priority portion of the lien is superior in all respects to the first security interest, just as any other superior lien would be. If it were otherwise, the fundamental purpose of the six-month priority would be easily defeated by the presence of a pre-existing security interest, which is precisely what the priority was supposed to correct. In most instances, the association's lien – being so much smaller in amount than the mortgage indebtedness – would never be, as a practical matter, collectible.

Under the Uniform Laws, the calculus of the priority is equal to not more than six months of regular assessments but, upon computation of that amount, the priority amount can be a combination of regular and special assessments, fees, charges, late charges, fines and interest. UCIOA § 3-116(a). In Nevada, the priority calculus is for nine months of regular assessments. NUCIOA § 116.3116(1).[11]

The other part is junior to the first security interest but ahead of other mortgages, deeds of

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[11] A lender faced with the association's limited priority could be expected to protect its collateral by requiring its borrowers to escrow for association assessments in the same manner as lenders have long required escrow for property taxes and casualty insurance. I am not awarethat there are any studies on this subject, but anecdotal evidences strongly suggests that lender rarely – if ever – require a borrower to escrow for association assessments.

trust and encumbrances not recorded before the recording of the declaration.[12]

20. The amount to which the association is entitled under its priority position is the assessment "amount which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien," UCIOA § 3-116(b),[13] or, in Nevada, nine months (NUCIOA § 116.3116(2)). The decision to use "institution of an action" (rather than "commencement of an action") was deliberate in order to ensure that the triggering event not is not limited to the initiation of a judicial action. "Action" means just that: something done. In jurisdictions that employ nonjudicial foreclosure, the action is typically recording a notice of default and giving appropriate notice to interested persons of the date, time and place of the sale.

Foreclosure

21. The association lien is foreclosed, on a unit in a condominium or planned community, in the same manner that a mortgage or deed of trust is foreclosed.[14] Nevada enacted NUCIOA § 116.31162 instead of 1982 UCIOA Section 3-116(j); it left in place

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[12] The association prior position does not affect the priority of mechanic's or materialmen's liens. UCIOA § 3-116(b); NUCIOA § 116.3116(2). UCIOA contains an optional provision confirming that the association's lien is not subject to homestead, dower and curtesy laws; Nevada did not adopt that provision.

[13] The first sentence of 1982 UCIOA is as follows: "The association has a lien on a unit for any assessment levied against the unit or fines imposed against its unit owner from the time the assessment or fine becomes due." That sentence was amended in 1994 to delete "from the time the assessment or fine becomes due" because it appeared to cause confusion with respect to priority issues. The statutory intention was, 1982 and now, that the association's lien is the functional equivalent of real estate taxes (except for the special priority rules set out in subsection (b)). The lien arises by virtue of the statute.

[14] The association's lien is foreclosed "in like manner as a mortgage on real estate." UCA § 3-116(a), UPCA § 3-116(a). 1982 UCIOA re-ordered Section 3-116 but did not change the substance; subsection (j) provides: "The association's lien may be foreclosed as provided in this subsection: (1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or power of sale under [insert appropriate state statute] [or by power of sale under subsection (k)]. Subsequent revisions to UCIOA did not change this.

the provisions relating to non-real estate cooperatives and moved the process rules for foreclosure of units in a condominium, planned community or real estate cooperative to Section 31162. This change nonetheless preserves the association's right to foreclose by sale – the same manner by which a mortgage or deed of trust is foreclosed.[15]

22. The statutory priority of the association's lien is not limited to a first claim against the proceeds from the foreclosure sale (up to the priority calculus). It also 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.[16]

23. That result naturally follows from the customary rule regarding priority of interests in real estate.[17] A foreclosure sale of the association's lien is governed by the same principles generally applicable to lien foreclosure sales, so that foreclosure of a lien entitled to

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[15] I am not admitted to practice in the State of Nevada. In my review of NCUIOA §§ 116.31162 - 31164, I concluded that these provisions have been tailored to deal with units in common interest communities, but the rules embodied in these sections are very similar to process rules in foreclosure of mortgages and deeds of trust.

[16] There is an exception, though very unlikely: If the first security interest is recorded before the declaration, the association's lien would be junior to it.

[17] The Restatement of Property (Mortgages) (1996) states the general rule, in the context of mortgage foreclosure, this way in the Introductory Note to Chapter 7: "[A] valid foreclosure of a senior lien terminates not only the owner's equity of redemption, but all junior interests whose holders are joined as well." Section 7.1 repeats this principle: A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law." By substituting "association lien" for "mortgage," the rule in NUCIOA 116.3116 is clearly understood.

Comment a. to Section 7.1 reaffirms this conclusion: "It is a fundamental principle of mortgage law that a valid judicial foreclosure of a senior mortgage terminates not only the owner's title and equitable redemption rights, but also all other junior interests whose holders were made parties defendant. A power of sale (nonjudicial) foreclosure that complies with applicable statutory notice and related requirements accomplishes the same results. Thus, a purchaser at a foreclosure sale not only acquires the previous owner's interests in the real estate, but a title free and clear of all other properly joined interests that were junior to the foreclosed lien. ... It is equally axiomatic that the title deriving from a foreclosure sale, whether judicial or by power of sale, will be subject to all mortgages and other interests that are senior to the mortgage being foreclosed."

priority extinguishes that lien and all subordinate liens. The liens attach to the proceeds of the sale and are paid out accordingly.

23. The holder of the first security interest can easily protect its position by paying the six-month priority amount to the association and taking an assignment from the association.

Conclusion

24. NUCIOA follows the principles in UCIOA:

- The association enjoys a statutory limited priority ahead of a first security interest similar to the priority given to property taxes and other governmental charges.

- Because of this statutory priority, foreclosure by the association extinguishes a first security interest and all other junior interests whether foreclosure is judicial or nonjudicial.

- The holder of a first security interest can – and should – protect itself against an association foreclosure by requiring that its borrower escrow the full amount of the association's priority and paying it to the association to avoid extinguishment of its security interest.

Dated: June 17, 2013.

Carl H. Lisman

Subscribed and sworn to in my presence this 17 day of June, 2013.

Notary Public

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EXHIBIT 3

Senate Bill No. 280–Senator Kihuen

CHAPTER.....

AN ACT relating to common-interest communities; authorizing the establishment of an impound account for the payment of assessments under certain circumstances; revising provisions governing the collection of past due financial obligations owed to an association; revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

Section 7 of this bill authorizes the establishment of an impound account for advance contributions for the payment of assessments. Under **section 8** of this bill, not earlier than 60 days after a unit's owner becomes delinquent on a payment owed to the association and before the association mails a notice of delinquent assessment or takes any other action to collect a past due obligation, the association must mail a notice to the unit's owner setting forth the fees that may be charged if the unit's owner fails to pay the past due obligation, a proposed repayment plan and certain information concerning the procedure for requesting a hearing before the executive board.

Section 11 of this bill authorizes a unit's owner, the authorized agent of a unit's owner or the holder of a security interest on the unit to request from the association a statement concerning certain amounts owed to the association. Under **section 11**, the association may charge certain fees for such a statement. **Section 11** also revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Sections 1-6. (Deleted by amendment.)

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the

construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

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

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

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

➥ The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

3. ***The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account***

for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.

4. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~[4.]~~ *5.* Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

~~[5.]~~ *6.* A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

~~[6.]~~ *7.* 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.

~~[7.]~~ *8.* A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[8.]~~ *9.* The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

~~[9.]~~ *10.* In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

~~[10.]~~ *11.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection ~~[4,]~~ *5,* in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

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

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

➥ whichever date occurs later.

4. ***An association may not mail to a unit's owner or his or her successor in interest a letter of its intent to mail a notice of delinquent assessment pursuant to paragraph (a) of subsection 1, mail the notice of delinquent assessment or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless, not earlier than 60 days after the obligation becomes past due, the association mails to the address on file for the unit's owner:***

(a) A schedule of the fees that may be charged if the unit's owner fails to pay the past due obligation;

(b) A proposed repayment plan; and

(c) A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing.

5. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:

(a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or

(b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(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, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~[first-class mail]~~ ***certified or registered mail, return receipt requested,*** to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

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 (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. (Deleted by amendment.)

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner. ~~[The statement remains effective for the period specified in the statement, which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in~~

~~the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.]~~

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to

furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~[at no charge]~~ to the unit's owner . ~~[or, if]~~ ***The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If*** the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within

the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit may request a statement of demand from the association. Not later than 10 days after receipt of a written request from the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit for a statement of demand, the association shall furnish a statement of demand to the person who requested the statement. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit, whichever is applicable.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the person who requested the statement of demand. Unless the person who requested the

statement of demand receives a replacement statement of demand, the person may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

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EXHIBIT 4

Articles

Background on the formation [1975] **& birth**[1982*] **of :**

The Uniform Common Interest Ownership Act

– in West Virginia it is known as WV Code §36B

The Uniform Common Interest Ownership Act (UCIOA)

A presentation by Carl Lisman, Chair of the Drafting Committee of the Uniform Common Interest Ownership Act (UCIOA)

June 09, 2006

By Carl Lisman (802) 864-5756 *clisman@lisman.com (http://www.lisman.com/Carl.html)*

Crownsville, Maryland -

The following is a presentation that Carl Lisman , Chair of the Drafting Committee on Amendments to the Uniform Common Interest Ownership Act (UCIOA).and Treasurer of the National Conference of Commissioners on Uniform State Laws presented to the Maryland Task Force on Common Ownership Communities - Maryland Department of Housing and Community Development on January 23, 2006. There were 21 people present at the meeting. A CAI survey was taken and discussed. Roger Winston Task Force Member.member introduced Mr. Carl Lisman.

Introduction of Guest - Roger Winston: "Mr. Carl Lisman is a shareholder in Lisman, Webster, Kirkpatrick & Leckerling, P.C. in Burlington, Vermont. He served as an Adjunct Professor at the Vermont Law School from1982 to 1998, teaching real estate transaction law to third year students. He is a Vermont Commissioner on Uniform State Laws and Treasurer of the National Conference of Commissioners on Uniform State Laws. As a Uniform Law Commissioner, he chaired the drafting committees on the Uniform Common Interest Ownership Act (1994) and the Uniform Nonjudicial Foreclosure Act. He is co-chair of the Joint Editorial Board for Real Property Acts. He received his B.A. from the University of Vermont and his J.D. from Harvard Law School."

Mr. Carl Lisman: Roger's given you a pretty good back ground for those of you who don't know about the National Conference of Commissioners on Uniform State Laws. It's an organization of the states. It was founded over more than 125 years ago and it is the body that brings to the states legislation, carefully thought through legislation we hope, for adoption by the states and most of the laws begin with the word "uniform" like Uniform Commercial Code, Uniform Anatomical Gift Act and the topic which we are about to discuss, the Uniform Common Interest Ownership Act, and the Condominium Act.

I became a uniform laws Commissioner in 1976, I knew very little about the organization and shortly after my appointment I received a letter congratulating me on being appointed a Commissioner, telling me that my first committee meeting will be the meeting of the Uniform Condominium Act Committee in the fall of 1976. I did not know then what a condominium was; it was a word that I had heard there weren't many of those things in Vermont at the time and those that were, were sort of thought to be weird and not anything that would gain traction in the housing market. Times have changed and I'm glad that we went through the true false test, I may be preaching to the choir but more than half the homes started in the United States are homes that will end up in Common Ownership Communities and this gets bigger and bigger everyday and it needs more and more attention on a legislation level.

We finished drafting the Uniform Condominium Act in 1975 and immediately went back and started all over again in 76 and did some further amendments. What we discovered in the states that adopted the Uniform Condominium Act is that people who tried to evade, not avoid but evade, the act were creating what we called planned communities. This might be the time to pause for a second and get our terms straight. I'm going to talk mostly about the Uniform Common Interest Ownership Act, known by it's acronym UCIOA which is an amalgam of three different Uniform laws. Uniform Condominium Act, Uniform Planned Community Act and the Model Real Estate Cooperative Act.

In a condominium unit owners own their own unit; together they are members of an Association. The Association manages the common elements for that property because the unit owners own the common elements together. Tenants on the old law, Tenants and Condominium we don't use that term anymore.

In a planned community the unit owners own their own units and they are members of Associations and the Association owns the common elements. And what the Uniform Act refers to the Real Estate Co-operative, the Association owns the real estate and the units and by virtue of a document frequently called a Proprietary Lease, members have rights to occupy particular units. Those are the big three Common Interest Communities and that's the subject matter of the Uniform Common Interest Ownership Community Act.

We discovered after we did the condo act that people were evading the provisions of the condo act by vesting title to the elements in the Association since the definition of condominiums under the condominium act excluded that. They were of use so we came out with the Planned Community Act and right afterwards the Real Estate Co-op Act. When those were done we asked ourselves the obvious questions, can we smoosh this stuff altogether. Smoosh by the way is a defined legal term.

We smooshed this altogether and came up with the Uniform Common Interest Ownership Act. We also discovered in the smooshing process that we had different rules that made little sense for otherwise physically identical pieces of property. I used to try and trick my students at the Vermont Law School by drawing on the board little stick figures of a box, a house on top, one line going down and one line going across so that it looked like a two story house. I'd draw three of them on the black board and ask which one is the condominium, which one is the planned community and which one was the co-op, and of course you couldn't answer that by looking at the picture because physically identical property can take different forms of the ownership and then if you took that black board and placed it on its side that funny looking figure of the house now becomes a sub-division and with a triangle on them they now become a property and we soon realized that from a legal stand point it made little sense to have the law perpetuate the myth. The myth being that condominiums are high rise buildings, that planned communities are sub-divisions, and that co-ops look

like apartments. Because none of them from a legal stand point has to, and for a variety of good reasons should not be required to fit the mold.

Let me tell you the three basic principles of Common Interest Ownership Act. Remember these and you will pass my course.

The first is that UCIOA is a disclosure law not a regulatory law. Although there is an optional part 5 to UCIOA it is essentially self enforcing through private mechanism. There is no governing overlay in creating a common interest community.

Secondly it's long. You ask yourself, why that is a guiding principle? It's long because many of the provisions of the act begin with the phrase "Unless the declaration otherwise provides." We wanted to create default rules, we wanted to be able to shorten legal documents, we wanted to try to get the process started so that people could make intelligent decisions about whether to buy or lend based on the legal documentation as between 2 physically such as they are, identical projects where the price point is the same, the units are the same, and they really are right next to one another. What is there to differentiate one from the other from a buyer's perspective? We thought that attempting to standardize documentation we could help people see what's outside the norm and then let the market deal with whether or not outside the norm would be attracted to buyers and to lenders. So that we have a document called the Uniform Form 1, a Simple Condominium declaration. Simple Condominium Declaration is 3 ½ pages because the law otherwise fills in all the blanks.

And finally and perhaps most importantly in the underlying principles, when UCIOA was written we believed it to be a very balanced and fair act to all of the constituents who have an interest in common interest ownership communities. Developers to developer's, lenders to buyers, to sellers, units managers to officers and directors to Associations and to some degree to the municipalities that interact with the Associations. It's balanced because of the political realities of getting a very long and complicated law passed through a legislature that is probably not going to say this is not their number one priority or not their number two priority.

I testified in a number of states where the legislative reaction has been it's too long and too complicated and that's a real issue for UCIOA. Once people read it they see how well it works, how balanced it is for all who have an interest. So for those of you who have not read it let me try to distill it for you within just a few minutes of time. I'm going to do it in the context of the four major constituencies in a common interest community.

The developers, the associations, the lenders and the owners. Mostly in that order because that's mostly the order in which the act current deals with these constituency groups. That's not intended to suggest that the developers are more important than others or that lenders should have a lower priority than the association. First, the developer, which under the Uniform Act we call a Declarant. Declarant declares the declarations that's why we call it the declarant. The Declarant gets flexibility and protection. That's probably the most important benefit of the Act to a developer.

Let me point out to you that on the disclosure principle of the Act we go a long way to separate what goes into the Declaration, which gets reported in the land record on the one hand, from what is meaningful information to a perspective buyer or a unit lender on the other hand. We see the Declaration as being a title

document, we don't typically ask home buyers to read title documents. We leave that to abstractors and lawyers, and title insurance companies, they comment on them and they may call something to the attention of a buyer or owner but they're not trained to read those types of documents. Those other folks are.

So, in the first instance we focus on the declaration of the Uniform Act and we say to the developer here's a list of eighteen things that you have to put in every declaration regardless of the type of the project-condo plans, community, co-op, high rise, sub-division, garden apartments, lots, whatever it is under the scope of the act you have to put these things in your declaration. Most of them are pretty basic stuff legally sufficient description of real estate, reference to a plat that shows the boundaries of common interest community, and so forth. But there are a couple of provisions that has to be in the declaration. For title purposes they also have a minor disclosure. As long as developer reserves the right in a declaration to do enumerated events, that developer has a right to do that and that right can not be taken away.

The association says ahah we have wrested control from the associated developer let's take away the developer's rights to build the next building. We call those rights development rights.

Under the Uniform Common Interest Ownership Act the development rights are the rights to

1) Add real estate once identified in the declaration to the common interest community;
2) remove portions of the common interest community from the reach of the declaration;
3) to create units common elements and limited common elements within the region;
4) sub-divide units;
5) to convert units into common elements and vice versa; and as long as the developer specifies in the declaration which or all of those rights it wants to have and the time period in which to exercise them the developer does have those rights. That's a very valuable tool for a developer.

The developer says I'm going to build a 12 story high rise and I'm going to put residential units on all of the floors, the market may change as the project is being build-out, interest rates may change, circumstances may change, outside the project a smart developer will reserve the right to change the size of the units and maybe the floor plans of those units to meet changed market demands.

Becky Bowman: Do you specify a time period that the developer obtain these rights? And how does that work with the representations being made to the purchasers of the units?

Mr. Lisman: Good question for those of you who did not hear the question. Is there a time frame on the exercise on the Developer's rights and how do you deal with the representations that were made to the initial purchasers? Yes, there's time frame when we did the original Uniform Condominium Act we looked intensely at the Virginia Condominium Act which was relatively new at the time and under the Virginia Act it said that those rights can be exercised if at all only within 7 years. We put that in the original Condominium Act and decided after a while that was a really bad idea. Every project is of a different size and complexity. They all change so we finally concluded that the right answer was to say let the developer choose the time period and as long as the developer discloses it, then buyers will know, and they will make a meaningful decision. I've seen documents where the developer's rights have been reserved for 99 years. I've seen disclosure in the public offer statement but I've never seen anybody well and appropriately disclosing a 99 year reservation. I think a 99 year reservation really borderlines in violating the act.

So giving the Developer this flexibility really, really, really is important for developers because they now have a statutory safe harbor which they might not have in common law because judges may say this is unreasonable when the statute says you may do it. In addition to development rights the Act also goes into a concept of special declarant rights. There are too many instances over time where Associations and developers were at odds very early in the process and the Associations tried to stop the developers from finishing the projects. Taking away the right to build Tower C, refusing to let the Developer's construction vehicles on private road way, it goes on and on and on.

So there are a whole bunch of special declarant rights that at least the Act statutorily creates and can not be taken away including the right to complete improvements shown on the plan. A right to go on the common elements for that purpose, it's a pretty extensive list and it's very valuable list because it tells the developers that they are protected. Third point on what the Act is to developers is a statutory right to control the association board for a period of time during build-out and sell-out. The Act is pretty specific about when a certain percentage of the units have been sold that one person has to go on board from among the owners.

Then when a second percentage is reached and so forth until that at a particular point there is a transition where the unit owners have taken control of the Association and there are two important factors here from the Developer's stand point during build-out and sell-out. Controlling the Association, essentially having a veto over the Association, at least with respect to the relationship with the Developer, is a very valuable and comforting asset. But developers don't get away with just getting the asset without having the liability to balance. The liability that balances that right to obtain control are two. One is Directors on the Association Board were appointed by the developer having a higher duty of care than those who are elected by the Unit Owners, they're held to a higher standard. And the second is for so long as the developers retain control over the board, the statute of limitations doesn't begin to run on claims for construction defects with respect to the common owners.

So let me stop there and move to what the Associations get. Under the Uniform Act they get really two things that they wouldn't otherwise. One is there is an extensive list of the numerated powers of the Association. Power to fine, after notice and opportunity to have been heard. In many States' associations have no authority to fine. There's a Virginia Supreme Court decision that says that only the state could fine. Private associations couldn't. Extensive list of the numerated power, sue be sued, own real estate, convey real estate and so forth, because not all associations are incorporated, and because they are not all incorporated there are a number of issues about the power of an association.

And even if they are incorporated there are a number of issues about of what an association can and can not do. Secondly, and also of great importance, the Uniform Act came up with the concept of the super Lien. The Association has the power to assess, maintenance fees, annual assessments what ever you call them. It has a lien either by statute or common law and the declaration especially if it's a planned community. It says that the Association has a lien against the owners unit or lot for the unpaid assessment. The problem with that, if we stop right there is that more likely than not there's going to be a mortgage on the unit or the lot and that mortgage is going to have a priority ahead of the association's lien.

By analogy we looked to municipal taxes in home mortgages and came up with what we thought at the time a very innovative and good solution. We are now convinced that we are more brilliant than we thought we were.

The analogy with home mortgages and taxes is lenders who have a first mortgage will never want to see the property sold for unpaid property taxes, use their powers in mortgaging under the mortgage to pay the taxes and then stick it to the homeowners owner who hasn't paid. They add the balance to the notes of the mortgage. So what we did is we came up with the concept of the super lien. We said that the Association has a priority for unpaid Assessments up to and about equal to 6 months of unpaid assessments and ahead of the first mortgage and what happens of course is the Association contacts the bank, the bank doesn't want to see the unit foreclosed and have their mortgage lowered in priority, the bank advances the unpaid assessments and deals with its delinquent borrower in that context. It really is important for almost every Association that there not be one or two or three people who don't pay their assessments.

These Associations' budgets, and I'm not talking about Columbia where one or two or three people wont' make a difference, I'm talking about the average size Association in the United States today where somebody isn't paying and the Association can't do something that they expect them to do when they adopted the last budget. Otherwise other folks have to subsidize that's not a fair result. So the super lien gives the association some power of great importance. What do lenders get? They get the comfort of good title.

Every state has a law on what lenders can lend for and what collateral they can take and loan value ratios and interest limitations and stuff like that. For a long time there was a question in the legal world as to whether or not you could have what we now label the flying freeholds. That is to say if you have an interest in real estate, the unit that starts on the third floor, your unit doesn't touch the ground it's held up by steel girds, steel girds go into the ground but no part of your unit is attach directly to the ground. The Uniform Act and the predecessor FHA Model Act both legitimize flying freehold. The other area in which they give comfort on title is Unreasonable Restraints on alienation and the Rule Against Perpetuities. For those of you who are lawyers, remember law school was the last time you thought about the Rule Against Perpetuities. Both of those deal with tying interest together over a period of time. In the case of a condominium the tying of the Common Ownership Interest with a unit lasts forever.

We talked about development rights and how important those were to developers and we talked briefly about special declarants rights, of which the developer's rights are a sub-set. Suppose you are a construction lender, you commit to a 25 million dollar construction loan, ABC Inc. is going to build the XYZ condominium project. The whole project is declared without any phasing or reservation of developers rights, the developer starts construction, starts with the infrastructure the water, sewer, the roads and so forth and about a third through the project the developer goes belly up. The loan got out of balance, there was no way that developer would have 2 nickels to rub together, it just didn't work, so now the lender is sitting there saying I've got a project that's 1/3 built. What am I going to do?

Well, one thing the lender could do is go to its own default department and deputize someone there to be the new developer and build the project up. That's happened but lenders don't like to do that because that's not their business, because they are not developers. They are lenders. So the second alternative is to find someone to buy the project. That's where the rub comes. That buyer is going to want to be able to stand in the shoes of the original developer in so far as having all of the rights of the original developer, but if that subsequent developer thought about it for more than 7 seconds, the subsequent developer wouldn't want to have all of the liabilities of the failed original developer. But one of the issues is, should that subsequent developer be responsible for the warranty obligations of the failed developer? And then, just to stir the pot a little more, think of the poor lender.

Because, if the lender, by transferring the developing rights to a successor developer it's deemed itself to be the successor developer, now there are 2 successor developers. If that lender is a successor developer it's the biggest target in town and everything that's wrong with that project is going to result in a law suit with the bank. Now if you want banks to lend to people who build common interest communities then you've got to give them some protection. What we came up with was the concept of Transfer of Special Declarant Rights, which says that if a lender takes the developer's special declarant rights at the time the loan is given and then after default transfer them without exercising them, then that lender is not a successor declarant, and has no liability for what the original developer did or did not do or the subsequent developer will do or doesn't do. It's a way to encourage lenders to lend and a way to make sure that failed projects at least in the construction phase find a new home and a new developer so that they could be built out.

Third, five unit condominium projects, row houses, one right next to the other there's a leak in the roof and the insurance doesn't cover it so the president of the association walks down the street to the bank and says we need a $100,000 to replace the roof, the lender looks at the president of the association and says, great we will be pleased to make you the loan, you have five owners, that's fine just get all five owners to sign the loan. It can be done but it is really difficult and why does the lender say that he wants all five units to sign the mortgage? Because in a condominium the association doesn't own the common units, the unit owners own them. How can an Association give a mortgage on the units, only the unit Owners can so the president rings the door bells and comes back to the bank and says I can't get everybody to sign but we still need the new roof then the bank says no problem I'll give you the money just sign this guarantee right here. The treasurer would have to sign the guarantee too. People don't volunteer for those kinds of reasons. So that left the association between a rock and a hard place especially when the circumstances are dramatic where do you get the money from?

So the Uniform Act says what if the association has a condo playing community collateral? That's really its most valuable asset. The most valuable assess in the association was its ability to assess its members. Backed up by that Assessment plan including a 6 month priority. So the uniform act say that if the declaration authorizes it, the association may pledge the income stream of the association as collateral, it's great for the bank and also great for the association because it means that you don't have to go through all kinds of silly hoops and there's a statutory basis for doing this. We do association loans all the time in states where there is a uniform act, and in states where there isn't, but it's a lot more comforting to the lender when you have this statutory basis.

Finally, what do the owners get? First they get a public offering statement. They're buying from the developer, the developer is required to deliver the purchaser the public offering statement. Understanding what the contract purchaser says there's a contract decision period measured from when the buyer gets the public offering statement. It's a disclosure document we go on in great length about what it is that is suppose to go in the disclosure document. But from a practical perspective it's the kind of information that you or I, if we were going to be buying in a common interest community, would want to know about. Public offering statement is real meat and potatoes.

If you are buying a resale not from the developer but from another unit owner you get a resale certificate. Some what less information than a public offering statement but none the less very meaningful information.

Secondly buyers from the developers get statutory warranties. If there's a model that the unit owner is showing off then the unit that gets actually sold needs to conform to what that actual model looks like, if there are representations made what the units will be and what will be in them and what the view will be those expressed warranties and representations are actionable.

Third there is a requirement that plans be labeled "must be built" or "need not be built" so that the swimming pool or the tennis court, golf course, recreational building whatever it may be shows up on that nice glossy brochure. There has to be a label on there showing these people that I have no intention of building it. Finally for those of you who have experience in condominiums, in planned communities, one of the things you will notice when you compare documents, for what might other wise be physically identical projects, is that votes in the association common expense liability in the condominium, and ownership interest in the common owners, are treated differently.

Under the old FHA Model Act which was the law and 2/3 of the states used until the Uniform laws started to be adopted, it said that those who we call now allocated interest have to be the same for every unit. That is to say if it was 3.4% Ownership Interest in the common elements, it's 3.4% interest common expense liability and 3.4% of the votes whatever the allocations may be. The problem with that is it does not make a whole lot of sense in these communities frequently in planned communities 1 unit, 1 vote or the amount of expenses it pays in assessments in the associations so one of the great steps forward in the Common Interest Ownership Act is this creation of concept of allocated interests and allowing the developer to specify in the declaration the basis for the allocations, so that more often than not the uniform state gets 1 unit and 1 vote without regard to the size of its common elements.

Its common expense liability is probably more lined up with the appropriate share of the common expenses, the replacement size of the value, and the ownership of the common elements may be based on the original pricing but the advantage of the allocation that way is that it fits better with reality. It stops forcing round pegs into square holes. I've got one more topic that I want to talk about when we wrote the original Uniform condominium Act and even when we were doing the original version of the Common Interest Ownership Act the big issue in the world for common interest communities was the developer overreaching.

That issue hasn't gone away, but it still was the biggest issue, every other issue paled in comparison so much of those laws were written to deal with overreaching developers and I think that you will discover that if you ask folks practicing in the states with the law, the developer overreaching is now not an issue. But in the last 5 or 10 years, another issue has risen we didn't anticipate when we started writing these laws in the early 70's, and that is overreaching or perceived overreaching by the board and prospective unit owners.

It is really a hot button issue and I say perceived because in some cases I don't think that it's real but in other cases I know that it is real so we now have a committee that's hard at work drafting what we call a Homeowners Bill of Rights a lot of it is procedure stuff. In the procedural stuff is a lot of substance by way of example requiring the board to give notice to the unit owners before adopting the rule, requiring the association to give notice to the unit owners to before commencing litigation, mandating that an association can not act arbitrarily, requiring open board meetings, dealing with the whole contentious issue of foreclosures with regard to assessments needs. You have figured out and we have too that associations come in all sizes and one law has to fit all sizes so there's a lot of flexibility built into what we are doing and what we have done to achieve positive results.

For more information, please check out the articles listed below:

- Maryland Task Force on Common Ownership Communities to Hold Public Hearings - Jeanne N. Ketley
- The National Conference of Commissioners on Uniform State Laws - NCCUSL - UCIOA
- Robert H. Nelson - proponent for creation of homeowner association private governments
- Maryland Homeowner's Association
- Maryland Dept of Housing & Community Development (DHCD) Task Force on Common Ownership Communities
- Maryland DHCD Task Force on Common Ownership Communities Appointees - 2006
- Maryland Mediation and Conflict Resolution Office - Louis G. Gieszl, Deputy Director
- Issues Homeowners Have With Common Interest Developments - Bob Lewin
- A New Jersey Homeowner Association Bill Announcement - Wilfredo Caraballoo & Joseph V. Doria Jr.
- Carl H. Lisman - Lisman, Webster, Kirkpatrick & Leckerlin

SEE ATTACHED PDF w/hot links to the above references within this document.

Description

The Uniform Common Interest Ownership Act (UCIOA) - A presentation Carl Lisman a Uniform Laws Commissioner and Treasurer of the National Conference of Commissioners on Uniform State Laws.

REFERENCE SOURCE: 4/3/2011

**Birth [1982] reference: David A. Kahne, Law Offices of David A. Kahne with Professor Susan French- e.g. AARP Public Policy Institute,* A Bill of Rights for Homeowners in Associations.

July 2006, 69 pages.

TAB 39

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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 and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2013, pursuant to NRCP 5(b), I served via first class U.S. Mail, postage prepaid, and via email the **Motion to Alter or Amend Judgment**

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filed on June 26, 2013 to the following parties:

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TAB 40

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Plaintiff, 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, a Nevada non-profit corporation and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **NOTICE OF APPEAL**

Notice is hereby given that Plaintiff SFR Investment Pool I, LLC, by and through its attorneys of record, Howard Kim & Associates, hereby appeals to the Supreme Court of the State of Nevada from the following orders or judgments:

1. All judgements and orders in this case;

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2. "Order Denying Plaintiff's Motion for Preliminary Injunction" entered on June 10, 2013, notice of entry of which was served on June 11, 2013;

3. "Order for Dismissal and Cancellation of Notice of Pendancy of Action" entered on June 11, 2013, notice of entry of which was served on June 12, 2013.

3. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 11th day of July, 2013.

HOWARD KIM & ASSOCIATES

/s/ Jacqueline A. Gilbert
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Case No. 63614

In the Supreme Court of Nevada

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

Appellant,

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, a Nevada non-profit corporation,

Respondent.

APPEAL

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

JOINT APPENDIX, VOLUME V

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ALPHABETICAL INDEX

Vol.	Tab	Date Filed	Document	Bates Number
2	14	4/29/2013	Affidavit of Service [Lucia Parks]	JA226 – JA227
1	6	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA035
1	7	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA036
1	8	4/3/2013	Affidavit of Service [U.S. Bank, N.A.]	JA037
1	11	4/19/2013	Answer to Complaint for Quiet Title and Injunctive Relief	JA054 – JA062
1	3	3/27/2013	Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA014 – JA028
2	17	5/2/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens and Motion to Dismiss]	JA255 – JA256
5	31	5/30/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint]	JA757 – JA758
5	39	6/27/2013	Certificate of Service [Motion to Alter or Amend Judgment]	JA875 – JA876
4	29	5/28/2013	Certificate of Service [Opposition to U.S. Bank, N.A.'s Motion to Dismiss]	JA657
3	24	5/14/2013	Certificate of Service [Reply in Support of Motion for Preliminary Injunction]	JA493 – JA494

6	44	7/24/2013	Certificate of Service [Reply in Support of Motion to Alter or Amend Judgment and Notice of Errata]	JA1008 – JA1009
5	33	5/31/2013	Certificate of Service [Supplement to Opposition to Motion to Dismiss]	JA790
1	1	3/22/2013	Complaint for Quiet Title and Injunctive Relief	JA001 – JA011
3	26	5/17/2013	Court Minutes	JA501 – JA502
2	15	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA228 – JA247
2	16	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA248 – JA254
6	41	7/17/2013	Defendant, U.S. Bank, N.A.'s, Opposition to the Plaintiff's Motion to Alter or Amend Judgment	JA879 – JA893
5	30	5/29/2013	Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA658 – JA756
1	13	4/25/2013	Defendant, U.S. Bank, N.A.'s, Request for Judicial Notice in Support of the Response to the Plaintiff's Motion for Preliminary Injunction	JA088 – JA225
1	12	4/25/2013	Defendant, U.S. Bank, N.A.'s, Response to the Plaintiff's Motion for Preliminary Injunction	JA063 – JA087
2	19	5/9/2013	Exhibits in Support of Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA263 – JA374

5	38	6/26/2013	Motion to Alter or Amend Judgment	JA811 – JA874
5	40	7/12/2013	Notice of Appeal	JA877 – JA878
5	35	6/11/2013	Notice of Entry of Order [Denying Plaintiff's Motion for Preliminary Injunction]	JA795 – JA801
5	37	6/12/2013	Notice of Entry of Order [for Dismissal and Cancellation of Notice of Pendency of Action]	JA805 – JA810
6	48	9/25/2013	Notice of Entry of Order [Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment]	JA1019 – JA1023
2	18	5/3/2013	Notice of Entry of Order [Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction]	JA257 – JA262
6	45	7/24/2013	Notice of Errata	JA1010 – JA1011
2	22	5/14/2013	Notice of Joinder in Defendant U.S Bank, N.A.'s Motion to Expunge Lis Pendens	JA381 – JA384
2	21	5/14/2013	Notice of Joinder in Defendant, U.S. Bank N.A.'s Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA378 – JA380
2	20	5/14/2013	Notice of Joinder in Plaintiff's Motion for Preliminary Injunction	JA375 – JA377
1	2	3/22/2013	Notice of Lis Pendens	JA012 – JA013
1	9	4/10/2013	Notice of Petition for Removal	JA038 – JA046
1	5	3/28/2013	Notice of Posting and Acceptance of Bond	JA032 – JA034
1	10	4/17/2013	Notice of Remand	JA047 – JA053

3	25	5/15/2013	Opposition to Motion to Expunge Lis Pendens	JA495 – JA500
4	28	5/24/2013	Opposition to U.S. Bank, N.A.'s Motion to Dismiss	JA507 – JA656
5	34	6/10/2013	Order Denying Plaintiff's Motion for Preliminary Injunction	JA791 – JA794
5	36	6/11/2013	Order for Dismissal and Cancellation of Notice of Pendency of Action	JA802 – JA804
6	47	9/25/2013	Order Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment	JA1017 – JA1018
6	51	8/5/2013	Recorder's Transcript of Proceedings [Motion to Alter or Amend Judgment heard on July 30, 2013]	JA1055 – JA1059
6	50	8/5/2013	Recorder's Transcript of Proceedings [Motion to Dismiss and Motion to Expunge Lis Pendens heard on June 4, 2013]	JA1046 – JA1054
3	27	5/23/2013	Reply in Support of Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA503 – JA506
3	23	5/14/2013	Reply in Support of Motion for Preliminary Injunction	JA385 – JA492
6	43	7/23/2013	Reply in Support of Motion to Alter or Amend Judgment	JA901 – JA1007
6	42	7/18/2013	Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA894 – JA900
5	32	5/31/2013	Supplement to Opposition to Motion to Dismiss	JA759 – JA789

6	46	7/29/2013	Supplement to Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA1012 – JA1016
1	4	3/28/2013	Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction	JA029 – JA031
6	49	5/29/2013	Transcript of Proceedings [Motions heard on May 16, 2013]	JA1024 – JA1045

CHRONOLOGICAL INDEX

Vol.	Tab	Date Filed	Document	Bates Number
1	1	3/22/2013	Complaint for Quiet Title and Injunctive Relief	JA001 – JA011
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	4	3/28/2013	Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction	JA029 – JA031
	5	3/28/2013	Notice of Posting and Acceptance of Bond	JA032 – JA034
	6	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA035
	7	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA036
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	38	6/26/2013	Motion to Alter or Amend Judgment	JA811 – JA874
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	40	7/12/2013	Notice of Appeal	JA877 – JA878
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	50	8/5/2013	Recorder's Transcript of Proceedings [Motion to Dismiss and Motion to Expunge Lis Pendens heard on June 4, 2013]	JA1046 – JA1054
	51	8/5/2013	Recorder's Transcript of Proceedings [Motion to Alter or Amend Judgment heard on July 30, 2013]	JA1055 – JA1059

TAB 30

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DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **DEFENDANT, U.S. BANK, N.A.'S, REPLY IN SUPPORT OF THE MOTION TO DISMISS WITH PREJUDICE THE PLAINTIFF'S COMPLAINT**

The Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4 (hereinafter "U.S. Bank"), by and through their attorney of record, Chelsea A. Crowton, Esq. of the law firm of Wright, Finlay & Zak, LLP, hereby submits its Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint.

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This Reply is based on the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, all judicially noticed facts, and on any oral or documentary evidence that may be presented at a hearing on this matter.

DATED this 30th day of May, 2013.

WRIGHT, FINLAY & ZAK, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENTS

A. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED WITH REGARDS TO THE COMPLAINT BECAUSE THE PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF AGAINST U.S. BANK.

a. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED WITH REGARDS TO THE COMPLAINT BECAUSE THE PLAINTIFF FAILS TO REFUTE THE LEGAL ARGUMENTS BY U.S. BANK RELATING TO N.R.S. 116.3116(2)(b) AND MISSTATES THE NATURE OF N.R.S. 116.3116(2)(c).

The Plaintiff fails to provide any substantive support to the "extinguishment" theory beyond the citation to N.R.S. 116.3116(2)(c). The Plaintiff fails to assert any substantive arguments as to the necessity for the inclusion of N.R.S. 116.3116(2)(b), if N.R.S. 116.3116(2)(c) extinguishes all "junior" liens, including a first, position Deed of Trust. N.R.S. 116.3116(2)(c) is merely a payment priority Lien created to ensure that an HOA is compensated for any loss or maintenance on a Property that is in foreclosure or vacant. N.R.S. 116.3116(2)(b) and (2)(c) were created to strike an equitable balance between the HOA and a Beneficiary under a secured Deed of Trust. The equitable balance between the two statutes is to construe N.R.S. 116.3116(2)(c) as a payment priority Lien, whereby under N.R.S. 116.3116(2)(b), the Plaintiff

took title subject to U.S. Bank's Lien. The specific exclusion of a first, position Deed of Trust, taxes and governmental liens, and liens recorded prior to the date of the recorded of the CC&Rs, impugns a level of significance as to these Liens. The inclusion of N.R.S. 116.3116(2)(b) is significant as to the nature of the "Super-Priority" Lien, for the inclusion of N.R.S. 116.3116(2)(b) implies that the Legislature intended to exclude a first, position Deed of Trust from the purview of liens "junior" to a "Super-Priority" Lien. The legislative intent behind N.R.S. 116.3116 et seq. is not premised on extinguishing other third-party Deeds of Trust secured against the Property, especially Deeds of Trust that meet the criteria set in N.R.S. 116.3116(2)(b).[1] The Legislative intent behind the 2009 amendment to N.R.S. 116.3116 focuses solely on the limitation of costs and collection fees incurred by the HOA against the Property.[2] The Legislative History does not focus on or state that a first, position Deed of Trust is extinguished by an HOA Sale.[3] The basis of N.R.S. 116.3116 is twofold: (1) to provide a means for an HOA to collect on past-due assessments and (2) to prevent the extinguishment of an HOA Lien upon a foreclosure by a first, position Deed of Trust.[4] The Legislative comments track with the above-stated analysis and fail to assert that an HOA "Super-Priority" Lien extinguishes a first, position Deed of Trust.[5] If the Court were to take the Plaintiff's theory to the next logical conclusion, then the inclusion of N.R.S. 116.3116(2)(b) is incongruous, for if the intent of N.R.S. 116.3116(2)(c) was to extinguish all liens secured against the Property, except taxes and governmental liens, then the Legislative would have no necessity to draft N.R.S. 116.3116(2)(b). Therefore, the inclusion of N.R.S. 116.3116(2)(b) equates with the clear statement that U.S. Bank's Lien is not extinguished by an HOA foreclosure sale.

The arguments by the Plaintiff regarding Section 1 of the Uniform Common Interest Ownership Act are flawed and fail to mandate an extinguishment of U.S. Bank's Lien. Section 1 of the Comments of the Uniform Common Interest Ownership Act is referenced in the context of

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[1] See Legislative History attached to the Defendant's Reply as **Exhibit A.**
[2] See Legislative History attached to the Defendant's Reply as **Exhibit A.**
[3] Id.
[4] Id.
[5] Id.

a foreclosure by an HOA, with a first, position Deed of Trust still secured against the Property.[6] Section 1 states that mortgage lenders "will most likely pay" the assessments.[7] Section 1 does not mandate that U.S. Bank must pay the assessments nor does Section 1state that a first, position Deed of Trust will be extinguished upon an HOA foreclosure sale.[8] The language cited in Section 1 is merely a means to forestall the herein litigation if an HOA Lien is not paid prior to the sale.[9] The last sentence in Comment 1 of the Uniform Common Interest Ownership Act fails to lend support to the Plaintiff's "extinguishment" theory, for the last sentence fails to assert that a first, position Lien would be extinguished upon an HOA sale. The Plaintiff continues to assert that an HOA will not be paid the nine (9) months of assessments and dues if the HOA does not have the power to sell the Property.[10] Under N.R.S. 116.3116(2)(c), the HOA has the power of sale in order to collect on the nine (9) months of assessments and dues; however, the power of sale is conditioned on the purchaser taking title subject to N.R.S. 116.3116(2)(b). The HOA sale is an atypical non-judicial foreclosure right because if a Lien meets N.R.S. 116.3116(2)(b) then the power of sale does not extinguish a first, position Lien. Therefore, Section 1 of the Uniform Common Interest Ownership Act fails to support the "extinguishment" theory proffered in the Complaint.

The Legislative Letter cited in the Plaintiff's Opposition attests to the fact that the Plaintiff merely acquired the position held by Parks. The Legislative Letter states that a purchaser at an HOA foreclosure sale gets "all title held by the previous owner."[11] Prior to the foreclosure sale by the HOA, Parks held title subject to U.S. Bank's Lien. Plus, the Legislative Letter asserts that the purchaser at an HOA foreclosure sale is not liable to the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to N.R.S. 116.31164.[12] The inclusion of this language is indicative of a "Second

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[6] See Plaintiff's Opposition to MTD at pgs. 11-12.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] See Legislative Letter attached to the Plaintiff's Opposition as **Exhibit 5.**
[12] Id.

foreclosure" by a first, position Lien that survives the HOA foreclosure sale. Therefore, the Legislative Letter fails to lend support to the arguments asserted in the Complaint.

Based on the above, the Defendant's Motion to Dismiss should be granted because the Plaintiff fails to refute the legal arguments in the Motion to Dismiss or assert any substantive support to the "extinguishment" theory proffered in the Complaint.

B. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED IN THIS CASE BECAUSE THE PLAINTIFF MISCONTRUES THE NEVADA REAL ESTATE OPINION.

The Plaintiff misconstrues the language in the Real Estate Division Advisory Opinion 13-01 to falsely imply that a Homeowner's Association foreclosure sale extinguishes a first, position Deed of Trust. First, the Advisory Opinion specifically states at the end of the Opinion that the Opinion is not a rule, regulation, or final legal determination. The Advisory Opinion disclaims the legal enforcement of the contents of the Opinion and specifically states that the Opinion is merely the views of the Real Estate Division. Second, the Advisory Opinion does not focus on the interaction of "priority" liens under N.R.S. 116.3116(2)(b) and (2)(c), for the Advisory Opinion focuses on the amount of costs and fees that an HOA can incur against the Property.

Third, the Advisory Opinion from the Real Estate Division of the State of Nevada, Department of Business and Industry fails to lend support to the Plaintiff's Complaint, for the Advisory Opinion reaffirms the language in N.R.S. 116.3116 and reaffirms the assertions by U.S. Bank as to the attachment of the first position priority Deed of Trust to the Property subsequent to the foreclosure by the Plaintiff in this case. The Advisory Opinion states that the Plaintiff merely has a "Super-Priority Lien" against the Subject Property as to nine (9) months of assessments of expenses and charges incurred against a Homeowner's Association. The Advisory Opinion specifically limits the "priority" status of the Plaintiff to a "portion of an association's lien." The Advisory Opinion references the very action being undertaken by U.S. Bank with the second foreclosure on the first position Deed of Trust.

The Advisory Opinion states that the "priority" of nine (9) months of assessments is premised on the potential loss by the Homeowner's Association of unpaid assessments that would be eliminated by an imminent foreclose of the first security interest. The Advisory

Opinion treats the "priority" status of the Plaintiff has a monetary status that entitles the Plaintiff to assessments and charges in lieu of a "priority" status of extinguishment of all junior liens secured by the Property. Plus, the Advisory Opinion specifically states that "each portion of the super priority lien is limited to the specific charge state and nothing else" and payment to the Plaintiff of the charges under N.R.S. 116.3116(1) and N.R.S. 116.310312 "relieves [the Plaintiff's] super priority lien status. The Advisory Opinion's language is tempered by the implication that a first, position Deed of Trust survives the Homeowner's Association foreclosure, for the Advisory Opinion discusses the eventuality of the second foreclosure by the first position Lender. Based on the above, U.S. Bank's Lien maintained its first position status in the chain of title of the Property.

In addition, the Advisory Opinion specifically states that N.R.S. 116.3116 is a means for a party to **only** determine the starting point and amounts of the nine (9) months of assessments owed to the Plaintiff in this case. The Advisory Opinion never states nor mentions that a foreclosure under N.R.S. 116.3116 extinguishes a first position priority Deed of Trust. The Advisory Opinion contemplates the eventual foreclosure by a first position priority Deed of Trust, thereby implying that the Plaintiff's theory regarding U.S. Bank's Lien is false and should be disregarded by the Court. Plus, the Advisory Opinion is premised on a recommendation for the Homeowner's Association to collect on unpaid assessments **prior to** the extinguishment of any fees owed to the Homeowner's Association by a subsequent foreclosure by the first position priority Deed of Trust. Based on the language in the Advisory Opinion and the nature of U.S. Bank's Lien, U.S. Bank's Lien survived the HOA sale.

C. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE N.R.S. 116.310312 DOES NOT LEND SUPPORT TO THE PLAINTIFF'S THEORY REGARDING N.R.S. 116.3116(2)(c) EXTINGUISHING A FIRST, POSITION PRIORITY DEED OF TRUST.

The Plaintiff attempts to create a statutory duty upon the Court to "harmonize" N.R.S. 116.3116 and N.R.S. 116.310312.[13] The Plaintiff provides no substantive reasoning as to the requirement to harmonize the two statutes, beyond the bald assertion by the Plaintiff of the

[13] See Opposition to MTD at pgs. 16-18.

necessity to harmonize the two statutes. The language in N.R.S. 116.3116 and N.R.S. 116.310312 does not mandate that the two statutes must be read in conjunction with another or that the two statutes must harmonize with regards to the priority of HOA Liens. The language and the legislative history of N.R.S. 116.310312 specifically negate the assertion by the Plaintiff regarding the necessity to "harmonize" the two statutes. The legislative history for N.R.S. 116.310312(6) focuses around the fact that the legislatures did not want an abatement lien to have the legal authority to extinguish an HOA Lien.[14] The legislative history for N.R.S. 116.310312 clearly expresses a concern over the maintenance of Properties in a Homeowners Association that are vacant or wherein the Bank prolongs foreclosing on the Property.[15] The language in N.R.S. 116.310312 specifically exempts the priority liens established under N.R.S. 116.3116(a) and (c).[16] The lack of priority over a lien created under N.R.S. 116.3116(2)(a) or (c) shows the incongruity of the two statutes and the inability of the Court to construe the two statutes as "harmonizing" and a means to extinguish a first, position Deed of Trust. Comparatively, the legislative intent of N.R.S. 116.3116 deals with the limitation on the amount of fees and collection costs incurred by an HOA and the establishment of a payment priority Lien to forestall an extinguishment of an HOA Lien upon a foreclosure by a first, position Deed of Trust. The legislative history of the two statutes shows the desire by the HOA to be monetarily compensated for expenses incurred by the HOA, which would otherwise by extinguished by a foreclosure by U.S. Bank. The exclusion of subsection (b) in N.R.S. 116.310312 does not equate with proof regarding an abatement lien extinguishing a first, position Deed of Trust. The legislative comments by Michael Buckley assert that the exclusion of section (b) of N.R.S. 116.3116 is based on the fact that the N.R.S. 116.310312 deals with HOA Liens and subsection (b) deals with first mortgage liens.[17] The legislative comments make no assertion as the exclusion of N.R.S. 116.3116(2)(b) being indicative of the intent to have an abatement lien extinguishes a first, position Deed of Trust. Based on the above, the Court should disregard the arguments related to N.R.S. 116.310312.

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[14] See Legislative History of N.R.S. 116.310312 attached to Defendant's Response as **Exhibit B.**
[15] See Legislative History of N.R.S. 116.310312 attached to Defendant's Response as **Exhibit B.**
[16] N.R.S. 116.310312(6).
[17] See Legislative History of N.R.S. 116.310312 attached to Defendant's Reply as **Exhibit B.**

In addition, the language in N.R.S. 116.310312 mirrors N.R.S. 116.3116 and merely establishes a payment priority Lien rather than attesting to an extinguishment of U.S. Bank's Lien. N.R.S. 116.310312(6) states,

> 6. Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.[18]

N.R.S. 116.310312 does not include an extinguishment provision nor does the section assert that a lien under N.R.S. 116.310312 extinguishes a first, position Deed of Trust.[19] The Plaintiff admits that N.R.S. 116.310312 does not include any language regarding an extinguishment of a first, position Deed of Trust.[20] The legislative intent of N.R.S. 116.310312 is premised on the same concern as the legislative intent of N.R.S. 116.3116: collection of money owed to the HOA prior to the foreclosure by a first, position Deed of Trust.[21] The legislative comments for N.R.S. 116.310312 are consistent with the necessity to establish solely a **payment** priority lien to ensure that the HOA is compensated for any loss prior to or after the foreclosure by the first, position Deed of Trust.[22] Based on the language in N.R.S. 116.310312(6) and the legislative history of N.R.S. 116.310312, an abatement lien does not have the power to extinguish all liens secured against the Property, which negates the arguments asserted by the Plaintiff in this case. Plus, the fact that N.R.S. 116.310312 includes the provision in N.R.S. 116.3116 that deals with a **payment priority** lien, impugns a level of support to U.S. Bank's theory that N.R.S. 116.3116(2)(c) does not extinguish a first, position Lien.

Based on the above, the Defendant's Motion to Dismiss should be granted and U.S. Bank should be allowed to continue with its foreclosure on the Property.

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[18] N.R.S. 116.310312(6).
[19] See N.R.S. 116.310312 et seq.
[20] See Opposition to MTD in general.
[21] See Legislative History of N.R.S. 116.3116 attached to Defendant's Response as **Exhibit A.**
[22] See Legislative History of N.R.S. 116.3116 attached to Defendant's Response as **Exhibit A.**

D. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE A COMPARISON OF N.R.S. 107.080 AND N.R.S. 116.3116 DOES NOT SHOW AN INTENT TO EXTINGUISH A FIRST, POSITION DEED OF TRUST UPON AN HOA SALE.

The Plaintiff asserts that the requirements under N.R.S. 116.31162-116.31168 are consistent with N.R.S. 107.080, thereby proving that the Plaintiff took title free of U.S. Bank's Lien.[23] First, the argument by the Plaintiff assumes that the Court has determined that U.S. Bank's Lien is junior to the HOA Lien and thereby subject to an extinguishment by the HOA sale. As stated above filed by U.S. Bank, the "Super-Priority" Lien recorded by the HOA is merely a payment priority lien and does not extinguish U.S. Bank's first, position Deed of Trust, pursuant to N.R.S. 116.3116(2)(b). U.S. Bank's Lien is not subject to the Plaintiff's "axiomatic" foreclosure argument, since U.S. Bank's Lien is not "junior" to the HOA Lien. Therefore, the comparisons between N.R.S. 107.080 and N.R.S. 116.3116 et seq. are meritless and should be disregarded by the Court.

Second, the notification requirements under N.R.S. 116.31162-116.31168 differ with regards to the manner of notification, method of notification, and the timeframe for a sale of the Property. N.R.S. 107.080(2)(a)(2), requires that a power of sale cannot be exercised against the Subject Property until after thirty-five (35) days of delinquency on the loan.[24] N.R.S. 107.080(4) and N.R.S. 107.087 require: (1) that the Notice of Trustee's Sale be posted in a public place for twenty (20) consecutive days, (2) publication of a copy of the Notice of Trustee's Sale three times in a newspaper in general circulation, and (3) service to the grantor or titleholder of the Notice of Trustee's Sale, or mailing of the Notice of Trustee's Sale, or posting of the Notice of Trustee's Sale at the Property.[25] N.R.S. 116.31162(1)(b) requires thirty (30) days after mailing the Notice of Delinquent Assessment before a Notice of Default can be recorded against the Property.[26] N.R.S. 116.31162(3) requires the expiration of ninety (90) days before a Notice of Sale can be recorded in the Clark County Recorder's Office.[27] The Notice of Sale, recorded pursuant to N.R.S. 116.311635, must be mailed to the unit's owner or successor in interest,

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[23] See Opposition to MTD at pgs. 16-18.
[24] N.R.S. 107.080(2)(a)(2).
[25] N.R.S. 107.080(4) and N.R.S. 107.087.
[26] N.R.S. 116.31162(1)(b).
[27] N.R.S. 116.31162(3).

mailed to any person who requested notice, mailed to the Ombudsman, and personally served on the unit's owner or posted on the Property.[28] N.R.S. 116.31162 only requires the titleholder or their successor's in interest to be mailed a copy of the Notice of Default and Notice of Delinquent Lien.[29] U.S. Bank and other lienholders secured against the Property are not mandated under N.R.S. 116.3116 et seq. to get notice of the HOA foreclosure. N.R.S. 116.31163 only states that a Beneficiary of a secured interest against the Property can be provided notice of the sale or default upon notification to the HOA of the secured interest against the Property.[30] The statutory language in N.R.S. 107.090 does not equate with the Plaintiff taking title free of U.S. Bank's Lien. N.R.S. 107.090 merely asserts that any "person with an interest" in the Property can request a copy of the Notice of Default or Notice of Sale by recording in the Clark County Recorder's Office or mailing to the HOA a request for special notification.[31] An HOA is only required to mail a copy of the Notices associated with the foreclosure to an interested party, if the interested party has requested notice pursuant to N.R.S. 107.090. The requirements under N.R.S. 107 et seq. and N.R.S. 116 et seq. vary with regards to the amount of time prior to a foreclosure on the Property and the means by which notifications are to be sent to the titleholder and interested parties.

Plus, the failure of the legislature to amend N.R.S. 116 to include a mediation program similar to N.R.S. 107.086 is indicative of the differences in treatment with regards to an HOA foreclosure sale and a sale by a first, position Deed of Trust. It is not disputed by either party that the Legislature enacted the provisions in N.R.S. 116 et seq. to prevent abuses by the HOA. The concerns regarding standing and rights of the titleholder/borrower are not present under N.R.S. 116, which is indicative that the Legislature interpreted a foreclosure by an HOA to be subject to a first, position Deed of Trust (which would require the Beneficiary to comply with all provisions under N.R.S. 107.080 and N.R.S. 107.086 in order to foreclose).

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[28] N.R.S. 116.311635.
[29] N.R.S. 116.31162(1)(a).
[30] N.R.S. 116.31163(1) and (2).
[31] N.RS. 107.090(2).

The similarities between N.R.S. 107 et seq. and N.R.S. 116 et seq. do not prove that the Plaintiff took title free of U.S. Bank's Lien, for the similarities between the two sections of N.R.S. merely show that the Legislature saw a necessity to have uniformity in notices and mailings when divesting a titleholder or Borrower of title to the Property. It is undisputed by both parties that under N.R.S. 107 et seq. and N.R.S. 116 et seq., a titleholder/Borrower loses any right to redeem title to the Property. The simple fact that N.R.S. 107 et seq. and N.R.S. 116 have similar, but not identical provisions, is evidence of the fact that the Legislature saw the necessity to have consistency in notifications and mailings with regards to a foreclosure that strips a titleholder/Borrower of their rights to the Property.

Based on the above, the Court should disregard the assertions by the Plaintiff regarding the comparisons between a foreclosure under N.R.S. 107.080 and a sale under N.R.S. 116.3116.

E. THE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE PLAINTIFF FAILS TO STATE CLAIMS FOR QUIET TITLE/DECLARATORY RELIEF AND UNJUST ENRICHMENT AGAINST U.S. BANK.

The Plaintiff attempts to create a genuine issue of material fact in the case by asserting throughout the Opposition that the Plaintiff has asserted a plausible basis wherein U.S. Bank's Lien was extinguished by the HOA Sale.[32] The Plaintiff also asserts that U.S. Bank's interest is adverse to the interest of the Plaintiff, due to the fact that the Plaintiff is asserting that N.R.S. 116 et seq. extinguishes all "junior" liens secured against the Property.[33] U.S. Bank may claim an interest in the Property, but the mere fact that U.S. Bank has an interest in the Property does not defeat the Motion to Dismiss the Complaint. The Complaint fails as a matter of law to state a claim for relief against U.S. Bank, due to the preservation of U.S. Bank's Lien after the HOA sale. The Court does not have to accept statements of law that are counter to the language in a statute and legislative history of a statute. These facts refute the basis of the Complaint and entail that the Court must rule in favor of U.S. Bank.

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[32] See Plaintiff's Opposition to MTD in general.
[33] See Plaintiff's Opposition to MTD at pgs. 18-19.

The Plaintiff also fails to refute in the Opposition that the language and legislative history of N.R.S. 116.3116 et seq. does not support the "extinguishment" theory proffered by the Plaintiff in the Complaint. The legislative history of N.R.S. 116.3116 and the 2009 amendment focuses on the ability of a Homeowner's Association to collect on past dues and assessments prior to the HOA Lien being extinguished by a first, position foreclosure sale.[34] Nowhere in the legislative history or in the Plaintiff's Opposition does the Plaintiff point to a specific comment or section of the legislative history that asserts that an HOA sale extinguishes a first, position Deed of Trust.[35] Instead of relying on the legislative history and the language in N.R.S. 116.3116 et seq., the Plaintiff falsely relies on a non-binding Nevada Real Estate Division Opinion and general non-judicial foreclosure law. The Plaintiff completely negates the unique nature of the power of sale given to an HOA under N.R.S. 116.3116(2)(c) and negates the inclusion of N.R.S. 116.3116(2)(b) in the statute. The Legislative included N.R.S. 116.3116(2)(b) to preserve U.S. Bank's Lien after an HOA sale; otherwise, if the Legislative intended N.R.S. 116.3116(2)(c) to extinguish all "junior" liens secured against the Property, including first, position Deeds of Trust, the inclusion of N.R.S. 116.3116(2)(b) would be moot. The Plaintiff fails to account for the fact that the comments in the legislative history focus on a payment priority lien.[36] Plus, the Nevada Real Estate Opinion 13-01 negates the applicability of the Opinion to the herein case, for the Opinion expressly states that the Opinion is not a rule, regulation, or final legal determination. Based on these factors, the Plaintiff does not have a plausible basis to assert an "extinguishment" theory regarding U.S. Bank's Deed of Trust. In addition, the Plaintiff misconstrues U.S. Bank's legal arguments in the Motion to Dismiss regarding the likelihood of success on the quiet title cause of action.

The Plaintiff asserts in the Opposition that the Plaintiff has sufficiently pled a cause of action for quiet title based on the fact that U.S. Bank asserts that U.S. Bank's Lien remains after the HOA sale.[37] The Plaintiff's quiet title cause of action fails to state a claim for relief because

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[34] See Legislative History attached to the Defendant's Reply as **Exhibit A.**
[35] See Plaintiff's Opposition to MTD in general.
[36] See Legislative History attached to the Defendant's Reply as **Exhibit A.**
[37] See Plaintiff's Opposition to MTD at pgs. 18-19.

the quiet title cause of action is premised on a false analysis of the interaction between N.R.S. 116.3116(2)(b) and 116.3116(2)(c). The Plaintiff cannot assert a valid claim for quiet title because the language in the statute, an equitable analysis of N.R.S. 116.3116 and contract principles, and the legislative history of N.R.S. 116.3116 et seq. clearly states that the Plaintiff took title subject to U.S. Bank's Lien. The Plaintiff merely purchased as much equity in the Property as Spencer possessed prior to the HOA sale, which is a possessory, title interest in the Property subject to U.S. Bank's Lien. The Plaintiff cannot assert an adverse interest against U.S. Bank's Lien because the nature of the HOA sale cannot extinguished a priority lien under N.R.S. 116.3116(2)(b).

Plus, the Plaintiff cannot maintain an unjust enrichment cause of action against U.S. Bank. To state a claim for unjust enrichment, the Plaintiff must allege that U.S. Bank has retained a benefit, which in equity and good conscious, belongs to another party. Ramanathan v. Saxon Mortg. Services, Inc., 2011 WL 6751373 *6 (D. Nev. 2011) (citing LeasePartners Corp. v. Robert L. Brooks Trust, 113 Nev. 747, 942 182, 187 (1997)). Accordingly, unjust enrichment is an equitable claim. All Direct Travel Services, Inc. v. Delta Air Lines, Inc., 120 Fed. Appx. 673,676, 2005 WL 23420, at *2 (C.A.9 Cal. 2005). U.S. Bank has not retained the funds paid by the Plaintiff at the HOA sale nor does U.S. Bank retain a benefit belonging to the Plaintiff in this case. As stated above, the Plaintiff took title subject to U.S. Bank's Lien. The Plaintiff had knowledge of the recording of U.S. Bank's Lien prior to purchasing title at the HOA sale. The Plaintiff has been able to retain a temporary, possessory interest in the Property based on the funds expended at the HOA sale. If the Plaintiff had not paid the HOA Lien, U.S. Bank would have been forced under N.R.S. 116.3116 et seq. to pay the lien upon the foreclosure by U.S. Bank. Any additional money paid by the Plaintiff at the time of the HOA sale needs to be directed to the HOA who retained the funds paid by the Plaintiff and not towards U.S. Bank. Based on these facts, U.S. Bank has not been unjustly enriched by the actions of the Plaintiff in this case and the Plaintiff cannot maintain its unjust enrichment claim for relief against U.S. Bank

Therefore, the Defendant's Motion to Dismiss should be granted because the Plaintiff fails to state a claim for quiet title against U.S. Bank.

II. CONCLUSION

Based on the above, U.S. Bank's Motion to Dismiss the Complaint should be granted and U.S. Bank should be allowed to proceed with a foreclosure on the Property. The Plaintiff's request for leave to amend should be denied in this case; since, the defects in the Plaintiff's Complaint are premised on matters of law and not a failure to plead facts.

DATED this 29th day of May, 2013.

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AFFIRMATION

Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **DEFENDANT, U.S. BANK, N.A.'S, REPLY IN SUPPORT OF THE MOTION TO DISMISS WTH PREJUDICE THE PLAINTIFF'S COMPLAINT** filed in Case No. A-13-678814-C **does not** contain the social security number of any person.

DATED this 29th day of May, 2013.

WRIGHT, FINLAY & ZAK, LLP

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EXHIBIT A

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MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
March 6, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:12 a.m. on Friday, March 6, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

Assemblyman Richard McArthur (excused)

60 days following a foreclosure sale. Mr. Sasser made reference to section 6 of A.B. 189, which is the notice to quit after a foreclosure sale. He said that he did not really care about that section, as it was a result of the enthusiasm on the part of the Legislative Counsel Bureau. I would suggest that section 6 needs to fall off of the bill.

Chairman Anderson:
So, the bankers would like us to remove section 6 as being unnecessary. Have you prepared an amendment?

Bill Uffelman:
I could prepare one very quickly, Mr. Anderson (Exhibit S).

Chairman Anderson:
Did you raise these concerns with the primary sponsor of the bill?

Bill Uffelman:
I have spoken with Mr. Sasser, who was acting as a representative of the sponsor of A.B. 189.

Chairman Anderson:
Thank you, sir. Does anybody have any amendments that need to be placed into the record? Ms. Rosalie M. Escobedo has submitted testimony, and that will be entered into the record (Exhibit T). We will close the hearing on A.B. 189.

[A three-minute recess was called.]

I will open the hearing on Assembly Bill 204.

Assembly Bill 204: Revises provisions relating to the priority of certain liens against units in common-interest communities. (BDR 10-920)

Assemblywoman Ellen Spiegel, Clark County Assembly District 21:
Thank you for having me and for hearing this bill. As a disclosure, I serve on the Board of the Green Valley Ranch Community Association. This bill will not affect me or my association any more than it would any other association in this state. My participation on the board gave me firsthand insight into this issue. That is what led me to introduce this legislation. I am here today to present A.B. 204, which can help stabilize Nevada's real estate market, preserve communities, and help protect our largest assets: our homes. Whether you live in a common-interest community or not, whether you like common-interest communities or hate them, whether you live in an urban area or a rural area, the

outcome of this bill will have a direct impact on you and your constituents. Just as a summary, A.B. 204 extends the existing superpriority from six months to two years. There are no fiscal notes on this. In a nutshell, this bill makes it possible for common-interest communities to collect dues that are in arrears for up to two years at the time of foreclosure. This is necessary now because foreclosures are now taking up to two years. At the time the original law was written, they were taking about six months. So, as the time frames moved on, the need has moved up.

Since everyone who buys into a common-interest community clearly understands that there are dues, community budgets have historically been based upon the assumption that nearly all of the regular assessments will be collected. Communities are now facing severe hardships, and many are unable to meet their contractual obligations because of all of the dues that are in arrears. Some other communities are reducing services, and then simultaneously increasing their financial liabilities. They and their homeowners need our help.

I recognize that there are some concerns with this bill, and you will hear about those later this morning directly from those with concerns. I have been having discussions with several of the concerned parties, and I believe that we will be able to work something out to address many of their concerns. In the meantime, I would like to make sure that you have a clear understanding of this bill and what we are trying to achieve.

The objectives are, first and foremost, to help homeowners, banks, and investors maintain their property values; help common-interest communities mitigate the adverse effects of the mortgage/foreclosure crisis; help homeowners avoid special assessments resulting from revenue shortfalls due to fellow community members who did not pay required fees; and, prevent cost-shifting from common-interest communities to local governments.

This bill is vital because our constituents are hurting. Our current economic conditions are bleak, and we must take action to address our state's critical needs. I do not need to tell you that things are not good, but I will. If you look, I have provided you with a map that shows the State of Nevada and, by county, how foreclosures are going (Exhibit U). Clark, Washoe, and Nye Counties are extremely hard hit, with an average of 1 in every 63 housing units in foreclosure. People whose homes are being foreclosed on are not paying their association dues, and all of the rest of the neighbors are facing the effects of that. Clark County is being hit the hardest, and we will look at what is going on in Clark County in a little bit more depth just as an example.

In Clark County, between the second half of 2007 and the second half of 2008, property values declined in all zip codes, except for one really tiny one, which increased by 3 percent. Overall, everywhere else in Clark County, property values declined significantly. The smallest decline was 13 percent, and that was in my zip code. The largest decline was 64 percent. Could you imagine losing 64 percent of the equity of your home in one year? Property values have plummeted, and this sinkhole that we are getting into is being affected because there is increased inventory of housing stock on the market that is due to foreclosures, abandoned homes, and the economic recession. People cannot afford their homes; they are leaving; they are not maintaining them. It is flooding the market, and that is depressing prices. You sometimes have consumers who want to buy homes, but they cannot get mortgages. That keeps homes on the market. There is increased neighborhood blight and there is a decreased ability for communities to provide obligated services. For example, if you have a gated community that has a swimming pool in it (or a nongated community, for that matter), and your association cannot afford to maintain the pool, and someone is coming in and looking at a property in that community, they will say, "Let me get this straight: you want me to buy into this community because it has a pool, except the pool is closed because you cannot afford to maintain the pool; sorry, I am not buying here." That just keeps things on the market and keeps the prices going down, because they are not providing the services; therefore, how do you sell something when you are not delivering?

Unfortunately, we are hearing in the news that help is not on the way for most Nevadans. We have the highest percentage of underwater mortgage holders in the nation. Twenty-eight percent of all Nevadans owe more than 125 percent of their home's value. Nearly 60 percent of the homeowners in the Las Vegas Valley have negative equity in their homes. This is really scary. Unfortunately, President Barack Obama's Homeowner Affordability and Stability Plan restricts financing aid to borrowers whose first mortgage does not exceed 105 percent of the current market values of their homes. There are also provisions that they be covered by Fannie Mae or Freddie Mac. Twenty-eight percent owe more than 125 percent, and cannot get help from the federal government. And for 60 percent of homeowners, the help is just not there. So, we need to be doing something.

What does this mean to the rest of the people who are struggling to hold onto their homes in common-interest communities? Their quality of life is being decreased because there are fewer services provided by the associations. There is increased vandalism and other crime. As I mentioned earlier, there is a potential for increased regular and special assessments to make up for revenue

shortfalls, and then there is the association liability exposure. Let me explain that.

If you have a community that has a pool, and you were selling it as a community with a pool, and all of a sudden you cannot provide the pool, the people who are living there and paying their dues have a legal expectation that they are living in a pool community, and they can sue their community association because the association is not providing the services that the homeowners bought into. That could then cause the communities to further destabilize as they have financial exposure with the possibility of lawsuits because they are not providing services since the dues are not paid.

That all leads to increased instability for communities and further declines in property values. I went to see for myself. What does this really mean? What are we talking about? Through a friend in my association who generously helped send out some surveys, we received responses to this survey from 75 common-interest community managers. Fifty-five of them were in Clark County, 20 of them were in Washoe County. Their answers represented over 77,000 doors in Nevada. That is over 77,000 households, and they all told me the same thing. First of all, not one person was opposed to the bill. They gave me some comments that were very enlightening. They are all having problems collecting money; they all do not want to raise their dues; they do not want to have special assessments; they are cutting back; they are scared.

I want to share some comments with you and enter them into the record. Here is the first one: "Dollars not collected directly impact future assessment rates to compensate for the loss of projected income. Also, there is less operating cash to fund reserves or maintain the common area." That represented 2,001 homes in Las Vegas. Another one: "Our cash reserves are severely underfunded and we have serious landscaping needs." This is 129 homes in Reno that are affected. This one just really scared me: "Increase in bad debt expense over $100,000 per year has frustrated the majority of the owners who are now having to pay for those who are not paying, including the lenders who have foreclosed." That is from the Red Rock Country Club HOA, over 1,100 homes in Las Vegas. This last one: "The impact is that the HOA is cutting all services that are not mandated: water, trash, and other utilities. The impact is that drug dealers are moving into the complex, and homicides are on the rise, and the place looks horrible. Special assessments will not work. Those that are paying will stop paying if they are increased. The current owners are so angry that they are footing the bill for the deadbeat investors that they no longer have any pride or care for their units. I support this bill 100 percent. The assessments are an obligation and should not be reduced." That is from someone who manages several properties in Las Vegas.

I mentioned an additional impact, and that I really believe that this bill will affect everybody in the state, even those who do not live in common-interest communities. Let me explain that. There could be cost shifting to local government. I gave you a couple of examples in the handout: graffiti removal, code enforcement, inspections, use of public pools and parks, and security patrols. Let me use graffiti as an example.

My HOA contracts with a firm to come out and take care of our graffiti problem. We do this, and we pay for this. Clark County also has a graffiti service for homeowners in Clark County. There are about 4,000 homes in our community, and our homeowners are told, "If you see graffiti, here is the number you call. It is the management company. They send out American Graffiti, who is the provider we use, and they have the graffiti cleaned up." If an association like mine all of a sudden says, Well, you know, we do not have the money to pay our bills and do other things. We could cut out the graffiti company and we could just say to our homeowners, 'You know what, the number has changed.' So instead of calling the management company, you now call Clark County. There is a cost shift. There is a limited number of resources available in Clark County, and that will have to be spread even thinner.

It goes on into other things too. You have the pools that are closed. The people are now going to send their kids to the public pools, again, taking up more of the county resources and spreading it out thinner and thinner. There are community associations that are now, because of their cash flow problems, having to pay their vendors late. Many of their vendors are small local businesses. They are being severely impacted because the reduced cash flow is having a ripple effect on their ability to employ people.

Chairman Anderson:
Let us go back to the graffiti removal question. I understand the use of pools and parks. Are you under the impression that the HOA and common-interest community would allow the city to go and do that?

Assemblywoman Spiegel:
It is my opinion, and from what I have heard from property managers, especially that big long quote that I read, that people are cutting back on everything and anything that they deem as nonessential.

Chairman Anderson:
That is not the question. The question deals specifically with graffiti removal and security. Patrols by the police officers are usually not acceptable in gated communities and other common-interest communities. This would be a rather

dramatic change, and it would probably change the city's view of their relationship with, or their tolerance of, some common-interest communities.

Assemblywoman Spiegel:
Mr. Chairman, one thing I can tell you is that my community, Green Valley Ranch, last year had our own private security company who would patrol our several miles of walking trails and paths. We have since externalized our costs and now the city of Henderson is patrolling those at night instead of our private service.

Chairman Anderson:
So, for your common-interest community, you have moved the burden over to the taxpayers and the city as a whole.

Assemblywoman Spiegel:
Yes, but our homeowners are also taxpayers of the city.

Chairman Anderson:
Of course, they choose to live in such a gated complex.

Assemblywoman Spiegel:
It is not gated. Parts of the community are, and some parts are not. Overall, the master association is not a gated area.

Chairman Anderson:
You allow the public to walk on those same paths?

Assemblywoman Spiegel:
Yes. They are open to all city residents, and non-city residents.

Chairman Anderson:
Okay. Are there any questions for Ms. Spiegel on the bill?

Assemblyman Segerblom:
Is it your experience that the lender will pay the association fees when the property is in default, or will they let it go to lien and then the association fees are paid when the property is sold?

Assemblywoman Spiegel:
My experience has been that, in many instances the fees are just not being paid. The lenders are not paying the fees. There may be some exceptions, but as a general rule they are not.

Alan Crandall, Senior Vice President, Community Association Bank, Bothell, Washington:

We have approximately 25,000 communities here in the State of Nevada. I am honored to speak today. I am a resident of Washington state. The area I want to specialize in my discussion is with loans for capital repair. We are the nation's leading provider of financing of community associations to make capital repairs such as roofs, decks, siding, retaining walls, and large items that the communities, for health and safety issues, have to maintain. Today, in Nevada, we are seeing associations with 25 to 35 percent delinquency rate. We are unable to make loans for these communities because we tie these loans to the cash flow of the association. If there is no cash flow coming in to support their operations, we cannot give them a loan. We do loans anywhere from $50,000, and we just approved one today for $17 million, so there are some communities out there with some severe problems that need assistance.

Now you may ask, why do we care about the loan? The loan is important in that it empowers the board to offer an option to the homeowners. Some of you may live in a community, and some of you may have children or parents who live in one. Because of a financial requirement for maintaining the property—the roof, the decks that may be collapsing, or a retaining wall that may be failing—they have to special assess because they do not have the money in their reserves. It was unforeseen, or they have not had the time to accumulate the money for whatever reason. These loans allow the association to provide the option to the homeowner to pay over time because, in effect, the board borrows the money from the bank, which is typically set up as a line of credit; they borrow the portion that they need for those members who do not have the ability to pay lump sum. So, whether that is $5,000, $10,000, $40,000, or $50,000, or my personal record which is $90,000 per unit, due in 60 days, it is a major financial hardship on homeowners. The typical association, based upon my experience of 18 years in this industry, is comprised of one-third of first time home buyers who may have had to borrow money from mom and dad to make the down payment, and who have small children for whom they are paying off their credit cards for next Christmas. Another one-third is comprised of retirees on a fixed income. Neither of those two groups, which typically make up two-thirds of an average community, are in a position to pay a large chunk of money in a very short period of time. The board cannot sign contracts in order to do the work unless they are 100 percent sure they can pay for the work when it is done. That is where the loan assists.

I urge your support of this bill. It will give us the ability to have some cash flow and guarantees that there will be some extended cash flows in these difficult times, and make it easier for those banks, like ours, who provide this special

type of financing that helps people keep their homes, to continue to do so. Thank you.

Bill DiBenedetto, Private Citizen, Las Vegas, Nevada:
I moved to Nevada in 1975 when I was 11 years old. The first time I was here was in 1982 as a delegate to Boys State. If you told me at that time that I would be testifying, I would have said, No way, you have got to know what you are talking about. Well, I was up here at an event honoring the veterans, and I saw this bill. I serve as the secretary-treasurer of my HOA, Tuscany, in Henderson, Nevada. The reason I became a board member was I revolted against the developer's interests in raising our dues. You see, we were founded in 2004, and we are at 700 homes out of 2,000, which means we are under direct control of our declarant, Rhodes Homes. We are at their mercy if they want to give us a special assessment or raise our dues. The reason I am here today is I also serve as secretary-treasurer. I am testifying as a homeowner, not as a member of the board. As of last year, our accounts receivable were over $200,000, which represented 13 percent of our annual revenue. Out of our 600 homeowners, 94 percent went to collections. Out of those, there were eight banks. When a bank takes over a home, they turn off the water; the landscaping dies; our values go down. We need these two years of back dues. Anything less, I believe, would be a bailout for the banks that took a risk, just like the homeowners. When it comes right down to it, out of the 700 homes that we have, we have to fund a $6.2 million reserve. Why? Because the developer continued to build a recreation center, greenways, and other amenities. So, our budget is $1.6 million. We have $200,000 in receivables. We receive 90-day notices from our utility companies. We can barely keep the lights and the water on. Our reserve fund, by law, is supposed to be funded, but we cannot because we have to pay the utility bills. I moved into that community because it was unique: We have rallied the 700 homes. We are not looking for a handout, but we are looking for what is right. When the bank took over the homes, they assumed the contracts that were made: to pay the dues, the $145 a month. I have banks that are 15 months past due, 10 months past due, 12 months past due. Thank you for listening to me.

Assemblyman Segerblom:
In regards to the banks owning these properties, at least under current law, what they owe for six months would be a super lien which you would collect when the property is sold. Have you been able to collect on those super liens?

Bill DiBenedetto:
Yes, we have.

Assemblyman Segerblom:
Is it your experience that the banks never pay without this super lien?

Bill DiBenedetto:
The banks never pay until the home is sold.

Assemblyman Segerblom:
Now, they are just paying for only six months?

Bill DiBenedetto:
They are paying for six months, and we are losing money that should be going into our reserve fund.

Chairman Anderson:
Does the bank not maintain an insurance policy on the property as the holder of the initial deed of trust?

Bill DiBenedetto:
I do not know. I would assume they would have to have some kind of liability insurance with the property.

Assemblyman Cobb:
When the banks foreclose, do they not take the position of the owner in terms of the covenants?

Bill DiBenedetto:
They do.

Assemblyman Cobb:
Do they have to start paying dues?

Bill DiBenedetto:
They have to start paying dues, and they have to abide by the covenants, which includes keeping their landscaping living.

Assemblyman Cobb:
How are they turning off the water and destroying the property?

Bill DiBenedetto:
They just shut off the water at the property.

Assemblyman Cobb:
And you do not do anything to try to force them to abide by the covenants?

Bill DiBenedetto:
There is nothing that we can do, unless we want to absorb legal costs by taking them to court. We cannot afford that. We have called them; we have begged them; there is just no response.

Assemblyman Cobb:
You cannot recover those legal costs if you do take them to court?

Bill DiBenedetto:
I have not pursued that any further with my board or the attorneys. Thank you.

Chairman Anderson:
Thank you, sir.

Michael Trudell, Manager, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have emailed a prepared statement to members of the Committee (Exhibit V). I do not want to belabor the point. There is a statutory obligation of HOAs to maintain their common areas and to maintain the reserve accounts for their HOAs. I also believe that there is a direct impact on homeowners when there is only a six month ability for the HOA to collect because we have to be much more aggressive in our collection process. If that time frame was to be increased, we would be more willing to work with homeowners. Recently, our board at Caughlin Ranch changed our collection policy to be much more aggressive and to start the lien process much more quickly than we had in the past, which eventually leads to a foreclosure process. I think that has a direct impact upon our homeowners.

Chairman Anderson:
Mr. Trudell, you have been associated with this as long as I can recall, and you have been appearing in front of the Judiciary Committee. In dealings with the banks, have there been these kinds of problems in the past with your properties and others that you have been with?

Michael Trudell:
Yes, sir. Mr. Chairman, in the past, banks were much more receptive in working with us to pay the assessments and to get a realtor involved in the property to represent the property for sale.

Chairman Anderson:
Since the HOA traditionally looks out to make sure that everyone is doing the right thing, when there is a vacant property there, you probably become a little bit more mindful of it than you would in a normal community. Do you think that

this is the phenomenon right now because of the current economic situation? By extending this time period, are we going to be establishing an unusual burden, or changing the responsibility of the burden in some unusual way? In other words, should it have originally been this longer period of time? Why should there be any limit to it at all?

Michael Trudell:
From the association's standpoint, no limit would be better for the HOA, because each property is given its pro rata share of the annual budget. When we are unable to collect those assessments, then the burden falls on the other members of the HOA. As far as the current condition, banks in many instances are not taking possession of the property, so the property sits in limbo. There is a foreclosure, and then there is no property owner, at least in the situations that I have dealt with in Caughlin Ranch. We have had much fewer incidences of foreclosure than most HOAs.

Chairman Anderson:
Thank you very much. Let us turn to the folks in the south.

Lisa Kim, representing the Nevada Association of Realtors, Las Vegas, Nevada:
The Nevada Association of Realtors (NVAR) stands in support of A.B. 204. Property owners within common-interest community associations are suffering increases in association dues to cover unpaid assessments that are uncollectable because they are outside of the 6-month superpriority lien period. Many times, these property owners are hanging on by a thread in making their mortgage payment and association dues payment. I talk to people everyday that are nearing default on their obligations. By increasing the more-easily collectable assessments amount, the community associations are going to be able to keep costs down for the remaining residents. Thank you.

Chairman Anderson:
Thank you.

John Radocha, Private Citizen, Las Vegas, Nevada:
I cannot find anywhere in this bill, or in NRS Chapter 116, where a person, who has an assessment against him or her, has the right to go to the management company and obtain documents to prove retaliation and selective enforcement that was used to initiate an assessment. If they come by and accuse me of having four-inch weeds, and my next door neighbor has weeds even taller, and they are dead, that is selective enforcement. I think something should be put into this bill where I, as an individual, have the right to go to the management company and demand documentation. That way, when a case comes up, a person can be prepared. This should be in the bill someplace.

Chairman Anderson:
We will take a look and see if that is in another section of the NRS. It may well be covered in some other spot, sir.

John Radocha:
On section 1, number 5, I was wondering, could not that be changed to "a lien for unpaid assessments or assessments is extinguished unless proceedings to enforce the lien or assessments instituted within 3 years after the full amount of the assessments becomes due"?

Chairman Anderson:
The use of the words "and" and "or" are usually reserved to the staff in the legal division. They make sure the little words do not have any unintended consequences. But, we will take your comments under suggestion.

Michael Buckley, Commissioner, Las Vegas, Commission for Common-Interest Communities Commission, Real Estate Division, Department of Business and Industry; Real Property Division, State Bar of Nevada:
We are neutral on the policy, but we wanted to point out that one of the requirements for Fannie Mae on condominiums is that the superpriority not be more than six months. Just for your education, the six month priority came from the Uniform Common-Interest Ownership Act back in 1982. It was a novel idea at the time. It was met with some resistance by lenders who make loans to homeowners to buy units. It was generally accepted. We are pointing out that we would want to make sure that this bill would not affect the ability of homeowners to be able to buy units because lenders did not think that our statutory scheme complied with Fannie Mae requirements.

My second point is that there was an amendment to the Uniform Common-Interest Ownership Act in 2008. It does add to the priority of the association's cost of collection and attorney's fees. We did think that this would be a good idea. There is some question now whether the association can recover its costs and attorney's fees as part of the six-month priority. We think this amendment would allow that and it would allow additional monies to come to the association.

Chairman Anderson:
Are there any questions for Mr. Buckley who works in this area on a regular basis?

Assemblyman Segerblom:
I was not clear on what you were saying. Are you saying that this law would be helpful for providing attorney's fees to collect the period after six months?

Michael Buckley:
What I am saying is that, with the existing law, there is a difference of opinion whether the six-months priority can include the association's costs. The proposal that we sent to the sponsor and that was adopted by the 2008 uniform commissioners would clarify that the association can recover, as part of the priority, their costs in attorney's fees. Right now, there is a question whether they can or not.

Assemblyman Segerblom:
So, you are saying we should put that amendment in this bill?

Michael Buckley:
Yes, sir. This was part of a written letter provided by Karen Dennison on behalf of our section.

Chairman Anderson:
We will make sure it is entered into the record (Exhibit W).

Assemblywoman Spiegel:
I have received the Holland & Hart materials on March 4, 2009 at 2:05 p.m. They were hand delivered to my office. I am happy to work with Mr. Buckley and Ms. Dennison on amendments, especially writing out the condominium association so that they are not impacted by the Fannie Mae/Freddie Mac provisions.

David Stone, President, Nevada Association Services, Las Vegas, Nevada:
All of my collection work is for community associations throughout the state, so I am extremely familiar with this issue. Last week, I had the pleasure of meeting with Assemblywoman Spiegel in Carson City to discuss her bill and her concerns about the prolonged unpaid assessments (Exhibit X).

Chairman Anderson:
Sir, we have been called to the floor by the Speaker, and I do not want them to send the guards up to get us. I have your writing, which will be submitted for the record. Is there anything you need to quickly get into the record?

David Stone:
The handout is a requirement for a collection policy, which I think would affect and help minimize the problem that Assemblywoman Spiegel is having. I submitted a friendly amendment to cut down on that. I see that associations with collection policies have lower delinquent assessment rates over the prolonged period, and I think that would be an effective way to solve this problem. Thank you.

Chairman Anderson:
Neither Robert's Rules of Order, nor Mason's Manual, which is the document we use, recognizes any kind of amendment as friendly. They are always an impediment. Thank you, sir, for your writing. If there are any other written documents that have not yet been given to the secretary, please do so now.

Wayne M. Pressel, Private Citizen, Minden, Nevada:
Myself and two witnesses would like to speak against A.B. 204. I realize that this may not be the opportunity to do so, I just want to make sure that we are on the record that we do have some opposition, and we would like to articulate that opposition at some later time to the Judiciary Committee.

Chairman Anderson:
There will probably not be another hearing on the bill, given the restraints of the 120-day session. The next time we will see this bill is if it gets to a work session, at which time there is no public testimony. I would suggest that you put your comments in writing, and we will leave the record open so that you can have them submitted as such. With that, we are adjourned.

[Meeting adjourned at 11:20 a.m.]

RESPECTFULLY SUBMITTED:

_____
Robert Gonzalez
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 6, 2009 **Time of Meeting:** 8:12 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 182	C	Jennifer Chisel, Committee Policy Analyst	Federal Register, list of explosive materials
A.B. 207	D	Assemblyman John C. Carpenter	Prepared testimony introducing A.B. 207.
A.B. 207	E	Assemblyman Carpenter	Suggested amendment to A.B. 207.
A.B. 207	F	Robert Robey	Suggested amendment to A.B. 207.
A.B. 189	G	Assemblyman Joseph Hogan	Prepared testimony introducing A.B. 189.
A.B. 189	H	Assemblyman Joseph Hogan	Chart comparing the various eviction processes of various states.
A.B. 189	I	Assemblyman Joseph Hogan	Flow chart of the California eviction process.
A.B. 189	J	Jon L. Sasser	Prepared testimony supporting A.B. 189.
A.B. 189	K	Rhea Gerkten	Prepared testimony supporting A.B. 189.
A.B. 189	L	James T. Endres	Suggested amendment to A.B. 189.
A.B. 189	M	Charles "Tony" Chinnici	Prepared testimony against A.B. 189.
A.B. 189	N	Jennifer Chandler	Prepared testimony against A.B. 189.
A.B. 189	O	Jeffery G. Chandler	Prepared testimony against A.B. 189.
A.B. 189	P	Kellie Fox	Prepared testimony opposing the change in section 2 of A.B. 189.
A.B. 189	Q	Bret Holmes	Prepared testimony against A.B. 189.
A.B. 189	R	Charles Kitchen	Prepared testimony against A.B. 189.

Nick Anthony, Committee Counsel:
His bill limited the fees and the amount of interest that could be collected. This bill limits the extra costs that may be incurred in collecting a past-due obligation.

Assemblywoman Spiegel:
For example, if a common-interest community association charges a fine, it is not paid, and there is a collection effort to go after the fine, in addition to seeking to collect the penalty for the violation, there would be interest and a collection fee. This amendment would limit the collection fee. My understanding is that Assemblyman Munford's bill limited what the penalty itself could be and the interest rate.

This bill also encompasses regular assessments, what are called HOA dues. They are the general assessments that are due periodically to maintain the operating accounts and balances of the associations and to fund their reserve accounts.

Chair Segerblom:
After the last hearing on this bill, there were questions about whether your extension of the look-back for homeowners' association (HOA) liens to two years would violate Federal Housing Administration (FHA) or Fannie Mae or Freddie Mac regulations. Did you look into that?

Assemblywoman Spiegel:
I believe the bill said to the extent it was not an issue with federal law. If that is not the case, I will put in another amendment if necessary.

Chair Segerblom:
Mr. Uffelman is here, so he will probably give us some language on that.

Assemblywoman Spiegel:
This is something that will help preserve communities.

Chair Segerblom:
I think the intent is fantastic.

Assemblyman Kihuen:
I want to commend you for bringing this bill. Some of these issues came up on the first bill, so I am glad to see this bill.

Chair Segerblom:
Is there anyone here in support?

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
David Stone, the president of Nevada Association Services, and I have worked with Assemblywoman Spiegel, and we came up with a friendly amendment that we proposed in the original hearing (Exhibit O). It puts in place a policy for collections for homeowners' associations. We believe that if homeowners' associations actually have policies in place, then perhaps these collections would not take beyond six months.

Chair Segerblom:
So you are adding a subsection (c)? Would that impact the amendment submitted by Speaker Buckley? It seems like it is a different issue.

Assemblywoman Spiegel:
Ms. Laxalt's amendment requires common-interest communities to develop a collections policy and to provide that disclosure to the homeowners. By doing that, it makes it more fair and transparent for everyone and offers additional consumer protection because the homeowners know what their obligations are and they understand the ramifications of their actions. Conversely, it also helps the associations by clearly delineating in the policy the time frames of what would happen and when, which could accelerate the collection process and not have as large of a fiscal impact on the homeowners or the associations.

Neena Laxalt:
We just had a quick look at Speaker Buckley's amendment, and I am sure that my client would have some concerns. We would be happy to speak with the Speaker about our concerns.

Chair Segerblom:
We will not be taking any action today on this bill.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support this bill because I think it is a good bill. Also the Assemblywoman sits on one of my boards in Henderson, and this will be very beneficial. I have two comments. The amendment that has been offered by Speaker Buckley may conflict or may need to be resolved with NRS 116.31031, which already limits the collection cost in regard to fines.

Chair Segerblom:
The amendment deletes that section and replaces it.

Michael Schulman:
Okay.

I think Michael Buckley, the Chairman of the Commission, wrote to you to state that the FHA does not have rules against this particular type of statute. They have concerns about it because it will affect them, but I do not think their loans are precluded because of it.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
One of the things that is good about extending the time frame from six months to two years would be that it would allow an association to slow the collections process down. If a homeowner gets behind in his assessments and the association knows it has a two-year comfort level, it will allow the association to not race out and hire a lawyer and start the collection process.

Assemblywoman Spiegel:
I just needed to disclose that I am on the board of the Green Valley Ranch Community Association in Henderson, Nevada. This bill will not affect my association any more or less than any other.

Chair Segerblom:
Is there anyone who would like to speak against the bill?

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
When the bill was first heard in Committee, I submitted a document from the Summerlin North Homeowner Association (Exhibit P), which was amended to change the forbearance time from six months to three months. I think that an aggressive collections policy by an association is the answer to the problem the Assemblywoman is trying to solve.

The policy provides that the association can pursue on a contract theory as well as the normal course of foreclosure. The policy also provides that the association can work out with the homeowner their failure to pay in a timely fashion. It is the collections policy that makes these things work.

I am supportive of the amendment offered by Ms. Laxalt. I would point out that while Assemblywoman Buckley's amendment strikes existing law and moves it to a new section, it increases the lowest level of cost to $50 and the second level to $75, whereas existing law provides for $20 and $50 in those two categories. I am not sure where the reduction is, unless it is an overall reduction in cost.

The letter submitted (Exhibit Q) provided the policy of Fannie Mae, which will not buy a mortgage on a condominium with more than six months of past due assessments. We took a small survey. Other lenders, while they do not have established policies, said the bill if passed will have a negative impact on lending in Nevada. Again, on behalf of the bankers, the answer to the problem the Assemblywoman is trying to address is an aggressive collection policy by the homeowners' association.

Chair Segerblom:
Will Assemblywoman Spiegel's two-year provision prevent some federal mortgages or not?

Bill Uffelman:
It would certainly run afoul of Fannie Mae with regard to condominiums or attached dwellings. They have specifically said they will not buy those kinds of mortgages for the secondary market.

Chair Segerblom:
Do you have any proposed language which would carve out Fannie Mae?

Bill Uffelman:
My proposed amendment would be to eliminate that section of the bill and change the two years back to six months. I had understood that the Assemblywoman was going to exclude condominiums and attached dwellings from these provisions, which would be the kind of amendment you would want to include.

Chair Segerblom:
What percentage of mortgages are Fannie Mae? Pretty high? Would it also include Veterans Administration (VA) loans?

Bill Uffelman:
Yes, it is pretty high. I did not ask a VA lender. So you understand, the latter pages of the letter (Exhibit P) are the guidelines that that lender is publishing for the benefit of mortgage brokers and anyone who is making loans.

Chair Segerblom:
What percentage of homeowners' associations are condominiums?

Bill Uffelman:
In Nevada, I do not know.

Assemblyman Hambrick:
Not only do condominiums have their own HOAs, I also live in Summerlin North and there are condominiums within an HOA. They can be members of other groups.

Bill Uffelman:
A condominium by its very nature would have to have a homeowners' association because of the common areas within it. So yes, there are a lot of condominium associations that are sub-associations of Summerlin, for example. There are a lot of properties in Summerlin that would be affected by this provision.

Assemblywoman Spiegel:
Condominiums represent about 20 percent of associations. I am willing to go through any language or any proposed amendment from Mr. Uffelman.

Chair Segerblom:
It sounds like it would be worth it. Would you be willing to do that Mr. Uffelman?

Bill Uffelman:
I would be happy to give her language on that, but we would still be opposed to the bill.

Erin McMullen, representing Bank of America, Las Vegas, Nevada:
We just want to go on record in opposition to this bill because we believe that it penalizes banks for trying to work with individuals and not foreclosing sooner.

Assemblywoman Spiegel:
I think this would be an important bill in terms of what it means for our values and our state's real estate values and what it means to our homeowners and our communities. I would like to see our communities being kept strong. I am willing to work with everyone because I think this bill is important.

Chair Segerblom:
I will close the hearing on A.B. 204. We will take a short recess.

I will open the hearing on Assembly Bill 207.

Assembly Bill 207: Makes various changes concerning common-interest communities. (BDR 10-694)

Assemblyman Segerblom:
Yes, I thought that was a valid point. Since insurance cannot be purchased for punitive damages, and because, for the most part, these are volunteer boards, I think it is inappropriate at this time to have a director subject to punitive damages.

Chairman Anderson:
There were also issues brought forth by Mr. Gordon, representing the Olympia Group. I would suggest that, if he wants, he can raise them again in the Senate. We will probably see this bill again in conference.

I would entertain a motion to amend and do pass Assembly Bill 350 with the amendments suggested in mock-up number 3895, which Legal carefully reviewed yesterday and the deletion of the provision for punitive damages.

> ASSEMBLYMAN SEGERBLOM MOVED TO AMEND AND DO PASS ASSEMBLY BILL 350 AS STATED.
>
> ASSEMBLYMAN KIHUEN SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

We will not have to consider Assembly Bill 108. [The bill was incorporated into Assembly Bill 350.]

Assemblyman Segerblom:
Assembly Bill 204, Assembly Bill 207, Assembly Bill 251, Assembly Bill 311, and Assembly Bill 361 were all unanimously approved as amended by the Subcommittee.

Chairman Anderson:
Do they each have an amendment?

Assemblyman Segerblom:
Yes.

Chairman Anderson:
We will take up Assembly Bill 204. We were briefed on all of these yesterday.

Assembly Bill 204: Revises provisions relating to the priority of certain liens against units in common-interest communities. (BDR 10-920)

Nicolas Anthony, Committee Counsel:
Assembly Bill 204 has two amendments attached. One is to address a potential conflict with Fannie Mae lending provisions and the other is about collection policies [pages 48-49 of Exhibit E].

Chairman Anderson:
I will entertain an amend and do pass motion on the recommendation of the Subcommittee.

ASSEMBLYMAN MANENDO MOVED TO AMEND AND DO PASS ASSEMBLY BILL 204.

ASSEMBLYMAN SEGERBLOM SECONDED THE MOTION.

Assemblyman Cobb:
I think that two years is an extraordinary amount of time to have a look-back, especially when we are trying to clear these houses out of inventory and drop as many barriers as possible to getting them into the hands of new owners. What concerned me about some of the testimony we heard on this bill was that some homeowners' associations said that they cannot extract any kind of dues, fines, fees, or assessments from banks; they cannot even get them to mow the lawns.

We heard testimony on a separate bill that the bank is in the same position as any other owner. There is a process to move against them to collect, so there does not need to be all the lawyers' fees and everything else that will be piled on. One of my constituents said he was trying to buy homes to reduce the inventory and get the economy going again, and he was handed an invoice for $4,000 from a homeowners' association with $16-a-month dues. So it was not the dues, it was the attorney's fees and everything else that was added on. I think six months should be enough.

Chairman Anderson:
Homeowners' associations have been dealing with the problem for some time, and they would like to abrogate it so that the expenses they have been carrying are passed to the new owner as part of closing.

Assemblyman Segerblom:
Another issue was that this bill was supposed to put a fire under the banks' feet because, right now, they just let the property go knowing that after six months they are no longer obligated for these fees. This will hopefully encourage the banks to get the properties up and running and try to sell them.

Assemblyman McArthur:
I do think 24 months is far too long, but I will vote yes to get this bill out of Committee. I reserve my right to change my vote later.

THE MOTION PASSED. (ASSEMBLYMAN COBB VOTED NO. ASSEMBLYMAN McARTHUR RESERVED THE RIGHT TO CHANGE HIS VOTE ON THE FLOOR.)

Let us turn to Assembly Bill 207, Assemblyman Carpenter's bill. The recommendation from the subcommittee was an amend and do pass.

Assembly Bill 207: Makes various changes concerning common-interest communities. (BDR 10-694)

ASSEMBLYMAN MANENDO MOVED TO AMEND AND DO PASS ASSEMBLY BILL 207.

ASSEMBLYMAN KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Let us turn to Assembly Bill 251. Again, the Subcommittee voted unanimously to recommend an amend and do pass to the full Committee.

Assembly Bill 251: Revises provisions relating to common-interest communities. (BDR 10-555)

Nicolas Anthony, Committee Counsel:
There is a mock-up prepared [page 52 of Exhibit E], which clarifies that if an election is held and there is a member running without opposition, then the board does not have to send out ballots. It can just elect the person.

ASSEMBLYMAN CARPENTER MOVED TO AMEND AND DO PASS ASSEMBLY BILL 251.

ASSEMBLYMAN SEGERBLOM SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Let us turn to Assembly Bill 311, Assemblyman Settelmeyer's bill.

Assembly Bill 311: Revises provisions governing the financial statements of common-interest communities. (BDR 10-389)

GARY E. MILLIKEN (Community Associations Institute):
I agree with everything Ms. Gallo and Ms. Stokey said. The bottom of page 2 of the bill, the very last sentence says, "... owns the vehicle for the purpose of responding to requests for public utility services ... ." Do we need to add the words "first responder" or "emergency" in that situation?

CHAIR CARE:
I will close the hearing on A.B. 129 and open the hearing on A.B. 204.

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

ASSEMBLYWOMAN ELLEN B. SPIEGEL (Assembly District No. 21):
As a disclosure, I serve on the Board of the Green Valley Ranch Community Association. My participation on the Board gave me insight into this issue. I learned about some of these issues as I was going door-to-door speaking with constituents, and I did more research.

I am here to present A.B. 204, which can help stabilize Nevada's real estate market, preserve our communities and help protect our largest assets—our homes. Whether you live in a common-interest community or not, whether you like common-interest communities or hate them, and whether you live in an urban or rural area, the outcome of this bill will have an impact on you and your constituents.

In a nutshell, this bill does two things. First, it requires common-interest communities to implement and publicize their collection policies. This will increase the likelihood that associations will be able to collect their assessments or dues prior to foreclosures. Second, it makes it possible for common-interest communities to collect dues in arrears for up to two years at the time of foreclosure. This is necessary because foreclosures are now taking up to two years.

Everyone who buys into a common-interest community understands there are dues. Community budgets have historically been based on the assumption that nearly all of the regular assessments or dues will be collected. Communities are now facing severe hardships, and many are unable to meet their contractual obligations because they are not receiving the revenues owed to them. Others

are reducing their services and maybe simultaneously increasing their financial liabilities. They and their homeowners need our help.

I recognize there are some who are opposed to this bill, and you will hear from them later this morning. The objectives of the bill are to help homeowners, banks and investors maintain their property values; help common-interest communities mitigate the adverse effect of the mortgage foreclosure crisis; help homeowners avoid special assessments resulting from revenue shortfalls because fellow community members did not pay their required fees; and prevent cost shifting from common-interest communities to local governments. This bill is vital because our constituents are hurting. Our economic condition is bleak, and we must take action to address our State's critical needs.

Statewide, our individual property values continue to decline. Our urban areas are being hit the hardest. Everywhere in Nevada, we are having foreclosure problems. Clark County is the hardest hit. Between the second half of 2007 and the second half of 2008, property values declined in all zip codes in the Las Vegas Valley, except for one. The smallest decline was 13 percent, and the largest decline was 64 percent.

Our property values are being depressed because of a few factors. The increased inventory of housing due to foreclosures, abandoned homes and economic recession bring the pricing down. Consumer inability to acquire mortgages, increased neighborhood blight and the decreased ability of communities to provide obligated services also bring prices down. No one wants to buy into a blighted community unless it is at a bargain-basement price.

We all hoped the stimulus package would help, but help is not on the way for most Nevadans. We have the highest percentage of underwater mortgages in the nation. Twenty-eight percent of Nevadans owe more than 125 percent of their mortgage value, so they are not qualified for federal help. Nearly 60 percent of the homeowners in the Las Vegas Valley have negative equity in their homes.

What does this mean for homeowners in common-interest communities? There is decreased quality of life because there are fewer services provided by the associations. There is also increased vandalism and other crime. There is the potential for increased regular and special assessments to make up for revenue shortfalls. As a corollary to that, associations have liability exposure because, if

they say they are providing certain services, people may have bought in because of those services. If those services are not being provided, the association has liability for that. There is increased instability for communities and further declines in property values. Nevada Revised Statute 116.3107 requires associations to maintain, repair and replace the common elements. If the money is not there, it has to come from somewhere. Associations stop providing services or impose special assessments.

I conducted a survey and received responses from community association managers statewide. My responses covered 77,020 doors. Seventy-five common-interest communities responded—55 responded in Clark County and 20 in Washoe County. No one was opposed to the bill. I provided you with a summary of my testimony (Exhibit F, original is on file in the Research Library). The comments I received from the survey were enlightening, Exhibit F, pages 10 through 12.

Cost shifting is going on for some services. The costs are being shifted to local governments. For example, in my community, we have a company that does graffiti removal. Clark County also provides graffiti-removal services. If we needed to cut our budget for lack of funds, we could theoretically advise the homeowners to call Clark County, and they will come and take care of it. This cost would shift to the local government.

Code enforcement would be similar. If we have to cut back on inspections, local governments would have to take on those roles. The use of public pools and parks will increase because, if the communities are not able to maintain their pools, people will then go to the public pools and parks.

I was questioned about security patrols. My community experienced an increase in vandalism and problems along our walking paths. We could not afford to beef up our private security patrols. So, we turned to the City of Henderson. My community is open and ungated. The City of Henderson has increased patrols in my community. There is cost shifting going on because we cannot afford to hire the private companies we have traditionally relied on.

Another potential impact is when communities are having cash-flow issues and make late payments to local vendors—gardeners or small businesses that provide support services. This further contributes to the downfall of the area.

There are a few proposed amendments out there. You have received two of them by e-mail or regular mail. I put an amendment together that encapsulates one of the amendments and has some additional language (Exhibit G). My amendment does two things. The bill has excluded certain types of units because of Fannie Mae and Freddie Mac requirements. At the time, we thought the easiest way to do that would be to limit it to single-family homes. That excluded lots that have been purchased but not developed and other things that should be covered. We have made the language generic so those would be included where permissible.

There are some condominiums and attached townhomes on properties that were excluded in the version of the bill you have, and they do not fall under Fannie Mae and Freddie Mac requirements and provisions. Those should be included as well.

The other component of this amendment is that, if Fannie Mae and Freddie Mac requirements were to change so properties could be covered under them or the super priority could be extended under them, no additional legislation would be needed.

The Bankers Association has an amendment (Exhibit H). I do not support that amendment because it takes away from the intent of helping communities recover funds and make themselves whole so they can provide the services they need to provide.

I urge your support. Assembly Bill 204 supports Nevada communities and is vital for our recovery. It stabilizes communities; it will mitigate further declines in property values and local businesses; and it will help homeowners, families, banks and other investors.

CHAIR CARE:
We have two proposed amendments, one from Sandra Duncan (Exhibit I) and one from the Bankers Association, Exhibit H. Your mock-up, Exhibit G, would relate to all real property within the association, correct? Initially, it was the detached family dwelling.

ASSEMBLYWOMAN SPIEGEL:
Initially, it was all property. Then, we limited it to single-family dwellings in consideration of Fannie Mae and Freddie Mac because condominiums,

townhomes and other attached dwellings could not be included or they would not underwrite the mortgages. We thought that was acceptable because they underwrite approximately 80 percent of all mortgages. We did not want to create more problems for homeowners. However, we excluded lots such as Mrs. Duncan was concerned about.

CHAIR CARE:
The way your amendment, Exhibit G, is drafted, it says, "... unless the federal regulations ... ," Exhibit G, page 2, line 15. It goes on to say, "... If the federal regulations ... ." There are already federal regulations. Is this in anticipation of federal regulations being adopted?

ASSEMBLYWOMAN SPIEGEL:
I understand there are regulations or requirements that say for loans Fannie Mae and Freddie Mac underwrite, there is no more than a six-month super priority associated with that. The second part of the language says, if they were to change their regulations to whatever period they would designate, that would apply here as well.

CHAIR CARE:
Apparently, discussions like that are taking place in Washington, D.C.?

ASSEMBLYWOMAN SPIEGEL:
They are either taking place or are imminent.

CHAIR CARE:
If they were adopted, I do not know if we need the language.

SENATOR PARKS:
Detaching condominiums and townhouses is a problem for me and a number of my constituents. Something has to be in this bill addressing their issues. The existing language appears to include single-family, condominiums and townhouses, whereas the revised language appears to me to only include single-family detached dwellings.

ASSEMBLYWOMAN SPIEGEL:
The original version of the bill did include townhomes and condominiums. The amended version to address the Fannie Mae and Freddie Mac issue was limited to single-family homes. My amendment, Exhibit G, would extend it to

condominiums, townhomes and other types of property wherever possible because Fannie Mae and Freddie Mac's federal regulations take precedence over Nevada law.

CHAIR CARE:
Section 1 of the bill, page 3, line 24 through 27, says the executive board will make the policy established available to each unit's owner. Does that mean it is available upon request, or is there a requirement contemplated here that policy would be given to the unit owners as a matter of course?

ASSEMBLYWOMAN SPIEGEL:
Under NRS 116, the boards are required to mail the budget to each homeowner within their association for approval and ratification of the budget. This provision would require the collections policy to be included in that packet.

SANDRA DUNCAN (Airpark Estates Homeowners' Association):
I had submitted a proposed amendment, Exhibit I. However, the language in Assemblywoman Spiegel's amendment, Exhibit G, is better than what I had suggested. I am in favor of her bill. We have at least one homeowner who is seriously delinquent. The process of foreclosure is taking considerably longer than the six months. This extension of the super-priority lien would help avoid other homeowners having to make up for the amount of money we are losing. Even though we are small, our association has a collections policy. We mail that out annually to our homeowners. If you pass Assemblywoman Spiegel's amendment, Exhibit G, I will withdraw my amendment.

JOSH GRIFFIN (American Nevada Company):
We support this bill and Assemblywoman Spiegel's amendment. American Nevada Company has built and developed the two largest condominium projects in that section of Green Valley in Assembly District No. 21.

MS. ROCK:
Olympia Group supports this bill. It is valuable. The lack of the ability to collect assessments puts a burden on government agencies. Southern Highlands, which is our largest master-planned community, is located in the southwest area of Las Vegas. The Las Vegas Metropolitan Police Department (Metro), Southwest Area Command services that area. On any shift, they generally have between 11 and 16 vehicles on the road. They cover 250,000 rooftops. That is approximately one Metro vehicle to 20,000 homes. We have 7,000 homes in

Southern Highlands and 4 security vehicles. That is 1 security vehicle for every 1,700 homes. On a daily basis, when calls come into Metro, they call our security force to be a first response for backup if there are vehicular accidents. Master-planned communities provide vital services that take the burden off law enforcement agencies. But it is a nonessential service and is something considered to be cut when there is a lack of funds.

MICHAEL TRUDELL (Caughlin Ranch Homeowners' Association):
We support this bill. I had some concerns about the amendment approved on the other side because, as a manager, we have to interpret these provisions, and we disagree with title companies or Realtors regarding our interpretation. This amendment, Exhibit G, clarifies the intent of the bill and the provisions that would exclude those houses from the two-year super-priority lien to the six-month in a way that satisfies our concerns.

MIKE RANDOLPH (Homeowner Association Services):
I am in favor of this bill. I am glad to see the requirement to send the collection policy annually. It should also be sent with all welcome packages and resale packages.

Condominium and townhouse associations have a high foreclosure rate. The costs not paid during the super-priority lien raises fees to other members who are struggling to stay in their homes. If we can include the condominiums, townhouses and mobile home communities, it would be great for Nevada and all homeowners.

BILL UFFELMAN (Nevada Bankers Association):
I am a representative to the Summerlin North Community Association. We modified our policy to specifically emphasize the ability of the association to do collections outside the lien process. They could bring an action.

The irony is that homeowners' associations, in many cases, are the first one to know a homeowner is in trouble. They have not missed their mortgage payment but miss their HOA payment. If the association stays on top of that and exercises its right under the law, there is self help there.

You processed a bill from Senator Parks talking about the foreclosure owner filing within 30 days; they are the new owner. The association will know who the new owner is. On May 5, you will hear a bill from

Assemblyman Richard McArthur, Assembly District No. 4, which talks about a homeowners' association entering properties in the association to do minimal maintenance so it is not an eyesore.

That lien, because it is an assessment, will survive and be part of the foreclosure and would be paid. The new owner of that property has an obligation to maintain the property at the HOA standards.

In foreclosures, a bank or the lender does not have any title or right to that property until the foreclosure sale. You have a 21-day notice that there is going to be a sale. You have to give a 90-day notice of default and the intent to exercise rights to sell. Typically, you do not get the 90-day notice until you have missed payments for 3 months. The reality is, in approximately 210 days, the lender may become the owner at the foreclosure sale, or a third party may purchase the property. That is where the six-month look back on homeowner assessments comes in.

Until you start missing payments, the lender has no idea what your situation is. The bill is retroactive. As the bill is written, prospectively, we can pick and choose among the dwellings this will apply to in a homeowners' association because it would apply if someone's loan is a Fannie Mae or Freddie Mac conforming loan. If Fannie Mae or Freddie Mac own the loan, their rules would apply. If it is another mortgage-backed security, you would have another set of rules if it forecloses another time.

The bill is disruptive of the lending process. Lenders, when a bundle of mortgages is offered, have to evaluate what they are buying. This is in part what got us where we are because the people who were supposed to do that evaluation were not paying attention to their job.

My amendment, Exhibit H, is to strike section 2. That will keep the law at the six-month look back on homeowners' association dues. It takes advantage of the provision, saying HOAs must get serious about managing their association. With Senator Parks' bill and Assemblyman McArthur's bill, you are attacking the core of the problem. In many ways, there is a reward for homeowners' associations where the association management has not exercised their right. The purchaser at the foreclosure is going to pay—the financial institution that is foreclosing or a third-party purchaser at the foreclosure sale.

The Nevada Bankers Association is opposed to section 2 of this bill and ask that you strike it from the bill.

CHAIR CARE:
Were you stating there are people who are making their mortgage payments but skipping the general assessments? The property manager or HOA is aware of that. I do not know the degree of tolerance for that.

MR. UFFELMAN:
My association tightened down its collection policy. Before that, you were allowed about six-months slippage before they attacked you. Now they attack more aggressively and quicker. They give you 30 days to cure, and if you do not cure, you no longer get the option of monthly payments; you have to pay a year ahead. They made it clear they have a right to sue in civil court under the contract. You have a contract with your homeowners' association and have a contractual obligation to pay the fees. You could get a judgment against you. That could all be triggered before you miss your first mortgage payment.

CHAIR CARE:
You gave us the 200-day scheme, which gave rise to the 6 months currently on the books. The testimony was that foreclosures are now taking up to two years.

MR. UFFELMAN:
I do not know whether they are taking two years. One of the ironies is that around Thanksgiving, Fannie Mae and Freddie Mac dictated a moratorium that they were not allowing any more foreclosures for about 90 days. So, we had a big spike in foreclosure filings in March. That was because Fannie Mae and Freddie Mac's foreclosure moratorium expired.

Those who service the mortgages—receive the payments and distribute them to paper holders, mortgage-backed securities or the bank—the system got bound up. We have worked through those things. There are lenders who have not pursued foreclosures. Once I have become the owner, I have an obligation under Nevada law, and as further emphasized by Assemblyman McArthur's bill and Senator Parks' bill, to maintain that property to the association's standards. That is going forward after the foreclosure. I have no control over what happens up to the time of the sale.

There is the situation where an investor purchases a home and intends to flip that home to make money. Perhaps he sat on it for a year and did no maintenance. Assemblyman McArthur's bill speaks to that situation. Senator Parks' bill speaks to the situation that, once it is sold, the association will know who the owner of the property is. Then the association would pursue the new owner to do what he is required by law to do. As lenders, we have no control of it until we own it.

GEORGE ROSS (Bank of America):
Bank of America opposes A.B. 204, at least section 2. The time of six months should not be extended to two years. Bank of America works with those with whom it has mortgages to try to keep them in their properties. Those people are beginning to exhibit signs that they may fall behind. If they do fall behind, miss payments or make late payments, Bank of America makes every effort to contact that person and find out what is happening. Bank of America tries to find out what it can do to adjust the mortgage, forgive payments for six months or redo their mortgage. Similarly, Bank of America is now in a nationwide program to redo hundreds of thousands of mortgages. Six thousand or more people work directly on this.

Sometimes, these efforts do not work, and the home is ultimately foreclosed. This can take time, up to two years. What we are seeing here is that because we worked with these people for a period of time to try to keep them in their home, we will be penalized for 18 more months of homeowner dues. If we work with these people and are then penalized with homeowner dues, that is not a good economic calculation.

You will get several bills from the Assembly having to do with helping renters in foreclosed situations and bills helping those who are getting mortgages. Assembly Bill 149 will set up a mediation process for those who are afraid to go to their lender. Those are progressive bills. But this bill sends the wrong message to a bank who may be trying to help people stay in their homes.

ASSEMBLY BILL 149 (1st Reprint): Revises provisions governing foreclosures on property. (BDR 9-824)

CHAIR CARE:
I will close the hearing on A.B. 204. We will go back to work session and address A.B. 59, Exhibit C, page 2.

ASSEMBLYMAN MCARTHUR:
That was changed in the amendment. I am not sure why, when the wording is technical. An HOA can include high-rise condominiums. If you go to common-interest communities, it refers to the single-family detached dwellings. That was probably added to coincide with the wording on page 1 where my original bill had HOAs, and they changed to common-interest communities. Those are common-interest communities; that is why the wording was changed.

CHAIR CARE:
We had A.B. 204, and I am looking at a note indicating the amendment was added to avoid conflict with federal laws. I recall some connection to the Federal National Mortgage Association (Fannie Mae).

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

ASSEMBLYMAN MCARTHUR:
There were some Fannie Mae and lookback problems when you went further than the six-month lookback. That was part of complying with those laws.

SENATOR WIENER:
Mr. Chair, to respond to your question about subjective determination, on page 2, line 33, "adversely affects the use and enjoyment." An abandoned or vacant property does not always have to be sight, it could be odor or something deteriorating on the premises which would ... you might not see it, but you can smell its presence.

Assemblyman McArthur, on page 3, section 1, subsection 9, paragraph (c), it says "has failed to pay assessments for more than 30 days." When does the clock start ticking on the 30 days? Is it on the date due or within a 10-day grace period?

ASSEMBLYMAN MCARTHUR:
I would assume right at the beginning when it is due.

SENATOR PARKS:
I also saw 30 days and thought it seemed a fairly short period of time. A 60-day period would be more appropriate.

ASSEMBLYMAN MCARTHUR:
I agree with you, but that 30 days was not in my original bill. I would be happy to make it 60 days.

SENATOR PARKS:
Mr. Chair, I would say if we are looking at an amendment, we may want to address that.

CHAIR CARE:
That is fine. Thank you, Senator Parks. Any additional questions?

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
I am in support of the bill. In the fall, Assemblyman McArthur and I talked about the problem. I suggested the lender has no right of entry until after the foreclosure sale, at which time the lender, for better or worse, winds up being the winner. I suggested this remedy was perhaps the way to deal with these things. As he has noted, we do not want to view this as a license for the association to make it the most pristine house on the block.

The questions you had regarding what is blight or deterioration were good ones. I suspect when you see it, you will know it. Over the weekend, there was a story in the paper that relates to the concept of affecting the enjoyment. A colony of bees had moved onto a property. The next-door neighbor was allergic to bee stings, and the roses in her yard drew the bees. The neighbors, out of their own pockets, had the bees removed. Those situations hopefully will be remedied under this bill. Some members asked why we have to notify them that we have filed the notice of default with the election to sell when it is a public document. I have suggested they might want to go along to get along. There are technical issues, but everybody is going to have to roll with this to make it work.

You are correct in the reference to the single-family designation. If you are in a condominium, their obligation includes the maintenance of the exterior and the common grounds. All those things are supposed to be recovered from their fees, whereas this special assessment is relative to the single-family homes and would carry into the foreclosure and be an obligation to be paid, unlike A.B. 204, the extension and lookback. Extending the 30 days to 60 days makes sense.

RANDY ROBISON (Nevada Credit Union League):
We signed in opposed, but are in complete support of the bill. Assemblyman McArthur did meet with our group before the Session and talked about how to get a situation where lending institutions and HOAs were talking about the issue much sooner in the process. However, many of the Committee members have already spoken to some of our concerns with the way the bill has been crafted?

Our issue is not with maintenance, maintaining a property, the landscaping, that type of thing. It is to the HOA's benefit as well as to the eventual owner to have that done in terms of market value and appraisal. That is not our issue. We are concerned it is crafted too broadly, particularly when we are talking about who bears the responsibility for cost recovery and those issues. A few points other Committee members have spoken to in section 1, subsection 2, paragraph (b), subparagraphs (3) and (4), lines 31 through 33, are subjective, although we understand what they are trying to get at. That might be too broad for our comfort.

CHAIR CARE:
The testimony was this language may already exist elsewhere in statute or local ordinance in North Las Vegas.

ASSEMBLYMAN MCARTHUR:
Yes. That is what I remember. I am not sure that is in our statute.

CHAIR CARE:
Since Senator Parks proposed an amendment, rather than doing anything today, this goes on work session—if we can verify the language is elsewhere in law.

MR. ROBISON:
One of our other considerations is further clarifying the limit to the application of the authority the HOA has to maintain. Perhaps that might be done by a high-dollar cap on allowable expenditures. Another way to do that may be to require documentation that shows when the costs were incurred and what they were incurred for, so when you present an order for payment, the payee has a record of those expenses.

On page 3, section 1, subsection 9, is the definition of "vacant." We were concerned about the broadness and subjectivity of the definition in terms of

subsection 9, paragraph (a), "Which appears unoccupied." We also had the 30-day concern on paragraph (c). I will use a personal example. When I come to the Legislative Session, I bring my family with me, shut down the house, turn off the lights, and we are gone for four and one-half to five months. The way we are situated in our HOA, we have one neighbor. The other side is open space all around us. At night, if you are driving by on a regular basis, it could appear the house is vacant. However, we go home a few times a Session to pull weeds. We are paid up on our assessments, but there seems to be some wiggle room that may be tightened up.

Those are our concerns. We support the concept of the bill. Assembly members have mentioned the air play between this and A.B. 204. I apologize and thank Assemblyman McArthur; he did meet with us before this Session. We spent time with him last week on some of our concerns. Comments he made in his testimony helped in terms of clarifying the intent. We did want to get on the record with those further concerns.

CHAIR CARE:
You had the same discussion on the Assembly side?

MR. ROBISON:
Unfortunately, we did not. We came to this party a little late, and I will take full responsibility for not getting over to the other side.

CHAIR CARE:
You are here representing the Nevada Credit Union League, and I do not think of credit unions as home lenders or getting in the business of refinancing homes. What is the role of credit unions when it comes to HOAs and foreclosure?

MR. ROBISON:
A significant portion of our portfolios do home mortgages. With all of the mortgage and foreclosure discussions occurring the last several months, our position is we did not do some of the risky, questionable lending on the front end because our structure does not allow us to in terms of risk or portfolio assets. Our problem as the economy has further deteriorated is many members are now losing their jobs and having difficulty paying their mortgage. In credit union land, if you miss your mortgage payment, the first time you miss it you are likely to get a call from a kind customer service representative at one of our institutions who says, hey, we see you missed your payment, is everything

okay, is there something we can do to help, has your situation changed? If so, come in and talk about it—as opposed to other institutions that may take three months before it is even flagged, and then there is another lag time to address the situation.

We do not have a problem with the intent of the bill, as we typically do that already. We know much sooner than most when one of our members is in what is going to be financial trouble. If they have to walk away from a home and we go through the foreclosure process, we already go in and start to maintain the property and the landscape. We do not like to be in the lawn-cutting business, but we figure out a way to get it done.

To answer your question, Mr. Chair, there is limited application and impact to credit unions because of our size and structure. Sometimes, that is more magnified than in other, larger financial institutions.

SENATOR WASHINGTON:
You mentioned one of your concerns about the bill is either hard-copy documentation of the cost incurred or a cap. Which would your association prefer?

MR. ROBISON:
As the League was looking at the bill, the hard-dollar cap was what they saw first. As they discussed it more, it became clear that may not work in all situations because different HOAs have varied levels of assessments and requirements in the covenants, conditions and restrictions (CC&Rs). An alternative or perhaps a conjunctive measure would be reporting when that order for costs is presented. You could sit down and have a discussion about what was done to the lawn that died. Some of this other stuff may have been beyond the scope of what we were talking about.

SENATOR WASHINGTON:
Would you want that documentation of incurred costs before the services are rendered or after?

MR. ROBISON:
We are talking in terms of after the order is issued because we do not want to limit the association in maintaining the minimums according to the CC&Rs. But

trying to balance the interests of maintaining versus getting beyond the scope of minimum maintenance may help us trim some of that cost.

ASSEMBLYMAN MCARTHUR:
I will say that we are both the same on the intent of this bill to just maintain, not add anything on. The whole idea of this bill is to make sure we get the HOAs, the lending institutions and real estate people comfortable. It looks like most of our interests are covered, but if there is something they would like to see tightened up, I would be happy to do so if we amend it anyway.

CHAIR CARE:
Mr. Robison, if you have anything, please share it with Assemblyman McArthur.

SENATOR COPENING:
Assemblyman McArthur, regarding subsection 9 where you talk about the vacancy, is there a period when somebody walks away in which the HOA could enter the property, but the banking institution will not have known that person has walked away yet?

ASSEMBLYMAN MCARTHUR:
Usually the HOAs are the first to know if somebody has just walked away. They know that their assessments and dues have not been paid and the place is deteriorating. It may have been deteriorating several months before they walked away. The problem has always been the lending institutions do not know about it, and there has been no way for them to get together. Hopefully, this way the HOAs and lending institutions will get together and talk about it, even though the lending institutions have not started paperwork for the default process.

SENATOR COPENING:
If an HOA enters the home, perhaps because of a broken window and they need to enter the premises, or they need to deal with the landscape, who assumes liability should something happen to that property? For example, a fire starts in the house or a sprinkler system breaks. Who actually has the liability for that home during that time?

ASSEMBLYMAN MCARTHUR:
The unit owner still owns the property. All this bill does is let the HOAs go on the property and maintain the property. If there is some major damage, someone

still owns it. But the whole problem is they walk away, you cannot find them and the lending institutions may not be aware of it.

SENATOR COPENING:
If an injury happens on that premises, even though that person has walked away and the HOA has chosen to go onto that property, it is still the responsibility of the owner of that home, even though they did not give permission?

ASSEMBLYMAN MCARTHUR:
That is my understanding. They can go on the property to maintain it, not for anything else.

MR. UFFELMAN:
Normally, an insurance clause in your mortgage says you will maintain an insurance policy as the owner of the property. If you defaulted on the loan and defaulted on your insurance payments too, the mortgage company has a right to purchase insurance to insure the property even though they have not gone into default during the 90-day period. There is a presumption that somebody related to the property is maintaining insurance. Whether that is 912 percent of the time, we cannot guarantee that, but the property insurance requirement is built into a mortgage.

CHAIR CARE:
Let us go to Las Vegas. Mr. Radocha, you had wanted to say a few words about A.B. 361, and Mr. Buckley, you will follow Mr. Radocha.

JOHN RADOCHA:
I am a homeowner. I know you have heard enough about good and bad boards, and the most precious commodity of the homeowner is his home, but I want to reference page 3, section 2, subsection 1, paragraph (a) and line 42. I believe this has taken the homeowner's bill of rights from him. It is like giving these guys a blank check on a board. Yes, they let you speak at a board meeting if you have an association meeting, but it is like a kangaroo court. I have seen people speak and I have seen people going through papers not even paying attention. I would like to know if that provision could be stricken from this bill because it gives them the right to do whatever they want. Where do we get the vote? This is what is bothering me. It does not say put it on a ballot.

The association CC&Rs say there will be no campers or trailers seen above the walls. A guy comes in, he gets on the board and the next thing you know there are campers and trailers above the walls. There is a rule no diesel trucks, and all of a sudden a guy comes in, he gets on the board, and the next thing you know there it is, and they say, oh no, that has been changed, that has been amended. We the people do not have a say. Everything is up to the board, and if they can get enough people at a meeting to go along with them, they say it passes. A lot of the time the president will say, I am in favor of this, anybody else? The board puts up their hands and, by golly, it passes. I do not think that is fair. I would like for homeowners to have more voting power. This bill says do any and all of the following: adopt and amend bylaws, rules and regulations. I think this should be stricken.

CHAIR CARE:
We had about a half dozen common-interest communities (CIC) or HOA bills, and we have an equal amount coming over from the Assembly. The passage you have cited in NRS 116.3102 is existing law; it is in here because it has to be. The proposal is to change a subsection to that section but not that particular language. I need you to understand that.

Your proposal would be, if the Committee had appetite, to strike from the statutes a provision you have cited, "adopt and amend bylaws, rules and regulations." Is that correct?

MR. RADOCHA:
That is correct. You could leave it in, but you need to give homeowners a provision to vote. Some boards take advantage of this. That is a big loophole. I cited some examples. Another example is they want to change something. The board people will knock on doors and say, we want you to do this, and if you do not do it, four or five days later you get a letter that says you have some three-inch weeds or you have a grease spot on your driveway. They can come up with any thing they want and you are powerless. Let the people vote on what they want to do. That is all I want to see.

CHAIR CARE:
Thank you. I am sorry you did not get to testify on A.B. 207.

MR. RADOCHA:
May I ask a question on A.B. 207? Is some of this stuff going to come up later?

CHAIR CARE:
There are other bills coming. Whatever Website you are consulting, keep watching; there will be others.

Mr. Buckley, you have heard the proposed amendment from Senator Parks as to the person holding the security interest providing the association—it would be 60 days as opposed to 30 days—and then the comments from Mr. Robison. You probably had prepared testimony, but you may want to comment anyway.

MICHAEL BUCKLEY (Chair, Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry):
I have worked with Assemblyman McArthur on the language in the bill and did not have any prepared testimony, but I would make four points for the benefit of the Committee.

The first thing is—if you look at page 2, section 1, subsection 2, paragraph (b), line 25 and then subparagraph (4), line 32—to notice the word "and." All four of those things have to be present. It is not if you are blighted or if you adversely affect, it is all of those things. That is the way the bill is written.

You will also see on page 3, subsection 9, paragraph (b), line 35 the word "and." It is not only that it is unoccupied, but it is not maintained and the assessments are not paid. So it is all three of those things. That may address some concerns of the Senators and the people who spoke.

The other thing is in reference to Mr. Robison's concerns. The association would use the standards in the community to maintain the property. It would naturally defer to whatever standards, so it would not be something out of the ordinary. If it was provided, it would be in accordance with the standards. That is what the association would do anyway.

As far as records and what money is spent, the association has to maintain records of what it spends. Under NRS 116.31175 and NRS 116.31177, unit owners are entitled to look at those records. Concerns about seeing how much the association spends are already built into NRS 116.

For an explanation on page 6, section 3, subsection 2, paragraph (c), line 7 with regard to single-family detached dwelling, yes, the issue was that Fannie Mae and Federal Home Mortgage Corporation (Freddie Mac) guidelines prohibit a superpriority lien from going beyond six months. The thought was that a single-family detached home would not be a condominium. But A.B. 204 was changed to refer to the federal regulations instead. That would be a good change in section 1, subsection 6.

Lastly, this is more a question for perhaps Assemblyman McArthur. The intent in section 1, subsection 7 is even though people may say because you acquire property at a foreclosure sale, you take free and clear of the governing documents, that is not the case. Once the property is sold to an owner, the unit is subject to the governing documents until the governing documents are amended, the community terminated or whatever. Subsection 7 creates a problem because in one sense it states what is in the law, but then it says the person would maintain the unit in accordance with the governing documents. There are many other obligations under the governing documents. The question is whether the intent of subsection 7 was to state what is already the case—which probably makes it unnecessary—or to create a statutory duty, which would be a reason to keep it in and probably change it. The person is bound by the governing documents, and it cannot be removed except in accordance with the governing documents.

I suppose a related issue is the bill states the association has a lien. The question arises what is the remedy for that lien? Is it just a lien that the association would sue on, or is it something that could be foreclosed as an assessment lien? The beginning of the bill references following a procedure for fines and providing that an association cannot foreclose for a fine but can foreclose on an assessment. There should be some clarity in the bill as what is the remedy for the lien, whether it can be included as an assessment to be foreclosed or exactly what would happen.

Those were my comments. I passed some technical comments on to Assemblyman McArthur and the bill drafter.

CHAIR CARE:
You are working with Assemblyman McArthur, and we are not going to put this bill on for work session until next week. I note the amendment that came out of the Assembly made six changes. This is a work in progress; we want to get it

right. Mr. Buckley, if you continue discussions with Assemblyman McArthur, then we can get something for the work session detailing the concerns and possible resolutions.

MR. BUCKLEY:
Happy to do so.

ASSEMBLYMAN MCARTHUR:
Yes. I deferred a lot to Mr. Buckley in his technical changes. The changes we made before is clarifying language, and he made the bill technically and legally stronger.

FLORENCE JONES:
I wear many hats in this situation. I am on a board of directors in Utah, and my primary home is in two homeowners' associations in Las Vegas. I would like to thank the Senator from my district, Allison Copening. I appreciate the work you and Assemblyman McArthur are doing. Both of you represent the area of my primary home in Sun City Summerlin.

To the gentleman who is concerned about having homeowner rights, the bylaws and the CC&Rs give us an annual meeting where homeowners have a great deal to say. The board of directors meeting is for business. In the one I sit on, homeowners may submit in writing whatever they may want to have addressed and be given a time through this venue under the Open Meeting Law statute. However, at the homeowners' annual meeting, the homeowners have a time to transact the business of the homeowners' association. He needs to look back to his bylaws and find out when his annual meeting is, gather his neighbors together and get whatever he wants accomplished done.

The bill as it stands is a work in progress, and I concur with the 60-day amendment that Senator Parks has suggested. I am concerned that formal mail needs to be directed to the homeowner, such as a certified registered letter with a return receipt, so there has been proper notice by the association and we do not have people taking over.

I get to my primary residence once every six months, but I have a lighting system that comes on at dusk and goes off at dawn. My courtyard is covered with sprinklers and I have people who do my landscaping. I could see where this might be misused if there are not some tight controls.

There will be a workshop next. I want to relate to this Committee that one of the realtors who I participate with on my other board has asked me to put on the record that there is some issue going on right now with foreclosures in the Las Vegas area where we have attorneys who have created their own collection agencies. They are picking up the ball from the HOA and running with it. When a home is put on the block for foreclosure, in addition to assessments, huge fees running $5,000 to $10,000 are now added to the price of the foreclosed home the realtors are dealing with. They are trying to get people into these homes or back onto the market and homes that are a blight back into use. There is a great deal of concern among the realtors of the Las Vegas area. I do not know if this is going on in other areas. I am thankful we are having the workshop because I have alerted the folks in Las Vegas who are concerned. They are in the process of e-mailing Assemblyman McArthur.

This is a great step in getting the language and protection for our neighborhoods in this time of people being forced to move on. But those of us who are left behind want to be sure our absence is not misunderstood. Even though our bills are paid, we might not be there for long periods of time. Assemblyman McArthur spoke to that clearly; some of us have more than one residence in this wonderful time of retirement.

CHAIR CARE:
I remind everyone this is Assemblyman McArthur's bill and will remain so. We will close the hearing on A.B. 361.

Earlier, when Senators Copening, McGinness and I met as a Subcommittee, we asked Chair Dennis Neilander of the State Gaming Control Board about the amendment from the Assembly for Senate Bill (S.B.) 83.

SENATE BILL 83 (2nd Reprint): Makes various changes relating to the regulation of gaming. (BDR 41-311)

The three of us meeting as a Subcommittee recommended we concur with the Assembly amendment. The amendment was in section 19 of the bill; They had added the language in the bill saying an heir to an interest regulated by the Gaming authorities would have one year to submit the application for compliance to get a license. The Probate Section of the Nevada State Bar was concerned that under certain circumstances, one year may not be sufficient, so

EXHIBIT B

EXHIBIT B

EXHIBIT B

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Fifth Session
March 25, 2009

The Committee on Judiciary Subcommittee was called to order by Chair Tick Segerblom at 1:39 p.m. on Wednesday, March 25, 2009, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 5100 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

SUBCOMMITTEE MEMBERS PRESENT:

Assemblyman Tick Segerblom, Chair
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen

SUBCOMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Harvey J. Munford, Clark County Assembly District No. 6
Assemblyman James A. Settelmeyer, Assembly District No. 39
Assemblyman Richard McArthur, Clark County Assembly District No. 4
Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21
Assemblyman John C. Carpenter, Assembly District No. 33
Assemblyman Mark A. Manendo, Clark County Assembly District No. 18

Minutes ID: 752

STAFF MEMBERS PRESENT:

Alison Combs, Committee Policy Analyst
Nick Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Emilie Reafs, Committee Secretary
Steve Sisneros, Committee Assistant

OTHERS PRESENT:

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Monica Wise, Private Citizen, Las Vegas, Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Paula McDonough, President, Park Tower Homeowners Association, Reno, Nevada
Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada
Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada
Garrett Gordon, Reno, Nevada, representing Olympia Group, Las Vegas, Nevada
Angela Rock, President, Olympia Management Services, Las Vegas, Nevada
Michael Schulman, Las Vegas, Nevada, representing various homeowners associations throughout Nevada
Randolph Watkins, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Michael Forman, Vice President, Green Valley Ranch Community Association, Henderson, Nevada
Michael Dixon, Private Citizen, Henderson, Nevada
Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada
John Radocha, Private Citizen, Las Vegas, Nevada
Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Frances Copeland, Private Citizen, Las Vegas, Nevada
Robert Allgeier, President, Westwood Park Homeowners Association, Minden, Nevada
Wendell Vining, Vice President, Westwood Park Homeowners Association, Minden, Nevada

Gary Lein:
Yes, absolutely. The other point is on section 1, subsection 1, paragraph (b). The audit requirement was always troublesome. We would do a review for three years and on the fourth year do an audit. The problem was having to go back into the prior year and audit the beginning balances, and it created a lot of additional work and expense to the association. I like paragraph (b) which has us consistently preparing reviewed financial statements. Where I have a problem trying to figure out is where the numbers $75,000 versus $150,000 came from. I do not know how that was developed. I do like the idea of consistently budgeting for a certain service, because there are significant differences between a review and an audit.

Assemblyman Settelmeyer:
I appreciate his disclosure on pecuniary interest, and I think his suggestion might have some merit. I chose four years because it is in existing law. I think this bill will provide some economic relief to people.

Chair Segerblom:
If you would think about the five-year versus four-year, and if it sounds good to you, it sounds good to me.

Assemblyman Settelmeyer:
I would be agreeable to that. It makes sense. If you want to have it go from four years to the year prior to the reserve study, as he indicated, I think it is a very favorable amendment, and I think it would benefit everyone.

Chair Segerblom:
I will call this bill back to the Committee, and I will open Assembly Bill 361.

Assembly Bill 361: Makes changes relating to the destruction or deterioration of foreclosed or vacant units in common-interest communities. (BDR 10-940)

Assemblyman Richard McArthur, Clark County Assembly District No. 4:
The intent of this bill is to do two things: one, to get the lending institutions and the homeowners' associations together early on in the foreclosure and vacancy process, so that the lending institutions can provide some contact information to the homeowners' associations, with their address, phone number, and the department that handles residential mortgages; and two, to make sure the homeowners' associations can maintain the exterior of the foreclosed properties and go on to the property without any liability for trespass.

I will review the bill. Section 1, subsection 1, states that a lending institution must provide the association with contact information. Paragraphs (a), (b), and (c) are the trigger points to make sure the lending institutions have to provide that information to the homeowners' associations (HOAs).

Subsection 2, about halfway through states "the association may enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions...."

Subsection 3 basically says that if a unit is vacant "the association may enter the grounds of the unit to maintain the exterior of the unit." That is the real basis for this bill. That is what people have been worried about because of the foreclosure process. The HOAs did not have any contact information with the lending institutions and there was no guarantee that there would not be liability problems when the HOA tried to keep up the exterior of these homes on their own.

Chair Segerblom:
It sounds from the first section that some of these lending institutions are trying to hide so they cannot be assessed or called on the carpet for not maintaining the property.

Assemblyman McArthur:
They basically do not have any real reason to hurry up and start the foreclosure process. The homeowners' associations have not been able to find out who the lending institutions are.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
To my right is Angela Rock with Olympia Group. To be brief, we support the bill. I have been working with the sponsor on some clarifying language, so we will continue to work with him to come up with a resolution.

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
I worked with the sponsor early on and suggested to him that this kind of bill is a solution to some of the problems we have in the communities where properties are falling into disrepair. My members assure me that once they have the legal authority to do maintenance, they do it, but until there is a foreclosure, they do not own the property and have no right of entry. If the association can do the things the Assemblyman has suggested to at least minimally keep properties in compliance, then we are all better off. So we support this bill.

Michael Schulman, representing various homeowners' associations, Las Vegas, Nevada:
This is one of the best bills we have seen this year. Our clients have a number of issues with houses that are not taken care of, and they are an incredible liability to our associations.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
I support this bill and give Assemblyman McArthur an "attaboy."

Chair Segerblom:
Is there anyone else in favor the bill? [There were none.] Is there anyone in opposition? [There were none.] Is there anyone neutral? [There were none.]

Assemblyman McArthur:
I will have a couple of wording changes, but it will not change the intent of this bill. I have already talked to Legal and the people who were testifying today, we have one section to clear up, and I will get it to you as soon as I can. The purpose of this bill is to get the homeowners' associations and the lending institutions together so they can work together on it. I think everyone will be happy with it.

Assemblyman Hambrick:
It seems like a common sense bill. It keeps the value of the property up, and it will have a good ripple affect.

Chair Segerblom:
We will bring A.B. 361 back to the Committee. That ends the three bills that had not been heard before. Now we are going to go back to some of the bills that have been heard by the full Judiciary Committee to discuss them further. I will open the hearing on Assembly Bill 108.

Assembly Bill 108: Revises provisions governing community managers of common-interest communities. (BDR 10-178)

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have some comments on A.B. 108. I submitted some comments (Exhibit L). I propose one amendment. There are three kinds of homeowners' associations: self-managed, managed with internal employees who are community managers, and others which have outside community managers. This bill is a good bill because it increases the standards for community managers. We will all benefit from that.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
May 6, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:25 a.m. on Wednesday, May 6, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblyman Bernie Anderson, Assembly District No. 31
Assemblyman John C. Carpenter, Assembly District No. 33
Assemblyman William Horne, Assembly District No. 34
Assemblyman Richard McArthur, Assembly District No. 4
Assemblyman Harvey J. Munford, Assembly District No. 6

STAFF MEMBERS PRESENT:

Nick Anthony, Deputy Legislative Counsel
Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry

Barry Smith, Executive Director, Nevada Press Association, Inc.
Bill Uffelman, President and CEO, Nevada Bankers Association
Randy Robison, Nevada Credit Union League
John Radocha
Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry
Florence Jones
Ben Graham, Administrative Office of the Courts
Connie S. Bisbee, M.S., Chair, State Board of Parole Commissioners
Teresa Werner
Lee Rowland, American Civil Liberties Union of Nevada
Patricia Hines
Lucy Flores, External Affairs and Development Specialist, Office of the Vice President for Diversity and Inclusion, University of Nevada, Las Vegas
Katie Monroe, Executive Director, Rocky Mountain Innocence Center
Sam Bateman, Nevada District Attorneys Association
Jason Frierson, Office of the Public Defender, Clark County
Orrin Johnson, Office of the Public Defender, Washoe County
Tonja Brown, Advocate for the Innocent
Ron Titus, Director and State Court Administrator, Administrative Office of the Courts
Tray Abney, Director, Government Relations, Reno-Sparks Chamber of Commerce
Mark Woods, Deputy Chief, Northern Command, Division of Parole and Probation, Department of Public Safety

CHAIR CARE:
I will open the hearing on Assembly Bill (A.B.) 207.

ASSEMBLY BILL 207 (1st Reprint): Makes various changes concerning common-interest communities. (BDR 10-694)

ASSEMBLYMAN JOHN C. CARPENTER (Assembly District No. 33):
I am here to introduce A.B. 207, which makes a number of changes to the requirements pertaining to common-interest communities. Section 1 exempts a rural agricultural, residential common-interest community from paying the $3 fee as required pursuant to chapter 116.31155 of the *Nevada Revised Statutes* (NRS) regarding the Office of the Ombudsman.

The Spring Creek Association was exempt from this fee for many years. During the 2005 Legislative Session, the law was changed. Spring Creek Association requests the $3 fee be eliminated.

The next change requested in A.B. 207 is to NRS 116.31083. The requirements of this section are expensive to comply with. The cost of mailing a notice to each property owner would be over $2,500 in postage alone. Spring Creek Association does comply with the Open Meeting Law, is more economical and resident friendly. George Taylor of the Attorney General's Office requested I clarify the status to reflect that a rural agricultural residential common-interest community was a public body in reference to the ability of the Attorney General to enforce the Open Meeting Law. This change is found on page 7, section 2, subsection 3, paragraph (b), lines 10 through 12. Nevada Revised Statute 116.31152 speaks to reserve studies. Spring Creek Association has no problem in complying with this section. However, small associations in rural Nevada in those counties with a population under 45,000 have a difficult time complying because of the cost of hiring a reserve study specialist. Often, the only common element the small communities have is a road with two or three culverts.

The amendment provides a small association use an engineer or contractor to do a specific reserve study. I have a friendly amendment (Exhibit C), which I delivered to the Committee yesterday. This friendly amendment has been proposed by Gail Anderson of the Real Estate Division of the Department of Business and Industry. It provides if one of these associations did want to use the service of the Office of the Ombudsman, they would have to pay the fee.

CHAIR CARE:
Thank you, Mr. Carpenter. Ms. Eissmann or Mr. Wilkinson, can you tell us what has happened with Senator Dean A. Rhoads' bill?

LINDA J. EISSMANN (Committee Policy Analyst):
Mr. Chair, I looked that up this morning. It was heard in Assembly Committee on Judiciary on April 17, but no action has been taken.

CHAIR CARE:
That bill contains what is section 1 of this bill. I do not recall if it had the language in section 2, which would be consistent with what is contained in section 1. Mr. Carpenter, from the Real Estate Division standpoint, if such a

rural association wanted to be a member, it could be a member for purposes of Office of the Ombudsman's purview?

ASSEMBLYMAN CARPENTER:
That is true. If they wanted to use the services of the Office of the Ombudsman, they would have to pay the fee.

GAIL J. ANDERSON (Administrator, Real Estate Division, Department of Business and Industry):
I appreciate Assemblyman Carpenter's willingness to accept the friendly amendment from the Real Estate Division (Exhibit D). Rural residential communities have utilized the services of the program of the Office of the Ombudsman. There are seven registered and of those seven, three have utilized their services. It could be clarified they could pay the fees and remain active in the program should they choose. I also wanted to set forth on the record if they do not pay the fees and are not utilizing the services of the Office of the Ombudsman, they still have the Alternative Dispute Resolution Program under NRS 38 which is facilitated by the Office of the Ombudsman. They pay a separate filing fee and could utilize those services, which do not preclude them.

I also wanted to put on the record,

> that if an association is exempt, that they would not be able to utilize the services. If they contact us or file an affidavit and we look up and find that they're exempt from registration by their choice, then we would decline to allow them to go through the process of conferencing and investigation.

CHAIR CARE:
Anyone have any questions for Ms. Anderson?

BARRY SMITH (Executive Director, Nevada Press Association, Inc.):
I am here to support the clarification that places these small communities under the Open Meeting Law.

CHAIR CARE:
As I recall, Assemblyman Carpenter, the testimony was confused as to what happened in the last minutes of the last Session. These associations were thrown within the shadow of the Office of the Ombudsman when that was not intended. It was the other issue making it a public body.

ASSEMBLYMAN CARPENTER:
I do not know what happened, but I missed where they were required to pay the fee and so did Senator Rhoads. We did not know it until after the Session was over. That is why we are back to ask they not have to pay the fee. Spring Creek Association has not used the Office of the Ombudsman. When they are under the Open Meeting Law, they operate quite well, as well as the county commissioners and the city council. They agree they need to comply with the Open Meeting Law and do.

SENATOR WIENER:
Was the provision for 20 or fewer units also in Senator Rhoads' bill as part of the definition of communities that wanted to reach 20 or fewer units?

ASSEMBLYMAN CARPENTER:
The only thing in Senator Rhoads' bill is where they ask the fee not be paid.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED A.B. 207.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION PASSED. (SENATOR AMODEI ABSTAINED FROM THE VOTE.)

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CHAIR CARE:
I will open the hearing on A.B. 361.

ASSEMBLY BILL 361 (1st Reprint): Makes changes relating to common-interest communities. (BDR 10-940)

ASSEMBLYMAN RICHARD MCARTHUR (Assembly District No. 4):
Assembly Bill 361 is another homeowners' association (HOA) bill. It is about foreclosed or vacant property in common-interest communities. The intent of this bill is to do two things. It is to get the lending institutions and HOAs together early on in the foreclosure process of the vacancy situation and have the lending institutions provide contact information to the HOAs, their addresses and telephone numbers, and the departments that handle residential mortgages.

The second thing this bill does is assure the HOAs can maintain the exterior of the foreclosed or vacant properties without liability for trespass. Those are the two main points of the bill. If you like, Mr. Chair, we can open the bill and I can go through the pertinent paragraphs and answer any questions.

CHAIR CARE:
Yes. Generally, not dwelling on the specifics too much, just a general idea of how the bill would work.

ASSEMBLYMAN MCARTHUR:
Page 2, section 1, subsection 1, sets out that lending institutions need to contact the HOAs. Subsection 2 says once the default process is started, which leads to the foreclosure, the unit owner has been notified, they have had a chance for a hearing to fix any problems and nothing has been done, then the association can enter the grounds, whether vacant or not, and maintain the exterior. It also says the HOA can maintain it but does not have to if they do not have the money or for some reason they cannot.

Section 1, subsection 2, paragraph (a), line 21 goes through the things you should do in maintaining the exterior—landscaping, standing water, health and safety issues. The intent of the bill is to maintain the exterior. This is not a green light for HOAs to put in new landscaping, $1,000 palm trees, etc. It is just to maintain it.

Section 1, subsection 3 is the same as subsection 2 except for vacant property where someone has walked away. On page 3, section 1, subsection 7, two points are set out in statutes in another place but pertinent to this bill. That is why it is here. It states if you buy a home in a foreclosure process, you have to maintain the exterior of the home. People seem to think if you buy something in foreclosure, you do not have to abide by the governing documents. The other point is the units cannot be removed from the HOA. People also thought if you buy a home in foreclosure, you do not have to be part of the HOA.

Section 1, subsection 8 says the association can enter the grounds and is not liable for trespass. Section 1, subsection 9, gives the definition of the word "vacant." We make a distinction between someone who has walked away from the unit and someone who does not live there, but it is a second home and they have paid their dues, their assessments are up and the exterior is maintained.

CHAIR CARE:
The language may already exist in other provisions of NRS, but page 2, section 1, subsection 2, paragraph (b), subparagraph (3), lines 31 and 32 say "Results in blighting or deterioration of the unit or surrounding area." When we get into case law of eminent domain that causes this, is there a particular statute that tells us what "blight or deterioration" means? It is subjective to some degree.

ASSEMBLYMAN MCARTHUR:
The exact wording was taken out of a bill used in North Las Vegas. I do not know if we have it in statute, but some of that wording was taken out of a bill that used it for quite awhile, and it seemed to work for them.

CHAIR CARE:
In the same section, subparagraph 4 says "adversely affects the use and enjoyment of nearby units." That could be a guy next door who says, I am losing sleep because I do not like the way the place looks next door.

ASSEMBLYMAN MCARTHUR:
Though subjective that wording was left in to cover any problems that may come up.

CHAIR CARE:
On page 3, section 1, subsection 9, line 31, is the definition of "vacant." This may exist elsewhere, but one of the components of that is "which appears unoccupied." People go on vacation, you know it is unoccupied.

ASSEMBLYMAN MCARTHUR:
That is why we have the definition. If someone has walked away from the unit or owns it as a second home and it appears unoccupied, it covers both cases. Paragraph (b) on line 33 further clarifies that. It does not include something that looks like it is unoccupied, which may be a second home.

CHAIR CARE:
On page 6, section 3, subsection 2, subparagraph (c), the lien language focuses on single-family detached dwellings.

ASSEMBLYMAN MCARTHUR:
That was changed in the amendment. I am not sure why, when the wording is technical. An HOA can include high-rise condominiums. If you go to common-interest communities, it refers to the single-family detached dwellings. That was probably added to coincide with the wording on page 1 where my original bill had HOAs, and they changed to common-interest communities. Those are common-interest communities; that is why the wording was changed.

CHAIR CARE:
We had A.B. 204, and I am looking at a note indicating the amendment was added to avoid conflict with federal laws. I recall some connection to the Federal National Mortgage Association (Fannie Mae).

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

ASSEMBLYMAN MCARTHUR:
There were some Fannie Mae and lookback problems when you went further than the six-month lookback. That was part of complying with those laws.

SENATOR WIENER:
Mr. Chair, to respond to your question about subjective determination, on page 2, line 33, "adversely affects the use and enjoyment." An abandoned or vacant property does not always have to be sight, it could be odor or something deteriorating on the premises which would ... you might not see it, but you can smell its presence.

Assemblyman McArthur, on page 3, section 1, subsection 9, paragraph (c), it says "has failed to pay assessments for more than 30 days." When does the clock start ticking on the 30 days? Is it on the date due or within a 10-day grace period?

ASSEMBLYMAN MCARTHUR:
I would assume right at the beginning when it is due.

SENATOR PARKS:
I also saw 30 days and thought it seemed a fairly short period of time. A 60-day period would be more appropriate.

ASSEMBLYMAN MCARTHUR:
I agree with you, but that 30 days was not in my original bill. I would be happy to make it 60 days.

SENATOR PARKS:
Mr. Chair, I would say if we are looking at an amendment, we may want to address that.

CHAIR CARE:
That is fine. Thank you, Senator Parks. Any additional questions?

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
I am in support of the bill. In the fall, Assemblyman McArthur and I talked about the problem. I suggested the lender has no right of entry until after the foreclosure sale, at which time the lender, for better or worse, winds up being the winner. I suggested this remedy was perhaps the way to deal with these things. As he has noted, we do not want to view this as a license for the association to make it the most pristine house on the block.

The questions you had regarding what is blight or deterioration were good ones. I suspect when you see it, you will know it. Over the weekend, there was a story in the paper that relates to the concept of affecting the enjoyment. A colony of bees had moved onto a property. The next-door neighbor was allergic to bee stings, and the roses in her yard drew the bees. The neighbors, out of their own pockets, had the bees removed. Those situations hopefully will be remedied under this bill. Some members asked why we have to notify them that we have filed the notice of default with the election to sell when it is a public document. I have suggested they might want to go along to get along. There are technical issues, but everybody is going to have to roll with this to make it work.

You are correct in the reference to the single-family designation. If you are in a condominium, their obligation includes the maintenance of the exterior and the common grounds. All those things are supposed to be recovered from their fees, whereas this special assessment is relative to the single-family homes and would carry into the foreclosure and be an obligation to be paid, unlike A.B. 204, the extension and lookback. Extending the 30 days to 60 days makes sense.

RANDY ROBISON (Nevada Credit Union League):
We signed in opposed, but are in complete support of the bill. Assemblyman McArthur did meet with our group before the Session and talked about how to get a situation where lending institutions and HOAs were talking about the issue much sooner in the process. However, many of the Committee members have already spoken to some of our concerns with the way the bill has been crafted?

Our issue is not with maintenance, maintaining a property, the landscaping, that type of thing. It is to the HOA's benefit as well as to the eventual owner to have that done in terms of market value and appraisal. That is not our issue. We are concerned it is crafted too broadly, particularly when we are talking about who bears the responsibility for cost recovery and those issues. A few points other Committee members have spoken to in section 1, subsection 2, paragraph (b), subparagraphs (3) and (4), lines 31 through 33, are subjective, although we understand what they are trying to get at. That might be too broad for our comfort.

CHAIR CARE:
The testimony was this language may already exist elsewhere in statute or local ordinance in North Las Vegas.

ASSEMBLYMAN MCARTHUR:
Yes. That is what I remember. I am not sure that is in our statute.

CHAIR CARE:
Since Senator Parks proposed an amendment, rather than doing anything today, this goes on work session—if we can verify the language is elsewhere in law.

MR. ROBISON:
One of our other considerations is further clarifying the limit to the application of the authority the HOA has to maintain. Perhaps that might be done by a high-dollar cap on allowable expenditures. Another way to do that may be to require documentation that shows when the costs were incurred and what they were incurred for, so when you present an order for payment, the payee has a record of those expenses.

On page 3, section 1, subsection 9, is the definition of "vacant." We were concerned about the broadness and subjectivity of the definition in terms of

subsection 9, paragraph (a), "Which appears unoccupied." We also had the 30-day concern on paragraph (c). I will use a personal example. When I come to the Legislative Session, I bring my family with me, shut down the house, turn off the lights, and we are gone for four and one-half to five months. The way we are situated in our HOA, we have one neighbor. The other side is open space all around us. At night, if you are driving by on a regular basis, it could appear the house is vacant. However, we go home a few times a Session to pull weeds. We are paid up on our assessments, but there seems to be some wiggle room that may be tightened up.

Those are our concerns. We support the concept of the bill. Assembly members have mentioned the air play between this and A.B. 204. I apologize and thank Assemblyman McArthur; he did meet with us before this Session. We spent time with him last week on some of our concerns. Comments he made in his testimony helped in terms of clarifying the intent. We did want to get on the record with those further concerns.

CHAIR CARE:
You had the same discussion on the Assembly side?

MR. ROBISON:
Unfortunately, we did not. We came to this party a little late, and I will take full responsibility for not getting over to the other side.

CHAIR CARE:
You are here representing the Nevada Credit Union League, and I do not think of credit unions as home lenders or getting in the business of refinancing homes. What is the role of credit unions when it comes to HOAs and foreclosure?

MR. ROBISON:
A significant portion of our portfolios do home mortgages. With all of the mortgage and foreclosure discussions occurring the last several months, our position is we did not do some of the risky, questionable lending on the front end because our structure does not allow us to in terms of risk or portfolio assets. Our problem as the economy has further deteriorated is many members are now losing their jobs and having difficulty paying their mortgage. In credit union land, if you miss your mortgage payment, the first time you miss it you are likely to get a call from a kind customer service representative at one of our institutions who says, hey, we see you missed your payment, is everything

okay, is there something we can do to help, has your situation changed? If so, come in and talk about it—as opposed to other institutions that may take three months before it is even flagged, and then there is another lag time to address the situation.

We do not have a problem with the intent of the bill, as we typically do that already. We know much sooner than most when one of our members is in what is going to be financial trouble. If they have to walk away from a home and we go through the foreclosure process, we already go in and start to maintain the property and the landscape. We do not like to be in the lawn-cutting business, but we figure out a way to get it done.

To answer your question, Mr. Chair, there is limited application and impact to credit unions because of our size and structure. Sometimes, that is more magnified than in other, larger financial institutions.

SENATOR WASHINGTON:
You mentioned one of your concerns about the bill is either hard-copy documentation of the cost incurred or a cap. Which would your association prefer?

MR. ROBISON:
As the League was looking at the bill, the hard-dollar cap was what they saw first. As they discussed it more, it became clear that may not work in all situations because different HOAs have varied levels of assessments and requirements in the covenants, conditions and restrictions (CC&Rs). An alternative or perhaps a conjunctive measure would be reporting when that order for costs is presented. You could sit down and have a discussion about what was done to the lawn that died. Some of this other stuff may have been beyond the scope of what we were talking about.

SENATOR WASHINGTON:
Would you want that documentation of incurred costs before the services are rendered or after?

MR. ROBISON:
We are talking in terms of after the order is issued because we do not want to limit the association in maintaining the minimums according to the CC&Rs. But

trying to balance the interests of maintaining versus getting beyond the scope of minimum maintenance may help us trim some of that cost.

ASSEMBLYMAN MCARTHUR:
I will say that we are both the same on the intent of this bill to just maintain, not add anything on. The whole idea of this bill is to make sure we get the HOAs, the lending institutions and real estate people comfortable. It looks like most of our interests are covered, but if there is something they would like to see tightened up, I would be happy to do so if we amend it anyway.

CHAIR CARE:
Mr. Robison, if you have anything, please share it with Assemblyman McArthur.

SENATOR COPENING:
Assemblyman McArthur, regarding subsection 9 where you talk about the vacancy, is there a period when somebody walks away in which the HOA could enter the property, but the banking institution will not have known that person has walked away yet?

ASSEMBLYMAN MCARTHUR:
Usually the HOAs are the first to know if somebody has just walked away. They know that their assessments and dues have not been paid and the place is deteriorating. It may have been deteriorating several months before they walked away. The problem has always been the lending institutions do not know about it, and there has been no way for them to get together. Hopefully, this way the HOAs and lending institutions will get together and talk about it, even though the lending institutions have not started paperwork for the default process.

SENATOR COPENING:
If an HOA enters the home, perhaps because of a broken window and they need to enter the premises, or they need to deal with the landscape, who assumes liability should something happen to that property? For example, a fire starts in the house or a sprinkler system breaks. Who actually has the liability for that home during that time?

ASSEMBLYMAN MCARTHUR:
The unit owner still owns the property. All this bill does is let the HOAs go on the property and maintain the property. If there is some major damage, someone

still owns it. But the whole problem is they walk away, you cannot find them and the lending institutions may not be aware of it.

SENATOR COPENING:
If an injury happens on that premises, even though that person has walked away and the HOA has chosen to go onto that property, it is still the responsibility of the owner of that home, even though they did not give permission?

ASSEMBLYMAN MCARTHUR:
That is my understanding. They can go on the property to maintain it, not for anything else.

MR. UFFELMAN:
Normally, an insurance clause in your mortgage says you will maintain an insurance policy as the owner of the property. If you defaulted on the loan and defaulted on your insurance payments too, the mortgage company has a right to purchase insurance to insure the property even though they have not gone into default during the 90-day period. There is a presumption that somebody related to the property is maintaining insurance. Whether that is 912 percent of the time, we cannot guarantee that, but the property insurance requirement is built into a mortgage.

CHAIR CARE:
Let us go to Las Vegas. Mr. Radocha, you had wanted to say a few words about A.B. 361, and Mr. Buckley, you will follow Mr. Radocha.

JOHN RADOCHA:
I am a homeowner. I know you have heard enough about good and bad boards, and the most precious commodity of the homeowner is his home, but I want to reference page 3, section 2, subsection 1, paragraph (a) and line 42. I believe this has taken the homeowner's bill of rights from him. It is like giving these guys a blank check on a board. Yes, they let you speak at a board meeting if you have an association meeting, but it is like a kangaroo court. I have seen people speak and I have seen people going through papers not even paying attention. I would like to know if that provision could be stricken from this bill because it gives them the right to do whatever they want. Where do we get the vote? This is what is bothering me. It does not say put it on a ballot.

The association CC&Rs say there will be no campers or trailers seen above the walls. A guy comes in, he gets on the board and the next thing you know there are campers and trailers above the walls. There is a rule no diesel trucks, and all of a sudden a guy comes in, he gets on the board, and the next thing you know there it is, and they say, oh no, that has been changed, that has been amended.

We the people do not have a say. Everything is up to the board, and if they can get enough people at a meeting to go along with them, they say it passes. A lot of the time the president will say, I am in favor of this, anybody else? The board puts up their hands and, by golly, it passes. I do not think that is fair. I would like for homeowners to have more voting power. This bill says do any and all of the following: adopt and amend bylaws, rules and regulations. I think this should be stricken.

CHAIR CARE:
We had about a half dozen common-interest communities (CIC) or HOA bills, and we have an equal amount coming over from the Assembly. The passage you have cited in NRS 116.3102 is existing law; it is in here because it has to be. The proposal is to change a subsection to that section but not that particular language. I need you to understand that.

Your proposal would be, if the Committee had appetite, to strike from the statutes a provision you have cited, "adopt and amend bylaws, rules and regulations." Is that correct?

MR. RADOCHA:
That is correct. You could leave it in, but you need to give homeowners a provision to vote. Some boards take advantage of this. That is a big loophole. I cited some examples. Another example is they want to change something. The board people will knock on doors and say, we want you to do this, and if you do not do it, four or five days later you get a letter that says you have some three-inch weeds or you have a grease spot on your driveway. They can come up with any thing they want and you are powerless. Let the people vote on what they want to do. That is all I want to see.

CHAIR CARE:
Thank you. I am sorry you did not get to testify on A.B. 207.

MR. RADOCHA:
May I ask a question on A.B. 207? Is some of this stuff going to come up later?

CHAIR CARE:
There are other bills coming. Whatever Website you are consulting, keep watching; there will be others.

Mr. Buckley, you have heard the proposed amendment from Senator Parks as to the person holding the security interest providing the association—it would be 60 days as opposed to 30 days—and then the comments from Mr. Robison. You probably had prepared testimony, but you may want to comment anyway.

MICHAEL BUCKLEY (Chair, Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry):
I have worked with Assemblyman McArthur on the language in the bill and did not have any prepared testimony, but I would make four points for the benefit of the Committee.

The first thing is—if you look at page 2, section 1, subsection 2, paragraph (b), line 25 and then subparagraph (4), line 32—to notice the word "and." All four of those things have to be present. It is not if you are blighted or if you adversely affect, it is all of those things. That is the way the bill is written.

You will also see on page 3, subsection 9, paragraph (b), line 35 the word "and." It is not only that it is unoccupied, but it is not maintained and the assessments are not paid. So it is all three of those things. That may address some concerns of the Senators and the people who spoke.

The other thing is in reference to Mr. Robison's concerns. The association would use the standards in the community to maintain the property. It would naturally defer to whatever standards, so it would not be something out of the ordinary. If it was provided, it would be in accordance with the standards. That is what the association would do anyway.

As far as records and what money is spent, the association has to maintain records of what it spends. Under NRS 116.31175 and NRS 116.31177, unit owners are entitled to look at those records. Concerns about seeing how much the association spends are already built into NRS 116.

For an explanation on page 6, section 3, subsection 2, paragraph (c), line 7 with regard to single-family detached dwelling, yes, the issue was that Fannie Mae and Federal Home Mortgage Corporation (Freddie Mac) guidelines prohibit a superpriority lien from going beyond six months. The thought was that a single-family detached home would not be a condominium. But A.B. 204 was changed to refer to the federal regulations instead. That would be a good change in section 1, subsection 6.

Lastly, this is more a question for perhaps Assemblyman McArthur. The intent in section 1, subsection 7 is even though people may say because you acquire property at a foreclosure sale, you take free and clear of the governing documents, that is not the case. Once the property is sold to an owner, the unit is subject to the governing documents until the governing documents are amended, the community terminated or whatever. Subsection 7 creates a problem because in one sense it states what is in the law, but then it says the person would maintain the unit in accordance with the governing documents. There are many other obligations under the governing documents. The question is whether the intent of subsection 7 was to state what is already the case—which probably makes it unnecessary—or to create a statutory duty, which would be a reason to keep it in and probably change it. The person is bound by the governing documents, and it cannot be removed except in accordance with the governing documents.

I suppose a related issue is the bill states the association has a lien. The question arises what is the remedy for that lien? Is it just a lien that the association would sue on, or is it something that could be foreclosed as an assessment lien? The beginning of the bill references following a procedure for fines and providing that an association cannot foreclose for a fine but can foreclose on an assessment. There should be some clarity in the bill as what is the remedy for the lien, whether it can be included as an assessment to be foreclosed or exactly what would happen.

Those were my comments. I passed some technical comments on to Assemblyman McArthur and the bill drafter.

CHAIR CARE:
You are working with Assemblyman McArthur, and we are not going to put this bill on for work session until next week. I note the amendment that came out of the Assembly made six changes. This is a work in progress; we want to get it

right. Mr. Buckley, if you continue discussions with Assemblyman McArthur, then we can get something for the work session detailing the concerns and possible resolutions.

MR. BUCKLEY:
Happy to do so.

ASSEMBLYMAN MCARTHUR:
Yes. I deferred a lot to Mr. Buckley in his technical changes. The changes we made before is clarifying language, and he made the bill technically and legally stronger.

FLORENCE JONES:
I wear many hats in this situation. I am on a board of directors in Utah, and my primary home is in two homeowners' associations in Las Vegas. I would like to thank the Senator from my district, Allison Copening. I appreciate the work you and Assemblyman McArthur are doing. Both of you represent the area of my primary home in Sun City Summerlin.

To the gentleman who is concerned about having homeowner rights, the bylaws and the CC&Rs give us an annual meeting where homeowners have a great deal to say. The board of directors meeting is for business. In the one I sit on, homeowners may submit in writing whatever they may want to have addressed and be given a time through this venue under the Open Meeting Law statute. However, at the homeowners' annual meeting, the homeowners have a time to transact the business of the homeowners' association. He needs to look back to his bylaws and find out when his annual meeting is, gather his neighbors together and get whatever he wants accomplished done.

The bill as it stands is a work in progress, and I concur with the 60-day amendment that Senator Parks has suggested. I am concerned that formal mail needs to be directed to the homeowner, such as a certified registered letter with a return receipt, so there has been proper notice by the association and we do not have people taking over.

I get to my primary residence once every six months, but I have a lighting system that comes on at dusk and goes off at dawn. My courtyard is covered with sprinklers and I have people who do my landscaping. I could see where this might be misused if there are not some tight controls.

There will be a workshop next. I want to relate to this Committee that one of the realtors who I participate with on my other board has asked me to put on the record that there is some issue going on right now with foreclosures in the Las Vegas area where we have attorneys who have created their own collection agencies. They are picking up the ball from the HOA and running with it. When a home is put on the block for foreclosure, in addition to assessments, huge fees running $5,000 to $10,000 are now added to the price of the foreclosed home the realtors are dealing with. They are trying to get people into these homes or back onto the market and homes that are a blight back into use. There is a great deal of concern among the realtors of the Las Vegas area. I do not know if this is going on in other areas. I am thankful we are having the workshop because I have alerted the folks in Las Vegas who are concerned. They are in the process of e-mailing Assemblyman McArthur.

This is a great step in getting the language and protection for our neighborhoods in this time of people being forced to move on. But those of us who are left behind want to be sure our absence is not misunderstood. Even though our bills are paid, we might not be there for long periods of time. Assemblyman McArthur spoke to that clearly; some of us have more than one residence in this wonderful time of retirement.

CHAIR CARE:
I remind everyone this is Assemblyman McArthur's bill and will remain so. We will close the hearing on A.B. 361.

Earlier, when Senators Copening, McGinness and I met as a Subcommittee, we asked Chair Dennis Neilander of the State Gaming Control Board about the amendment from the Assembly for Senate Bill (S.B.) 83.

SENATE BILL 83 (2nd Reprint): Makes various changes relating to the regulation of gaming. (BDR 41-311)

The three of us meeting as a Subcommittee recommended we concur with the Assembly amendment. The amendment was in section 19 of the bill: They had added the language in the bill saying an heir to an interest regulated by the Gaming authorities would have one year to submit the application for compliance to get a license. The Probate Section of the Nevada State Bar was concerned that under certain circumstances, one year may not be sufficient, so

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
May 11, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 9:14 a.m. on Monday, May 11, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblyman Mo Denis, Assembly District No. 28
Assemblyman Richard McArthur, Assembly District No. 4

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Robert D. Faiss, Adjunct Professor, William S. Boyd School of Law, University of Nevada, Las Vegas
James Conway, Student, William S. Boyd School of Law, University of Nevada, Las Vegas

Charles Peterson, Student, William S. Boyd School of Law, University of Nevada, Las Vegas
Lindsay Demaree, Student, William S. Boyd School of Law, University of Nevada, Las Vegas
Dennis K. Neilander, Chair, State Gaming Control Board
Melissa Saragosa, Las Vegas Township Justice Court, Department 4, Clark County
Ben Graham, Administrative Office of the Courts
Jon Sasser, Washoe Legal Services
Susan Fisher, Northern Nevada Motel Association; Southern Nevada Multi-Housing Association
Michael Buckley
Howard Skolnik, Director, Department of Corrections
Stefanie Ebbens, Legal Aid Center of Southern Nevada, Inc.
Frances Doherty, District Judge, Department 12, Family Division, Second Judicial District

CHAIR CARE:
I will open the hearing on Assembly Bill (A.B.) 218.

ASSEMBLY BILL 218: Authorizes the Nevada Gaming Commission to prescribe the manner of regulating governmental entities that are involved in gaming. (BDR 41-603)

ROBERT D. FAISS (Adjunct Professor, William S. Boyd School of Law, University of Nevada, Las Vegas):
Students from the gaming law legislative advocacy seminar will testify in support of their 2009 legislative project, A.B. 218. I will read from my written testimony (Exhibit C).

JAMES CONWAY (Student, William S. Boyd School of Law, University of Nevada, Las Vegas):
I will read from my written testimony (Exhibit D).

CHARLES PETERSON (Student, William S. Boyd School of Law, University of Nevada, Las Vegas):
I will read from my written testimony (Exhibit E).

SENATOR COPENING:
I would prefer to place everything we just heard into a summary so we understand it, and put it on work session.

SENATOR WASHINGTON:
I request a copy of the Arizona statute regarding what is reasonable.

CHAIR CARE:
Ms. Fisher, please provide us with the Arizona statute, and we will do the research. We will address A.B. 361, Exhibit G, page 14. There was no opposition to this bill, and several amendments were proposed.

ASSEMBLY BILL 361 (1st Reprint): Makes changes relating to common-interest communities. (BDR 10-940)

MS. EISSMANN:
I have not heard from Assemblyman Richard McArthur since Thursday. He indicated some concern with the bill coming up on work session so quickly because he was anticipating amendments and wanted time to look through them. For the record, I would point out that Randy Robison also provided an amendment that I distributed to everybody.

CHAIR CARE:
Assemblyman McArthur, did you see the e-mail from Rocky Finseth? Section 1, subsection 6 of the bill, page 3, line 19 refers to paragraphs (a) and (c), what about (b)?

MICHAEL BUCKLEY:
The intent was to follow the language in NRS 116.3116, and subsection (b) refers to first mortgage liens.

CHAIR CARE:
The e-mail I received said, "Otherwise, the HOA lien will take precedence over the first security interest lien."

MR. BUCKLEY:
This same issue came up in A.B. 204. There may be federal regulations prohibiting the length of the priority of the lien. I suggest we add language to say it would not be prior if there were violations of federal regulations.

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

CHAIR CARE:
Is that in the amendment we were given this morning (Exhibit H)?

MR. BUCKLEY:
Yes. It is on page 2 of Exhibit H beginning on line 19.

CHAIR CARE:
We have a letter from Caughlin Ranch wanting to expand the definition of the exterior of the unit. Did you see that? The additional language would say, "including all landscaping and property exclusively owned by the unit owner." This is in section 1, subsection 7 of the bill.

ASSEMBLYMAN RICHARD MCARTHUR (Assembly District No. 4):
I did see that. We made a change on page 1, line 22 of the amendment, Exhibit H; hopefully, that language will make him feel more comfortable.

MR. BUCKLEY:
Section 1, subsection 2, paragraph (a) is where they were talking about that.

CHAIR CARE:
Do you have any objection to that language?

ASSEMBLYMAN MCARTHUR:
No. We had included that language in our amendment, Exhibit H, on page 2, line 22. After the initial sale, the unit is bound by the governing documents. Also, on page 1, lines 22 and 23, there was a concern of the credit unions regarding landscaping.

CHAIR CARE:
The amendment deletes landscaping and says "maintenance," Exhibit H, page 1, line 23.

MR. BUCKLEY:
We are confusing two things. You are talking about the Caughlin Ranch issue. They wanted to say it applied not just to the exterior of the unit but to the parts

the unit owner was obligated to maintain. That would be consistent with Assemblyman McArthur's proposal. That is separate from the credit union issue.

The credit union concern was that the association could go beyond standard maintenance or make improvements. I suggested it in lines 22 and 23 on page 1 of the amendment, Exhibit H, where it expressly states the standards in the governing documents; instead of just landscaping, it would be landscaping maintenance. The word "landscaping" needs to stay in.

ASSEMBLYMAN MCARTHUR:
I did not discuss this with Mr. Robison, but we talked about it before. I hope this will satisfy his concerns.

CHAIR CARE:
There is that and the e-mail I received from Mr. Buckley. There is the Caughlin Ranch issue and the reference to paragraphs (a) and (c) but not (b) of NRS 116.3116. Does that cover all of it?

MR. BUCKLEY:
One was the 60 days instead of 30 days.

CHAIR CARE:
We were going to go with 60?

MR. BUCKLEY:
Yes. That was the committee's recommendation, and that has also been changed.

On page 2 of the amendment, Exhibit H, line 8, we have added the word "reasonable" inspection fees rather than "any" inspection fees. On line 10, there would be a record of the costs. On line 32, we have added the word "reasonably." There were some concerns that if a unit owner was gone for a while, the credit union wanted drive-bys every so often. To put the word "reasonably" as an overall standard makes it subject to better interpretation.

CHAIR CARE:
Even though there was no opposition, reference is made to several amendments. We now have the 30 days going to 60 days for the time required to provide the contact information. We have the amendment from

Assemblyman McArthur and Mr. Buckley, Exhibit H, which also addresses the nonreference to paragraph (b) of subsection 2 of NRS 116.3116. We have the expanded definition of exterior of the unit. We have the landscaping maintenance for the credit union.

SENATOR WIENER:
For clarification, you mentioned the 30 days goes to 60 days for contact information. I see section 1, subsection 1 of the bill related to the contact information, and I still see not later than 30 days. But I see the 60-day extension in section 1, subsection 9.

ASSEMBLYMAN MCARTHUR:
They are two different situations.

SENATOR WIENER:
I do not see an extension. I still see 30 days when it comes to contact information.

MR. BUCKLEY:
There was no objection to the original 30 days. It was just how long it was unoccupied.

SENATOR COPENING:
Are Caughlin Ranch's amendments addressed in Assemblyman McArthur's amendment, Exhibit H?

CHAIR CARE:
No. We just got it on record. The sponsor has no objection to that.

SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED A.B. 361 WITH ASSEMBLYMAN McARTHUR'S LATEST AMENDMENTS AND CAUGHLIN RANCH'S AMENDMENT.

CHAIR CARE:
As to the expanded definition of the exterior of a unit?

SENATOR COPENING:
Correct.

MR. WILKINSON:
There was some discussion about the 30-day period. That was referenced in subsection 1, and that was Senator Parks' concern. Is that not to be included in the amendment? That was the question Senator Wiener was asking. There are two references to 30 days in the bill, but Senator Parks' reference was the one in section 1, subsection 1 of the bill.

CHAIR CARE:
That is why the language appeared as it does in the binder, Exhibit G, page 14.

ASSEMBLYMAN MCARTHUR:
These are two separate things. The first reference is in regard to providing contact information in section 1, subsection 1 of the bill.

CHAIR CARE:
Senator Parks is fine with that.

SENATOR WIENER SECONDED THE MOTION.

MR. WILKINSON:
The motion is to leave it as currently provided with the 30 days in section 1, subsection 1 of the bill. The proposed language—which I recognize is taken from A.B. 204 on page 2, starting at line 19, of the amendment, Exhibit H, where it refers to federal regulations adopted by the Federal Home Loan Mortgage Corporation—specifically references the lien under paragraph (b) of subsection 2 of NRS 116.3102 and a period of priority for that. This is adding the new language specifically as it pertains to paragraphs (a) and (c) of subsection 2 of NRS 116.3116, on page 3, line 19 of the bill. How does that fit in here, and is it necessary?

MR. BUCKLEY:
The intent is to keep the same rule and be consistent with A.B. 204. We want to make sure this bill does not affect the ability to get home loans in Nevada if the federal regulations require a shorter priority. Whatever language we need to do, that is what we should have.

MR. WILKINSON:
We have the changes proposed in this amendment, Exhibit H, along with the changes from Caughlin Ranch relating to maintenance of the landscaping and

Chair Segerblom:
I understand that. You are saying that you do not need to be audited because you are just an employee and the language, as it reads now, would require you to be audited?

Michael Trudell:
True, and the homeowners' association is already being audited.

Chair Segerblom:
We will close the hearing on A.B. 108 and open the hearing on Assembly Bill 204.

Assembly Bill 204: Revises provisions relating to the priority of certain liens against units in common-interest communities. (BDR 10-920)

Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21:
I wanted to give you a brief update on the surveys I was doing, speaking with community groups to find out about the impact this bill would have on them. I have received responses that cover over 78,000 doors statewide, and I have not received a response from anyone who said this bill would not be beneficial to them.

I am also here to present an amendment on behalf of Assembly Speaker Buckley (Exhibit N). This amendment is designed to offer consumers and homeowners some additional protection by limiting the cost of collection associated with the fines. The amendment adds a new section to Chapter 116 of *Nevada Revised Statutes* (NRS), designed to limit the collection fees for fines, penalties, or any past due obligation. It starts at $50, if the outstanding balance is less than $200, and then there is a sliding scale based on the amount of the obligation, which maxes-out at $500.

Chair Segerblom:
Mr. Anthony, does this mirror Assemblyman Munford's bill?

Nick Anthony, Committee Counsel:
No, his impacts an existing section, this adds a new section to NRS Chapter 116.

Chair Segerblom:
His placed limitations on fines or penalties...

Nick Anthony, Committee Counsel:
His bill limited the fees and the amount of interest that could be collected. This bill limits the extra costs that may be incurred in collecting a past-due obligation.

Assemblywoman Spiegel:
For example, if a common-interest community association charges a fine, it is not paid, and there is a collection effort to go after the fine, in addition to seeking to collect the penalty for the violation, there would be interest and a collection fee. This amendment would limit the collection fee. My understanding is that Assemblyman Munford's bill limited what the penalty itself could be and the interest rate.

This bill also encompasses regular assessments, what are called HOA dues. They are the general assessments that are due periodically to maintain the operating accounts and balances of the associations and to fund their reserve accounts.

Chair Segerblom:
After the last hearing on this bill, there were questions about whether your extension of the look-back for homeowners' association (HOA) liens to two years would violate Federal Housing Administration (FHA) or Fannie Mae or Freddie Mac regulations. Did you look into that?

Assemblywoman Spiegel:
I believe the bill said to the extent it was not an issue with federal law. If that is not the case, I will put in another amendment if necessary.

Chair Segerblom:
Mr. Uffelman is here, so he will probably give us some language on that.

Assemblywoman Spiegel:
This is something that will help preserve communities.

Chair Segerblom:
I think the intent is fantastic.

Assemblyman Kihuen:
I want to commend you for bringing this bill. Some of these issues came up on the first bill, so I am glad to see this bill.

Chair Segerblom:
Is there anyone here in support?

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
David Stone, the president of Nevada Association Services, and I have worked with Assemblywoman Spiegel, and we came up with a friendly amendment that we proposed in the original hearing (Exhibit O). It puts in place a policy for collections for homeowners' associations. We believe that if homeowners' associations actually have policies in place, then perhaps these collections would not take beyond six months.

Chair Segerblom:
So you are adding a subsection (c)? Would that impact the amendment submitted by Speaker Buckley? It seems like it is a different issue.

Assemblywoman Spiegel:
Ms. Laxalt's amendment requires common-interest communities to develop a collections policy and to provide that disclosure to the homeowners. By doing that, it makes it more fair and transparent for everyone and offers additional consumer protection because the homeowners know what their obligations are and they understand the ramifications of their actions. Conversely, it also helps the associations by clearly delineating in the policy the time frames of what would happen and when, which could accelerate the collection process and not have as large of a fiscal impact on the homeowners or the associations.

Neena Laxalt:
We just had a quick look at Speaker Buckley's amendment, and I am sure that my client would have some concerns. We would be happy to speak with the Speaker about our concerns.

Chair Segerblom:
We will not be taking any action today on this bill.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support this bill because I think it is a good bill. Also the Assemblywoman sits on one of my boards in Henderson, and this will be very beneficial. I have two comments. The amendment that has been offered by Speaker Buckley may conflict or may need to be resolved with NRS 116.31031, which already limits the collection cost in regard to fines.

Chair Segerblom:
The amendment deletes that section and replaces it.

Michael Schulman:
Okay.

I think Michael Buckley, the Chairman of the Commission, wrote to you to state that the FHA does not have rules against this particular type of statute. They have concerns about it because it will affect them, but I do not think their loans are precluded because of it.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
One of the things that is good about extending the time frame from six months to two years would be that it would allow an association to slow the collections process down. If a homeowner gets behind in his assessments and the association knows it has a two-year comfort level, it will allow the association to not race out and hire a lawyer and start the collection process.

Assemblywoman Spiegel:
I just needed to disclose that I am on the board of the Green Valley Ranch Community Association in Henderson, Nevada. This bill will not affect my association any more or less than any other.

Chair Segerblom:
Is there anyone who would like to speak against the bill?

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
When the bill was first heard in Committee, I submitted a document from the Summerlin North Homeowner Association (Exhibit P), which was amended to change the forbearance time from six months to three months. I think that an aggressive collections policy by an association is the answer to the problem the Assemblywoman is trying to solve.

The policy provides that the association can pursue on a contract theory as well as the normal course of foreclosure. The policy also provides that the association can work out with the homeowner their failure to pay in a timely fashion. It is the collections policy that makes these things work.

I am supportive of the amendment offered by Ms. Laxalt. I would point out that while Assemblywoman Buckley's amendment strikes existing law and moves it to a new section, it increases the lowest level of cost to $50 and the second level to $75, whereas existing law provides for $20 and $50 in those two categories. I am not sure where the reduction is, unless it is an overall reduction in cost.

The letter submitted (Exhibit Q) provided the policy of Fannie Mae, which will not buy a mortgage on a condominium with more than six months of past due assessments. We took a small survey. Other lenders, while they do not have established policies, said the bill if passed will have a negative impact on lending in Nevada. Again, on behalf of the bankers, the answer to the problem the Assemblywoman is trying to address is an aggressive collection policy by the homeowners' association.

Chair Segerblom:
Will Assemblywoman Spiegel's two-year provision prevent some federal mortgages or not?

Bill Uffelman:
It would certainly run afoul of Fannie Mae with regard to condominiums or attached dwellings. They have specifically said they will not buy those kinds of mortgages for the secondary market.

Chair Segerblom:
Do you have any proposed language which would carve out Fannie Mae?

Bill Uffelman:
My proposed amendment would be to eliminate that section of the bill and change the two years back to six months. I had understood that the Assemblywoman was going to exclude condominiums and attached dwellings from these provisions, which would be the kind of amendment you would want to include.

Chair Segerblom:
What percentage of mortgages are Fannie Mae? Pretty high? Would it also include Veterans Administration (VA) loans?

Bill Uffelman:
Yes, it is pretty high. I did not ask a VA lender. So you understand, the latter pages of the letter (Exhibit P) are the guidelines that that lender is publishing for the benefit of mortgage brokers and anyone who is making loans.

Chair Segerblom:
What percentage of homeowners' associations are condominiums?

Bill Uffelman:
In Nevada, I do not know.

Assemblyman Hambrick:
Not only do condominiums have their own HOAs, I also live in Summerlin North and there are condominiums within an HOA. They can be members of other groups.

Bill Uffelman:
A condominium by its very nature would have to have a homeowners' association because of the common areas within it. So yes, there are a lot of condominium associations that are sub-associations of Summerlin, for example. There are a lot of properties in Summerlin that would be affected by this provision.

Assemblywoman Spiegel:
Condominiums represent about 20 percent of associations. I am willing to go through any language or any proposed amendment from Mr. Uffelman.

Chair Segerblom:
It sounds like it would be worth it. Would you be willing to do that Mr. Uffelman?

Bill Uffelman:
I would be happy to give her language on that, but we would still be opposed to the bill.

Erin McMullen, representing Bank of America, Las Vegas, Nevada:
We just want to go on record in opposition to this bill because we believe that it penalizes banks for trying to work with individuals and not foreclosing sooner.

Assemblywoman Spiegel:
I think this would be an important bill in terms of what it means for our values and our state's real estate values and what it means to our homeowners and our communities. I would like to see our communities being kept strong. I am willing to work with everyone because I think this bill is important.

Chair Segerblom:
I will close the hearing on A.B. 204. We will take a short recess.

I will open the hearing on Assembly Bill 207.

Assembly Bill 207: **Makes various changes concerning common-interest communities. (BDR 10-694)**

TAB 31

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **DEFENDANT, U.S. BANK, N.A.'S, REPLY IN SUPPORT OF THE MOTION TO DISMISS WITH PREJUDICE THE PLAINTIFF'S COMPLAINT** was made on the 30th day of May, 2013, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Howard C. Kim, Esq.
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/s/ Ashley Renteria
An Employee of WRIGHT, FINLAY & ZAK, LLP

AFFIRMATION

Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **CERTIFICATE OF MAILING** filed in Case No. A-13-678814-C **does not** contain the social security number of any person.

DATED this 30th day of May, 2013.

WRIGHT, FINLAY & ZAK, LLP

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TAB 32

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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 and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

SUPPLEMENT TO OPPOSITION TO MOTION TO DISMISS

Hearing Date: June 4, 2013
Hearing Time: 8:15 a.m.

Plaintiff SFR INVESTMENTS POOL 1, LLC ("SFR") hereby supplements its Opposition to U.S. Bank's Motion to Dismiss.

ORDER DENYING MOTION TO DISMISS

On May 30, 2013, the Honorable Judge Jerome Tao issued an order denying a motion to dismiss that provides an in-depth statutory analysis of NRS 116.3116, and supports SFR's position. See First 100, LLC v. Burns, et al, Order Denying Defendant's Motion to Dismiss,

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Case No. A677693, a true and accurate copy is attached as **Exhibit 1**. The court concluded that a properly noticed HOA foreclosure sale does, indeed, extinguish the first security interest as a junior lien, just as does a foreclosure pursuant to a first deed of trust:

> (36) Thus, the operation of NRS 116.3116 appears as follows. NRS 116.316 [sic] creates a series of specific and unique requirements when an HOA imposes a lien against a property and wishes to initiate a foreclosure sale to satisfy unpaid assessments. Where NRC [sic] Chapter 116 is silent, the Court must presume that the Legislature intended that the **ordinary and established principles governing the conduct of foreclosure sales in Nevada apply** to "fill in the gaps."
>
> (37) Accordingly, when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages. . . . **[I]f those subordinate lienholders [including holders of first security interests] fail to stave off foreclosure by paying off the assessment**, then their subordinate claims are paid off with any surplus proceeds of the foreclosure sale. **After the sale is completed, any subordinate claims are automatically extinguished by operation of law. If the lender's mortgage remains unsatisfied after the foreclosure sale, it may be able to pursue a deficiency action against the mortgagor of record** (the original defaulting party), **but not against the property itself or against a new bona fide third-party who purchased the property at the foreclosure sale.**
>
> Ex. 1 (internal citations omitted) (emphasis added).

OPINION LETTER FROM DRAFTER OF UCIOA

Because the Legislature has been considering amendments to NRS 116.3116, the Common-Interest Committee of the Nevada State Bar Real Property Section[1] sought counsel from Carl Lisman, one of the drafters of the Uniform Common Interest Ownership Act ("UCIOA") and other uniform acts. Mr. Lisman provided an opinion letter setting forth the meaning and purpose behind UCIOA and specifically the evolution of the super priority lien. See May 29, 2013 Opinion Letter from Carl Lisman to CIC Nevada State Bar Real Property Section ("Lisman Opinion Letter"), a true and accurate copy is **Exhibit 2**.

He analyzed Nevada's NRS 116.3116 and explained the priority treatment of the HOA's lien not only gives the HOA a claim to proceeds when the first security interest forecloses, but it also means that the foreclosure of the HOA lien extinguishes the first security interest:

> The priority treatment of the association's lien is not limited to a first claim to proceeds

[1] Michael E. Buckley and Karen D. Dennison

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> from the foreclosure sale (up to an amount of unpaid assessments, fee, charges, late charges, fines and interest not exceeding six months of assessments determined by the periodic budget). **It also puts the association ahead of the first security interest—and that means foreclosure by the association extinguishes the first security interest and all junior interests.**
>
> The result naturally follows from the customary rule regarding priority of interests in real estate. A foreclosure sale of the association's lien is governed by the same principles generally applicable to lien foreclosure sales, so that foreclosure of a lien entitled to priority extinguishes that lien and all subordinate liens. The liens attach to the proceeds of the sale and are paid out accordingly.

Ex. 2, Lisman Opinion Letter, p. 6.

Based on the reasoning and supporting authority set forth in Judge Tao's recent order, Carl Lisman's opinion letter, and in Plaintiff's briefing, Plaintiff requests that this Court deny the motion to dismiss.

DATED May 31st, 2013.

HOWARD KIM & ASSOCIATES

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EXHIBIT 1

ORDD

DISTRICT COURT

CLARK COUNTY, NEVADA

FIRST 100, LLC, Plaintiff, v. RONALD BURNS, et al., Defendants.	CASE NO.: A677693 DEPARTMENT NO. XX **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

This matter having come on for hearing on the 8th day of May, 2013; Luis A. Ayon, Esq., and Margaret E. Schmidt, Esq., appearing for and on behalf of Plaintiff; Chelsea A. Crowton, Esq., appearing for and on behalf of Defendant, U.S. Bank; Karl L. Nielson, Esq., appearing for and on behalf of Defendant, Ronald Burns; Gregory L. Wilde, Esq., appearing for and on behalf of Defendant, National Default Servicing Corporation; and the Court having hearing arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion by Defendant U.S. Bank NA to dismiss the Complaint pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure ("NRCP").

(2) This dispute arises from foreclosure proceedings conducted against a residential property located at 3055 Key Largo Drive, Unit #101, Las Vegas, Nevada 89120, identified by APN 162-25-614-153 ("the Subject Property"). The Subject

Property is located within a common-interest community governed by a homeowners' association as defined in NRS Chapter 116, known as the Canyon Willows Owners Association (HOA). The prior owners of the property (who are not parties to this action) failed to pay all monthly assessments due under the operating documents of the common-interest community. In response, the HOA asserted a lien against the Subject Property and initiated foreclosure proceedings pursuant to NRS 116.3116 et seq. which culminated in a foreclosure sale conducted on February 2, 2013.

(3) The Plaintiff is First 100 LLC, a Nevada limited-liability corporation, which alleges that it acquired the Subject Property at the February 2, 2013 public auction. According to the allegations of the Complaint, the Plaintiff properly recorded a Deed on February 4, 2013 reflecting its purchase of the Subject Property. However, two days later, on February 6, 2013, the Subject Property was re-sold by way of foreclosure and Trustee's Sale initiated by Defendant National Default Servicing Corporation, who asserted that it was the named trustee under Deed of Trust previously recorded against the Subject Property on October 30, 2006, as Instrument No. 200610300002548 (and referred to in the pleadings as the "BNC Mortgage Deed of Trust"). Defendant Robert Burns purchased the Subject Property at the February 6, 2013 Trustee's Sale.

(4) The Plaintiff's Complaint asserts three causes of action: (First) Wrongful Foreclosure against Defendant National Default Servicing Corporation; (Second) Declaratory Relief/Quiet Title against all Defendants; and (Third) Injunctive Relief against Defendant Burns.

(5) As framed by the partics' briefing and oral arguments, the issue before the Court is a straightforward question of law. The Plaintiff contends that the February 2 foreclosure sale conducted pursuant to NRS 116.3116 et seq. and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguished, by operation of law, any and all prior encumbrances upon the Subject Property. Thus, according to the Plaintiff, the subsequent Trustee's Sale conducted on

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

February 6 was unlawful because the October 30, 2006 Deed of Trust against the Subject Property had been extinguished in its entirety by the February 2 foreclosure sale. Therefore, the Plaintiff alleges that it is the rightful and legal owner of the Subject Property via its purchase of the Subject Property on February 2 free and clear of all prior encumbrances.

(6) In considering a Motion to Dismiss pursuant to NRCP 12(b)(5), the Court must accept all factual allegations of the pleadings to be true and view those allegations both liberally and in the light most favorable to the non-moving party. However, the Court need not accept the parties' assertions of law as true. The Court's analysis is limited to the factual allegations contained within the four corners of the Complaint and all inferences reasonably arising therefrom. A claim can only be dismissed if it is clear beyond any reasonable doubt that the plaintiff cannot prove any set of facts at trial that would entitle it to relief. Furthermore, a complaint can be dismissed even if all of the elements of a cause of action have been technically pled so long as the Court, relying on "judicial experience and common sense," finds that the allegations of the complaint are "conclusory" or "implausible." *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)[1].

(7) In this case, the parties do not appear to dispute that the February 2, 2013 foreclosure sale was properly conducted in accordance with all of the legal requirements of NRS Chapter 116. The parties also do not appear to dispute that the BNC Mortgage Deed of Trust was a perfected legal encumbrance upon the Subject Property properly recorded on October 30, 2006. The parties also do not appear to dispute that the lien asserted against the Subject Property by the HOA was proper and legal under the provisions of NRS Chapter 116. The parties also do not appear to dispute that, if the Plaintiff's interpretation of the legal consequences of NRS Chapter 116 is correct, the Plaintiff has properly pled the elements supporting its causes of

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[1] *Ashcroft* was decided pursuant to FRCP 12(b)(6). However, where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this Court in applying the Nevada Rules. *E.g., Executive Management Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53 (2002). NRCP 12(b)(5) is identical to FRCP 12(b)(6).

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

action.

(8) Therefore, the question before the Court is a straightforward question of statutory interpretation: whether a foreclosure sale properly initiated and conducted pursuant to NRS Chapter 116 automatically extinguishes all prior encumbrances on the property such that a bona fide purchaser at the foreclosure sale acquires the property free and clear of all prior encumbrances.

(9) In interpreting the scope and meaning of a statute, the Court looks first to the words of the statute. The words of a statute are assigned their ordinary meaning unless it is clear from the face of the statute that the Legislature intended otherwise. When "the language of a statute is plain and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. Adv. Op. 76 (November 23, 2011). If the Legislature has independently defined any word or phrase contained within a statute, the Court must apply the definition created by the Legislature. If, and only if, the Court determines that the words of the statute are ambiguous when given their ordinary and plain meaning, then reference may be made to other sources such as the legislative history of the statute in order to clarify the ambiguity. An "ambiguity" exists where a provision is susceptible to two reasonable interpretations.

(10) A threshold question in this case is whether the security interest represented by the BNC Mortgage Deed of Trust is senior or junior to the lien asserted by the HOA. NRS 116.3116 states in part as follows:

> 2. 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 owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent....

> The lien is also prior to all security interests described in paragraph (b) to the extent of...the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(11) Thus, under NRS 116.3116, a previously perfected first security interest retains its seniority over a subsequent lien asserted by a homeowners' association *except* to the extent that the subsequent association lien is based upon unpaid regular periodic assessments for common expenses. In that event, notwithstanding that the association's lien was asserted subsequently in time, a portion of the homeowners' association lien (limited to what was unpaid during the nine months immediately preceding the lien) is given artificial priority over a previously perfected first security interest. The portion of the association lien equating to what was unpaid during those nine months is commonly said to have "super-priority" status over other prior encumbrances. If the association claims that more than nine months' assessments stand unpaid, then the amount unpaid during the nine months immediately preceding the lien is entitled to "super priority" status over other encumbrances, but any assessments remaining unpaid for more than nine months would be subordinate to other previously perfected encumbrances.

(12) The parties do not appear to dispute that the lien asserted by the HOA in this case was based upon regular periodic assessments that were unpaid during the nine

months immediately preceding the imposition of the lien. Therefore, as a matter of law, the lien asserted by the HOA is deemed to be senior to the security interest created by the BNC Mortgage Deed of Trust even though the HOA lien was asserted subsequently in time. The parties do not appear to dispute this legal conclusion.

(13) Thus, the parties appear to agree that the HOA lien was senior to the BNC Mortgage Deed of Trust at the instant in time immediately before the property was sold via foreclosure sale to the Plaintiff on February 2, 2013. However, what the parties vigorously dispute is whether the junior security interest (the BNC Mortgage Deed of Trust) was extinguished by operation of law as a result of the February 2 foreclosure sale.

(14) NRS 116.31162 states that, after a lien is asserted by a homeowner's association and certain procedures are followed, the association "may foreclose its lien by sale." If the association chooses to proceed with a non-judicial foreclosure sale, then NRS 116.31164 governs how the foreclosure sale is to occur. After the foreclosure sale is completed, NRS 116.31164 governs how the proceeds of the sale must be allocated. In particular, NRS 116.31164(3) states:

> 3. After the sale, the person conducting the sale shall....
> (c) Apply the proceeds of the sale for the following purposes in the following order:
> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
> (5) Remittance of any excess to the unit's owner.

(15) Thus, the plain language of NRS 116.31164 expressly contemplates that the proceeds must first used to pay the expenses of the sale, taxes and other governmental charges, legal expenses, and the association's lien, and then to satisfy

"subordinate claim[s] of record."

(16) In this case, the parties agree that the proceeds of the sale totaled only approximately $2,000.00, far less than what would have been required to pay off all of the liens and security interests that existed against the Subject Property prior to the foreclosure sale. Accordingly, the question before the Court can be phrased as follows: when the proceeds from a foreclosure sale conducted pursuant to NRS 116.31164 are inadequate to satisfy all of the various lienholders when distributed as required in NRS 116.31164(3), does the failure to satisfy the subordinate interests mean that those subordinate interests survive the foreclosure sale to the extent that they remain unsatisfied, or instead that those subordinate interests are extinguished by operation of law such that a bona fide third-party purchaser at the foreclosure sale takes the property free and clear of any unsatisfied subordinate encumbrances?

(17) The Plaintiff avers that the latter case is true. Consequently, the Plaintiff asserts that because all subordinate interests were extinguished on February 2 when it acquired the Subject Property, the subsequent foreclosure sale conducted on February 6 based upon an unpaid subordinate security interest was unlawful. On the other hand, the Defendant avers that the former must be true. Consequently, the Defendant avers that its subordinate security interest survived the February 2 sale because the interest remained unsatisfied from the proceeds of that sale, and accordingly it possessed the legal right to foreclose upon the Subject Property and trigger a second foreclosure sale in order to satisfy its subordinate interests. In effect, the Defendant argues that the Plaintiff, by purchasing the Subject Property for an amount insufficient to pay off all existing encumbrances, only acquired the property "subject to" those unsatisfied encumbrances.

(18) The Court has reviewed the entirety of NRS Chapter 116, and there appears to be no statutory provision that expressly states that an unsatisfied junior lien either is, or is not, extinguished by operation of law as a consequence of a foreclosure sale conducted pursuant to NRS 116.31164. In their briefs, the parties are also unable

to identify any particular provision expressly on point. Therefore, in analyzing the answer to this question, the Court must consider other sources, such as the legislative history of NRS 116.31164, and other similar statutes contained within the NRS.

(19) NRS Chapter 116 was originally introduced in 1991 as Assembly Bill 221, with the stated purpose of "adopt[ing] the Uniform Common-Interest Ownership Act," or UCIOA (Preamble of AB 221, introduced January 24, 1991; statement of introduction of AB 221, Minutes of the Assembly Committee on Judiciary, February 20, 1991). At the time, the UCIOA had already been adopted in several other states and was under consideration in at least 3 others. (Memorandum dated March 13, 1991 from Uniform Common Interest Ownership Act Subcommittee, in the legislative record as an exhibit to Minutes of the Assembly Committee on Judiciary, March 20, 1991). NRS 116.3116 originally corresponded to Section 100 of AB 221, and NRS 116.31164 originally corresponded to Section 102 of AB 221. The "super priority" lien verbiage included within Section 100 of AB 221 is identical to NRS 116.3116 as it exists today, except that the original "super priority" lien was limited to assessments unpaid during the six months (rather than 9 months) immediately preceding the lien. The time period was expanded to nine months in 2009 by Assembly Bill 204.

(20) NRS 116.3116 was subjected to various technical amendments in 1993 through AB 612 (which did not affect the "super priority" language at issue here). During testimony in support of the technical amendments, one of the drafters of the original bill testified that:

> "As a general proposition, it makes good sense to follow a uniform law as closely as possible, utilizing the optional suggestions in the uniform act to customize the law as necessary. The corresponding benefit -- especially important in a small state like Nevada -- is our own version of a uniform law with precedent in other uniform law jurisdictions. Maintaining the uniform law also makes available the very helpful explanatory comments, some of which contain illustrative examples, and all of which, like the act itself, represent not only very careful draftsmanship, but the input of all of the different groups involved in the homeowner association process; that is, developers, consumers, lenders, local governmental authorities, state regulators, managers and other

professionals, as well as homeowners associations themselves." (Testimony of Michael Buckley, Chairman of the Uniform Common-Interest Ownership Act Subcommittee, before the Assembly Judiciary Committee on May 20, 1993).

(21) Thus, one of the principal drafters of the bill expressly urged that the Nevada Legislature adhere as closely as practicable to the uniform version of the UCIOA, and the Nevada Legislature did so by enacting the "super priority" language originally included in the UCIOA into NRS 116.3116 without any amendment (and with virtually no debate). Consequently, the legislative history surrounding AB 221 contains virtually nothing useful to the Court's analysis in the case at hand. However, the Legislature apparently contemplated that adoption of the uniform language without amendment would enable Nevada courts to look to "precedent in other uniform law jurisdictions" as well as the background and explanatory comments accompanying the UCIOA in resolving questions relating to the scope and meaning of NRS 116.3116.

(22) Indeed, the Nevada Supreme Court regularly looks outside the confines of NRS Chapter 116 and to the Uniform Act (as well as other sources) in interpreting various provisions of NRS Chapter 116. *E.g., Holcomb Condominium HOA v. Stewart Venture LLC*, 129 Nev. Adv. Op. 18 (April 4, 2013) ("the term 'separate instrument' is not defined in NRS Chapter 116 or the Uniform Common-Interest Ownership Act (UCIOA)"); *Beazer Homes Holding Corp. v. District Court*, 128 Nev. Adv. Op. 66 (Dec. 27, 2012) (citing "the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3–102 of the Uniform Common Interest Ownership Act, upon which NRS 116.3102 is based"); *Boulder Oaks Community Association v. B&J Andrews*, 169 P.3d 1155 (2007) (unpublished) ("NRS Chapter 116 is Nevada's version of the Uniform Common-Interest Ownership Act and largely mirrors the uniform act [and citing to] the commentary to [the UCIOA]").

(23) NRS 116.3116 is modeled upon Section 3-116 of the 1982 version of the UCIOA, which was originally drafted by the National Conference of Commissioners on Uniform State Laws. NRS 116.3116 deviates from Section 3-116 in expanding the period of "super priority" to include unpaid assessments occurring during the preceding

9 months instead of merely 6 months, but otherwise NRS 116.3116 is identical to UCIOA Section 3-116.

(24) Official Comment 1 to Section 3-116 describes the purpose of the section as follows:

> "To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. ... A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity of protecting the priority of the security interests of lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provision of some state statutes which forbid some lending institutions from making loans not secured by first priority liens [state law should be consulted]."

(25) Thus, the drafters of the UCIOA expressly contemplated that, as a practical matter in most cases, the holder of the first security interest would seek to protect its interest from subordination to a "super priority" lien by simply paying the unpaid assessments. However, the Comment does not expressly specify whether, if a lender chooses not to do so and instead permits the property to proceed to foreclosure, the lender's first security interest is thereby extinguished. Furthermore, nothing else in either the plain text or comments of UCIOA appear to relate specifically to the question of whether a foreclosure sale initiated due to unpaid assessments extinguishes all other junior liens, including a first security interest rendered junior because of the "super priority" provision. Quite to the contrary, Comment 1 suggests that the drafters of the UCIOA intended to leave this question to state law rather than establishing uniform national standards.

(26) In Opposition to the Motion, the Plaintiff notes that, as a general principle of Nevada law, foreclosure of a superior security interest extinguishes all junior interests that did not participate in the foreclosure process. *E.g., Brunzell v.*

Lawyers Title Ins. Co., 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). The Plaintiff also notes that the Nevada Department of Business and Industry has issued an administrative opinion, dated December 12, 2012, that interprets NRS Chapter 116.3116 such that a foreclosure based upon a "super priority" lien extinguished a first security interest made junior only due to the "super priority" statute. The Plaintiff also cites to an opinion by a Washington State appellate court (interpreting a statute identical to the UCIOA) finding that a foreclosure based upon a "super priority" lien extinguished a first security interest that was given notice of the pending foreclosure and yet chose not to participate. *Summerhill Village HOA v. Roughly*, 270 P.2d 639 (Wash.Ct.App. 2012). The Plaintiff also notes that some Judges of this Judicial District have resolved this question in favor of the Plaintiff's argument. The Court also notes that at least one scholarly commentator has opined that a non-judicial foreclosure sale under the UCIOA extinguishes all junior liens that did not participate in the foreclosure process as "necessary parties." *See*, Winokur, "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under The UCIOA," 27 Wake Forest Law Review 353, 378 n.106 (1992) ("foreclosure extinguish[es] the Less-Prioritized Lien").

(27) In support of its Motion, the Defendant cites to an opinion issued by Judge Dawson of the U.S. District Court, *Diakonos Holdings LLC v. Countrywide Home Loans*, 2013 WL 531092 (D.Nev. February 11, 2013), rejecting the reasoning of the Washington court in *Summerhill*. The Defendant also cites to various unpublished, non-precedential Orders issued by other Judges of this Judicial District that have found that a foreclosure sale based upon a "super priority" lien does not extinguish a first security interest upon the property. (*See*, Defendant's Motion, pages 11-14).

(28) In short, the situation before this Court appears to be as follows. By this Motion, this Court is asked to interpret the scope and meaning of a statute that was enacted by the Nevada Legislature after virtually no meaningful debate, that was modeled on a broad uniform act that specifically left unanswered the question raised by

this Motion, whose legislative sponsor urged the Legislature not to deviate from the text of the uniform act so that the courts of this State could rely upon precedent from other states, and upon which the courts of different states, and the Judges of this Judicial District, have taken different positions.

(29) In the absence of clear guidance from the text of the statute or its legislative history, this Court is left to examine other sources for guidance. One such source consists of other statutes that relate to matters similar to those addressed by NRS 116.3116.

(30) In Nevada, holders of security interests against real property may initiate foreclosure through multiple statutory avenues. For example, the holder of a mortgage may initiate a judicial foreclosure via NRS 40.430 et seq. The holder of a deed of trust may also initiate a non-judicial foreclosure (commonly known as a "Trustee's Sale") pursuant to NRS 107.080 et seq. A landlord (or other assignee of the right to receive rent from real property) may also seek the appointment of a receiver to initiate a foreclosure upon a security instrument pursuant to NRS 107A.260.

(31) It is well-settled that any foreclosure sale conducted pursuant to NRS 40.462, 107.080, or 107A.260 automatically extinguishes all junior security interests against the property. *E.g., Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Thus, the Defendant is essentially arguing that a foreclosure conducted pursuant to NRS 116.3116 is something wholly unique under Nevada law, because it would represent the only type of foreclosure permitted in Nevada under which junior liens would not be automatically extinguished.

(32) However, if the Defendant is correct that 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 in the text or legislative history 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.

(33) Notably, NRS 40.462 was enacted in 1989, and NRS 107.080 was originally enacted in 1927. In other words, both NRS 40.462 and 107.080 pre-date the enactment of NRS 116.3116, as does the opinion of the Nevada Supreme Court in *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). Thus, the Legislature must be presumed to have known when NRS 116.3116 was enacted that the normal consequence of a foreclosure sale in Nevada would be that all junior liens are automatically extinguished. Had the Legislature intended that NRS 116.3116 represent a singular departure from established legal norms, the Legislature certainly could have included language to that effect. The Court notes that the Legislature utilizes a variety of common phrases throughout the NRS when it intends to create exceptions to other statutes; *see, for example*, NRS 78.090(1) ("Notwithstanding the provisions of NRS 77.300..."); NRS 62B.390(1) ("Except as otherwise provided in NRS 62B.400..."); NRS 62E.010(2) ("Except as otherwise provided by specific statute...."); NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter..."); NRS 48.025 ("All relevant evidence is admissible, except as otherwise provided by this title..."); NRS 51.075(2) ("The provisions of NRS 51.085 to 51.305, inclusive, are...not restrictive of the exception provided by this section"). Yet none of these phrases are contained anywhere within NRS Chapter 116 in any context that suggests an intention to depart from the ordinary rule that, in Nevada, foreclosure sales extinguish junior liens. The absence of any language to this effect suggests that this was not the intention of the Legislature.

(34) Moreover, NRS 116.3116 et seq. contains a series of specific departures and deviations from the foreclosure proceedings established in NRS 40.462 and 107.080, but none that relate to the extinguishment or non-extinguishment of junior liens. For example, the idea of "super priority" exists nowhere in NRS Chapter 40 or 107. Similarly, neither NRS 40.462 nor 107.080 include the kinds of specific notice provisions required by NRS Chapter 116 before a foreclosure sale can be initiated. Yet the Legislature included no language in NRS 116.3116 that can be read as departing from the principle of extinguishment. It is well-settled that the inclusion of one thing must be read as the implying the omission of another (*"expressio unius est exclusio alterius"*). Thus, when the Legislature chose to include language designed to deviate in certain specific ways from established foreclosure practices, but not language that changes whether junior liens are extinguished, that choice must be deemed by this Court to have been intentional and deliberate.

(35) Furthermore, not only did the Legislature include no language departing from the principle of extinguishment under NRS Chapter 40 and 107, it included language in NRS Chapter 116 highly similar to language contained in NRS Chapter 107 that expressly recites that junior liens are extinguished. NRS 107.080(5) recites that a Trustee's Sale "vests in the purchaser the title of the grantor...without equity or right of redemption." NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption." This similarity suggests that the Legislature intended that a purchaser at a NRS Chapter 116 foreclosure sale acquires exactly the same title as he would have acquired had the foreclosure been a NRS Chapter 107 Trustee's Sale, i.e., title free and clear of junior encumbrances. Moreover, the words "without equity or right of redemption" were defined long ago by the Nevada Supreme Court, which held that a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...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." *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003).

(36) Thus, the operation of NRS 116.3116 appears to be as follows. NRS 116.316 creates a series of specific and unique requirements when an HOA imposes a lien against a property and wishes to initiate a foreclosure sale to satisfy unpaid assessments. Where NRC Chapter 116 is silent, the Court must presume that the Legislature intended that the ordinary and established principles governing the conduct of foreclosure sales in Nevada apply to "fill in the gaps."

(37) Accordingly, when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages. NRS 116.3116(2). However, in order to perfect this "super priority" lien, the association must give proper notice to all parties including any holders of first security interests whose priority will have been adversely affected. NRS 116.31163(2). Furthermore, if the association wishes to foreclose upon the property in order to satisfy its lien, it may do so, but only after given specific notice to all subordinate lienholders of record. NRS 116.311635(1)(a)(2). As expressly contemplated by Comment 1 to UCIOA Section 3-116, most subordinate lienholders would likely protect their interest from extinguishment by simply paying off the unpaid assessments. Indeed, that appears to be the specific purpose of requiring that those lienholders be given notice under NRS 116.31163(2) and NRS 116.311635(1)(a)(2). But if those subordinate lienholders fail to stave off foreclosure by paying off the assessment, then their subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). After the sale is completed, any subordinate claims are automatically extinguished by operation of law. *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). If the lender's mortgage remains unsatisfied after the foreclosure sale, it may be

able to pursue a deficiency action against the mortgagor of record (the original defaulting party), but not any claim against the property itself or against new bona fide third-party who purchased the property at the foreclosure sale.

(38) In their briefs, both parties advance various policy and "fairness" arguments in support of their respective positions. For example, the Defendant argues that permitting a bona-fide third-party purchaser to procure a property for a mere $2,000 while extinguishing a mortgage worth many times that amount is "unfair". However, any junior lienholder has a simple remedy for this unfairness -- as expressly contemplated by Comment 1 to UCIOA Section 3-116, a lender can avoid foreclosure and protect its interest from extinguishment by simply intervening to pay off the assessments.

(39) Moreover, the Court notes that the Defendant's argument would lead to an equally "unfair" result. In this case, if the Defendant's argument were adopted, then the net result would be that the Plaintiff will have paid $2,000 to satisfy the association's lien, yet does not own the Subject Property. In effect, the Plaintiff paid off the lien asserted by the HOA and acquired nothing in return, because immediately after it acquired the Subject Property, the property was taken by the Defendant and sold to someone else for more money. This result appears fundamentally unfair to bona fide third-party purchasers who will have paid off the assessments that the lender failed to pay despite having been given specific notice of the existence of the unpaid assessments, and despite the obvious intent of the drafters of the UCIOA that, in most cases, the lender would protect its own interest by paying off the assessments. This result would achieve the perverse outcome of actually rewarding sloth and inaction on the part of the lender, who, as expressly recognized by Comment 1 to UCIOA Section 3-116, is the one party (other than the defaulting owner) in a position to stop the foreclosure, protect its own interests, and make the association whole by paying the assessments. Instead, the Defendant's interpretation of NRS 116.3116 would result in the association and the lender being made whole at the expense of bona fide third-party

purchasers, a result that is quite obviously absurd.

(40) The Defendant appears to suggest this outcome, however unfair, is the natural consequence of the fact that the Plaintiff attempted to purchase the Subject Property for less than the cumulative total of all existing encumbrances upon the Subject Property, and "buyer beware" because, had the Plaintiff properly done its homework, it should have known that it might stand to lose the Subject Property unless it purchased the Subject Property for an amount sufficient to pay off all existing liens.

(41) But, as noted, the party best-positioned to protect its interests (and incidentally to protect any innocent third parties) is the lender whose interests are directly at stake. It is a well-recognized principle of Nevada law that when both potential interpretations of a statute or rule are unfair to someone, the brunt of any unfairness should not fall on innocent third parties. *E.g., NC-DSH Inc. v. Garner*, 125 Nev. 647, 656 (2009) (in choosing who should suffer from the fraudulent actions of an agent, "ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt"); *Rothman v. Fillette*, 469 A.2d 543, 545 (Pa. 1983) (cited approvingly in *NC-DSH Inc. v. Garner*, 125 Nev. 647, 656 (2009)) ("a principal acting through an agent in dealing with an innocent third party must bear the consequences of the agent's fraud" because of "the long recognized principle that where one of two innocent persons must suffer because of the fraud of a third...the loss should be borne by him who put the wrongdoer in a position of trust and confidence and thus enabled him to perpetrate the wrong"). *See also, Tri-County Equipment & Leasing v. Klinke*, 128 Nev. Adv. Op. 33 (June 28, 2012) (Gibbons, J., concurring) (when one party is likely to receive a windfall, it should be the party who lacks any responsibility for the situation) (relevant citations omitted). In this case, it is true that the lender cannot be said to bear responsibility for the non-payment of assessments by the record owner. However, the lender is in a far better position to protect its interests, make the association whole, and eliminate the need for foreclosure than a third-party purchaser at the foreclosure sale with no connection to the lender, the

HOA, or the previous owner. Yet, accepting the Defendant's argument in this case would result in the Plaintiff being the only party who suffers any monetary loss from the non-payment of assessments, as both the HOA and the Defendant have been made whole. That result is fundamentally unfair and could not have been what the Legislature intended.

(42) In a sense, this outcome can be seen as unfair to the lender whose interest in this case was extinguished by the purchase of the Subject Property for a mere $2,000. However, Comment 1 to UCIOA Section 3-116 proposes two simple solutions. First, the lender (having been given specific notice of the association's "super priority" lien) can protect its interest by paying the unpaid assessments before foreclosure is initiated by the association, thereby removing the "super priority" lien and ensuring that its security interest is the most senior one remaining. Alternatively, and more proactively, as noted by Comment 1 the lender can ensure that there can never be a default or a "super priority" lien by simply impounding money in advance and paying the assessments itself, much as lenders now commonly impound money to pay tax bills in order to prevent tax liens and government tax foreclosures. In either case, the association will have been made whole, thus accomplishing the fundamental purpose of NRS 116.3116, and the lender can seek to satisfy its own security by initiating its own foreclosure at which its security interest would be the most senior encumbrance.

(43) In general, however, questions regarding the fairness of any public policy are for the Legislature to resolve, not for the Judiciary. The Legislature is entitled to enact legislation that may, in some instances, be unfair to some parties. But the Judiciary cannot substitute its own judgment for that of the Legislature and read a statute in a manner other than as it is drafted merely because the application of the statute might seem unwise. In this case, the disposition of this Motion is based upon the application of clear principles of statutory interpretation. In the complete absence of any language in NRS Chapter 116 reflecting a Legislative intent to depart from the

established principle that subordinate liens are extinguished by foreclosure sales, the Court must assume that the Legislature intended that Chapter 116 foreclosures operate precisely in the same manner.

(44) For the foregoing reasons, the Defendant's Motion to Dismiss is DENIED.

DATED: May 30, 2013

JEROME T. TAO
DISTRICT COURT JUDGE

EXHIBIT 2

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May 29, 2013

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Ladies and Gentlemen:

You have asked whether foreclosure of its assessment lien by a Nevada common interest association extinguishes a first security interest and other junior interests.

It is my opinion that foreclosure by an association extinguishes the first security interest and all other subordinate interests if the foreclosure otherwise complies with the requirements of Nevada law.

As discussed more below, the Nevada statute is based on and incorporates, with variations not relevant to my opinion, the provisions of the Uniform Common Interest Ownership Act ("UCIOA"). My long experience in the writing of UCIOA and its predecessor laws gives me a unique perspective into the meaning and intent of Nevada's Uniform Common-Interest Ownership Act ("NUCIOA").

UCIOA and NUCIOA clearly contemplate that foreclosure by an association extinguishes a first security interest.

My Experience and Background

ULC Commissioner. The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) was established in 1892. It provides States with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

I have served as a Uniform Law Commissioner without interruption since 1976. I have been involved, almost continuously, in the drafting of substantially all of the uniform and model laws relating to condominiums, planned communities, cooperatives, time-shares, partition of real estate, land security interests and nonjudicial foreclosure.

My initial involvement in common interest ownership law was as a member of the ULC's 1976 review committee on the Uniform Condominium Act. Thereafter, I was a member of the drafting committees that produced the 1980 Uniform Planned Community Act and the 1982 Uniform Common Interest Ownership Act. I chaired the committee that amended the Uniform Common Interest Ownership Act in 1994.

I chaired the drafting committee that produced both the 2008 amended Uniform Common Interest Ownership Act and the Uniform Common Interest Owners Bill of Rights Act.

Educator. I taught a course on real estate transactions for 18 years as an adjunct professor at Vermont Law School, with an emphasis on common interest ownership law.

I've been on the faculty of numerous courses and classes for lawyers and others involved in real estate, including chairing the American Law Institute-American Bar Association's courses on condominium, planned community and mixed use projects as well as serving on the faculty of the ALI-ABA course on resort real estate. In those classes, I emphasize the benefits and burdens of the Uniform laws for developers, lenders, merchant builders, unit purchasers and sellers, associations and managers.

I've addressed legislative committees in a number of States on the subject of the real property Uniform Laws as well as been an invited speaker at symposia and similar events.

Peer Organizations. I've chaired the Common Interest Committee of the American College

of Real Estate Lawyers and the Condominium and Planned Community Committee of the ABA Real Property Section.

I chaired, until recently, the Joint Editorial Board on Real Property, jointly sponsored by the American College of Real Estate Lawyers, the ABA Real Property Section, the Uniform Law Conference, the Community Association Institute, the American College of Mortgage Attorneys and the American Land Title Association.

UCIOA and NUCIOA

Our goals in promulgating the 1982 UCIOA[1] were many, but we believe that we achieved at least two of them:

First, we consolidated, into a single statute, the law applicable to the creation and termination of the condominium, planned community and real estate cooperative forms of real estate;[2] the operation of common interest community associations; and protections of consumers in purchases from the declarant and in resale transactions.

Second, we eliminated substantially all of the variations applicable to common interest communities attributable solely to the legal form of the community and, as to the remainder, we "harmonized" the differences.

1982 UCIOA is divided into five parts:

- Article 1 contains definitions and general provisions.
- Article 2 provides for the creation, alteration and termination of common interest

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[1] The ULC has subsequently amended UCIOA: First, in 1994, to address minor changes and, second, in 2008, to significantly expand Part 3 to expand governance rights for owners and increased transparency of board actions, as well as other changes throughout the rest of the Act. Those changes do not affect my opinions.

[2] The important distinctions among these three forms of ownership is who owns what: In a condominium, unit owners own their units individually and, together, they own the common elements, which their association (in which they are mandatory members) manages; in a planned community, unit owners own their own units but their association (in which they are mandatory members) owns the common elements; and in a real estate cooperative, the association owns both the units and common elements but owners, by virtue of their membership in the association, have exclusive rights to particular units.

In each, the association has a lien to enforce its assessment authority.

communities.

- Article 3 concerns the administration of the community association.
- Article 4 deals with consumer protection for purchasers.
- Article 5 is an optional Article which establishes an administrative agency to supervise a developer's activities.

Nevada enacted NUCIOA in 1991. At that time, Nevada adopted, without variations not relevant to my opinion, 1982 UCIOA's Section 3-116. The Nevada version is NRS 116.3116.

The ULC proudly proclaims that roughly half the States have enacted one or more of the Uniform Condominium Act, the Uniform Planned Community Act or one of the iterations of UCIOA.[3]

Priorities

The first of the uniform laws addressing common interest communities was the Uniform Condominium Act. It was initially designed to deal with a wide range of issues including flexibility for developers, abuses by developers, the need to protect developer lenders after developer failure, separating title documentation from purchaser disclosure, appropriate disclosure for purchasers, and the powers and responsibilities of the association.[4]

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[3] UCIOA: Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, West Virginia, Vermont.

Uniform Condominium Act: Alabama, Arizona, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, Washington.

Uniform Planned Community Act: Pennsylvania.

Uniform Common Interest Owner Bill of Rights: Kansas.

[4] Although nothing in the Uniform Condominium Act prohibited a "horizontal" condominium, the presumption that guided its drafting was that a condominium would be vertical, as with mid- and high-rise buildings.

The Uniform Planned Community Act was initially designed to deal with the "multi-unit residential 'planned community' served by common area facilities owned and operated by a homeowner association." Although nothing in the Uniform Planned Community Act prohibited a "vertical" planned community, the presumption that guided its drafting was that a planned community would be horizontal, as with traditional subdivisions in which the association owned common land.

Because the role of an association is critical to the success or failure of the great majority of common interest communities, we devoted a significant amount of time to empowering the association. One of the most important conclusions that we reached addressed the need of the association to be properly funded.

Most common interest associations raise funds for their operations by assessing their members; some associations have amenities or other assets that generate income from third parties, but they are few in comparison. Similarly, most associations begin their budgeting process by identifying their expenses and then match up total expenses with assessment revenue. The consequence of this process is that if a single unit owner fails to pay her assessment obligations, the association is forced to cut back its expenses in the same amount – to the end that not all budgeted services can be provided. For that reason, the association was given a statutory lien against the unit owner's unit; it was believed that the mere existence of the lien would be sufficient leverage to ensure the association's ability to collect and, if not so, then the association was given the statutory authority to foreclose its lien in the same manner as a security interest.

However, if the association's only realistic remedy is foreclosure,[5] the association's lien – for assessments arising after the unit owner's mortgage was recorded in the office of the recorder – would ordinarily be junior to the first security interest. As a result, a foreclosing association would take subject to the first security interest – not a practical result – or, worse, be foreclosed by the holder of the first security interest.

It was Fannie Mae and Freddie Mac that proposed a solution that would protect the association and the interests of the holder of the first security interest: Give the association a limited priority ahead of the first security interest – UCIOA chose an amount equal to six months of assessments under the annual budget; the Nevada version is nine months. As explained in the Official Comments,

> as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to

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When we were comparing Uniform Condominium Act and the Uniform Planned Community Act during the 1982 UCIOA drafting process, we immediately recognized that the condominium and planned community forms of ownership were interchangeable, so that a condominium could be created as a traditional "homes association" neighborhood and a planned community could be a high-rise building. With that recognition, we sought to eliminate variations.

[5] That would be true if pursuit of a money judgment against the unit owner would be futile.

> enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders.

First embodied in the 1976 Uniform Condominium Act, this priority principle has become the law not only in States that enacted one or more of the Uniform laws and in a half dozen other States by specific legislation.

A lender faced with foreclosure by the association could be expected to protect its collateral by paying off the six month priority amount. And it could do so without advancing its own funds by requiring its borrowers to escrow for association assessments in the same manner as lenders require escrow for property taxes and casualty insurance.[6]

Foreclosure

The priority treatment of the association's lien is not limited to a first claim to proceeds from the foreclosure sale (up to an amount of unpaid assessments, fee, charges, late charges, fines and interest not exceeding six months of assessments determined by the periodic budget). It also 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.[7]

That result naturally follows from the customary rule regarding priority of interests in real estate.[8] A foreclosure sale of the association's lien is governed by the same principles generally applicable to lien foreclosure sales, so that foreclosure of a lien entitled to priority extinguishes that lien and all subordinate liens. The liens attach to the proceeds of the sale and are paid out accordingly.

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[6] Of course, back in 1976, there were many fewer foreclosures and only a few of them required more than six months from commencement to completion. Even in a judicial foreclosure jurisdiction, foreclosure actions – in the absence of a meritorious defense – would be completed in less than 12 months. Requiring a borrower to escrow six months of association associations was seen as a minor burden.

[7] There is an exception, though very unlikely: If the first security interest is recorded before the declaration, the association's lien would be junior to it.

[8] The Restatement of Property (Mortgages) (1996) states the general rule, in the context of mortgage foreclosure, this way in Section 7.1: "A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law." By substituting "association lien" for "mortgage," the rule in NUCIOA 116.3116 is clearly understood.

The holder of the first security interest can easily protect its position by paying the six-month priority amount to the association and taking an assignment from the association.

Conclusion

The NUCIOA follows the principles in UCIOA:

- The association enjoys a statutory limited priority ahead of a first security interest similar to the priority given to property taxes and other governmental charges.

- Because of the statutory priority, foreclosure by the association extinguishes the first security interest and all other junior interests.

- The holder of a first security interest can – and should – protect itself against an association foreclosure by requiring that its borrower escrow the full amount of the association's priority and paying it to the association to avoid extinguishment of the security interest.

Sincerely,

Carl H. Lisman

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TAB 33

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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 and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2013, pursuant to NRCP 5(b), I served via first class U.S. Mail, postage prepaid, the **Supplement to Opposition to U.S. Bank, N.A.'s Motion to Dismiss**, filed on May 31st, 2013 to the following parties:

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TAB 34

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DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Plaintiff, vs. US 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, and LUCIA PARKS, an individual; DOES I through X, and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-678814-C Dept. No.: XVIII **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiff's Motion for Preliminary Injunction having come on for hearing in the above-entitled Court on May ~~17~~ 16, 2013 at the hour of ~~8:30~~ 8:15 A.M. The Plaintiff, SFR Investments Pool 1, LLC, appearing by and through its counsel of record, Diana S. Cline, Esq., of Howard Kim & Associates; the Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, appearing by and through its counsel of record, Chelsea A. Crowton, Esq., of Wright, Finlay & Zak, LLP, and the Court having considered all arguments presented, the pleadings on

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