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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendant Bank of America, N.A.'s (**BANA**) motion to dismiss plaintiff Las Vegas Development Group, LLC's (**LVDG**) second amended complaint, filed August 15, 2013, came on for hearing before the Court on September 17, 2013. Marilyn Fine, Esq. appeared on behalf of LVDG, and Natalie L. Winslow, Esq. appeared on behalf of BANA. The Court, having examined the pleadings and heard the arguments of counsel at the hearing on the motion, finds as follows:

**FINDINGS OF FACT**

A. On June 22, 2006, Genevieve Uniza-Enriquez (the **borrower**) purchased certain real property located at 6279 Downpour Court, Las Vegas, Nevada 89110.

B. The borrower secured her purchase of the property with a deed of trust for $360,000.00 against the property.

C. On June 25, 2010, the successor trustee under the deed of trust and/or agent of the beneficiary, ReconTrust Company, N.A. (**ReconTrust**) recorded a first notice of default against the property.

D. On June 30, 2010, an assignment of the deed of trust was recorded in favor of BAC Home Loans Servicing, LP.

E. ReconTrust rescinded the first notice of default on March 30, 2011.

F. On April 5, 2011, ReconTrust recorded a second notice of default.

G. On December 29, 2011, the Nevada Foreclosure Mediation Program recorded its certificate, indicating that "[t]he Beneficiary may proceed with the foreclosure process."

H. ReconTrust recorded a notice of trustee's sale on December 29, 2011, and additional notices of trustee's sale on April 12, 2012 and July 25, 2012.

I. On April 1, 2010, Absolute Collection Services, LLC (**ACS**), as agent for Palo Verde Ranch Homeowners' Association (**Palo Verde**), recorded a Notice of Delinquent Assessment Lien against the property in the amount of $754.56.

J. The notice specifically stated that "[a]dditional monies shall accrue under this claim at the rate of the claimant's periodic assessments, *plus permissible late charges, costs of collection and interest and other charges*, if any, that shall accrue subsequent to the date of this notice." (Emphasis added).

K. The lien did not provide the amount attributable to assessments only – the only amount subject to Nevada's super priority lien statute.

L. On July 14, 2010, ACS recorded a notice of default against the property, stating that the amount owed as of July 13, 2010, totaled $1,749.65.

M. On November 18, 2010, ACS recorded a notice of foreclosure sale, stating that $2,873.86 was required to pay off the lien to avoid the HOA foreclosure sale.

N. On April 12, 2011, LVDG purchased the property at the HOA foreclosure sale.

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O. A trustee's deed upon sale was recorded on April 13, 2011, in favor of LVDG, stating that LVDG purchased the property for the total amount of $4,001.00.

P. On January 17, 2012, LVDG initiated this action, alleging, *inter alia*, that BANA's deed of trust was extinguished by virtue of the HOA foreclosure sale.

## CONCLUSIONS OF LAW

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (**HOA**) a lien against a residential property for unpaid association dues, fines, and certain other assessments (**HOA Lien**).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (**UCIOA**). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (**Holder**) forecloses on the property. When foreclosure of the first deed of trust is

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complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, the Court orders as follows:

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **DENIED** with respect to the remaining defendant GENEVIEVE UNIZA-ENRIQUEZ. However, this Court determines that there are no claims remaining in this Case against Bank of America, N.A. and no just reason for delay in entry of a final appeal order in favor of Bank of America, N.A. pursuant to NRCP 54(b).

IT IS SO ORDERED.

Dated this 8 day of October, 2013.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

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**IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF CLARK**

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| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,<br><br>Plaintiff,<br><br>*v.*<br><br>BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,<br><br>Defendants. | Case No. A-12-654840-C<br>Dept. No. XXIII<br><br>MOTION FOR RECONSIDERATION<br><br>Arbitration Exemption:<br>Title to Real Property,<br>Declaratory Relief |

COME NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company ("LVDG"), by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Motion for Reconsideration of the Court's Order Granting Bank of America's Motion to Dismiss pursuant to NRCP 59(e) and E.D.C.R.

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This Motion is made and based upon EDCR 2.24, the pleadings and papers on file herein, the attached points and authorities, and any argument of counsel as the Court may consider.

DATED this 17th day of October, 2013.

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**NOTICE OF MOTION**

YOU AND EACH OF YOU, will please take notice that the **MOTION FOR RECONSIDERATION** will come on regularly for hearing on the 18 day of NOV 2013, at the hour of 9 3 0 A or as soon thereafter as counsel may be heard, in Department XXIII in the above-referenced court.

DATED this 17th day of October, 2013.

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## STATEMENT OF FACTS

### A. Summary

This matter is a declaratory relief / quiet title action, requesting determination of the parties' rights and interests in property located at 6279 Downpour, Las Vegas, Nevada (the "Property") and in particular, the rights and interests of Plaintiff LVDG (the bona fide purchaser of the Property at an HOA Lien Foreclosure Sale) vis-à-vis Defendant Bank of America (lienholder); and the rights and interests of Plaintiff LVDG vis-à-vis Defendant Genevieve Uniza-Enriquez (the former owner). The Property is situated in the common interest community known as Palo Verde Ranch and subject to CC&Rs in 2004, and rules and regulations for the Palo Verde Ranch Homeowners Association (the "HOA").

Plaintiff LVDG acquired the Property at a public auction held for foreclosure of a delinquent assessment lien (the "HOA Lien") on April 12, 2011 (the "HOA Lien Foreclosure Sale"). Immediately prior to the HOA Lien Foreclosure Sale, the Property was owned by Genevieve Uniza-Enriquez; and encumbered by a first deed of trust in favor of Plaintiff Bank of America as assignee of Utah Financial, Inc. (the "First Deed of Trust") recorded in 2006.

LVDG filed a complaint on January 17, 2012, seeking to quiet title to the Property. On August 1, 2013, LVDG filed an amended complaint, which added the former property owner, Genevieve Uniza-Enriquez. With respect to the former owner, LVDG seeks judicial determination of the effect of the HOA Lien foreclosure on the former owner's rights and interests in the Property.

With respect to Bank of America, LVDG seeks judicial determination of the effect of the HOA Lien foreclosure on the First Deed of Trust. LVDG believes that pursuant to NRS §116.3116(1) through NRS §116.3117 (the "HOA Lien Statutes") and well-established real estate law, a portion of an HOA Lien had super priority over the First Deed of Trust, Bank of America failed to pay the super priority amount of the HOA Lien to protect its security interest

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and as a result, foreclosure of the HOA Lien extinguishes the First Deed Of Trust by operation of law.

On August 15, 2013, Bank of America filed a Motion to Dismiss. On October 10, 2013, this Court entered an Order Granting Bank of America's Motion to Dismiss with prejudice (the "Order"), finding the following:

**CONCLUSIONS OF LAW**

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (HOA) a lien against a residential property for unpaid association dues, fines, and certain other assessments (HOA Lien).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

**4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.**

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (UCIOA). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. **Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (Holder) forecloses on the property. When foreclosure of the first deed of trust is complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.**

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> **ORDER**
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> * * * *
>
> Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because **NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.**

See Order (emphasis added).

## II.

## ARGUMENT

### A. STANDARD FOR RECONSIDERATION.

EDCR 2.24 provides that a party may seek "reconsideration of a ruling of the court..." EDCR 2.24(b). NRCP 59(e) permits a party to file a Motion to Alter or Amend a Judgment no later than 10 days after service of a written notice of entry of a judgment. The Court has great discretion as to whether to grant reconsideration. See Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 217 (1980) (reconsideration granted "in light of persuasive authority cited by the [parties]"). In Nevada, where "new issues of fact or law are raised supporting a ruling contrary to the ruling already reached" a motion should be reheard. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). A motion may be reheard if the Court "may have arrived at an erroneous conclusion." Geller v. McCown, 64 Nev. 102, 108 (1947), or if the decision is clearly erroneous. Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n, 113 Nev. 737, 741 (Nev. 1997). After reconsidering the matter, the court may "amend, correct, resettle, modify or vacate as the case may be, an order previously made and entered on the motion in the progress of the cause or proceeding." Trial v. Faretto, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975).

### B. THE BASIS FOR THE COURT'S DECISION IS CLEARLY ERRONOUS.

Reconsideration of the Court's Order granting Bank of America's Motion to Dismiss is proper because the Court misread and misinterpreted the HOA Lien Statutes in finding in essence that the super priority provision of NRS §116.3116(2) does not create a true lien, but

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merely a payment priority, which is only triggered upon foreclosure of the first deed of trust and accordingly, foreclosure of the super priority HOA Lien does not extinguish a first deed of trust. As supported by the recent Report of the Joint Editorial Board for Uniform Real Property Acts dated June 1, 2013, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, www.uniform.org/ shared/does/jeburpa/2013jun1 (the "JEBURP Report") attached hereto as **Exhibit 1**, this Court's interpretation of NRS §116.3116(2) is clearly erroneous. The JEBURP Report was prepared by the editorial board of the UCIOA in pertinent part to clarify the meaning and intended application of the HOA super priority lien provisions and to provide guidance to parties and the courts for resolving the high volume of litigation on the HOA Lien priority issue. See JEBURP Report, p. 6. As explained in the JEBURP Report, the Uniform Laws (defined as the UCIOA and its predecessor acts, the Uniform Condominium Act ("UCA"), the Model Real Estate Cooperative Act, and the Uniform Planned Community Act) "facilitate an association's ability to collect common expense assessments by providing that, subject to limited exceptions, the association's lien is prior to all encumbrances that arise after the recording of the declaration." JEBURP Report, p. 1. The JEBURP Report further states:

> The rationale for this approach lies in the realization that (1) the association is an involuntary creditor that is obligated to advance services to owners in return for a promise of future payments; and (2) the owners' default in these payments could impair the association's financial stability and its practical ability to provide the obligated services. The priority of the association's lien is critical because if there is insufficient equity in a unit/parcel to provide a full recovery of unpaid assessments, the association must (as explained above) either reassess the remaining unit owners or reduce maintenance and services. The potential impact of these acts on the community and the association's status as an involuntary creditor argue in favor of providing the association lien with priority vis-à-vis competing liens.
>
> Nevertheless, many practical and regulatory barriers militate against complete priority for an association's assessment lien. Because the interests of the general public outweigh the interests of the community alone, real estate tax liens and other governmental charges should have priority over an association's assessment lien. Likewise, complete priority for association liens could discourage common interest community development. Traditional first mortgage lenders might be reluctant to lend from a subordinate lien position if there was no "cap"

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on the potential burden of an association's assessment lien. In addition, some federally- or state-regulated lenders face regulatory restrictions on the amount of mortgage lending they can undertake involving security other than first lien security.

For these and other reasons, the general rule in the Uniform Laws (granting the association's lien priority as of the recording of the declaration) does not apply to first mortgages. Instead, the priority of the association's lien with respect to first mortgages is a function of the time the assessment becomes due. If the assessment becomes due after a first mortgage is of record, the assessment lien is generally subordinate to the lien of the first mortgage. However, this subordination is not absolute; under UCIOA §3-116(c), the association's lien is given a limited or "split" priority over the first mortgage lien to the extent of six months' worth of assessments based on the association's periodic budget.

> In this way, the Uniform Laws mark a substantial deviation from prior law, striking what the drafters described as "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." UCIOA §3-116, comment 1.

JEBURP Report, p. 6-7 in **Exhibit 1**.

As explained in the JEBURP Report, the HOA Lien created by the UCIOA [NUCIOA] is a true lien with bifurcated priority not merely a payment priority. The HOA Lien is junior to a first deed of trust, which was recorded prior to the date upon which the assessment becomes due. However, the first deed of trust's priority over the HOA Lien is not absolute because a portion of the HOA Lien has super priority over a first deed of trust up to a capped amount. See JEBURP, example 2, p. 8-10; JEBURB p. 9 ("association's six month limited priority lien constituted a true lien priority and not merely a distributional preference in favor of the association," referring to Summerhill Village Homeowners Assoc. v. Roghley, 270P.3d 639 (Wash. Ct. App. 2012) and application of Washington common interest ownership statutes). See also the last paragraph on page 9 of the JEBURP states in pertinent part:

> **Section -116(c) establishes that the association's lien is "prior to" even the lien of a first mortgage to the extent of both "common expense assessments …which would have become due in the absence of acceleration during the six months immediately preceding institution of**

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> **an action to enforce the lien" and "reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien." A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.[9]**

JEBURP Report, p. 9 in **Exhibit 1** (emphasis added).

Footnote 9 to the JEBURP Report notes that recent Nevada federal court decisions have found that the HOA Lien is a not a true lien, but merely a payment priority. However, the JEBURP Report explains that these decisions misread and misinterpret the UCIOA. Footnote 9 to the JEBURP Report states:

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

JEBURP Report, page 9, fn9 in **Exhibit 1** (emphasis added).

Nevada Supreme Court has yet to rule on this issue, and as supported by the JEBURB Report, some of the Nevada state and federal courts have been confused, and have misread NRS UCIOA §3-116 and §116.3116. Part of the confusion arises from the fact that some states like

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Nevada adopted the UCIOA virtually verbatim, while other states have adopted variations of the UCIOA or UCA. See JEBURP Report, pages 2-3 (more than 20 states have adopted the UCA, UCIOA, or nonuniform legislation comparable in substance to UCIOA §3-116). See also Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U. Chi. L.J. 53, 75, n 87-88 ("Boyak Article").[1] The *payment priority* theory arises from other states that have expressly altered provisions of the UCIOA to provide for a payment priority approach not a true lien approach. For example, Minnesota has adopted the UCIOA. For example, Minnesota altered the UCIOA statute to create a mere payment priority scheme. As explained in the table set forth below, Minnesota's HOA Lien Statutes are distinguishable from Nevada's HOA Lien Statutes because Nevada's HOA Lien Statute do not contain the *payment priority* language adopted by the Minnesota legislature and accordingly, Nevada is not a *payment priority* state.

Comparison of Nevada and Minnesota HOA Lien Statutes

| Description | NRS §116.3116 | Minn. Stat. Ann. §515B.3-116 |
|---|---|---|
| Lien Creation | 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. | (a) The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. 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. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charges pursuant to section 515B.3-102(a)(10), (11) and (12) are liens, and are enforceable as assessments, under this section. Recording of the declaration constitutes record notice and perfection of any assessment lien under this section, and no further recording |

[1] The Boyak Article provides a broad overview of common interest community statutes in various states, and recognizes that the laws differ from state to state.



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| | | of any notice of or claim for the lien is required. |
| Perfection | 4. 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 | Same as Nevada. See last sentence above. |
| Priority | 2. A lien under this section is prior to all other liens and encumbrances on a unit except:<br>(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;<br>(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<br>(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. | (b) Subject to subsection (c), a lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) any first mortgage encumbering the fee simple interest in the unit, or, in a cooperative, any first security interest encumbering only the unit owner's interest in the unit, (iii) liens for real estate taxes and other governmental assessments or charges against the unit, and (iv) a master association lien under section 515B.2-121(h). This subsection shall not affect the priority of mechanic's liens |
| **Super Priority** | **2. ******<br>**-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** | **(c) If a first mortgage on a unit is foreclosed, the first mortgage was recorded after June 1, 1994, and no owner or person who acquires the owner's interest in the unit redeems pursuant to chapter 580, 581, or 582, the holder of the sheriff's certificate of sale from the foreclosure of the first mortgage or any person who acquires title to the unit by redemption as a junior creditor shall take title to the unit subject to a lien in favor of the association for unpaid assessments for common expenses levied pursuant to section 515B.3-115(a), (e)(1) to (3), (f), and (i) which became** |

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|---|---|---|
| | **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. . . .** | **due, without acceleration, during the six months immediately preceding the end of the owner's period of redemption. The common expenses shall be based upon the association's then current annual budget, notwithstanding the use of an alternate common expense plan under section 515B.3-115(a)(2).** |

The Minnesota Lien Statutes afford the HOA Lien super priority only after the first mortgage forecloses. See 515B.3-116(c) (if a first mortgage on a unit is foreclosed, the person who acquires title at the mortgage foreclosure sale or by redemption takes title subject to a lien in favor of the HOA for unpaid assessments which became due, without acceleration, during the six months immediately preceding the end of the owner's period of redemption). However, Nevada's HOA Lien Statutes do not contain this limitation. See NRS 116.3116(2). Unlike the super priority provision in Minnesota's HOA Lien Statutes, the super priority provision in Nevada's HOA Lien statute is not triggered if or when the first deed of trust forecloses. Nevada's HOA Lien is a true lien not a mere *payment priority*. Compare the *payment priority* scheme in Minn. Stat. Ann. §515B.3-116(c) to the super priority provision in the second paragraph of NRS §116.3116(2). Unlike the Minnesota legislature, the Nevada legislature adopted the UCIOA virtually verbatim. Unlike the Minnesota HOA Lien Statute, Nevada's HOA Lien Statute creates a true lien not a *payment priority*, and a portion of Nevada's true lien has super priority over a first deed of trust upon recordation of the CC&Rs (not if or when a foreclosure under the first deed of trust occurs).

This legal conclusion is supported by the Nevada State Real Estate Division as supported by the advisory opinion dated December 12, 2012 (the "Real Estate Division Advisory"). A courtesy copy of the Real Estate Division Advisory is attached hereto as **Exhibit 2**. The Real Estate Division Advisory is important and persuasive because the Nevada Supreme Court will likely give deference to the Real Estate Division Advisory when it rules on this issue. The

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Nevada Supreme Court will likely defer to the agency's interpretation of the HOA Lien statutes because the agency's interpretation is based on the plain meaning of the statute. See State Bus. & Indus. v. Nev. Ass'n Servs., 128 Nev. Adv. Op. 34, 2012 WL 3127275* 4 (Nev. Aug. 2, 2012) ("We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division and no other commission or division, interpret NRS Chapter 116"); Dutchess Business Services v. Nev. State Bd. of Pharmacy, 124 Nev. 701, 709 (2009) (court defers to agency's interpretation of statutes if interpretation is within the language of the statute). The Real Estate Division Advisory explains that the HOA has a statutory lien and a portion of the lien has priority over a first deed of trust. See pages 8-9 of the Real Estate Division Opinion in **Exhibit 2**. See also page 6 of the presentation made by the Administrator of the Real Estate Division to the Nevada Senate Judiciary Committee on May 6, 2013 in **Exhibit 3**, which explains that foreclosure of the super priority lien extinguishes the first deed of trust.

This legal conclusion is further supported by the legal opinion of the State of Nevada Legislative Counsel Bureau dated December 7, 2012, which is attached hereto as **Exhibit 4** (the "LCB Opinion"). As explained in the LCB Opinion, the purchaser of a unit at a HOA Lien Foreclosure Sale, acquires all title held by the previous owner without equity or right of redemption. See pages 1-2, LCB Opinion, **Exhibit 4.** However, the purchaser does not acquire the property subject to a first deed of trust. The ownership interest acquired by the purchaser of a unit, survives a subsequent foreclosure of a security interest. See pages 3-4, LCB Opinion, **Exhibit 4.** Following the HOA Lien foreclosure sale, the HOA's foreclosing trustee is required to disburse the sales proceeds in accordance with NRS §116.31164(3)(c) to (1) the reasonable expenses of the sale; (2) reasonable expenses of securing possession before the sale; holding, maintaining and preparing the unit for sale, including taxes and insurance; to the extent provided in the CC&Rs, attorneys' fees and costs; (3) satisfaction of the HOA Lien; (4) satisfaction in the order of priority of any subordinate claim of record [in accordance with the ranking of priority in NRS §116.3116(2); e.g., first to the super priority portion of the HOA Lien, then to the first deed of trust, then to the sub-priority portion of the HOA Lien, then to junior liens in order of their priority based on "first in time" priority rules]; and (5) remittance of any excess to the owner. If

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proceeds received from the HOA Lien foreclosure sale are less than the amount owed on a security interest, the lender may pursue a judgment against the borrower/former owner. However, the lender cannot seek a judgment against the purchaser for any deficiency resulting from the distribution of proceeds when the HOA lien foreclosure deed contains the recitals described in NRS §116.31166. See pages 3-4, LCB Opinion, **Exhibit 4.** "No part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164." LCB Opinion, page 4.

## III.

## CONCLUSION

The new information before this Court should result in a correction of the Order entered on October 10, 2013. The JEBURB Report, Nevada Real Estate Division Advisory Opinion and legislative presentation, and Nevada Legislative Counsel Bureau Opinion provide useful guidance on the issue at hand. Contrary to the legal conclusions set forth in the Order, NRS §116.3116(2) does not create a *payment priority* triggered only on foreclosure of the first deed of trust. This Court is confusing Nevada's statutes with statutes from other states like Minnesota, which have made express alterations to UCIOA §3-116. Unlike Minnesota's super priority lien statute, Nevada's super priority lien statute creates a true lien not merely a payment priority triggered upon the first deed of trust's foreclosure.

DATED this 17th day of October, 2013.

Meier & Fine, LLC

By _____

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**Exhibit List**

| | |
|---|---|
| Exhibit 1: | Report of Joint Editorial Board for Uniform Real Property Acts dated 6/1/2013 |
| Exhibit 2: | Nevada State Real Estate Division Advisory Opinion dated 12/12/2012 |
| Exhibit 3: | Nevada Real Estate Division Presentation to the Nevada Senate Judiciary Committee on May 6, 2013 |
| Exhibit 4: | State of Nevada Legislative Counsel Bureau opinion dated 12/7/2012 |

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 17, 2013, I served a copy of the above and foregoing **Las Vegas Development Group, LLC'S MOTION FOR RECONSIDERATION** by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

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/s/ Cynthia Kelley
Cynthia Kelley, An employee of MEIER & FINE, LLC

# EXHIBIT 1

# REPORT OF THE JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS

# THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT

**JUNE 1, 2013**

*The Joint Editorial Board for Uniform Real Property Acts (the "Board") provides guidance to the Uniform Law Commission (ULC) and others regarding potential subjects for uniform laws relating to real estate, as well as advice regarding potential amendments to existing uniform laws relating to real estate. The Board is comprised of representatives of the ULC, the American Bar Association Real Property, Trust and Estate Law Section, and the American College of Real Estate Lawyers, as well as liaisons from the American College of Mortgage Attorneys, the American Land Title Association, and the Community Associations Institute.*

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# JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS

## THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT

### Introduction

*Role of Association Assessments.* In the modern common interest community (the most common forms of which are the condominium, the planned community, and the cooperative), each unit/parcel is subject to an assessment for its proportionate share of the common expenses needed to operate the owners' association (the "association") and to maintain, repair, replace, and insure the community's common elements and amenities. Assessments constitute the primary source of revenue for the community, and the ability to collect assessments is crucial to the association's ability to provide the maintenance and services expected by community residents. If some owners do not pay their proportionate share of common expenses, the association will be forced to shift the burden of delinquent assessments to the remaining unit owners through increased assessments or reduced services and maintenance, potentially threatening property values within the community.

*Statutory Lien.* To facilitate the association's ability to collect assessments, assessments unpaid by an owner constitute a lien on the owner's unit/parcel. In theory, the lien provides the association with the leverage needed to assure timely collection of assessments. If an owner fails to pay assessments, the association can institute an action to foreclose on the owner's interest in the unit/parcel and can use the proceeds of the foreclosure sale to satisfy the balance of the unpaid assessments (along with interest, costs, and to the extent authorized by the declaration and applicable law, attorney's fees incurred by the association in enforcing its lien).

*Uniform Law Treatment.* The Uniform Common Interest Ownership Act (UCIOA) — along with its predecessor acts, the Uniform Condominium Act, the Model Real Estate Cooperative Act, and the Uniform Planned Community Act (collectively, the "Uniform Laws") — facilitate an association's ability to collect common expense assessments by providing that, subject to limited exceptions, the association's lien is prior to all encumbrances that arise after the recording of the declaration. The rationale for this approach lies in the realization that (1) the association is an involuntary creditor that is obligated to advance services to owners in return for a promise of future payments; and (2) the owners' default in these payments could impair the association's financial stability and its practical ability to provide the obligated services. The priority of the association's lien is critical because if there is insufficient equity in a unit/parcel to provide a full recovery of unpaid assessments, the association must (as explained above) either reassess the remaining unit owners or reduce maintenance and services. The potential impact of these acts on the community and the association's status as an

involuntary creditor argue in favor of providing the association lien with priority vis-à-vis competing liens.

Nevertheless, many practical and regulatory barriers militate against complete priority for an association's assessment lien. Because the interests of the general public outweigh the interests of the community alone, real estate tax liens and other governmental charges should have priority over an association's assessment lien. Likewise, complete priority for association liens could discourage common interest community development. Traditional first mortgage lenders might be reluctant to lend from a subordinate lien position if there was no "cap" on the potential burden of the an association's assessment lien. In addition, some federally- or state-regulated lenders face regulatory restrictions on the amount of mortgage lending they can undertake involving security other than first lien security.

For these and other reasons, the general rule in the Uniform Laws (granting the association's lien priority as of the recording of the declaration) does not apply to first mortgages. Instead, the priority of the association's lien with respect to first mortgages is a function of the time the assessment becomes due. If the assessment becomes due after a first mortgage is of record, the assessment lien is generally subordinate to the lien of the first mortgage. However, this subordination is not absolute; under UCIOA § 3-116(c), the association's lien is given a limited or "split" priority over the first mortgage lien to the extent of six months' worth of assessments based on the association's periodic budget:[1]

> A lien under this section is also prior to [a first mortgage lien] to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.

In this way, the Uniform Laws mark a substantial deviation from prior law, striking what the drafters described as "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." UCIOA § 3-116, comment 1. Since its introduction in 1976, the six-month priority for association liens has been adopted in more than twenty

[1] Comparable priority provisions appear in the Uniform Condominium Act [UCA § 3-116], the Model Real Estate Cooperative Act [MRECA § 3-115], and the Uniform Planned Community Act [UPCA § 3-116].

jurisdictions, either through adoption of the UCA, UCIOA, or in nonuniform legislation comparable in substance to UCIOA § 3-116.[2]

The drafters of § 3-116(c) believed that the six-month association lien priority struck a workable and functional balance between the need to protect the financial integrity of

[2] The relevant Uniform Laws include Ala. Code § 35-8A-316(b) (six-month limited priority for assessment lien for condominium association); Alaska Stat. Ann. § 34.08.470(b) (six-month limited priority for assessment lien for common interest community association); Colo. Rev. Stat. Ann. § 38-33.3-316(b) (six-month limited priority for assessment lien for common interest community association); Conn. Gen. Stat. Ann. § 47-258(b) (six-month limited priority for assessment lien for common interest community association, plus association's costs and attorney fees in enforcing its lien); Del. Code Ann. tit. 25, § 81-316(b) (six-month limited priority for assessment lien for common interest community association); Minn. Stat. Ann. § 515B.3-116(c) (six-month limited priority for assessment lien for common interest community association); Vernon's Ann. Mo. Stat. § 448.3-116(2) (limited priority for six months of condominium association assessments and fines which are due at time of subsequent refinancing); Nev. Rev. Stat. Ann. § 116.3116(2) (nine-month limited priority for assessment lien for common interest community association; although duration may be reduced to six months if required by federal regulation); Purdon's Pa. Cons. Stat. Ann. tit. 68, § 5315(b) (six-month limited priority for assessment lien for planned community association); *id.* § 3315(b) (six-month limited priority for assessment lien for condominium association); *id.* § 4315(b) (six-month limited priority for assessment lien for cooperative association); R.I. Gen. Laws Ann. § 34-36.1-3.16(b) (six-month limited priority for assessment lien for condominium association); Vt. Stat. Ann. tit. 27A, § 3-116(b) (six-month limited priority for assessment lien for common interest community association); Rev. Code Wash. Ann. § 64.34.364(3) (six-month limited priority for assessment lien for condominium association); W. Va. Code § 36B-3-116(b) (six-month limited priority for assessment lien for common interest community association).

Jurisdictions that have not enacted one of the Uniform Laws, but that have adopted a limited priority lien provision, include the District of Columbia, D.C. Code § 42-1903.13(a)(2) (six-month limited priority for assessment lien for condominium association); Florida, Fla. St. Ann. §§ 718.116(1)(b), 720.3085(2)(c) (priority for assessment lien for association limited to twelve months of assessments or one percent of the original mortgage debt); Illinois, 765 Ill. Comp. Stat. § 605/9(g)(4) (six-month limited priority for assessment lien for condominium association); Maryland, Md. Code Real Prop. § 11B-117(c) (four-month limited priority for assessment lien of homeowners association); Massachusetts, Mass. Gen. Laws Ann. ch. 183A, § 6(c) (six-month limited priority for assessment lien for condominium association); New Hampshire, N.H. Rev. Stat. § 356-B:46(I) (six-month limited priority for assessment lien for condominium association); New Jersey, N.J. Stat. Ann. § 46:8B-21 (six-month limited priority for assessment lien for condominium association); and Tennessee, Tenn. Code Ann. § 66-27-415(b) (six-month limited priority for assessment lien for condominium association).

Although Kentucky, Maine, Nebraska, New Mexico, North Carolina, Texas, and Virginia each adopted versions of the UCA, those states did not enact the six-month limited-priority for condominium association liens. Ky. Rev. Stat. Ann. § 381.9193; Me. Rev. Stat. Ann. tit. 33, § 1603-116(b); Neb. Rev. Stat. § 76-874; N.M. Stat. Ann. § 47-7C-16; N.C. Gen. Stat. § 47C-3-116; Tex. Prop. Code § 82.113(b); Va. Code Ann. § 55-79.84.

the association and the legitimate expectations of first mortgage lenders. Fundamental to that belief was the assumption that, if an association took action to enforce its lien and the unit/parcel owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien — thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale. The drafters further understood — based on circumstances then existing — that the first mortgage lender's foreclosure proceeding would likely be completed within six months (particularly in jurisdictions with nonjudicial foreclosure) or a reasonable period of time thereafter, minimizing the period during which unpaid assessments would accrue for which the association would not have first lien priority. Finally, the drafters anticipated that the unit/parcel would, in the typical situation, have a value sufficient to enable the first mortgagee to recover the both the unpaid mortgage balance and the cost of six months of assessments. Once a buyer was in place — whether the foreclosing first mortgagee or a third party — that buyer would have to begin making monthly assessment payments, thus preserving the association's ability to carry out its maintenance and services obligations.

*Today's Marketplace.* The real estate market facing common interest communities today is quite different from the one contemplated by the drafters of the Uniform Laws:

- Many units/parcels in common interest communities are "underwater," with values below the outstanding first mortgage balance.

- More significantly — particularly in states with judicial foreclosure — there are long delays in the completion of foreclosures. During this time, neither the unit/parcel owner nor the mortgagee typically pays the common expense assessments — the unit/parcel owner is unable or unwilling to do so, and the mortgagee is not legally obligated to do so prior to acquiring title.

If it takes 24 months for a mortgagee to complete a foreclosure, but the association has a first priority lien for only the immediately preceding six months of unpaid assessments, the consequences for the association can be devastating. The association may receive payment of six months worth of assessments, but because of depressed unit/parcel values, the sale will not generate surplus proceeds from which the association could satisfy the subordinate portion of its lien — and the association likely could not collect a judgment against the unit/parcel owner for that unpaid balance.

Because an association's sources of revenues are usually limited to common assessments, the remaining residents of the community bear the consequences of default by a unit/parcel owner of its assessment obligations, unless the state's statute requires the mortgagee to bear some portion of that cost. As suggested above, § 3-116(c)'s "split" priority for association liens was premised on the assumption that the six-

month limited priority lien would protect the mortgagee's expected first lien position while enabling an association to recover a substantial portion of the common expense costs that would accrue during a period in which the first mortgagee was foreclosing on the unit/parcel. However, if foreclosure takes substantially longer than six months and foreclosure proceeds are inadequate to pay off the first mortgage, the association can collect only a fraction of unpaid assessments from the mortgagee, effectively forcing the remaining owners to bear increased assessments or decreased maintenance/services.

This problem has become extreme in the current economic environment, in which long foreclosure delays have become commonplace. In some cases, delay is attributable to the size of defaulted mortgage portfolios having overwhelmed the capacity of lenders and their servicers. Faulty record-keeping and transaction practices by both lenders and servicers have prompted statutory and judicial responses that have lengthened the foreclosure timeline in judicial foreclosure states.[3] Further, anecdotal evidence suggests that some mortgage lenders are delaying the institution of foreclosure proceedings on units/parcels affected by common interest assessments. If the lender acquires such a unit/parcel at a foreclosure sale via credit bid, the lender (as a successor owner of the unit/parcel) becomes legally obligated to pay assessments arising during the lender's period of ownership. The lender may fear that it may be unable to resell the unit/parcel quickly and for an appropriate return in a depressed housing market — recognizing that it will incur liability for assessments during any period in which it holds the unit/parcel for resale. Thus, for two reasons, the lender has a substantial economic incentive to delay the foreclosure. First, the lender may benefit from a higher recovery in the event that the local housing market experiences any recovery during the period of delay. Second, the delay enables the lender to avoid incurring any legal obligation to pay common expense assessments on the unit/parcel as those assessments accrue during the delay prior to foreclosure.

While the existing legal infrastructure gives the mortgage lender a substantial economic incentive to delay foreclosure, the consequences of this delay are devastating to the community and the remaining residents. To account for the unpaid assessments, the association must either increase the assessment burden on the remaining

[3] The Federal Housing Finance Authority, conservator for Fannie Mae and Freddie Mac, has published foreclosure timelines for all 50 states, reflecting the "periods within which Enterprise servicers are expected to complete the foreclosure process for mortgages that did not qualify for loan modification or other loss mitigation alternatives." Notice, State-Level Guarantee Fee Pricing, Federal Housing Finance Agency (September 25, 2012), 77 Fed. Reg. 58991, 58992. FHFA prepared these timelines from an analysis of the actual experience of Fannie Mae and Freddie Mac with foreclosure processing in each state, as adjusted for each state's statutory requirements and changes in law or practice in response to the foreclosure crisis. *Id.* The national average of the FHFA timelines is 396 days, ranging from 270 days (a common timetable in nonjudicial foreclosure states such as Georgia, Michigan, Minnesota and Missouri) to 750 days in New Jersey and 820 days in New York. *Id.* at 58992, 58993.

unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities). If the other community residents have to pay the burden of increased assessments to preserve community services/amenities, the delaying lender receives a benefit — the value of its collateral is preserved, to some extent, while the lender waits to foreclose. Yet this preservation of the mortgage lender's collateral value comes through the community's imposition of assessments that the lender does not have to pay or reimburse. This benefit arguably constitutes unjust enrichment of the mortgage lender, particularly to the extent that the lender enjoys this benefit by virtue of a conscious decision to delay instituting or prosecuting a foreclosure. See generally Andrea Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53 (2011).

## THE PURPOSE OF THIS REPORT

The Board has two primary purposes in issuing this Report. The first purpose is to address the appropriate interpretation of the existing six-month limited priority lien provision in the Uniform Acts. In states that have adopted § 3-116(c) or a provision substantially comparable to it, the pressures described in the Introduction have produced an increasing volume of litigation between associations and first mortgage lenders regarding the proper scope of the association's lien priority. This litigation may include not only questions regarding the effect of foreclosure proceedings by the association and/or the first mortgage lender, but also questions regarding whether an association can assert its six-month assessment lien priority only on a one-time basis or on a recurring basis (i.e., each time it brings an action to enforce its lien for unpaid assessments). As a result, the Board has prepared this Report to clarify, for the benefit of parties and courts faced with these disputes, the intended application of § 3-116(c) in a variety of scenarios in which priority disputes might arise.

The second purpose is to acknowledge — as addressed in the Introduction — that the existing law governing the relative priority of association liens and first mortgage liens is unsatisfactory. In a slight majority of states, association liens are subordinate to first mortgage liens and mortgage lenders have no obligation to pay or reimburse assessments that accrued prior to the lender's acquisition of title in a foreclosure sale. As a result, first mortgage lenders effectively can shift the costs of preserving the value of their collateral onto the remaining unit/parcel owners. Even in states that have adopted § 3-116(c) or a comparable limited priority rule for association liens, the six-month period of limited priority has proven insufficient to protect the community's financial interests. The Board thus encourages the ULC to consider preparing a uniform law that would strike a more appropriate balance between the interests of first mortgage lenders and common interest community associations and their residents.[4]

[4] In a state that has adopted § 3-116(c) of the Uniform Laws or a similar provision, the new uniform law would effectively function as an amendment to the existing state statute. In states

## APPLICATION OF § 3-116(c) AND THE SIX-MONTH LIMITED PRIORITY LIEN

This portion of the Report addresses the intended application of § 3-116(c) through examining a series of examples, the facts of which are reflective of those in judicial opinions addressing the relative priority of association liens and mortgage liens under § 3-116(c). Each example presumes the following facts: Pinecrest is a common interest community created by virtue of a recorded declaration pursuant to UCIOA. Under the declaration, parcels or units within Pinecrest are subject to a mandatory annual common expense assessment of $3,000, payable to Pinecrest Property Owners Association (PPOA) in monthly installments of $250. The assessments pay for operating expenses of PPOA, including the maintenance and insurance of common facilities and recreational areas within Pinecrest.

Unpaid assessments constitute a lien in favor of PPOA upon the affected parcel or unit. Homeowner is the owner of a parcel or unit within Pinecrest, which parcel or unit is subject to a properly recorded mortgage or deed of trust in favor of Bank, securing the repayment of the unpaid balance of Homeowner's mortgage debt to Bank in the amount of $200,000. In each example, Homeowner is in default to Bank on its debt secured by a mortgage or deed of trust, and is also in default to PPOA in payment of assessments.

***Example One: Homeowner has failed to pay both its common expense assessments and its mortgage for a period of 12 months, Bank institutes a foreclosure proceeding, joining PPOA as a party. Bank ultimately proceeds with a proper foreclosure sale, at which Buyer purchases the unit/parcel for $150,000.***

Section § 3-116(c) establishes that the association's assessment lien is "prior to" even the lien of a first mortgage to the extent of "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien." This means that prior to the sale, PPOA had a first priority lien in the unit/parcel to secure the payment of the preceding six months of common expense assessments ($1,500); Bank effectively had a second priority lien to secure the outstanding mortgage balance ($200,000); and PPOA had a third priority lien to secure the payment of the additional six months of unpaid assessments ($1,500).

When Bank forecloses its mortgage in this context, the foreclosure sale extinguishes its mortgage and PPOA's subordinate lien, with these liens being transferred to the sale proceeds. Bank's foreclosure sale does not extinguish PPOA's first priority "limited priority lien" for the immediately preceding six months of assessments, as that lien is senior under § 3-116(c) and is thus unaffected by Bank's foreclosure sale. Buyer will thus take title to the unit/parcel subject to PPOA's six-month limited priority lien; Buyer

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that do not currently have a limited priority provision for association liens, the new uniform law could be enacted as a freestanding statute.

must pay $1,500 to PPOA to extinguish this lien and clear her title.[5] The $150,000 sale proceeds will be applied first to costs of sale, then to the unpaid balance of Bank's mortgage. As the sale proceeds are insufficient to satisfy Bank's claim, PPOA is left with an unsecured claim for unpaid assessments beyond its six-month priority.

In Example One, it is conceivable that PPOA and Bank may agree, in advance, that the foreclosure sale will deliver clear title to the foreclosure sale purchaser. If PPOA and Bank so agree, the sale would also extinguish PPOA's six-month limited priority lien. If that sale produced a price of $151,500,[6] the proceeds would be applied first to costs of sale; the next $1,500 would be distributed to PPOA on account of its limited priority lien, and the balance would be distributed to Bank to be applied to the unpaid mortgage balance. Again, as the sale proceeds would be insufficient to satisfy Bank's claim, PPOA would be left with an unsecured claim for unpaid assessments beyond its six-month priority.

As described above, Example One involves a third party buying the property at Bank's foreclosure sale. It is perhaps more likely that Bank would end up as the foreclosure sale buyer by means of a credit bid, but this would not make a difference in terms of the appropriate application of § 3-116(c). If Bank buys the property for a credit bid in an amount less than or equal to the unpaid mortgage balance, Bank will receive clear title only if it pays PPOA $1,500 to satisfy its assessment limited priority lien; to the extent Bank does not pay that amount, Bank will take title subject to PPOA's lien, which PPOA could enforce by bringing a foreclosure proceeding of its own.

***Example Two: Homeowner has failed to pay its common expense assessment for 12 consecutive months (a total unpaid balance of $3,000). PPOA brings an action to foreclose its lien, joining Homeowner and Bank as parties. Bank does not institute a foreclosure action. PPOA obtains a judgment allowing it to foreclose; neither Homeowner nor Bank takes steps to redeem their respective interests. At the sale, Buyer purchases Homeowner's interest for a cash bid of $207,000. PPOA incurs costs and attorney's fees of $5,000 in conjunction with the sale.***

This example is based in part on the facts of *Summerhill Village Homeowners Association v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012). In *Summerhill Village*, the association commenced an action against the unit owner and her mortgagee (GMAC) to obtain a judgment for unpaid assessments and to foreclose its lien. The association obtained a default judgment and sold the unit to a third-party buyer for

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[5] If Buyer redeems her title by paying off the lien before PPOA brings an action to enforce it, Buyer can redeem by paying only the six months of unpaid assessments. By contrast, if Buyer does not pay off the lien until after PPOA brings an action to enforce it, Buyer must also pay the costs and reasonable attorney's fees incurred by PPOA in its lien enforcement action.

[6] In this context, the sale should produce a higher price (by an increment of $1,500) as the foreclosure sale purchaser will receive clear title rather than title subject to PPOA's senior lien for $1,500 worth of assessments.

$10,302 ($100 over the balance of the judgment). GMAC later sought to set aside the default judgment and establish the priority of its mortgage lien (or, in the alternative, to redeem the property). The Washington Court of Appeals held that under the six-month limited priority lien as incorporated in Washington's version of the Uniform Condominium Act, Rev. Code Wash. Ann. § 64.34.364(3), the association's foreclosure sale had extinguished the lien of the mortgagee. Under this view, the association's six-month limited priority lien constituted a true lien priority and not merely a distributional preference in favor of the association.

To the extent that *Summerhill Village* held that the association's foreclosure sale extinguished GMAC's mortgage lien,[7] the decision is consistent with the proper understanding of the six-month limited priority lien reflected in § 3-116. Section 3-116(c) establishes that the association's lien is "prior to" even the lien of a first mortgage to the extent of both "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien" and "reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien." A foreclosure sale of the association's lien (whether judicial or nonjudicial)[8] is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.[9]

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[7] The *Summerhill Village* court also concluded that under Washington's post-sale redemption statute, GMAC was not entitled to redeem the property. As the question of GMAC's right to redeem did not involve the interpretation of § 3-116(c), this Report expresses no opinion as to that aspect of the *Summerhill Village* decision.

[8] The Uniform Laws provide that in a condominium or planned community, the association must foreclose its lien in the manner in which a mortgage is foreclosed. Thus, an association may foreclose its lien by nonjudicial proceedings if the state permits nonjudicial foreclosure. See UCIOA § 3-116(k), UCA § 3-116(a).

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

As a result, in Example Two, under a proper application of § 3-116(c), PPOA would have a first priority lien on Homeowner's unit/parcel to the extent of $6,500, reflecting six months of unpaid assessments ($1,500) and the reasonable costs and attorney's fees incurred by PPOA in its foreclosure ($5,000). Bank would have a second priority lien on the unit/parcel to the extent of the $200,000 unpaid balance of Homeowner's mortgage debt. PPOA would have a third priority lien to the extent of the unpaid assessments beyond the six-month threshold (a total of $1,500).

PPOA's foreclosure sale in Example Two would extinguish both of its liens (the six month "limited priority lien" as well as the third-priority lien) as well as the Bank's mortgage lien, thereby delivering a clear title to Buyer. The extinguished liens would transfer to the $207,000 sale proceeds in the same order of priority. PPOA would receive the first $6,500 of the sale proceeds on account of its limited priority lien. Bank would receive the next $200,000 in sale proceeds on account of its mortgage lien. PPOA would receive the final $500 of sale proceeds on account of its third-priority lien, and the remaining $1,000 of PPOA's claim would be unsecured.

***Example Three. Because of a dispute over PPOA's enactment of parking rules and imposition of parking fines, Homeowner withheld payment of the monthly installment of assessments. After six months, PPOA brings an action to enforce its lien for the six preceding months of unpaid assessments and to collect fines (joining Bank as a party). Homeowner continues to withhold assessments. Six months later, while the first action is still pending, PPOA brings a second action to enforce another lien for the most recent six months of unpaid assessments and fines. Again, PPOA joins Bank as a party and seeks to establish its lien priority over Bank for the additional six months of unpaid assessments. Bank objects that PPOA is entitled to only one six-month limited priority lien and cannot extend its lien priority through successive actions.***

Example Three is based upon the facts in *Drummer Boy Homes Association, Inc. v. Britton*, 2011 Mass. App. Div. 186 (2011). In *Drummer Boy*, the association commenced three successive actions, seeking to establish lien priority for a total of 18 months of unpaid assessments. The association argued that the six-month limited priority lien provision in the Massachusetts statute [Mass. Gen. Laws Ann. Ch. 183A, § 6(c)] did not explicitly forbid — and thus presumptively permitted — successive actions to extend the association's six-month lien priority. The court rejected this view, instead concluding that the association's lien priority was limited to only six months of unpaid assessments:

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priority lien provision, which provides the association with priority to the extent of assessments accruing in the period immediately prior to the association's enforcement of its lien. As discussed in the text, this constitutes a true lien priority, and thus the association's proper enforcement of its lien would thus extinguish the otherwise senior mortgage lien.

> Under the Association's theory, however, a condominium association could file successive suits and thereby enlarge the priority portion of its lien such that its entire lien, no matter how large and no matter how much time was encompassed, would be prior to the first mortgage. If the Legislature had intended to make the condominium lien prior to the first mortgage, it could have done so explicitly.... Recognizing that a condominium association's lien could be extinguished entirely by a foreclosing first mortgagee, the legislature gave condominium associations a limited six-month period of priority. This was meant to be an "equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders." [quoting Uniform Condominium Act (1980) § 3-116, Comment 2.]

On its face, the language of § 3-116(c) does not explicitly address whether an association may file successive actions every six months to extend its limited priority lien priority. Section 3-116(c) provides, in pertinent part:

> A lien under this section is also prior to [a first mortgage recorded prior to the due date of the unpaid assessments] to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.

Nevertheless, the result reached by the court in *Drummer Boy* is consistent with the appropriate understanding of § 3-116(c). *See also* Hudson House Condo. Ass'n v. Brooks, 223 Conn. 610, 61 A.2d 862 (1992) (rejecting the view that Connecticut six-month limited priority lien statute permitted an association to institute a foreclosure proceeding every six months and thereby obtain perpetual superpriority over mortgagee). Section 3-116(c) provides an association with a first priority lien for the common expense assessments accruing during the six months preceding the filing of "an action" to foreclose (either an action by the association to foreclose its lien, or by the first mortgagee to foreclose the mortgage). The second and third lien foreclosure actions commenced by the association in *Drummer Boy* were not necessary to enforce the association's lien; only one such action is needed for the purpose of selling the unit/parcel and delivering clear title.[10] Thus, the association's commencement of the successive actions could only have been to extend the association's lien priority beyond the six months reflected in § 3-116(c). In such a situation, a court should properly consolidate those successive actions into a single action — in which the association would receive first lien priority only for the immediately preceding six months of unpaid assessments.

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[10] Recognizing this, the court in *Drummer Boy* properly consolidated the three actions into a single action. *Drummer Boy*, 2011 Mass.App.Div. 186, at *1.

Thus, in Example Three, Bank can redeem its first mortgage lien from the burden of PPOA's limited priority lien by payment of $1,500 (reflecting the immediately preceding six months of unpaid assessments) plus the costs (including reasonable attorney's fees) incurred by PPOA in bringing the action to enforce its lien).[11] Once Bank has paid this amount to PPOA, PPOA's foreclosure sale to enforce the balance of unpaid assessments would transfer title to the unit/parcel subject to the remaining balance of Bank's first mortgage. PPOA's lien for the unpaid assessment balance would transfer to the proceeds of the sale (if there are any proceeds).[12]

*Once the Association Brings an Action to Enforce Its Lien, Is Its Lien Priority Limited to the Prior Six Months of Unpaid Assessments, or Does Its Priority Extend to Include Any Assessments that Accrue During the Pendency of the Lien Enforcement Action?* Example Three addressed whether an association could extend its lien priority by filing successive lien enforcement actions every six months. In a recent set of Vermont decisions, however, several associations argued that once an association files an action to enforce its lien, its lien priority should extend not only to the unpaid assessments that had accrued during the preceding six months, but also to all assessments that accrued and remained unpaid during the pendency of the lien enforcement action. Two recent Vermont Superior Court decisions have accepted this argument. *Bank of America, N.A. v. Morganbesser*, No. 675-10-10 (Jan. 18, 2013); *Chase Home Finance, LLC v. Maclean*, http://www.vermontjudiciary.org/20112015%20Decisions/2012-6-25-13.pdf (Jan. 31, 2012). In the *Morganbesser* case, the court concluded that section 3-116(c) is "silent" as to the issue of continuing priority, and reasoned that continuing priority is justified because the association could "extend its superpriority merely by filing a new action for unpaid assessments which have come due every six months" and requiring the association "to repeatedly file new actions simply to extend its priority position serves no purpose." In addition, the court in *Morganbesser* justified its interpretation of section 3-116(c) by observing that "[e]xtending the superpriority from 6 months prior to institution through to the end of the action also provides the mortgage lender with an incentive, albeit a small one, to proceed as expeditiously as permitted in their foreclosure actions."

As explained in Example Three, however, section 3-116(c) does not (and was not intended to) authorize an association to file successive lien enforcement actions every six months as a means to extend the association's limited lien priority. Only one action

[11] In this situation, the court might reasonably conclude that the attorney fees incurred by PPOA in bringing a repetitive action were not reasonable and thus not secured by PPOA's superlien.

[12] If the value of the unit/parcel is less than the remaining balance due to Bank, of course, PPOA will have no substantial incentive to proceed with the foreclosure sale. No third party will agree to purchase the unit/parcel without an agreement by Bank to reduce the mortgage loan balance. PPOA could acquire the unit by credit bid, but this would obligate PPOA to pay ongoing assessments — accentuating the burden on the rest of the residents of the community, who will have to bear assessment increases or service decreases until PPOA could re-sell the unit/parcel.

is necessary to permit the association to enforce its lien, sell the unit/parcel, and deliver clear title; accordingly, successive actions would only serve to extend the association's lien priority beyond the six-month period expressed in section 3-116(c). Two other Vermont Superior Court decisions have disagreed with *Morganbesser* and *Maclean*, correctly concluding that section 3-116(c) places a six-month limit on the association's lien priority. See Vermont Hous. Fin. Auth. v. Coffey, S0367-11 CnC (Aug. 11, 2011) (Toor, J.); EverHome Mtge. Co. v. Murphy, No. 115-3-10 Bncv (Dec. 6, 2011) (Hayes, J.).

***Example Four. Homeowner fails to pay common expense assessments and its mortgage debt for a period of six months. Both Bank and PPOA institute foreclosure proceedings. In response to PPOA's foreclosure proceeding, Bank redeems its lien position by tendering payment of $3,500 to PPOA ($1,500 for six months of unpaid common expense assessments plus $2,000 in costs and attorney fees incurred to that date by PPOA in enforcing its lien). For the next six months, while Bank's foreclosure action is pending, Homeowner again fails to pay common expense assessments. PPOA brings another action to enforce its lien, once again joining Bank as a party.***

Example Four is based upon the facts in *Lake Ridge Condominium Association, Inc. v. Vega*, No. NNHCV116021568S (Conn. Super. Ct. June 25, 2012). Example Four presents a question about the appropriate interpretation of UCIOA § 3-116(c). Is the six-month limited priority lien a "one-time" lien; i.e., once an association brings an action to enforce its limited priority lien and the mortgagee responds by redeeming that lien by paying six months of common expense assessments, does the association no longer have the right to assert the limited priority lien for any future unpaid assessments? Or is the six-month limited priority lien a potentially recurring lien; i.e., in Example Four, can PPOA assert the limited priority lien a second time, and thereby successfully obtain lien priority over Bank's mortgage lien to the extent of the most recent six months of unpaid assessments?

In *Lake Ridge*, the association commenced a second action to enforce its lien two years after the mortgagee had ostensibly redeemed the association's priority by paying off the then-immediately preceding six months of assessments. The association argued that under the text of the statute and sound policy, there was no bar on repetitive association foreclosures and that in each such proceeding the association should be permitted to assert a limited priority lien for assessments unpaid during the immediately preceding six months. The mortgagee disagreed, asserting that under UCIOA as adopted in Connecticut, Conn. Gen. Stat. § 47-258, the six-month limited priority lien created but a "one-time" lien priority over the mortgagee.

The Connecticut Superior Court agreed with the lender, stating that the association had "previously satisfied its 'superpriority' lien" and holding that the statute "allows the assertion of that lien only once during the pendency of either an action to enforce either

the association's lien or a security interest (first priority mortgage)." See also Linden Condo. Ass'n, Inc. v. McKenna, 247 Conn. 575, 726 A.2d 502 (1999) (statute prevents association from asserting limited priority lien more than once during the course of a foreclosure action by the mortgagee).

The result reached by the court in *Lake Ridge* is consistent with the appropriate understanding of § 3-116(c) as drafted. Section 3-116(c) provides an association with first lien priority only to the extent of the six months of unpaid common expense assessments that accrued immediately preceding a lien foreclosure action by either the association or the first mortgagee. In Example Four, Bank had a foreclosure action pending at the time it made the $3,500 payment to redeem its mortgage from PPOA's limited priority lien, and that action remained pending at the time of PPOA's second lien enforcement proceeding. By its terms, § 3-116(c) does not permit PPOA to assert a first lien priority for more than six months of unpaid common expense assessments in the context of the same foreclosure proceeding by Bank.

As discussed in the Introduction, in fashioning the six-month limited priority lien, the drafters of UCIOA § 3-116(c) did not contemplate the now-common scenario in which the first mortgagee's foreclosure action might remain pending for two years or more. In such a situation, the mortgagee's delay in foreclosure may unreasonably force the community residents to bear either increased assessments or decreased maintenance/services.

***Example Five. Homeowner fails to pay common expense assessments for a period of six months. PPOA notifies Bank that Homeowner has not paid those assessments. Before PPOA commences an action to enforce its lien, Bank pays PPOA an amount equal to the preceding six months of common expense assessments. For the ensuing six months, Homeowner again fails to pay its common expense assessments. PPOA then commences an action to enforce its lien and joins Bank as a party. Bank responds by instituting a proceeding to foreclose its mortgage lien.***

In Example Five, Bank's payment of the unpaid common charges to PPOA does not prevent PPOA from now asserting its six-month limited priority lien. Under § 3-116(c), PPOA can assert a limited priority lien to the extent of "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien." Under the proper understanding of § 3-116(c), PPOA can thus assert a limited priority lien either in (a) an action by PPOA to enforce its association lien, or (b) an action by Bank to foreclose its mortgage lien. In Example Five, at the time of Bank's payment of the unpaid common expense assessments, PPOA had not commenced an action to enforce its lien, nor had Bank instituted a foreclosure proceeding. Bank's payment of the unpaid common charges was a voluntary business decision which Bank was not compelled to make to

protect its lien priority.[13] As a result, the payment does not prevent PPOA from asserting its limited priority lien in PPOA's subsequent lien enforcement action. To redeem its lien priority in PPOA's action, Bank will have to pay PPOA the immediately preceding six months of unpaid common expense assessments, as well as costs and reasonably attorney's fees incurred by PPOA in its lien enforcement action.

## CONCLUSION: A PROPOSAL FOR A NEW UNIFORM LAW

As discussed above, existing law governing the relative priority of association liens and first mortgage liens is unsatisfactory. In many states, association liens are entirely subordinate to first mortgage liens, and mortgage lenders have no obligation to pay or reimburse assessments that accrued prior to the time that the lender acquired title in a foreclosure sale. This permits first mortgage lenders to delay in foreclosing mortgages on common interest units/parcels, while effectively and unjustly shifting the cost of preserving the value of their collateral onto the remaining unit/parcel owners. Even in states that have adopted § 3-116(c) or a comparable limited priority rule for association liens, the six-month period of limited priority has proven insufficient to protect the community's financial interests.

The Board thus encourages the ULC to consider preparing a uniform law that would strike a more appropriate balance between the interests of first mortgage lenders and common interest community associations and their residents. A new uniform law might take a number of potential approaches:

- It might simply extend the association's existing limited priority lien from six months to a longer fixed duration, such as one year or more. A uniform law taking this approach might reflect a more appropriate response to the longer foreclosure timetables that have resulted in the wake of the mortgage crisis.[14]
- It might establish alternatives for the duration of association's limited priority lien, such that the duration of the association's lien priority might vary from state to state. A uniform law taking this approach might acknowledge that differences in local circumstances (i.e., the duration of a state's foreclosure

[13] Bank likely can add this payment to the balance of the Homeowner's mortgage debt as an amount advanced to protect Bank's security, at least to the extent permitted by the terms of Bank's mortgage or deed of trust (which typically provides that the lien shall secure such advances).

[14] It is worth noting that Florida's limited priority lien provides the association with priority to the extent of the lesser of twelve (12) months' worth of unpaid association assessments or one percent (1%) of the outstanding mortgage loan amount. Fla. Stat. Ann. § 718.116. Professor Andrea Boyack has observed that given the delays customarily experienced in Florida foreclosures, even this expanded lien priority has not been sufficient to permit Florida associations to recover all unpaid assessments. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53, 116 (2011).

timetable, or the extent of decreases in unit values) might warrant local differences in the duration of an association's lien priority.

- It might preserve the state's existing priority rule as a general matter, but require that if the first mortgage lender delays foreclosure beyond a defined period of time, the lender must pay assessments as they accrue during that period of delay (or some portion of those assessments). This would permit a first mortgage lender to make a determination to delay in foreclosing if the lender concludes that delay is justified, but would prevent the lender from being unjustly enriched by forcing the remaining unit/parcel owners to bear the increased cost of preserving the lender's collateral.
- It might preserve the state's existing priority rule as a general matter, but require that if the first mortgage lender delays foreclosure beyond a defined period of time, the association's lien would have priority (or extended priority) for the assessments accruing during that period of delay.
- It could analogize common interest ownership assessments to real property taxes, and give the association full priority over the first mortgage lender for unpaid assessments to the same extent as real property taxes currently enjoy a superpriority over first mortgage liens.[15]

The Board does not advocate for any one of these approaches; a drafting committee should make a determination following deliberations involving the participation of all relevant stakeholder groups (including first mortgage lenders, community associations, and government-sponsored enterprises like Fannie Mae and Freddie Mac).

[15] To a significant extent, an analogy between community assessments and property taxes is compelling, as the association often provides public services such as paving, snow removal, open space maintenance, and land use control/enforcement. First mortgage lenders would no doubt voice strong objections to giving association liens full priority, which raises a concern as to whether such a change would affect the availability of home mortgage credit for common interest units/parcels. Nevertheless, as Professor Boyack has noted, priority for real property taxes has not dissuaded lenders from making first mortgage loans; lenders have addressed this risk by requiring real property escrow accounts, and could demand similar escrow accounts for association assessments. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53, 116, 122 (2011).

# EXHIBIT 2

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

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

**QUESTION #1:**

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

**QUESTION #2:**

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

**QUESTION #3:**

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

**SHORT ANSWER TO #1:**

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

**SHORT ANSWER TO #2:**

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

**SHORT ANSWER TO #3:**

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

**ANALYSIS OF THE ISSUES:**

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The reasonable expenses of sale;

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

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

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

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

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

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

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

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

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

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

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

NRS 116.3116(2) states:

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).[13]

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

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

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

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

[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**ADVISORY CONCLUSION:**

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

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

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

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

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

[14] NRS 116.31164.

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

# EXHIBIT 3

Presentation to Senate Committee on Judiciary
Real Estate Division Advisory 13-01
By Gail J. Anderson, Administrator
May 6, 2013

SUMMARY OF NRED ADVISORY OPINION 13-01

Advisory Conclusions:

- An association's lien does not include "costs of collecting" as defined by NRS 116.310313, so the super priority portion of the association's lien does not include "costs of collecting;"
- The super priority portion of the association's lien (the "super priority lien") consists of: (1) 9 months of assessments; and (2) abatement costs under NRS 116.310312;
- The assessment portion of the super priority lien consists of only "assessments", i.e. not late charges, fines or interest;
- The association must take action to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the foreclosure process set out in NRS 116.31162 to enforce its super priority lien.

The Division's advisory looks at the language of NRS 116.3116 to reach its conclusions.

NRS 116.3116 Liens against units for assessments.

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

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

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

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

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

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

3. 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. 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. 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. 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. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

8. 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. 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. 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.

(Added to NRS by 1991, 567; A 1999, 390; 2003, 2243, 2272; 2009, 1010, 1207; 2011, 2448)

**NRS 116.3102 Powers of unit-owners' association; limitations.**

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(q) May exercise any other powers conferred by the declaration or bylaws.

(r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) 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.

(l) May exercise any other powers necessary and proper for the governance and operation of the association.

- Section 1 of NRS 116.3116 defines the lien an association has. Under NRS 116.3116(1) - associations have a lien on units consisting of: (1) Construction penalties; (2) Assessments; and (3) Penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1)(j) to (n)
- Section 2 of NRS 116.3116 sets out the lien's priority. Subsection 2(b) says the lien is subordinate to the first security, but after subsection 2(c), the language [highlighted in green] allows for part of the association's lien to be prior to the first security.
- The Division interprets this language to allow for two parts of the lien described in Subsection 1 to be prior to the first secured: (1) Costs pursuant to NRS 116.310312 (which are typically called abatement charges); and (2) 9 months of assessments as reflected in the association's budget.
- The 9 months of assessments is a "look back period" from the association's "action to enforce the lien."
- This statute having come from the Uniform Common Interest Ownership Act was written for a judicial foreclosure process, hence the term "action." But since Nevada does not require a judicial foreclosure process, the Division interprets this language to mean any action pursuant to the non-judicial foreclosure process, i.e. the mailing of the notice of delinquent assessment under NRS 116.31162.
- An association could do a judicial foreclosure process, but they are not required to.

Issues with NRS 116.3116:

1. Can anything other than regular assessments (monthly assessments based on the periodic budget) be part of the super priority lien?
   - Is there a cap to the super priority lien?
   - How does the regulation in NAC 645.470 on costs of collecting fit in?
2. Can an association's foreclosure of its super priority lien extinguish the first security interest?
   - Is the language in NRS 116.3116 sufficient?
   - Is the language describing the foreclosure process under NRS 116.31162 to 116.31168, inclusive sufficient to extinguish a first security?

**1. Can anything other than regular assessments be part of the super priority lien?**

This issue comes down to whether or not the language in NRS 116.3116(2)(c) [highlighted in green] includes collection costs for an association, and if so, is there a cap on the total super priority lien. The Division, as previously explained, reads this language to apply only to assessments provided in the association's budget that is limited to 9 months of regular monthly assessments.

Collection costs are not assessments provided in an association budget. The language of NRS 116.3116(2)(c) does not provide any mechanism for including collection costs within the priority lien.

Even more important to note, costs of collection are not referenced in the language of NRS 116.3116(1) that defines the association's lien. ***If costs of collection are not part of the lien, they cannot be part of the super priority portion of the lien.***

The concept of "costs of collecting" was first introduced to NRS 116 in 2009 with the adoption of NRS 116.310313. As is clear from the language of NRS 116.310313 an association may charge a unit's owner, but it does not say the charge can be liened on a unit.

NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.
1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
3. As used in this section:
(a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.
(Added to NRS by 2009, 2795)
(emphasis added)

NRS 116.310313 applies to the association's collection of any past due "obligation" as defined in the statute. It includes the collection of all amounts due to the association from an owner, i.e. fines and penalties, not merely assessments. The Commission for Common-Interest Communities and Condominium Hotels adopted NAC 116.470 with the authority provided in NRS 116.310313. It became effective May 5, 2011 on "the amount of the fees that an association may charge pursuant to this section."

**NAC 116.470 Fees and costs for collection of past due obligations of unit's owner.** (NRS 116.310313, 116.615)
1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment *pursuant to paragraph (a) of subsection 1 of NRS 116.31162* which exceed a total of $1,950, plus the costs and fees described in subsections 3 and 4.
2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment *pursuant to paragraph (a) of subsection 1 of NRS 116.31162* which exceed the following amounts:

| | | |
|---|---|---|
| (a) Demand or intent to lien letter..... | $150 | |
| (b) Notice of delinquent assessment lien..... | 325 | |
| (c) Intent to notice of default letter..... | 90 | |
| (d) Notice of default.... | 400 | |
| (e) Intent to notice of sale letter..... | | 90 |
| (f) Notice of sale..... | | 275 |
| (g) Intent to conduct foreclosure sale..... | 25 | |
| (h) Conduct foreclosure sale..... | 125 | |
| (i) Prepare and record transfer deed..... | 125 | |

(j) Payment plan agreement - One-time set-up fee..30
(k) Payment plan breach letter..... 25
(l) Release of notice of delinquent assessment lien..30
(m) Notice of rescission fee..... 30
(n) Bankruptcy package preparation and monitoring..... 100
(o) Mailing fee per piece for demand or intent to lien letter,
notice of delinquent assessment lien, notice of default and notice of sale..... 2
(p) Insufficient funds fee..... 20
(q) Escrow payoff demand fee..... 150
(r) Substitution of agent document fee..... 25
(s) Postponement fee..... 75
(t) Foreclosure fee..... 150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an 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, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.
4. If an association or a person acting on behalf of an association is attempting to collect a past due obligation from a unit's owner, the association or person acting on behalf of an association may recover from the unit's owner:
(a) Reasonable management company fees which may not exceed a total of $200; and
(b) Reasonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2.
5. If an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner is engaging in the activities set forth in NRS 116.31162 to 116.31168, inclusive, with respect to more than 25 units owned by the same unit's owner, the association or person acting on behalf of an association may not charge the unit's owner fees to cover the costs of collecting a past due obligation which exceed a total of $1,950 multiplied by the number of units for which such activities are occurring, as reduced by an amount set forth in a resolution adopted by the executive board, plus the costs and fees described in subsections 3 and 4.
6. For a one-time period of 15 business days immediately following a request for a payoff amount from the unit's owner or his or her agent, no fee to cover the cost of collecting a past due obligation may be charged to the unit's owner, except for the fee described in paragraph (q) of subsection 2 and any other fee to cover any cost of collecting a past due obligation which is imposed because of an action required by statute to be taken within that 15-day period.
7. As used in this section, "affiliate of the community manager of the association or of an agent of the association" means any person who controls, is controlled by or is under common control with a community manager or such agent. For the purposes of this subsection:
(a) A person "controls" a community manager or agent if the person:
(1) Is a general partner, officer, director or employer of the community manager or agent;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the community manager or agent;
(3) Controls in any manner the election of a majority of the directors of the community manager or agent; or
(4) Has contributed more than 20 percent of the capital of the community manager or its agent.
(b) A person "is controlled by" a community manager or agent if the community manager or agent:
(1) Is a general partner, officer, director or employer of the person;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;
(3) Controls in any manner the election of a majority of the directors of the person; or
(4) Has contributed more than 20 percent of the capital of the person.
(c) Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.
(Added to NAC by Comm'n for Common-Interest Communities & Condo. Hotels by R199-09, eff. 5-5-2011)
(emphasis added)

The regulation in NAC 116.470 cannot expand the statute; the regulation only establishes fees that can be charged pursuant to NRS 116.301313. There is confusion over whether the association's lien can include costs of collecting as a result of this regulation. The Division's position is that this regulation is limited to the authority granted by the statue; the statute does not allow an association to lien for costs of collecting.

The Commission's authority in NRS 116.310313 was to adopt a regulation establishing the fees that could be charged pursuant to NRS 116.310313. To make the costs of collecting part of an association's lien, NRS 116.310313 would have to say those costs can be part of the lien and that would have to be incorporated into NRS 116.3116.

When NRS 116.310313 was adopted in 2009, the Nevada Legislature also adopted NRS 116.310312. These costs in NRS 116.310312 – typically referred to as abatement charges – are specifically made part of the association's lien in NRS 116.310313 and they are incorporated into NRS 116.3116(1) by addition to NRS 116.3102(1)(j). If costs of collecting past due assessments are intended to be part of the super priority, lien specific language needs to be added to NRS 116.3116. It is not sufficient to refer simply to "costs of collecting" in NRS 116.3116, because as defined in NRS 116.310313, those costs apply to the collection of more than just assessments. For example, they apply to fines and penalties. Generally, a lien for fines cannot be foreclosed by an association – and would certainly not be part of the super priority lien.

**2. Can an association's foreclosure of its super priority lien extinguish the first security interest?**

The super priority lien comes into play in two situations – when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.

While the Division believes an association's foreclosure should be able to extinguish a first secured, the Division also recognizes problems with the current law making that conclusion uncertain. For example, NRS 116.3116 comes from the Uniform Common Interest Ownership Act which was written to apply to a judicial foreclosure process. Nevada does not require that associations follow a judicial foreclosure process, which leads to confusion regarding the meaning of certain words within NRS 116.3116. Additionally, the foreclosure statutes (NRS 116.31162 to 116.31168, inclusive) do not mandate notice to the first secured unless the lender previously requested such notice. While the Division believes notice to the first secured is commonplace for association foreclosures, the absence of a required notice in the law is a problem. Ultimately, the state of the current law will be for the courts to decide.

It is preferred that the law be absolutely clear as to the effect of the association's foreclosure. If the law is clear that an association's foreclosure would extinguish a first secured, associations would be more likely to receive payment from a lender making a foreclosure by the association

unnecessary. And in the unlikely event that a lender would ignore an association's foreclosure action, the sale by an association would be more likely to generate a sales price far greater than the amount of the super priority lien. In that event, the lender would receive the excess up to the amount of its deed of trust.

In a case out of Washington (Summerhill Village Homeowners Association v Roughley et al, 166 Wash.App. 625, 270 P.3d 639) (289 P.3d 645), an association's foreclosure did in fact extinguish a first security. Under Washington law, however, an association must follow a judicial foreclosure process in order to extinguish the first secured. Under Washington State law, an association could foreclose non-judicially, but it would not extinguish the first secured. A judicial foreclosure process would ensure adequate notice to the lender and allow them to participate in the process. It would also reflect in the record whether or not the lender maintained its secured status by paying the super priority lien amount. In order to generate a fair market value, the buyer needs to know whether the lender has paid the super priority lien. This would ensure an appropriate sales price at the sale.

# EXHIBIT 4

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December 7, 2012

Senator Scott-Hammond
8408 Gracious Pine Avenue
Las Vegas, NV 89143-4608

Dear Senator Hammond:

You have asked this office certain questions relating to the foreclosure of liens under chapter 116 of NRS, the chapter which governs common-interest communities in this State. We will answer each of your questions separately below.

## DISCUSSION

1. **What ownership interest is obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, considering the language set forth in NRS 116.31164?**

The provisions of NRS 116.31162 to 116.31168, inclusive, govern the foreclosure of a lien held by the association of a common-interest community. NRS 116.31164 sets forth the procedure for conducting the sale of real property by an association pursuant to the foreclosure of a lien on that property. With respect to the distribution and use of the proceeds of such a sale and the delivery of the property after the sale, subsection 3 of NRS 116.31164 provides:

> 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.

(Emphasis added). Additionally, subsection 3 of NRS 116.31166 provides that "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption."

In considering a provision of NRS, we are guided by several rules of statutory construction employed by the Nevada Supreme Court. As a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995); McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986) (words in a statute "should be given their plain meaning unless this violates the spirit of the act").

Applying this rule of statutory construction stated above, the plain language of subsection 3 of NRS 116.31164 provides that when property is sold pursuant to an association's foreclosure of a lien, the purchaser obtains a deed without warranty which conveys to the purchaser, as the grantee of the warranty made, executed and delivered by the person conducting the sale, all title held by the previous owner.[1] In addition, subsection 3 of NRS 116.31166 provides that the interest vested in the purchaser is that of the previous owner's title without equity or right of redemption. Thus, these two provisions of NRS clearly and unambiguously establish that when real property is sold pursuant to the foreclosure of a lien on the property held by an association, the purchaser acquires the entirety of the title held by the previous owner of the property, and such title is not subject to any claim of equity or right of redemption by the previous owner.

**2. Does the ownership interest obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, survive a subsequent foreclosure on a security interest, other than an association lien, on the same property?**

The order of distribution of proceeds of a sale of real property made pursuant to an association's foreclosure of a lien on the property is set forth in subsection 3 of NRS 116.31164. The order of priority for satisfying a security interest other than an association lien on such property is also set forth in subsection 3 of NRS 116.31164. Subsection 3 of NRS 116.31164 provides that proceeds from the sale of a property must be applied to "[s]atisfaction in the order

[1] A deed without warranty, unlike a warranty deed which contains a covenant of title, may carry with it the risk of a defect in the title. 13 M.L.P. 2d Deeds § 3 (2012) (citing Corbin on Contracts § 587).

of priority of any subordinate claim of record" but only after those proceeds are first applied to: (1) the reasonable expenses of the sale; (2) the reasonable expenses of securing, maintaining and preparing the property for sale; and (3) the satisfaction of the association's lien.

Significantly, subsection 1 and 2 of NRS 116.31166 also provide that:

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> " are conclusive proof of the matters recited.
> 2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

(Emphasis added)

Based on the plain language of subsection 2 of NRS 116.31166, the receipt for the purchase money contained in a deed without warranty delivered to a purchaser pursuant to NRS 116.31164 that includes the recitals described in subsection 1 of NRS 116.31166 serves to discharge the purchaser from any obligation to ensure the proper application of the purchase money paid by the purchaser.

In the event there are insufficient proceeds to satisfy a security interest, the holder of that security interest may be able to seek recourse by pursuing a deficiency judgment against the person who was the owner of the property at the time of sale under chapter 40 of NRS.[2] However, assuming the purchaser of the property obtains a deed containing the proper recitals described in subsection 1 of NRS 116.31166 and the receipt for purchase money described in subsection 2 of NRS 116.31166, there are no other applicable statutory provisions that would otherwise authorize the holder of a security interest to whom the previous owner of the property was obligated to seek a judgment against the purchaser of the property for any deficiency resulting from the distribution of proceeds. Accordingly, the ownership interest of a purchaser who obtains title through a deed properly containing the information described above is not subject to any claim made by the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to NRS 116.31164.

---

[2] NRS 40.451 to 40.463, inclusive, establish procedures for the award of a deficiency judgment, and NRS 40.4631 to 40.4639, inclusive, set forth provisions relating to actions by holders of junior real mortgages after a foreclosure sale. It should be noted, however, that pursuant to Assembly Bill No. 471 of the 2009 Legislative Session (Ch. 310, Statutes of Nevada 2009, at p. 1328-31), a deficiency judgment on an obligation secured by a mortgage, deed of trust or other encumbrance on or after October 1, 2009, may not be awarded against a homeowner if certain criteria are met.

3. **Can any part of an ownership interest vested in the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, be extinguished by a subsequent foreclosure on a security interest, other than an association lien, on the same property?**

As explained above, any recourse sought by the holder of a security interest to whom the previous owner of the property was obligated is properly made against that previous owner and not the purchaser of the property. Therefore, no part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164.

## SUMMARY

Based on the reasoning set forth above, it is the opinion of this office that: (1) the purchaser of real property sold pursuant to the foreclosure of an association lien under the provisions of NRS 116.31162 to 116.31168, inclusive, obtains all title belonging to the previous owner; and (2) if certain recitals and the receipt for purchase money are properly contained in the deed conveying such title to the purchaser, the purchaser is discharged from any obligation relating to the application of proceeds from the sale of the property to satisfy the claims described in NRS 116.31164, including any claim that may be made by the holder of an interest secured by the same property but to whom the previous owner, and not the purchaser, was obligated.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By _____
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Principal Deputy Legislative Counsel

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Chief Deputy Legislative Counsel

DY:dtm
Encl.
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**BANK OF AMERICA, N.A.'S OPPOSITION TO MOTION FOR RECONSIDERATION**

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I**

**INTRODUCTION**

Nevada law is clear: "No motion once heard and disposed of may be renewed in the same cause." EDCR 2.24(a). The Court disposed of this case after a hearing on Bank of America's motion to dismiss on September 17, 2013. Las Vegas Development Group (**LVDG**) filed its motion for reconsideration in blatant disregard of the standard for a motion for reconsideration; LVDG fails to raise any new issues of law or fact that were not previously available to the Court. Instead, LVDG raised nearly all of the same issues and arguments—packaged in a slightly different way—in

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its opposition to the motion to dismiss. The Court rejected LVDG's arguments then, and it should do the same now. It is apparent that in its quest to obtain a property for pennies on the dollar, LVDG is also attempting to get a "second bite at the apple" by filing the motion for reconsideration. LVDG's motion should be seen for what it is—a procedural ploy to reargue the motion already decided by the Court. LVDG's motion is a clear abuse of District Court Rule 13(7) and EDCR 2.24. The motion should be summarily denied.

## II

## PROCEDURAL HISTORY

LVDG filed its original complaint on January 17, 2012. It has since filed a first amended complaint on October 16, 2012 and a second amended complaint, which is the operative complaint, on August 1, 2013. Bank of America moved to dismiss the second amended complaint on August 15, 2013. On September 17, 2013, the Court granted Bank of America's motion on several bases, including that "[t]he plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust. Order at Conclusions of Law, ¶ 4.

On October 18, 2013, LVDG moved the Court to reconsider its order. LVDG does not point to any new issues of law or fact that would warrant the Court to grant LVDG's reconsideration motion. Accordingly, there is no legal basis for reconsideration. Even if there were, the Court's prior order was not clearly erroneous. The Court should deny LVDG's motion for reconsideration.

## III

## ARGUMENT

### A. LVDG Has No Legal Basis for Reconsideration

A motion for reconsideration may only be brought in accordance with Rule 13(7) of the Rules of the District Courts for the State of Nevada, and EDCR 2.24(a), which both state:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

D.C.R. 13(7); E.D.C.R. 2.24(a).

"Only in very rare instances in which *new issues of fact or law are raised* supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of*

*Las Vegas*, 92 Nev. 402, 404, 551 P.2d 244 (1976) (emphasis added). In *Moore*, the defendant moved for summary judgment, which the court denied. *Id.* The defendant then moved for a rehearing, which the court also denied. *Id.* The defendant filed a second motion for rehearing, which cited authorities previously overlooked by the defendant. *Id.* The court granted the motion for rehearing. *Id.* The Supreme Court reversed the district court, opining:

> The only feature which distinguishes the second motion for rehearing from the two previous motions is the citation of additional authorities for a proposition of law already set forth and adequately supported by reference to relevant authorities in the earlier motions. We note particularly that the second motion for rehearing raised no new issues of law and made reference to no new or additional facts. Under such circumstances the motion was superfluous and, in our view, it was an abuse of discretion for the district court to entertain it.

*Id.* at 405, 551 P.2d at 246.

The Nevada Supreme Court has also held that "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Tile Contractors Assoc. of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). But the "clearly erroneous" standard is *not* a separate avenue for reconsideration in and of itself. In *Masonry*, the Nevada Supreme Court determined the district court properly decided that a previous judge's ruling in the case was "clearly erroneous" solely because the district court's decision was made "in light of what he considered to be new clarifying case law." *Id.* In other words, before a court may reconsider a prior ruling, there must *always* be "new issues of law or fact" supporting a contrary ruling.

Just as the defendant in *Moore*, LVDG has completely failed to identify any new issues of law or fact, which were not previously raised, warranting a motion for reconsideration. LVDG points to four exhibits: **(1)** a report by the Joint Editorial Board for Uniform Real Property Acts, dated June 1, 2013; **(2)** Nevada Real Estate Division advisory opinion 13-01, dated December 12, 2012; **(3)** an apparent presentation and unauthenticated "presentation" to the Nevada Senate Judiciary Committee, dated May 6, 2013; and **(4)** a Nevada Legislative Counsel Bureau Opinion, dated December 7, 2012. *See generally* Mot. at Ex. 1-4. These documents do not raise any new issues of law or fact because all four exhibits were previously available to LVDG prior to the Court's hearing on the motion to dismiss the second amended complaint on September 17, 2013. Similar to

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*Moore*, LVDG simply cites to additional "authorities" to support its theory of the case that the homeowners' association foreclosure sale extinguished Bank of America's deed of trust. Accordingly, LVDG provides no legal basis for this Court to reconsider its prior order.

**B. The Court Applied the Correct Legal Standard**

Even if LVDG had articulated new issues of law or fact, the order is not clearly erroneous. Under Nevada Rule of Civil Procedure 12(b), a court only accepts "all *factual* allegations in the complaint as true." *See Conway v. Circus Circus*, 116 Nev. 870, 8 P.3d 837 (2000) (emphasis added). A court does not assume the truth of *legal conclusions*, even if they are cast in the form of factual allegations. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Here, as even LVDG points out in its motion for reconsideration, the Court determined that "*[t]he plain language of NRS 116.3116* demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust." Order at Conclusions of Law, ¶ 4 (emphasis added). Accordingly, because the plain language of the statute supports the Court's holding, the Court need not look at any other authorities, such as the joint editorial board report, Nevada's advisory opinion, a "presentation" to the judiciary committee, or a bureau opinion to render its decision.

**C. The Order was Not Clearly Erroneous**

In this case, the Court correctly dismissed LVDG's claim for quiet title. As set forth in Bank of America's motion to dismiss, **(1)** the CC&Rs contain a mortgage savings clause which bars LVDG's claims; **(2)** the super priority lien does not attach until after the senior deed of trust beneficiary forecloses; **(3)** the Nevada canons of construction demonstrate that foreclosure under NRS 116.3116 does not eliminate a senior deed of trust; **(4)** LVDG's statutory interpretation violates due process; **(5)** in this case, the homeowners' association foreclosure was not a super priority foreclosure; and **(6)** the homeowners' association foreclosure was commercially unreasonable.

Because the Court determined the plain language of NRS 116.3116 demonstrates that the super priority lien only attaches once a lender forecloses, the Court's dismissal of LVDG's quiet title claim was not clearly erroneous. That LVDG disagrees with the Court's order does not mean the Court erred, nor does it warrant reconsideration of the prior order. That LVDG has found additional

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"authorities" to support its flawed position that it can take the property purchased for pennies on the dollar also does mean the Court's order was clearly erroneous.

The Court should deny LVDG's motion in its entirety.

## IV

## CONCLUSION

For all of the above reasons, the Court should deny LVDG's motion for reconsideration.

DATED this 4th day of November, 2013.

**AKERMAN LLP**

/s/ Natalie L. Winslow

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4th day of November, 2013 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **BANK OF AMERICA, N.A.'S OPPOSITION TO MOTION FOR RECONSIDERATION**, postage prepaid and addressed to:

Marilyn Fine, Esq.
Rachel E. Donn, Esq.
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*Attorneys for Las Vegas Development Group, LLC*

**IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF CLARK**

-oOo-

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No. A-12-654840-C
Dept. No. XXIII

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

**Date: November 19, 2013**
**Time: 9:30 a.m.**

Arbitration Exemption:
Title to Real Property,
Declaratory Relief

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COMES NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company ("LVDG"), by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Reply in Support of its Motion for Reconsideration of the Court's Order Granting Bank of America's Motion to Dismiss (the "Order") pursuant to NRCP 59(e) as follows:

1. **This Court has Discretion to Reconsider, Alter and Correct the Order, and in this Case, should Alter, Amend and Correct the Order Because its Erroneous.**

This Court may reconsider, alter, amend and/or correct the Order pursuant to NRCP 59(e) or in the alternative EDCR 2.24(a). LVDG's Motion was brought under NRCP 59(e). This rule affords the non-prevailing party the opportunity to seek correction of an adverse order or judgment entered by the district court as well as an opportunity to avoid the time and expense of appeal. AA Primo Builders, LLC v. Washington, 245 P.3d 1190, 126 Nev. Adv. Rep. 53 (2010). The requirements for a motion brought pursuant to NRCP 59(e) are minimal and limited to: timeliness and compliance with NRCP 7(b). The Motion must be filed no later than 10 days following service of the Notice of Entry; and the Motion must be in writing, stating with particularity the grounds therefor and the relief sought. "NRCP 59(e) does not impose limits on scope beyond these requirements." AA Primo Builders at 1193.

In this Case, LVDG has met the requirements of NRCP 59(e). LVDG's Motion was filed on October 18, 2013, approximately 5 days after service of the notice of entry of the Order. Additionally, LVDG's Motion is in writing and specifically states the relief sought (reconsideration, alteration, amendment and correction of the Order to remove erroneous legal conclusions) and the grounds for the requested relief (Court erred in concluding that the HOA Lien is merely a *payment priority* triggered after foreclosure of a deed of trust). Accordingly, LVDG's Motion meets the requirements of NRCP 59(e) and as such, is properly before the Court.

LVDG's Motion also meets the requirements of EDCR 2.24 to the extent this local rule applies to NRCP 59(e) motions. Bank of America's Opposition to LVDG's Motion argues that LVDG's Motion fails to comply with the local rule because it allegedly raises no new facts or

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law supporting a ruling contrary to the Order. However, LVDG's Motion provides the Court with legal analysis and supplemental authority that was not previously before the Court; and specifically shows that the Order is erroneous because it concludes that the super priority provision of NRS §116.3116(2) does not create a true lien, but merely a payment priority, which is only triggered upon foreclosure of the first deed of trust and accordingly, foreclosure of the super priority HOA Lien does not extinguish a first deed of trust. LVDG's Motion alerts the Court that this legal conclusion is erroneous because it misreads and misinterprets the plain meaning of Nevada's HOA Lien Statutes, and inadvertently applies Minnesota law instead of Nevada law. LVDG's Motion explains that some states like Minnesota have expressly altered the super priority provisions of the UCIOA to provide for a payment priority scheme instead of a true lien; and the *payment priority* theory adopted by the Court in the Order arises from these statutes. LVDG's Motion compares the provisions of Nevada's HOA Lien Statutes to the provisions of Minnesota's HOA Lien Statutes; and shows a striking difference between the two. See chart on pages 9 through 11 of the LVDG's Motion. LVDG's Motion explains that Nevada's statutes clearly and unambiguously state that a HOA Lien has priority over all liens, except for liens recorded before the CC&Rs, first deeds of trust, and liens for real estate taxes and governmental assessments. However, the subordination of a HOA Lien to the first deed of trust is not absolute because a portion of the HOA Lien has super priority over the first deed of trust up to a limited amount (unpaid assessments due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien). NRS §116.3116 (2).

Minnesota's HOA Lien statutes are distinguishable. Minnesota's statutes state that a HOA Lien has priority over all liens, except for liens recorded before the CC&Rs, first mortgages encumbering the fee simple interest in a unit, liens for real estate taxes and governmental assessments, and a master association lien. Minn. Stat. Ann. §515B.3-116. Minnesota statutes further state that if the first mortgage is foreclosed and the owner does not redeem the property, the purchaser acquires title subject to a lien in favor of the association for unpaid assessments which became due without acceleration during the six months immediately

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preceding the end of the owner's period of redemption. Minn. Stat. Ann. §515B.3-116. Minnesota's statutes create a payment priority in favor of the HOA, which is triggered upon foreclosure of the first mortgage. However, Nevada's statutes do not. Nevada's statutes do not alter the UCIOA to provide for a *payment priority* scheme instead of a true lien. Unlike Minnesota, Nevada's statutes provide for a standalone bifurcated lien. In Nevada, a portion of the lien has super priority over the first deed of trust, and the remaining portion of the lien is subordinate to the first deed of trust. Both portions of the lien can be foreclosed upon in the event of delinquent assessments in accordance with NRS §116.31162 through §116.31167. Nevada expressly statutes do not provide for a payment priority lien, which is only triggered upon foreclosure of the first deed of trust. As a result, the Court erred in finding to the contrary.

LVDG's Motion alerts the Court of this misapplication/misinterpretation of law, and provides the Court with the following supplemental authority supporting the requested reconsideration, alteration, amendment and correction of the Order:

(1) Report of the Joint Editorial Board for Uniform Real Property Acts, explaining that some Nevada courts (e.g., Weeping Hollow Avenue Trust v. Spencer, 2013 WL 2296313 (D. Nev. May 24, 2013; Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev. Feb 11, 2013) have misread and misinterpreted the UCIOA because like this Court, they have concluded that the HOA Lien is a not a true lien, but merely a payment priority.

(2) Nevada State Real Estate Division Advisory Opinion, finding that the HOA has a true statutory lien, a portion of the lien has priority over a first deed of trust, and judicial foreclosure of an HOA Lien is unnecessary, which is contrary to this Court's legal conclusion in the Order.

(3) Nevada State Real Estate Division Senate Judiciary Presentation, explaining that foreclosure of a HOA super priority lien extinguishes the first deed of trust, which is contrary to this Court's legal conclusion in the Order.

(4) Legislative Counsel Bureau Opinion, finding that the purchaser does not acquire the property subject to a first deed of trust; and the ownership interest acquired by the

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purchaser of a unit survives a subsequent foreclosure of a security interest, which is contrary to this Court's legal conclusion in the Order.

None of these authorities were cited in LVDG's Opposition to Bank of America's Motion to Dismiss or otherwise before the Court at the hearing on this matter. All of these authorities are unbiased and persuasive; and all of these authorities establish that the Order is clearly erroneous because it is based on a misreading and misinterpretation of the Nevada's HOA Lien Statutes.

In light of the foregoing, the Court's Order should be altered, amended and/or corrected to provide that Nevada's HOA Lien is a true standalone lien not a mere *payment priority* based on the clear and unambiguous language of NRS 116.3116 through NRS 116.3117. In so doing, the Court should apply well established principles of real estate foreclosure law, find that foreclosure of a HOA Lien extinguishes a first deed of trust, and enter an Order denying Bank of America's Motion to Dismiss. Such a ruling is consistent with the plain meaning of Nevada's HOA Lien Statutes. Additionally, it is consistent with a recent ruling in the Nevada U.S. District Court. See 7912 Limbwood Court Trust v. Wells Fargo Bank, 2013 U.S. Dist. Lexis 154250 (Nev. D. October 28, 2013), a courtesy copy of which is attached hereto as **Exhibit 1**.

**2. This Court Should Not Alter the Order to Dismiss the Case on other Grounds**

To the extent Bank of America's Opposition advocates reconsidering, altering, amending or correcting the Order to provide for a dismissal based on other arguments made in its Motion to Dismiss, this Court should decline to do so. Bank of America's Opposition suggests that even if the Order is erroneous because it applies Minnesota law instead of Nevada law, the Court's decision to dismiss LVDG's Complaint was allegedly proper based on the following arguments: (1) the CC&Rs contain a mortgage savings clause which bars LVDG's claims; (2) Nevada canons of construction demonstrate that foreclosure under NRS 116.3116 does not eliminate a

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senior deed of trust; (3) LVDG's statuary interpretation violates due process; and (4) the HOA Lien Foreclosure Sale was commercially unreasonable.[1]

This Court did not accept these arguments at the time of the hearing on the Motion to Dismiss, and should not accept these arguments now. As supported by 7912 Limbwood Court Trust, Bank of America's mortgage savings clause argument is baseless because NRS 116.1104 specifically states that "Chapter 116 may not be varied by agreement, and the rights conferred by it may not be waived, except as expressly provided in this chapter;" and "[n]othing in §116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." 7912 Limbwood Court Trust at *30.

Additionally, Nevada canons of construction demonstrate that foreclosure under NRS 116.3116 extinguishes a senior deed of trust. See 7912 Limbwood Court Trust at *10-*24, applying Nevada rules of statutory construction and determining that: (1) if permitted in the subject CC&Rs, the HOA has super priority lien; (2) the HOA may file suit to recover unpaid assessments directly from the unit owner, or it may nonjudicially foreclose on the lien; and (3) foreclosure of a super priority lien extinguishes a first deed of trust. In 7912 Limbwood Court Trust, the U.S. District Court states:

> Nevada's statutory scheme is clear. *Section 116.3116(2)* unambiguously provides that the HOA super priority lien is prior to the first deed of trust. The statutory scheme also unambiguously provides for the HOA to resort to non-judicial foreclosure procedures to enforce its lien. The statute sets forth the order of priority by which the foreclosure sale proceeds must be distributed, and the association's lien must be satisfied before any other subordinate claim of record. The purchaser at an HOA foreclosure sale obtains the unit owner's title without equity or right of redemption, and a deed which contains the proper recitals "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. *§ 116.31166(2).* Compare *Nev. Rev. Stat. § 107.080* (providing that a mortgage foreclosure sale "vest in the purchaser the title of the grantor and any successors in interest without equity or right of redemption"); *Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317-18 (1867)* [*18] (providing that such a sale vests absolute title in the purchaser). Consequently, a foreclosure

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[1] Bank of America's Opposition also references the argument that "the homeowner's association foreclosure was not a super priority foreclosure." However, this argument triggers issues of fact that if taken as true, would result in a valid claim for relief. Since the court must accept LVDG's assertion that the HOA foreclosed on a super priority lien as true at this stage, the Court cannot dismiss LVDG's Complaint on this basis.



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> sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust.
>
> Even if these statutory provisions do not explicitly provide that foreclosure of the HOA super priority lien extinguishes the first deed of trust, *§ 116.1108* provides that general principles of law and equity "supplement the provisions of this chapter, except to the extent inconsistent with this chapter. "Under settled foreclosure principles, foreclosure of a superior lien extinguishes junior security interests.

7912 Limbwood Court Trust at *17-*18.

Like the Court in 7912 Limbwood Court Trust, this Court should find that pursuant to the plain meaning of NRS §116.3116, et. al., NRS §116.1108, and well-settled principles of real estate foreclosure law, foreclosure of a super priority lien extinguishes a first deed of trust. In so doing, this Court should find that Bank of America's statutory construction argument lacks merit.

This Court should also find that Bank of America's violation of due process argument lacks merit. As supported by 7912 Limbwood Court Trust, LVDG's statutory interpretation does NOT violate the lender's right to due process. See 7912 Limbwood Court Trust at *25-*28, stating: "Chapter 116 provides that an HOA perfects its lien by recording the declaration, which provides notice to any future first deed of trust holder of the potential that, under the statute, a super priority lien may take priority over the first deed of trust, even if the notice of default on the assessments is recorded after the first deed of trust;" and thus, lenders are "put on notice by operation of the statute that subject CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a first deed of trust recorded after the CC&Rs."

Finally, this Court should find that Bank of America's commercial unreasonableness argument lacks merit. As explained in 7912 Limbwood Court Trust, the Court "must apply the plain and unambiguous statutory language" and "statutory principles of priority, not the monetary value of the respective liens, control." 7912 Limbwood Court Trust at *24. Like the court in 7912 Limbwood Court Trust, this Court should find that the legal consequence of a HOA super priority lien foreclosure (e.g., extinguishment of a first deed of trust") is "neither novel nor unfair" because: (1) the lender "could have avoided this purportedly inequitable

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consequence by paying of the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of its junior interest;" (2) the lender could have "required an escrow for HOA assessments so that in the event of default, the lender could have satisfied the super priority lien amount without having to expend any of its own funds;" and (3) the lender can still pursue the borrower for the unpaid balance of the note because the "HOA foreclosure sale extinguished only the lender's security interest in the property, not the underlying debt." 7912 Limbwood Court Trust at *24-*25.

3. **Conclusion.**

For the reasons stated above, this Court should amend, alter and correct the Order entered on October 10, 2013, by removing the following erroneous provisions set forth in the Legal Conclusions:

> 4. The plain language of NRS §116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.
>
> * * *
>
> 6. . . . . Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (Holder) forecloses on the property. When foreclosure of the first deed of trust is complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.

In addition, this Court should amend, alter and correct the Order, by removing the erroneous holding contained therein, which states:

> NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

In so doing, this Court should reverse the decision entered on October 10, 2013, and deny Bank of America's Motion to Dismiss.

DATED this 15th day of ~~October~~ November, 2013.

Meier & Fine, LLC

By _____
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 15, 2013, I served a copy of the above and foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION** by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

Ariel E. Stern, Esq.
Jacob D. Bunkick, Esq.
AKERMAN SENTERFITT LLP
1160 Town Center Drive, Suite 330
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*Attorneys for Defendant, Bank of America*

**AND HAND-DELIVERY ON November 15, 2013 VIA RUNNER SERVICE.**

/s/ Cynthia Kelley
Cynthia Kelley, An employee of MEIER & FINE, LLC

# EXHIBIT 1

**7912 LIMBWOOD COURT TRUST, Plaintiff, v. WELLS FARGO BANK, N.A.; MTC FINANCIAL INC.; and FEDERAL HOME LOAN MORTGAGE CORPORATION, Defendants.**

**2:13-CV-00506-PMP-GWF**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA**

*2013 U.S. Dist. LEXIS 154250*

**October 28, 2013, Decided**
**October 28, 2013, Filed**

**COUNSEL:** [*1] For 7912 Limbwood Court Trust, Plaintiff: Joseph A. Gutierrez, LEAD ATTORNEY, Maier Gutierrez PLLC, Las Vegas, NV; Luis A Ayon, LEAD ATTORNEY, Maier Gutierrez Ayon PLLC, Las Vegas, NV.

For Wells Fargo Bank, N.A., Federal Home Loan Mortgage Corporation, Defendants: Chelsea Crowton, Wright, Finlay & Zak, LLP, Las Vegas, NV.

For MTC Financial, Inc., doing business as Trustee Corps, Defendant: Richard J. Reynolds, LEAD ATTORNEY, Burke, Williams & Sorensen, LLP, Santa Ana, CA; Michael E Sullivan, Robison Belaustegui Sharp & Low, Reno, NV.

**JUDGES:** PHILIP M. PRO, United States District Judge.

**OPINION BY:** PHILIP M. PRO

**OPINION**

ORDER

This case is one of many similar disputes over whether a foreclosure sale conducted by a homeowners' association ("HOA") to collect unpaid HOA assessments extinguishes all junior liens, including a first deed of trust. Presently before the Court are the following motions:

1. Defendant MTC Financial Inc.'s Motion to Dismiss (Doc. #37), filed on May 23, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Joinder (Doc. #39) on May 28, 2013. Plaintiff 7912 Limbwood Court Trust did not file a response to this Motion.

2. Defendants Federal Home Loan Mortgage Corporation [*2] and Wells Fargo Bank, N.A.'s Motion to Dismiss (Doc. #40), filed on May 29, 2013. Defendant MTC Financial Inc. filed a Joinder (Doc. #41) on May 29, 2013. Plaintiff filed an Opposition (Doc. #43) on June 10, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Reply (Doc. #46) on June 24, 2013. Defendant MTC Financial Inc. filed a Joinder (Doc. #47) on June 25, 2013.

3. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Expunge Lis Pendens (Doc. #48), filed on June 28, 2013. Plaintiff filed an Opposition (Doc. #49) on July 15, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Reply (Doc. #50) on July 22, 2013.

**I. BACKGROUND**

Because the matter is before the Court on motions to dismiss, the following recitation of background facts is taken largely from the Amended Complaint, which the Court takes as true. *Williams v. Gerber Prods. Co., 552 F.3d 934, 937 (9th Cir. 2008).* Additionally, the Court takes judicial notice of the fact that certain documents

were recorded in the Office of the County Recorder for Clark County, Nevada. See *United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).*

The [*3] property at issue, located at 7912 Limbwood Court in Las Vegas, Nevada, previously was owned by Sandra and Sonya Newton (the "Newtons"). (Am. Compl. (Doc. #33) at 1; Request for Judicial Notice (Doc. #38), Ex. 1.) The property was subject to a first deed of trust recorded in 2004 which identified Silver State Mortgage as the lender and Lawyers Title of Nevada as the trustee. (Request for Judicial Notice (Doc. #38), Ex. 1.) In 2011, Silver State Mortgage assigned the deed of trust to Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). (Am. Compl. at 2-3; Request for Judicial Notice (Doc. #38), Ex. 2.) Defendant MTC Financial Inc. ("MTC") thereafter was substituted as the trustee under the deed of trust. (Request for Judicial Notice (Doc. #38), Ex. 3.)

The property is subject to the 1995 Covenants, Conditions, and Restrictions ("CC&Rs") recorded by the Elkhorn Community Association ("Elkhorn"). (Am. Compl. at 3; Request for Judicial Notice (Doc. #12), Ex. P.) In 2010, Elkhorn initiated an HOA foreclosure sale of the property pursuant to *Nevada Revised Statutes § 116.3116, et seq.* to recover unpaid HOA assessments. (Am. Compl. at 2; Request for Judicial Notice (Doc. #12), Exs. G-I.) According [*4] to the Amended Complaint, Elkhorn, through its agent Angius & Terry, LLC, conducted the foreclosure sale in compliance with all statutory notice requirements. (Am. Compl. at 2-3.) The sale was conducted on March 6, 2012, at which Plaintiff purchased the property. (Id. at 2; Request for Judicial Notice (Doc. #12), Exs. H-J.) The HOA foreclosure deed was recorded with the Clark County Recorder on March 16, 2012. (Am. Compl. at 2; Request for Judicial Notice (Doc. #12), Ex. J.)

On October 5, 2012, Wells Fargo and MTC recorded a notice of default and election to sell based on the Newtons' deed of trust. (Request for Judicial Notice (Doc. #38), Ex. 4.) The sale was set for March 8, 2013. (Request for Judicial Notice (Doc. #38), Ex. 5.)

Plaintiff brought suit in Nevada state court on March 5, 2013, against Wells Fargo, MTC, Republic Services, and the Newtons to quiet title in the property. (Pet. for Removal (Doc. #1), Ex. A.) Plaintiff moved for a temporary restraining order and preliminary injunction seeking to enjoin Wells Fargo's foreclosure sale. (Pet. for Removal, Ex. E.) The state court set a hearing for March 12, 2013. (Pet. for Removal, Ex. F.) However, Wells Fargo and MTC sold the [*5] property on March 8, 2013, to Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac"). (Id.; Am. Compl. at 3; Request for Judicial Notice (Doc. #38), Exs. 6-7.) The state court set a hearing for April 2, 2013, for Defendants to show cause why the sale should not be set aside. (Pet. for Removal, Ex. F.) Prior to the April 2 hearing, MTC removed the action to this Court. (Pet. for Removal.)

This Court set a hearing on Plaintiff's Motion for Preliminary Injunction and the Nevada state court's order to show cause why the sale should not be set aside. (Order (Doc. #18).) At the hearing, the Court denied Plaintiff's motion for injunctive relief without prejudice for Plaintiff to file an Amended Complaint. (Mins. of Proceedings (Doc. #30).) Plaintiff filed an Amended Complaint against Wells Fargo, MTC, and Freddie Mac, asserting claims for wrongful foreclosure and to quiet title in the property. (Am. Compl.)

Defendant MTC now moves to dismiss, arguing MTC claims no interest in the property, and therefore it is not a proper defendant in a quiet title action. Additionally, MTC contends Plaintiff's wrongful foreclosure claim against MTC should be dismissed because MTC owes no common law [*6] duty to Plaintiff, MTC was an agent acting for a disclosed principal, and a wrongful foreclosure claim lies only as between trustors and mortgagors.

Defendants Wells Fargo and Freddie Mac join in MTC's Motion and also separately move to dismiss. Wells Fargo and Freddie Mac argue Wells Fargo's lien is superior to Elkhorn's HOA lien, and therefore it was not extinguished by the HOA foreclosure sale. Wells Fargo and Freddie Mac contend that under the Nevada statutory scheme, foreclosure on the HOA's lien does not extinguish the first deed of trust. Rather, the HOA's lien is a payment priority lien only, and the first deed of trust continues to encumber the property after foreclosure of the HOA lien. Wells Fargo and Freddie Mac contend that Plaintiff thus purchased merely a possessory interest in the property subject to the first deed of trust. Wells Fargo and Freddie Mac contend it would violate their due process rights to allow a later-recorded HOA assessment lien to extinguish the deed of trust lien recorded several years earlier. Wells Fargo and Freddie Mac also contend that Elkhorn's CC&Rs preserve the first deed of trust's priority over HOA liens. Defendants therefore also move to [*7] expunge the Notice of Lis Pendens that Plaintiff recorded on the property.

Plaintiff responds that Nevada's statutory scheme provides the HOA with a lien for nine months' worth of HOA assessments which is superior to the first deed of trust, referred to as the "super priority lien." According to Plaintiff, if the HOA forecloses on the super priority lien, all junior liens, including the first deed of trust, are extinguished. Plaintiff further contends an HOA cannot waive its super priority lien through the CC&Rs. Plaintiff also argues Defendants received the statutory notice re-

quired, and all lenders were on notice of the possibility of a super priority lien extinguishing a first deed of trust upon enactment of the super priority statutory scheme in 1991. Plaintiff contends Defendants could have preserved the security interest by complying with the statutory requirements to receive notice and by paying off the HOA super priority lien, but they sat on their rights and cannot be heard to complain now.

## II. DISCUSSION

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*. [*8] However, the Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the plaintiff's complaint. See *Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994)*. There is a strong presumption against dismissing an action for failure to state a claim. *Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003)*. A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id. at 555*.

### A. MTC's Motion to Dismiss

Under Nevada law, "[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." *Nev. Rev. Stat. § 40.010*. Because the Amended Complaint does not allege MTC claims an interest in the property, and MTC disclaims any interest in the property, the Court will dismiss Plaintiff's quiet title claim as against Defendant MTC.

As to the wrongful foreclosure [*9] claim against MTC, a trustee under a deed of trust owes no duties beyond those imposed by the deed of trust and applicable foreclosure statutes. *Harlow v. MTC Fin. Inc., 865 F. Supp. 2d 1095, 1100 (D. Nev. 2012)*. Plaintiff has not alleged MTC breached the deed of trust or any requirement imposed by the foreclosure statutes. Rather, Plaintiff asserts a common law wrongful foreclosure claim. See *Collins v. Union Fed. Sav. & Loan, 99 Nev. 284, 662 P.2d 610, 623 (Nev. 1983)*. The Court therefore will dismiss Plaintiff's wrongful foreclosure claim against MTC.

Defendants Wells Fargo and Freddie Mac filed a conclusory Joinder which did not explain how MTC's arguments applied to them. The Court therefore will deny Defendants Well Fargo and Freddie Mac's Joinder in MTC's Motion.

### B. Wells Fargo and Freddie Mac's Motion to Dismiss

The parties dispute the effect of the HOA foreclosure sale on the first deed of trust. The parties also dispute whether Wells Fargo's due process rights would be violated by allowing foreclosure of the HOA lien to extinguish Wells Fargo's security interest based on the first deed of trust. Finally, the parties dispute whether the Elkhorn CC&Rs provide that the HOA lien is subordinate [*10] to the first deed of trust.

#### 1. Priority

Wells Fargo and Freddie Mac contend the HOA super priority lien gives the HOA priority in payment only, and foreclosure on the HOA super priority lien does not extinguish Wells Fargo's security interest based on the first deed of trust. Plaintiff, on the other hand, contends foreclosure on the super priority lien extinguishes all junior liens, including the first deed of trust.

The Nevada Supreme Court has not addressed the statutory provisions at issue to determine whether a foreclosure sale on an HOA super priority lien extinguishes all junior liens, including a first deed of trust. "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." *Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007)* (quotation omitted). "In answering that question, this court looks for 'guidance' to decisions by intermediate appellate courts of the state and by courts in other jurisdictions." Id. (quotation omitted).

This Court looks to Nevada rules of statutory construction to determine the meaning of a Nevada statute. *In re First T.D. & Inv., Inc., 253 F.3d 520, 527 (9th Cir. 2001)*. [*11] Under Nevada law, a court should construe a statute to give effect to the legislature's intent. *Richardson Constr., Inc. v. Clark Cnty. Sch. Dist., 123 Nev. 61, 156 P.3d 21, 23 (Nev. 2007)*. If the statute's plain language is unambiguous, that language controls. Id. If the statute's language is ambiguous, the Court "must examine the statute in the context of the entire statutory scheme, reason, and public policy to effect a construction that reflects the Legislature's intent." Id.

Chapter 116 of the Nevada Revised Statutes, enacted in 1991, codifies the Uniform Common-Interest Ownership Act and sets forth the statutory framework for common interest communities such as HOAs. *Nev. Rev. Stat. § 116.001*; A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). *Section 116.3116(1)* provides for a lien in an HOA's favor "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." Additionally, unless the HOA's declaration provides otherwise, "any penalties, fees, charges, late charges, fines and interest charged [*12] pursuant to *[§ 116.3102(1)(j)-(n)]* are enforceable as assessments under this section." *Nev. Rev. Stat. § 116.3116(1)*; see also id. *§ 116.3102(1)(j)-(n)* (providing for charges for such items as late payment penalties, rental fees for common elements, and fines).

The key provision in dispute between the parties is *§ 116.3116(2)*, which sets forth the priority of the HOA lien with respect to other liens on the property. Pursuant to *§ 116.3116(2)*, the HOA lien is prior to all other liens on the property except:

> (a) Liens and encumbrances recorded before the recordation of the declaration[1] 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 . . . ; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

Although *§ 116.3116(2)(b)* makes a first deed of trust superior to an HOA lien, the last paragraph of *§ 116.3116(2)* gives what the parties refer to as "super priority" status to a portion of the HOA's lien which is superior to the first deed of trust:

> The [*13] 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*[2] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to *NRS 116.3115* which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. . . . This subsection does not affect the priority of mechanics' or materialmens' liens, or the priority of liens for other assessments made by the association.

Id. *§ 116.3116(2)*. Recording the HOA's declaration "constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required." Id. *§ 116.3116(4)*.

> 1 The declaration is "any instrument[], however denominated, that create[s] a common-interest community, including any amendments to th[at] instrument[]." *Nev. Rev. Stat. § 116.037*.
>
> 2 Allowing for the [*14] HOA's executive board to enter a unit to conduct maintenance or remove or abate a nuisance, and permitting the imposition of fees and costs for any such activity.

The HOA may pursue a civil suit to recover unpaid assessments directly from the unit owner, or it may foreclose on a lien created under *§ 116.3116*. Id. *§§ 116.3116(6), (10), 116.31162*. To conduct a foreclosure sale on its lien, the HOA must comply with certain notice requirements. First, the HOA must notify the owner of the delinquent assessments. Id. *§ 116.31162(1)(a)*. If the owner does not pay within 30 days, the HOA must record a notice of default and election to sell. Id. *§ 116.31162(1)(b)*. In addition to recording the notice of default, the HOA must mail it to "[a]ny holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." Id. *§ 116.31163(2)*. If the unit owner has not paid the lien amount within 90 days of the notice of default being recorded, the HOA then must give notice of the sale to the owner and to the known holder of a security interest if the security interest [*15] holder "has notified the association, before the mailing of the notice of sale, of the existence of the security interest." Id. *§116.311635(1)(b)(2)*; see also id. *§ 116.31162(1)(c)*.

At the sale, the HOA must sell to the highest bidder, and the HOA may credit bid on the property "up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien." Id. *§ 116.31164(2)*. After the sale, the seller must execute and deliver to the buyer "a deed without warranty which conveys to the grantee all title of the unit's owner to the unit." Id. *§§ 116.31164(3)(a), 116.31166(3)*. The seller must apply the proceeds of the sale 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; [*16] and

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

Id. *§ 116.31164(3)(c)*. "The sale of a unit pursuant to *NRS 116.31162, 116.31163* and *116.31164* vests in the purchaser the title of the unit's owner without equity or right of redemption." Id. *§ 116.31166(3)*. A deed which recites there was a default, the proper notices were given, the appropriate amount of time has lapsed between notice of default and sale, and notice of the sale was given, "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. *§ 116.31166(2)*. Upon payment, the purchaser is "discharge[d] from obligation to see to the proper application of the purchase money." Id.

*Section 116.3116(2)* effectively separates the HOA's lien into two separate liens. The last paragraph of subsection 2, which generally consists of the last nine months of unpaid assessments and any unpaid nuisance abatement costs, constitutes the super priority portion of the HOA's lien. It provides that the super priority portion of the HOA's lien is prior to the first deed of trust. The rest of the HOA's lien, consisting of any charges not contained within the super priority lien, including any assessments [*17] unpaid for more than nine months, is junior to the first deed of trust under *§ 116.3116(2)(b)*. The parties agree the statute operates in this fashion, but disagree about the legal effect of the HOA's foreclosure on the super priority lien.

Nevada's statutory scheme is clear. *Section 116.3116(2)* unambiguously provides that the HOA super priority lien is prior to the first deed of trust. The statutory scheme also unambiguously provides for the HOA to resort to non-judicial foreclosure procedures to enforce its lien. The statute sets forth the order of priority by which the foreclosure sale proceeds must be distributed, and the association's lien must be satisfied before any other subordinate claim of record. The purchaser at an HOA foreclosure sale obtains the unit owner's title without equity or right of redemption, and a deed which contains the proper recitals "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. *§ 116.31166(2)*. Compare *Nev. Rev. Stat. § 107.080* (providing that a mortgage foreclosure sale "vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption"); *Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317-18 (1867)* [*18] (providing that such a sale vests absolute title in the purchaser). Consequently, a foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust.

Even if these statutory provisions do not explicitly provide that foreclosure of the HOA super priority lien extinguishes the first deed of trust, *§ 116.1108* provides that general principles of law and equity "supplement the provisions of this chapter, except to the extent inconsistent with this chapter." Under settled foreclosure principles, foreclosure of a superior lien extinguishes junior security interests. *Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, 563 P.2d 82, 86 (Nev. 1977); Erickson Constr. Co. v. Nev. Nat'l Bank, 89 Nev. 350, 513 P.2d 1236, 1238 (Nev. 1973)*. If junior lienholders want to avoid this result, they readily can preserve their security interests by buying out the senior lienholder's interest. See *Carrillo v. Valley Bank of Nev., 103 Nev. 157, 734 P.2d 724, 725 (Nev. 1987); Keever v. Nicholas Beers Co., 96 Nev. 509, 611 P.2d 1079, 1083 (Nev. 1980)*.

Nothing in the statute suggests that anything other than normal foreclosure principles apply to an HOA foreclosure sale, nor is it inconsistent with [*19] Chapter 116 to apply the usual principle that foreclosure of a senior interest extinguishes junior interests. Rather, this result is consistent with the statutory purpose of the super priority lien to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments." Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982); see also *Nev. Rev. Stat. § 116.1109(2)* ("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among state enacting it."). Moreover, the Nevada Legislature presumably was aware of the normal operation of foreclosure law when it enacted Chapter 116 in 1991. If the Legislature intended a different rule to apply to an HOA foreclosure sale, it could have said so.

While Nevada state trial courts and decisions from the United States District Court for the District of Nevada are divided on the question,[3] other guidance from Nevada confirms the Court's conclusion about the statutory meaning. The Nevada Real Estate Division of the Department of Business and Industry and the Commission for Common Interest Communities and Condominium Hotels ("Real Estate [*20] Division") is the entity

charged with interpreting Chapter 116. *State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc., 294 P.3d 1223, 1227-28 (Nev. 2012)*; see also *Nev. Rev. Stat. §§ 116.043, 116.615, 116.623*. The Nevada Supreme Court therefore would defer to the Real Estate Division's interpretation so long as that interpretation is within the statute's language. *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy, 124 Nev. 701, 191 P.3d 1159, 1165 (Nev. 2008)*; *Folio v. Briggs, 99 Nev. 30, 656 P.2d 842, 844 (Nev. 1983)* (stating the Nevada Supreme Court "attach[es] substantial weight" to the interpretation of a state agency "clothed with the power to construe the statutes under which it operates"). The Real Estate Division has interpreted the statute to mean that foreclosure on the HOA super priority lien results in extinguishment of all junior liens, including the first deed of trust.

3 (See, e.g, Pet. for Removal, Ex. H, Attach. M; Request for Judicial Notice (Doc. #12), Exs. L-O, Q; Defs.' Mot. to Dismiss (Doc. #40), Exs. C-F; Pl.'s Opp'n to Defs.' Mot. to Dismiss (Doc. #43), Ex. 9.)

In a December 2012 advisory opinion, the Real Estate Division addressed three questions: (1) whether, [*21] pursuant to *§ 116.3116*, the HOA's super priority lien included collection costs; (2) whether the super priority lien can exceed nine times the monthly assessment plus charges; and (3) whether the HOA must institute a civil action for the super priority lien to exist. (Pl.'s Opp'n to Defs.' Mot. to Dismiss (Doc. #43), Ex. 1.) The Real Estate Division answered the first question by concluding the super priority lien does not include collection costs because the statute specifically states what constitutes the super priority lien. (Id. at 1, 3-7.) As to the second question, the Real Estate Division concluded the super priority lien consists only of unpaid assessments and certain charges specifically identified in *§ 116.310312*. (Id. at 2, 10-17.) As to the third question, the Real Estate Division asserted the HOA must take action to enforce its super priority lien, but it need not institute a civil lawsuit. (Id. at 2, 17-18.) Rather, the HOA could institute a non-judicial foreclosure under *§ 116.31162* or pursue other remedies. (Id.)

In reaching these conclusions, the Real Estate Division examined the priority of the HOA lien under *§ 116.3116(2)*. (Id. at 8-9.) The Real Estate Division sought [*22] to give guidance to HOAs on this point because "[u]nderstanding the priority of the lien is an important consideration for any board of directors looking to enforce the lien through foreclosure or to preserve the lien in the event of foreclosure by a first security interest." (Id. at 8.)

According to the Real Estate Division, the "ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security." (Id. at 9.) The Real Estate Division suggested it was "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association." (Id.); see also Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982) ("As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit."). In its conclusion, the Real Estate Division stated that the "association can use the super priority lien to force the first [*23] security interest holder to pay that amount." (Pl.'s Opp'n to Defs.' Mot. to Dismiss, Ex. 1 at 19.) The HOA retains a junior lien for other charges and penalties, and thus if the first security interest holder pays off the super priority lien, the first deed of trust lienholder still may foreclose and the HOA's junior lien for items not included in the super priority lien may be extinguished by that foreclosure. (Id.) Thus, contrary to Defendants' argument that *§ 116.3116(2)(b)* would be rendered meaningless by this construction of the statute, *§ 116.3116(2)(b)* establishes that the first deed of trust takes priority over that portion of an HOA lien which does not comprise the super priority lien, including any unpaid assessments beyond the nine months of unpaid assessments comprising the super priority lien.

The State of Nevada Legislative Counsel Bureau reached the same conclusion in a December 2012 advisory letter. (Pl.' Opp'n to Defs.' Mot. to Dismiss, Ex. 4.) The Legislative Counsel Bureau concluded the statute unambiguously provides that "the ownership interest of a purchaser who obtains title through a deed properly containing the [statutory recitals in *§ 116.31164*] is not subject [*24] to any claim made by the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to *NRS 116.31164*." (Id. at 3.) The Legislative Counsel Bureau concluded that "no part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under *NRS 116.3116(1)*." (Id. at 4.)

The Court rejects Defendants' argument that it would be inequitable to allow foreclosure of an HOA lien of relatively little value to extinguish a first deed of trust of considerable value. The Court must apply the plain and unambiguous statutory language. Moreover, statutory principles of priority, not the monetary value of the respective liens, control. Under the unambiguous statutory language, the HOA super priority lien is prior to the first deed of trust, and consequently foreclosure on

the HOA super priority lien extinguishes all junior security interests, including the first deed of trust.

Moreover, the result in this case is neither novel nor unfair. Wells Fargo easily could have avoided this purportedly inequitable consequence [*25] by paying off the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of its junior interest. Additionally, Wells Fargo could have required an escrow for HOA assessments so that in the event of default, Wells Fargo could have satisfied the super priority lien amount without having to expend any of its own funds. See Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982).

Finally, the HOA foreclosure sale extinguished only Wells Fargo's security interest in the property, not the underlying debt. *Olson v. Iacometti, 91 Nev. 241, 533 P.2d 1360, 1363 (Nev. 1975)* ("Foreclosure of the first trust deed extinguished only the security for the Olson-Iacometti note, not the indebtedness represented by that note.") Wells Fargo still can pursue the Newtons for the unpaid balance. The Court therefore will deny Defendants' Motion to Dismiss on the basis that the HOA foreclosure sale did not extinguish Wells Fargo's security interest based on the first deed of trust.

2. Due Process

Wells Fargo and Freddie Mac argue that allowing a foreclosure sale based on a later-recorded notice of delinquent HOA assessments to extinguish the previously recorded first deed of trust [*26] violates their due process rights because Nevada is a race-notice state. Plaintiff responds that Defendants had adequate notice of the super priority lien based on the super priority statute's enactment in 1991, the 1995 Elkhorn CC&Rs, and the notice procedures in the statute.

"Nevada is a race notice state." *Buhecker v. R.B. Peterson & Sons Constr. Co., 929 P.2d 937, 939, 112 Nev. 1498 (Nev. 1996)* (citing *Nev. Rev. Stat. §§ 111.320, 111.325*). Recorded security interests therefore "impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." *Nev. Rev. Stat. § 111.320.*

Under usual race notice rules, Wells Fargo's lien would be superior to the HOA delinquency notice because the first deed of trust was recorded in 2004, and the HOA did not record a notice of default on the assessments until 2010. However, Chapter 116 provides that an HOA perfects its lien by recording the declaration, which provides notice to any future first deed of trust holder of the potential that, under the statute, a super priority lien may take priority over the first deed of trust, even if the notice of default on the assessments is recorded after [*27] the first deed of trust. Id. *§ 116.3116(4)*. Chapter 116 was enacted in 1991, and thus Wells Fargo was on notice that by operation of the statute, the 1995 Elkhorn CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a first deed of trust recorded in 2004. Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate Wells Fargo's due process rights. Freddie Mac purchased the property after the HOA recorded the notice of default and conducted the HOA foreclosure sale. Freddie Mac therefore took the property with notice of the HOA foreclosure sale.

To the extent Wells Fargo contends Elkhorn failed to provide the required notice as a factual matter, the Amended Complaint alleges Elkhorn provided all statutorily required notices. (Am. Compl. at 2.) The Court must accept that allegation as true at this stage of the proceedings. In their Reply, Defendants assert that the statute violates due process because the statutory notice provisions do not necessarily require notice to the first deed of [*28] trust holder. The Court will not consider this issue raised for the first time in a reply brief. *Carstarphen v. Milsner, 594 F. Supp. 2d 1201, 1204 n.1 (D. Nev. 2009)*. The Court therefore will deny Defendants' Motion to Dismiss on the basis that Defendants' due process rights are violated by operation of the statute.

3. CC&Rs

Defendants argue the Elkhorn CC&Rs provide that first deeds of trust are superior to Elkhorn's HOA liens. Plaintiff responds that the statute prohibits waiver of Chapter 116's provisions.

Sections 6.16 and 6.17 of the Elkhorn CC&Rs provide as follows:

> **Section 6.16. Mortgages Protection.** Notwithstanding all other provisions hereof, no lien created under this Article VI, nor the enforcement of any provision of this Master Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Lot or Condominium, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Lot or Condominium by a judicial foreclosure or exercise of power of sale, such Lot or Condominium shall remain subject to this Master Declaration and the payment of all installments of assessments [*29] accruing subsequent to the date

such Beneficiary or Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any previously recorded First Mortgage upon the Lot or Condominium except as may be otherwise required in accordance with *NRS Section 116.3116*, as amended. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgage shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.

**Section 6.17. Priority of Assessment Lien.**

The lien of the assessments, including interest and costs (including attorneys' fees) as provided for herein, shall be subordinate to the lien of any previously Recorded First Mortgage upon any Lot or Condominium. The sale or transfer of any Single Family Residential Lot or Condominium shall not affect an assessment lien. However, the sale or transfer of any Single Family Residential Lot or Condominium pursuant to judicial or nonjudicial foreclosure of a previously Recorded First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale [*30] or transfer except as set forth in *NRS Section 116.3116*.

(Request for Judicial Notice (Doc. #12), Ex. P.) By the CC&Rs' plain language, in both sections 6.16 and 6.17 Elkhorn preserved its statutory super priority lien rights by reference to *§ 116.3116*, which is the statutory section setting forth the relative priority of the HOA's super priority and junior liens in relation to a first deed of trust. Chapter 116 provides that its requirements "may not be varied by agreement, and rights conferred by it may not be waived," except as "expressly provided in this chapter." *Nev. Rev. Stat. § 116.1104*. Nothing in *§ 116.3116* expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien. Accordingly, the Court will deny Defendants' Motion to Dismiss on this basis.

### C. Motion to Expunge Lis Pendens

Defendants' Motion to Expunge is based on the same arguments as presented in the Motion to Dismiss. Because the Court will deny Wells Fargo and Freddie Mac's Motion to Dismiss, the Court also will deny the Motion to Expunge.

## III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant MTC Financial Inc.'s Motion to Dismiss (Doc. #37) is hereby GRANTED. Judgment is [*31] hereby entered in favor of Defendant MTC Financial Inc. and against Plaintiff 7912 Limbwood Court Trust.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Joinder (Doc. #39) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Dismiss (Doc. #40) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Expunge Lis Pendens (Doc. #48) is hereby DENIED.

DATED: October 28, 2013

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

Las Vegas Development Group, LLC's (**LVDG**) motion for reconsideration, filed October 18, 2013, came on for hearing before the Court on December 17, 2013. Jacob D. Bundick and Natalie L. Winslow, Esq. appeared on behalf of Bank of America, N.A. (**BANA**). Counsel for LVDG was not present. The Court, having examined the motion and corresponding documents, and ruling solely based on the motion, opposition, and reply, as well as the other papers filed in this matter, finds as follows:

1. LVDG presented no new fact in its motion for reconsideration. Specifically, LVDG attached the following documents to its motion: **(1)** a report by the Joint Editorial Board for Uniform Real Property Acts, dated June 1, 2013; **(2)** Nevada Real Estate Division advisory opinion 13-01, dated December 12, 2012; **(3)** a "presentation" to the Nevada Senate Judiciary Committee, dated May 6, 2013; and **(4)** a Nevada Legislative Counsel Bureau Opinion, dated December 7, 2012.

2. The documents attached to LVDG's motion do not raise any new issues of law or fact because all four exhibits were previously available to LVDG prior to the Court's hearing on the motion to dismiss the second amended complaint on September 17, 2013.

3. The Court finds no manifest error in law or fact that would warrant it reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

4. The Court finds LVDG has not presented any newly discovered evidence that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

5. The Court finds no manifest injustice that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

6. The Court finds LVDG has not presented any change in controlling law that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

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**ORDER**

Based on the foregoing, the Court orders as follows:

LVDG's MOTION FOR RECONSIDERATION is **DENIED**.

IT IS SO ORDERED.

Dated this 21st day of January, 2015.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

**AKERMAN LLP**

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DISTRICT COURT

CLARK COUNTY, NEVADA

***

| | | |
|---|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, vs. BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20, AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants. | Case No. | A-12-654840-C |
| | Dept. No. | XXIII |

**NOTICE OF APPEAL**

**NOTICE IS HEREBY GIVEN** that the Plaintiff, LAS VEGAS DEVELOPMENT GROUP, LLC, by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., hereby appeals to the Supreme Court of the State of Nevada from (1) the Order granting Defendants' Motion to Dismiss entered on or about October 10, 2013; (2) the Order denying Plaintiff's Motion for Reconsideration entered on or about January 23, 2014; (3) all rulings and

interlocutory orders made appealable by any of the foregoing.

DATED this 21st day of February, 2014.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda
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***Attorney for Plaintiff***
**LAS VEGAS DEVELOPMENT GROUP, LLC**

**CERTIFICATE OF MAILING**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 21st day of February, 2014, I served a copy of the foregoing **NOTICE OF APPEAL**, by causing a copy of the same to be deposited in the United States mail, postage prepaid, addressed as follows:

Jacob D. Bundick, Esq.
Natalie L. Winslow, Esq.
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1160 Town Center Drive, Suite 330
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***Attorneys for Defendant***
***Bank of America, N.A.***

/s/ Timothy E. Rhoda
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT was entered in the above-captioned matter on October 10, 2013. A copy of said Order is attached hereto.

DATED this 10th day of October, 2013.

**AKERMAN SENTERFITT LLP**

/s/ Natalie L. Winslow
JACOB D. BUNDICK, ESQ.
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10th day of October, 2013 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, postage prepaid and addressed to:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendant Bank of America, N.A.'s (**BANA**) motion to dismiss plaintiff Las Vegas Development Group, LLC's (**LVDG**) second amended complaint, filed August 15, 2013, came on for hearing before the Court on September 17, 2013. Marilyn Fine, Esq. appeared on behalf of LVDG, and Natalie L. Winslow, Esq. appeared on behalf of BANA. The Court, having examined the pleadings and heard the arguments of counsel at the hearing on the motion, finds as follows:

**FINDINGS OF FACT**

A. On June 22, 2006, Genevieve Uniza-Enriquez (the **borrower**) purchased certain real property located at 6279 Downpour Court, Las Vegas, Nevada 89110.

B. The borrower secured her purchase of the property with a deed of trust for $360,000.00 against the property.

C. On June 25, 2010, the successor trustee under the deed of trust and/or agent of the beneficiary, ReconTrust Company, N.A. (**ReconTrust**) recorded a first notice of default against the property.

D. On June 30, 2010, an assignment of the deed of trust was recorded in favor of BAC Home Loans Servicing, LP.

E. ReconTrust rescinded the first notice of default on March 30, 2011.

F. On April 5, 2011, ReconTrust recorded a second notice of default.

G. On December 29, 2011, the Nevada Foreclosure Mediation Program recorded its certificate, indicating that "[t]he Beneficiary may proceed with the foreclosure process."

H. ReconTrust recorded a notice of trustee's sale on December 29, 2011, and additional notices of trustee's sale on April 12, 2012 and July 25, 2012.

I. On April 1, 2010, Absolute Collection Services, LLC (**ACS**), as agent for Palo Verde Ranch Homeowners' Association (**Palo Verde**), recorded a Notice of Delinquent Assessment Lien against the property in the amount of $754.56.

J. The notice specifically stated that "[a]dditional monies shall accrue under this claim at the rate of the claimant's periodic assessments, *plus permissible late charges, costs of collection and interest and other charges*, if any, that shall accrue subsequent to the date of this notice." (Emphasis added).

K. The lien did not provide the amount attributable to assessments only – the only amount subject to Nevada's super priority lien statute.

L. On July 14, 2010, ACS recorded a notice of default against the property, stating that the amount owed as of July 13, 2010, totaled $1,749.65.

M. On November 18, 2010, ACS recorded a notice of foreclosure sale, stating that $2,873.86 was required to pay off the lien to avoid the HOA foreclosure sale.

N. On April 12, 2011, LVDG purchased the property at the HOA foreclosure sale.

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O. A trustee's deed upon sale was recorded on April 13, 2011, in favor of LVDG, stating that LVDG purchased the property for the total amount of $4,001.00.

P. On January 17, 2012, LVDG initiated this action, alleging, *inter alia*, that BANA's deed of trust was extinguished by virtue of the HOA foreclosure sale.

## CONCLUSIONS OF LAW

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (**HOA**) a lien against a residential property for unpaid association dues, fines, and certain other assessments (**HOA Lien**).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (**UCIOA**). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (**Holder**) forecloses on the property. When foreclosure of the first deed of trust is

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complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, the Court orders as follows:

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **DENIED** with respect to the remaining defendant GENEVIEVE UNIZA-ENRIQUEZ. However, this Court determines that there are no claims remaining in this Case against Bank of America, N.A. and no just reason for delay in entry of a final appeal order in favor of Bank of America, N.A. pursuant to NRCP 54(b).

IT IS SO ORDERED.

Dated this 8 day of October, 2013.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

**AKERMAN SENTERFITT LLP**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,<br><br>Plaintiff,<br><br>v.<br><br>BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,<br><br>Defendants. | Case No.: A-12-654840-C<br>Dept.: XXIII<br><br>**NOTICE OF ENTRY OF ORDER** |

PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion for Reconsideration was entered in the above-referenced matter on January 23, 2014.

A copy of said Order is attached hereto and incorporated herein by reference.

DATED this 27th day of January, 2014.

**AKERMAN LLP**

/s/ Natalie L. Winslow
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of January, 2014 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, postage prepaid and addressed to:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

Las Vegas Development Group, LLC's (**LVDG**) motion for reconsideration, filed October 18, 2013, came on for hearing before the Court on December 17, 2013. Jacob D. Bundick and Natalie L. Winslow, Esq. appeared on behalf of Bank of America, N.A. (**BANA**). Counsel for LVDG was not present. The Court, having examined the motion and corresponding documents, and ruling solely based on the motion, opposition, and reply, as well as the other papers filed in this matter, finds as follows:

1. LVDG presented no new fact in its motion for reconsideration. Specifically, LVDG attached the following documents to its motion: **(1)** a report by the Joint Editorial Board for Uniform Real Property Acts, dated June 1, 2013; **(2)** Nevada Real Estate Division advisory opinion 13-01, dated December 12, 2012; **(3)** a "presentation" to the Nevada Senate Judiciary Committee, dated May 6, 2013; and **(4)** a Nevada Legislative Counsel Bureau Opinion, dated December 7, 2012.

2. The documents attached to LVDG's motion do not raise any new issues of law or fact because all four exhibits were previously available to LVDG prior to the Court's hearing on the motion to dismiss the second amended complaint on September 17, 2013.

3. The Court finds no manifest error in law or fact that would warrant it reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

4. The Court finds LVDG has not presented any newly discovered evidence that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

5. The Court finds no manifest injustice that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

6. The Court finds LVDG has not presented any change in controlling law that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

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**ORDER**

Based on the foregoing, the Court orders as follows:

LVDG's MOTION FOR RECONSIDERATION is **DENIED**.

IT IS SO ORDERED.

Dated this 21st day of January, 2015.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

**AKERMAN LLP**

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**IN THE SUPREME COURT OF NEVADA**

| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,<br><br>Appellant,<br><br>*vs.*<br><br>BANK OF AMERICA, N.A.,<br><br>Respondents. | Case No. 65083 |

**APPEAL**

From the Eighth Judicial District Court,

The Honorable Stefany A. Miley, District Judge

District Court Case No. A-12-654840-C

---

# APPELLANT'S APPENDIX VOLUME 2

---

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# INDEX OF APPENDIX

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*Attorneys for Las Vegas Development Group, LLC*

**IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF CLARK**

**-o0o-**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

*v.*

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No. A-12-654840-C
Dept. No. XXIII

OPPOSITION TO MOTION TO DISMISS

Arbitration Exemption:
Title to Real Property,
Declaratory Relief

COME NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Opposition to Defendant BANK OF AMERICA's Motion to Dismiss.

/ / /

/ / /

/ / /

/ / /

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This Opposition is made and based on the Points and Authorities set forth herein, the pleadings and papers on file herein, and arguments of counsel considered by the Court if a hearing is held.

DATED, this 28th day of August, 2013.

MEIER & FINE, LLC

By: /s/ Marilyn Fine .
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## POINTS AND AUTHORITIES

## I.

## STATEMENT OF FACTS

### A. Introduction

This action seeks to quiet title to real property located at 6279 Downpour, Las Vegas, Nevada, and identified by the Clark County Assessor as APN: 140-34-413-075. Plaintiff filed its Complaint on January 17, 2012, and Bank of America filed a Motion to Dismiss or in the alternative, Motion for More Definite Statement on February 27, 2012. This Court denied Bank of America's Motion at the hearing, which was held on April 10, 2012.

Bank of America filed an Answer to the Complaint on April 12, 2012. On September 14, 2012, Plaintiff filed a Motion for Leave to Amend its Complaint to add a claim for violation of NRS §107.080. A copy of the proposed First Amended Complaint was attached to the Motion for Leave. The proposed he First Amended Complaint is identical to the Complaint, but for an additional claim for violation of NRS §107.080.

Bank of America filed an Opposition to Plaintiff's Motion for Leave on October 3, 2012. This Court granted Plaintiff's Motion for Leave at the hearing which was held on October 16, 2012. However, it does not appear that the First Amended Complaint was ever filed.

Subsequently, both parties substituted different legal counsel. A Stipulation and Order for Leave to file a Second Amended Complaint was filed on August 1, 2013. The Second Amended Complaint is virtually identical to the initial Complaint, which survived Bank of America's previous Motion to Dismiss. The only substantive difference between the Second Amended Complaint and the initial Complaint is the addition of the former owner of the Property as a party (Defendant Genevieve Uniza-Enriquez). As a former owner of the Property, Genevieve Uniza-Enriquez claims an interest in the Property adverse to Plaintiff's interest in the Property. Accordingly, the Court cannot provide complete relief without the addition of this necessary party to the quiet title action.

On August 15, 2013, Bank of America filed a Motion to Dismiss the Second Amended Complaint, arguing for a second time that Plaintiff has failed to state a claim upon which relief

may be granted. Bank of America's Motion is inappropriate because this Court has already denied Bank of America's Motion to Dismiss Plaintiff's initial Complaint, which is virtually identical to the Second Amended Complaint but for the addition of an additional party.

Even if Bank of America's Motion were appropriate, the Motion should be denied because the Second Amended Complaint states a valid claim for relief based on NRS §30.010, NRS §40.010, NRS §116.001, et. seq. (Nevada's Uniform Common-Interest Ownership Act), and other applicable law.

**B. Statement of Undisputed Material Facts**

The Property is situated in the Development known as Palo Verde Ranch, and is subject to a Declaration of Covenants, Conditions, and Restrictions (the "CC&Rs), which were recorded on March 12, 2004. The Property is also subject to certain rules and regulations of the Palo Verde Ranch HOA (the "HOA"). See HOA Trustee's Deed in Exhibit M of Defendant's Motion.

The former owner, Genevieve Uniza-Enriquez, acquired the Property in 2006. A deed of trust in favor of Utah Financial, Inc. as lender and MERS as beneficiary was recorded on June 30, 2006. An assignment of the Deed of Trust from MERS to BAC Home Loans Servicing, LP ("BAC") was recorded in June 2010. See Deed of Trust and Assignment attached to Defendant's Motion as Exhibits A and D. It is believed that BAC is a subsidiary of Bank of America, and Bank of America claims a beneficial interest in the Deed of Trust.

As owner of the Property, Genevieve Uniza-Enriquez was obligated to pay HOA assessments. She stopped paying assessments in 2010 and as a result, the HOA took action to enforce and foreclose on its statutory lien by and through its agent, Absolute Collections Services, LLC ("ACS"). A Notice of Delinquent Assessment was recorded on April 1, 2010. A Notice of Default and Election to Sell under the HOA lien was recorded on July 14, 2010. A Notice of the HOA Lien Foreclosure Sale was recorded on November 18, 2010. See Exhibits I, J and K of Defendant's Motion.

The HOA Lien Foreclosure Sale took place on April 12, 2011, and LVDG acquired the Property at the HOA Lien Foreclosure Sale public auction. A trustee's deed upon sale was

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recorded by ACS in favor of LVDG on April 13, 2011 (the "HOA Trustee's Deed"). See HOA Trustee's Deed in Exhibit L of Defendant's Motion. LVDG was the highest bidder at the public auction. See last paragraph on the last page of the HOA Trustee's Deed in Exhibit L of Defendant's Motion. The HOA Trustee's Deed contains recitals stating that the default in payment of assessments for the Property occurred, and ACS "complied with all requirements of law, including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale." See last paragraph on the last page of the HOA Trustee's Deed in Exhibit L of Defendant's Motion.

## II.

## STATEMENT OF AUTHORITIES

### A. Legal Standard

Rule 12(b)(6) permits the Court to dismiss a complaint where it fails to state a claim upon which relief may be granted. In considering a motion to dismiss, the Court must take all well-pleaded allegations of material fact as true and construe them in a light most favorable to the non-moving party. Parlante v. Chase Home Finance, LLC, 2010 WL 3271511, *1 (D. Nev. 2010). There is a strong presumption against dismissing an action for failure to state a claim. Parlante at *1 (citations omitted). "It may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test." Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997). The test is "not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence in support of the claims." Gilligan at 249 (citations omitted).

### B. LVDG's Complaint States a Valid Claim for Relief

#### (1) This Court has Already Ruled on this Issue

This Court has already determined that Plaintiff's Complaint stated a valid claim upon which relief may be granted. In April 2012, this Court denied Defendant Bank of America's Motion to Dismiss pursuant to NRCP 12(b)(5). The only substantive difference between the initial Complaint and the Second Amended Complaint is the addition of the former owner as a

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party. Notwithstanding the foregoing, Defendant Bank of America argues (again) that Plaintiff's quiet title/declaratory relief claim fails as a matter of law. Consistent with its previous ruling, this Court should deny Defendant Bank of America's present Motion to Dismiss because LVDG's Complaint states a valid declaratory relief/quiet title claim as more particularly explained below.

**(2) LVDG's Claims are Based on the Plain Meaning of the Statutes**

LVDG's claims are valid based on the plain meaning of the following statutes: (a) NRS §30.010, et. seq. (Nevada's Uniform Declaratory Judgment Act); (b) NRS §40.010; and (c) Nevada's Uniform Common-Interest Ownership Act ("NUCIOA"). When a "statute is clear on its face, a Court may not go beyond the language of the statute in determining legislative intent." Diaz v. Eighth Judicial District Court, et. al., 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000).

**(a) LVDG Asserts Valid Claims under NRS §30.010, et. seq. and NRS §40.010**

LVDG's claims arise under Nevada's Uniform Declaratory Judgment Act and in particular, NRS §30.030 states in pertinent part:

> Courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

LVDG's claims also arise under NRS §40.010, which states:

> An action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim.

Pursuant to NRS §30.030 and NRS §40.010, this Court has the power to declare the rights and status of LVDG's interest in the Property vis a vis the former owner's adverse claims and interest in the Property (Defendant Genevieve Uniza-Enriquez). Additionally, this Court has the power to declare the rights and status of LVDG's interest in the Property vis a vis the lienholder's adverse claims and interest in the Property (Defendant Bank of America). With respect to Bank

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of America, this Court has the power to determine the validity, enforceability and priority of liens affecting the Property; and the effect of foreclosure on the parties' respective interest.

**(b) LVDG Asserts Valid Claims against the Former Owner under NUCIOA**

In determining the parties' rights and interests and adjudicating the adverse claims of LVDG and Defendant Genevieve Uniza-Enriquez, the Court should ultimately find that LVDG acquired the Property free and clear of the former owner's interest based on the plain language of the NUCIOA and in particular, NRS §116.3116(1) through §116.3116(7) (the "HOA Lien Statutes"):

1. NRS §116.3116(1) grants the HOA a statutory lien for assessments levied against the Property. NRS §116.3116(1) states in pertinent part: "the association has a lien on a unit for . . . 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."

2. The HOA's lien is perfected upon recordation of the CC&Rs pursuant to the express language of NRS §116.3116(4), which states: "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."

3. If assessments are not paid, NRS §116.31162 affords the HOA the right to foreclose on its statutory lien after providing the notices set forth in §116.31162 through §116.311635 and in accordance with the nonjudicial foreclosure sale procedures set forth in §116.31164(1) and §116.31164(2). The HOA's agent provides notice of the sale, and the property is sold at public auction in satisfaction of the lien "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." NRS §116.31164(2). After the sale, the person making the sale delivers a deed to the purchaser pursuant to NRS 116.31164(3)(a), and recitals made in the deed regarding the foreclosure notices are conclusive proof of the matters recited. NRS 116.31166(1) and (2).

4. Upon foreclosure of the lien pursuant to NRS §116.31162 through §116.31164, title to the property vests in the purchaser "without equity or right of redemption" pursuant to NRS §116.31166(3). This provision is similar to NRS §107.080(5), which provides

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that "title to the property vests in the purchaser the title of the grantor and any successors in interests without equity or right of redemption." The effect of foreclosure is the same under NRS §116.31166(3) and NRS §107.080(5). Foreclosure divests the former owner of title to the Property, and all legal rights to and equitable interest in the Property.

In this Case, LVDG acquired the Property at the HOA Lien Foreclosure Sale held in accordance with the HOA Lien Statutes and accordingly, LVDG has stated a valid claim for relief declaring that it acquired the Property free of the former owner's rights and interests.

**(c) LVDG Asserts Valid Claims against the Lienholder under NUCIOA**

In determining the parties' rights and interests and adjudicating the adverse claims of LVDG and Defendant Bank of America, the Court should ultimately find that LVDG acquired the Property free and clear of the lienholder's interest based on the plain language of the HOA Lien Statutes:

1. NRS §116.3116(1), which grants the HOA a statutory lien for assessments levied against the Property.

2. NRS §116.3116(4), which provides for perfection of the HOA's lien upon recordation of the CC&Rs.

3. NRS §116.3116(2), which ranks the priority of the HOA lien as to all other liens and encumbrances against the Property.

4. NRS §116.31162 through NRS §116.31168, which provides for nonjudicial foreclosure of the lien in the event of default.

5. NRS 116.31166(3), which provides that title to the property vests in the purchaser "without equity or right of redemption."

Pursuant to NRS §116.3116(2), the HOA lien is prior to all other liens and encumbrances, except: (a) liens and encumbrances recorded before the CC&Rs; (b) first security interests recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real estate taxes and governmental assessments. However, with respect to first security interests, the HOA lien has priority over the first security interest "to the extent of any of any charges incurred by the association on a unit pursuant to NRS 116.310312

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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." NRS §116.3116(2).

The priority exception for first security interests set forth in NRS §116.3116(2)(b) (hereafter referred to as the "First Mortgage Rule") and the exception to the First Mortgage Rule set forth in the second paragraph of this statute (hereafter referred to as the "Super Priority Rule") have the legal effect of bifurcating the HOA lien into two parts: (1) a super priority portion (limited to 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"); and (2) a sub-priority portion (consisting of the unpaid balance of delinquent assessments). Provisions of NRS §116.3116(2) provide for the following statutory priority scheme:

1st: liens for real estate taxes and other governmental assessments

2nd: super priority portion of HOA Lien up to a limited amount

3rd: first deed of trust

4th: sub-priority portion of the HOA Lien

5th : lien(s) recorded subsequent to recordation of the first deed of trust

Based on the plain meaning of the HOA Lien Statutes, the HOA had a valid perfected statutory lien, and a portion of this lien had priority over Defendant Bank of America's Deed of Trust. Because a portion of the HOA lien had priority over the subject Deed of Trust, foreclosure of the super priority portion of the lien extinguished the Deed of Trust by operation of law. As explained in Subsection B(4) below, foreclosure of senior liens extinguish junior liens pursuant to well established real property law.

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**(3) LVDG's Claims are Based on the Drafters' Intent**

Because the HOA Lien Statutes are clear and unambiguous, this Court need not look to legislative history to interpret the meaning of the statutes. However, a review of the Official Comments to the Uniform Common Interest Ownership Act ("UCIOA") shows that the drafters intended to grant the HOA a super priority lien up to a limited amount. [1] See State Bar Brief in **Exhibit 1** hereof and letter from one of the drafters, Carl Lisman, in *Exhibit A* attached thereto. Because the Nevada legislature adopted the UCIOA in pertinent part verbatim, it is reasonable to conclude that the Nevada legislature agreed with and intended to adopt the drafters' intent.

The drafters of the UCIOA designed the statute to provide for super priority lien in a de minimis amount and created a lien that could be foreclosed upon to give the HOA leverage. In so doing, the drafters designed the statute to balance the competing interests of the HOA and first deed of trust holder equitably. As explained in portions of the Official Comments to the UCIOA attached hereto in pertinent part as **Exhibit 2**, the statute strikes a balance between the association's need to enforce collection of unpaid assessments and the lender's security interest. See also State Bar Brief in **Exhibit 1** and Carl Lisman Letter in *Exhibit A* thereof.

Specifically, Comments for Section 3-116 of the Uniform Common-Interest Ownership Act of 1982 states in pertinent part:

> To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interest recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the

---

[1] The UCIOA was added to the Nevada Revised Statutes in 1991. See annotations to NRS §116.001 et. al. NUCIOA was adopted from the Uniform Common-Interest Ownership Act of 1982.

> association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

See Uniform Common-Interest Ownership Act of 1982, p. 155 in **Exhibit 2** hereof.

Based on the plain meaning of the UCIOA (which is virtually identical to the NUCIOA (except for changing 6 months to 9 months), a de minimis portion of the HOA lien has priority over a first deed of trust, resulting in the following priority scheme:

1st: liens for real estate taxes and other governmental assessments

2nd: super priority portion of HOA Lien up to a limited amount

3rd: first deed of trust

4th: sub-priority portion of the HOA Lien

5th : lien(s) recorded subsequent to recordation of the first deed of trust

The UCIOA Official Comments discuss this priority scheme on pages 96-106 in discussing distribution of proceeds upon termination of common interest communities. See excerpts from UCIOA Official Comments for §2-118 attached hereto as **Exhibit 3** and in particular, the examples on pages 97-99, providing for distribution of sales proceeds first to super priority portion of the HOA Lien, then to first deed of trust, then to sub-priority portion of the HOA Lien, then to junior lienholders, and then to owners in the event of any surplus.

Based on the plain meaning of the UCIOA/NUCIOA as supported by the drafters' Official Comments, the State Bar Brief and Carl Lisman's letter, this Court should find that a portion of a HOA lien has priority over a first deed of trust.

**(4) Foreclosure of the HOA Extinguishes All Junior Liens**

It is well establish law that foreclosure of a senior lien extinguishes junior liens by operation of law. See Erickson Constr. Co. v. Nev. Nat'l Bank, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973) (junior lien extinguished when lender foreclosed on Deed of Trust) citing Call v. Thunderbird Mortgage Co., 375 P.2d 169 (Cal. 1962) ("purchaser at foreclosure or execution sale takes title as of the date the lien vested and all subsequent or junior liens are eliminated"). See also Callahan v. First Commercial Title, Inc., 95 Nev. 441, 442, 596 P.2d 236, 237 (Nev.

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1979). As a result, foreclosure of a real estate tax lien and other governmental assessments, extinguishes an HOA lien, first deed of trust and all liens recorded after the first deed of trust; and the purchaser acquires title to the property free and clear of all liens. Likewise, foreclosure of the super priority portion of the HOA Lien extinguishes the first deed of trust, sub-priority portion of the HOA lien, and liens recorded after the first deed of trust. See State Bar Brief in **Exhibit 1**. In this circumstance, real estate tax liens and other governmental assessments survive the HOA Lien foreclosure. Accordingly, the purchaser at the HOA Lien Foreclosure Sale acquires title to the property subject to real estate tax liens and other governmental assessments.

Similarly, foreclosure of a first deed of trust extinguishes the sub-priority portion of the HOA lien and all liens recorded after the first deed of trust. However, the super priority portion of the HOA lien, real estate tax lien and other governmental assessments survive this foreclosure. As a result, the purchaser at a trustee's sale or judicial foreclosure sale under a deed of trust acquires title to the property subject to real estate tax liens and other governmental assessments as well as the super priority portion of the HOA lien.

The legal axiom for lien foreclosures (e.g., foreclosure of senior lien extinguishes all junior liens) applies to every type of lien in Nevada. Notwithstanding the foregoing, Bank of America urges this Court to find that this well establish rule does not apply to the HOA liens. Bank Of America argues that foreclosure of the super priority portion of the HOA lien does not extinguish the first deed of trust. If this were true, the HOA lien would be the only type of lien in Nevada that does not comply with the traditional rule. If the legislature intended such a drastic departure from the well-established rules, it would have said so. However, it did not. The HOA lien statute is silent in this regard, establishing a legislative intent to comply with the customary rule.

As explained in the State Bar Brief and supported by the UCIOA drafters' Official Comments attached hereto as **Exhibits 1 and 2**, the super priority rule achieves a balance between the interest of lenders and associations. The drafters recognized that while it was important to protect the lender's first security interest, it was equally important to ensure that the association collected at least a portion of a delinquent assessment lien.

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The UCIOA and NUCIOA have two purposes germane to this Case. The UCIOA/NUCIOA: (1) creates common interest communities; and (2) provides for the operation of the association. In a condominium community, the owners of units own their respective units, and the association and the owners own the common areas in the community. See generally NRS §116.093; NRS §116.095; NRS §116.2101; NRS §116.31038. See also State Bar Brief in **Exhibit 1**, Carl Lisman letter, *Exhibit A*. The associations manage the community and repair, maintain and improve the common areas. See NRS §116.3107, NRS §116.31073, and p. 6 of Preamble to Official Comments attached hereto as **Exhibit 4.** Typically, the associations are nonprofit corporations, which with few exceptions derive the majority of their revenues from assessments to its members (owners of property in the community, which are mandatory members of the association). Each year the association, prepares a budget estimating the cost of services (e.g., cost of managing the community and repairing, maintaining and improving the common areas) and determines the amount of assessments necessary to pay for these costs. See generally NRS §116.3102(1)(b). The drafters of the UCIOA recognized that if the owners failed to pay assessments, the association could not provide the services and accordingly, the planned community could not survive. See State Bar Brief in **Exhibit 1**, Carl Lisman letter, *Exhibit A*. To ensure collection of the assessments, the UCIOA granted the association a lien. See page 115 of UCIOA Official Comments for Section 3-116 in **Exhibit 2**. The existence of the lien encourages payment because in most states, foreclosure of a lien divests the owner's interest in the property and extinguishes junior liens by operation of law.

In enacting the NUCIOA and adopting the UCIOA virtually verbatim, the Nevada legislature demonstrated its agreement with the drafters' intent and in particular, the need to ensure the association's collection of at least a portion of its assessments. Since Nevada law provides for extinguishment of junior liens upon foreclosure of senior liens, collection of the super priority portion of the HOA lien was ensured because the owners or junior lienholders would pay the delinquent assessments to protect their interests in the property; or the property would be sold to the highest cash bidder at a HOA lien foreclosure sale, and the purchaser would acquire the property in satisfaction of the HOA lien.

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## C. This Court Should Reject Bank of America's Arguments

### (1) The Mortgage Savings Clause is Void

Bank of America's Motion argues that LVDG's claims are barred by a provision in the CC&Rs (referred to as the "Mortgage Savings Clause"), which states:

> [n]otwithstanding any other provision of this Declaration, no lien created under this Article V or under any other Article of the Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent.

This Court should reject Bank of America's argument because provisions of the NUCIOA cannot be varied, waived or evaded by the CC&Rs, except as expressly provided in the NUCIOA.

NRS §116.1104 states:

> **Provisions of chapter may not be varied by agreement, waived or evaded; exceptions.** Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in paragraph (b) of subsection 2 of NRS 116.12075, a declarant may not act under a power of attorney or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

NRS §116.1104 prohibits declarants from varying, waiving or evading provisions of the NUCIOA in the CC&Rs, except where sections of the NUCIOA expressly permit a variation in the declaration. NRS §116.1104 applies to the entire NUCIOA, including without limitation, NRS §116.3116, et. seq. (the "HOA Lien Statute"). Three sections of the HOA Lien Statute permit a variation in the CC&Rs.

NRS §116.3116(1) permits a variation for the inclusion of penalties, fees, charges, late charges, fines and interest in assessments. NRS §116.3116(1) states: "**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 enforceable as

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assessments under this section." NRS §116.3116(1) (emphasis added). As a result, the declarant may elect to exclude fines, late charges and/or other fees in the amount of assessments, and may include this variation of the HOA Lien Statute in the CC&Rs.

NRS §116.3116(3) permits a variation for the determination of priority for competing HOA liens. NRS §116.3116(3) states: "**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." NRS §116.3116(3) (emphasis added). Thus, the declarant may elect to alter the priority of competing HOA liens, and may include this variation of the HOA Lien Statute in the CC&Rs.

NRS §116.31164(2) permits a variation, regarding the association's right to purchase subject property at the HOA lien foreclosure sale. NRS §116.31164(2) states in pertinent part: "**Unless otherwise provided in the declaration or by agreement**, the association may purchase the unit and hold, lease, mortgage or convey it." NRS §116.31164(2) (emphasis added). Consequently, the declarant may elect to prohibit the association from acquiring property at the foreclosure sale, and may include this alteration of the HOA Lien Statute in the CC&Rs.

No other sections of the HOA Lien Statute permit a variation in the CC&Rs. In particular, NRS §116.3116(2) does not permit the declarant to alter this section of the NUCIOA. Pursuant to NRS §116.1104, the CC&Rs cannot alter the statutory scheme of priority or make any other variations contrary to the plain language of NRS §116.3116(2). As a result, any alteration to the statutory priority scheme results in a violation of NRS §116.1104.

NRS §116.1206(1) provides in pertinent part:

> Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.
>
> (b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other

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> governing document became effective before the enactment of the provision of this chapter that is being violated.

In this Case, the Mortgage Savings Clause in the CC&Rs violates NRS §116.1104 because it alters the statutory priority scheme of NRS §116.3116(2). As discussed, the plain language of NRS §116.3116(2) establishes the following statutory priority scheme:

1st: liens for real estate taxes and other governmental assessments

2nd: super priority portion of HOA Lien up to a limited amount

3rd: first deed of trust

4th: sub-priority portion of the HOA Lien

5th : lien(s) recorded subsequent to recordation of the first deed of trust

The Mortgage Savings Clause changes the statutory priority scheme to the following:

1st: liens for real estate taxes and other governmental assessments

2nd: first deed of trust

4th: the HOA Lien

5th : lien(s) recorded subsequent to recordation of the first deed of trust

The Mortgage Savings Clause varies the statutory priority scheme provided in NRS §116.3116(2) by eliminating the super priority portion of the HOA lien. Because the Mortgage Savings Clause varies the priority scheme of NRS §116.3116(2) in violation of NRS 116.1104, The Mortgage Savings Clause is void and has no force or effect. Pursuant to NRS §116.1206(1), The Mortgage Savings Clause "shall be deemed to conform" with NRS §116.3116(2) "by operation of law" - - - no amendment is necessary. Consequently, the Mortgage Savings Clause does not bar LVDG's claims as argued by Bank of America. Because the priority scheme in the Mortgage Savings Clause is deemed to conform to the priority scheme of NRS §116.3116(2) by operation of law, the Mortgage Savings Clause (as revised by NRS §116.1206(1)) supports LVDG's claims.

**(2) The HOA Lien Attaches and Perfects Upon Recordation of the CC&Rs**

Bank of America's Motion argues that the HOA statutory lien does not attach until after the senior deed of trust forecloses. The concept of attachment typically arises under Article 9 of

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Nevada's Uniform Commercial Code codified in Chapter 104 of the Nevada Revised Statutes (the "UCC") and in particular, statutes providing for the creation, attachment and perfection of security interests. A security interest is created upon execution and delivery of a security agreement (NRS §104.9105(1)(1)), but does not attach until there is an agreement for attachment, value is given, and the debtor has rights in the collateral. NRS §104.9203. The term "attachment" describes the event when the security interest "becomes enforceable against the debtor or third parties with respect to the collateral." See May v. G.M.B., Inc., 778 P.2d 424, 426, 105 Nev. 446, 450, f2 (Nev. 1989). It is well established that attachment occurs after creation of a security interest and before perfection of a security interest. See May at 426, 450, f2 and See May at 426, 450, f5 (citing NRS §104.9303(1): "a security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken").

Of course Article 9 of the UCC does not apply to security interests in real property (e.g., mortgages or deeds of trust) or other types of liens affecting real property such as statutory liens, judgment liens, attachment liens. See NRS §104.9109 (scope of applicability of UCC excludes real property). However, the fundamental concepts of creation, attachment and perfection of liens are generally applicable, and may assist the Court in ranking the priority of liens against real property.

As discussed, the HOA lien is a statutory lien created by NRS §116.3116(1). The HOA lien is perfected upon recordation of the CC&Rs pursuant to NRS §116.3116(4), which states:

> 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.

While the statute does not specify when the HOA lien attaches, the Court can reasonable conclude that the HOA lien attaches prior to or contemporaneously with recordation of the CC&Rs since as a matter of law, a lien cannot be perfected until the lien is created and attached.

Bank of America's argument that the HOA super priority lien does not attach and therefore, cannot be foreclosed upon until after foreclosure of a first deed of trust is disingenuous because it completely ignores the clear and unambiguous language of NRS §116.3116(4) (which

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perfects an HOA lien upon recordation of the CC&Rs) and NRS §116.31162 (which permits the HOA to foreclose on a delinquent lien). Moreover, Bank of America's argument is absurd because a deed of trust is extinguished upon foreclosure by operation of law. Callahan v. First Commercial Title, Inc., 95 Nev. 441, 442, 596 P.2d 236, 237 (Nev. 1979) (deed of trust is extinguished upon the sale of the property at foreclosure). Upon foreclosure, the foreclosing deed of trust no longer exists and accordingly, is no longer considered in the ranking of lien priority. If the HOA lien does not attach and the HOA could not foreclose until after the foreclosure of the first deed of trust as argued by Bank of America, no portion of the HOA lien would ever have priority over the first deed of trust because by the time the HOA lien attached and the HOA foreclosed, the first deed of trust is eliminated from the ranking of priority of liens.

Bank of America's reliance on NRS §116.31164 is a red herring because the statutory scheme for distribution of foreclosure proceeds has nothing to do with the ranking of priority of liens. NRS §116.31164 deals with distribution of proceeds following an HOA lien foreclosure sale, nothing more. The provisions do not suggest a legislative intent to negate NRS §116.3116(1) (creation of a HOA lien), NRS §116.3116(4) (perfection of an HOA lien); §116.3116(2) (ranking of priority of a HOA lien); and NRS §116.31162 through NRS §116.31166 (foreclosure of a HOA lien). Furthermore, NRS §116.31164 is consistent with other provisions of the statutes and virtually identical to NRS §40.462 (which provides for distribution of proceeds following foreclosure of liens against real property).

**(3) The Amount of the Lien does Not Negate Priority or Consequences of Foreclosure**

Bank of America's Motion argues that LVDG's interpretation of the HOA Lien Statutes would lead to unreasonable, inequitable, and absurd results because an HOA or third party purchaser could eliminate a lender's first deed of trust by paying off a de minimis assessment lien. However, the amount of a lien has no bearing on the legal effect of foreclosure. For example, if: two liens encumbered a parcel (e.g. mechanic's liens or other statutory liens, judgment liens, attachment liens, mortgages or deeds of trust); and the Court ranked the priority of the two liens in first and second priority position; and if the amount owed on the first priority lien was de minimis (e.g., $1,000.00) and the amount owed on the second priority lien was much

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larger (e.g., $1,000,000.00), the Court would still find that foreclosure of the first priority lien extinguished the second priority lien based on the fundamental principles of foreclosure. In so doing, the Court would not consider the amount owed on the respective liens (or on the loans secured by the respective deeds of trust) because the amount owed on the liens (or on the loans secured by the deeds of trust) has no impact on the fundamental axiom that a valid foreclosure of a senior lien extinguishes all subordinate liens. Once the court ranks the priority of a lien, foreclosure of the senior lien extinguishes all junior liens by operation of law.

Foreclosure of a HOA lien is governed by the same fundamental principles applicable to all lien foreclosure sales. As a result, foreclosure of an HOA lien extinguishes all subordinate liens. The subordinate liens attach to the proceeds of the sale, and are paid in accordance with their priority.

Bank of America argues that the foreclosure process is unfair and suggests that as a matter of equity, the legal effect of foreclosure should only apply in circumstances where the amount owed on the first priority lien exceeds the amount owed on the second priority lien; or at least where the amount owed on the first priority lien is not de minimis. However, the customary rules of lien priority and the legal effect of foreclosures should be evenly applied by the courts regardless of the circumstances. Bank of America would certainly be "whistling a different tune" if the "tables were turned" and Bank of America was defending foreclosure of a senior deed of trust secured by a loan with a de minimis unpaid balance. In this circumstance, Bank of America would argue and the Court would likely rule that the amount owed on the loan secured by a first deed of trust has no impact on the effect of foreclosure and that the junior lien was extinguished upon foreclosure of the deed of trust. The Court's analysis and conclusion of law should be the same in this Case.

The fact is that the foreclosure process is equitable because the junior lienholder can protect its interest by tendering the amount owed on the senior lien. Since the super priority portion of the HOA lien is limited, the first deed of trust holder can protect its interest by tendering the de minimis amount. The super priority portion of an HOA lien will always be relatively small to encourage the lender to pay the delinquent assessments so that budgeted

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services can be provided to the planned community. As discussed in Subsection B(3) above, the drafters of the UCIOA (which was adopted by the Nevada Legislature) designed the statute to provide for super priority lien in a de minimis amount and created a lien that could be foreclosed upon to give the HOA leverage. In so doing, the drafters designed the statute to balance the competing interests of the HOA and first deed of trust holder equitably.

**(4) Nonjudicial Foreclosure Provides Due Process**

Bank of America's Motion argues that LVDG's interpretation of the HOA Lien Statutes violates the due process clause. Bank of America's argument is flawed because the original lender, Utah Financial, Inc., had statutory notice of the HOA Lien prior to recordation of the Deed of Trust, and its assignee, BAC/Bank of America, had statutory notice of the HOA Lien prior to recordation of the Assignment of the Deed of Trust. As previously discussed, the HOA Lien was created and perfected upon recordation of the CC&Rs, which occurred prior to recordation of the Deed of Trust. Discovery will likely reveal that the loan underwriting criteria and FNMA selling guidelines recognized that a portion of the HOA lien had priority over the Deed of Trust, and show that the lenders had an opportunity to escrow 9 months of assessments to protect their security interest (which is the process contemplated by the drafters as discussed above).

Furthermore, Bank of America likely received actual notice of the HOA Lien Foreclosure Sale, and had an opportunity to protect its interest but failed to do so. As supported by the recitals in the HOA Trustee's Deed, the HOA foreclosing trustee, ACS, complied with all statutory notice requirements for the HOA Lien foreclosure. These statutory notice requirements are virtually identical to the statutory notice requirements for nonjudicial foreclosures under deeds of trust as described in the table below.

| *HOA Lien Statute* | *Deed of Trust Statute* | *Statutory Notice Requirement* |
|---|---|---|
| NRS 116.31162(1)(a) | NRS 107.080(2)(c)(3) | Notice of delinquency |
| NRS 116.31162(1)(a) | NRS 107.080(2)(c)(3) | Mail notice of delinquency |
| NRS 116.31162(1)(b) | NRS 107.080(2)(b) | Execute Notice of Default and Election to Sell (NOD) that describes deficiency in performance or payments |
| NRS 116.31162(1)(a) | NRS 107.080(3) | Record NOD |

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

Because a portion of the HOA Lien has super priority over a first deed of trust, the HOA foreclosing trustee is required to send a copy of the HOA Notice of Default and Notice of HOA Lien Foreclosure Sale to the record beneficiary under the first deed of trust based on: (1) NRS §116.3118(1), which incorporates the provisions of NRS §107.090 into the HOA Lien Statute; and (2) NRS §107.090(3), which requires the foreclosing trustee to send foreclosure notices to junior lienholders.

NRS §116.3118(1) states in pertinent part: "the provisions NRS §107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed."

NRS §107.090(3) states:

> The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080 cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
> (a) Each person who has recorded a request for a copy of the notice; and

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> (b) **Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**

NRS §107.090(3) (emphasis added)

Here, recitals in the HOA Trustee's Deed states that the foreclosing trustee "complied with all requirements of law, including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale." Pursuant to NRS 116.31166(1) and (2), these recitals are conclusive proof of the matters stated therein. Accordingly, LVDG can show that Bank of America received notice of the HOA Foreclosure proceedings.

**(5) The HOA Foreclosed on the Super-priority and Sub-priority Portions of the Lien**

Bank of America argues that LVDG has failed to state a valid claim upon which relief can be granted because the HOA foreclosure sale in this Case was not a super priority foreclosure sale. Bank of America suggests that because the super priority portion of an HOA lien is limited, the amount of delinquent assessments referenced in the foreclosure notices cannot change over time. Because the amount of delinquent assessments increased in this Case from the date of the Notice of Delinquent Assessments until the date of the HOA Lien Foreclosure Sale and because the notices did not identify the super priority portion of the lien, Bank of America argues that the HOA did not foreclose on the super priority portion of the HOA lien. Bank of America suggests that the HOA must foreclose on the super priority portion of an HOA lien separately from the sub-priority portion of the HOA lien. However, the HOA Lien Statutes impose no such requirement and it would be impractical and expensive to do so. The HOA may foreclose on the entire HOA lien, and foreclosure of the entire HOA lien extinguishes all junior liens. If the first deed of trust holder pays the super priority portion of the HOA lien, the HOA may continue with foreclosure of the sub-priority portion of the HOA lien; and foreclosure of the sub-priority portion of the HOA lien extinguishes all liens recorded after the first deed of trust.

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**(6) The HOA has No Obligation to Sell the Property for More than the Lien Amount**

Bank of America claims that the HOA Lien Foreclosure Sale in this Case is void because it was commercially unreasonable. In so doing, Bank of America relies on provisions Article 9 of the UCC, which requires secured parties to sell collateral in a commercially reasonable manner. See NRS §104.9610(2) ("every aspect of a disposition of collateral . . . must be commercially reasonable.") The commercial reasonableness requirement of NRS §104.9610(2) applies to foreclosure of security interests in personal property. It does not apply to foreclosure of liens against real property. See NRS §104.9109 (scope of applicability of UCC excludes real property).

Furthermore, NRS §116.31162(1) grants the HOA the right to foreclose on its lien, NRS §116.31164(2) permits the HOA or its agent to sell the property to the highest cash bidder. The statutes do not require the HOA to sell the property for more than the amount owed on the lien, an amount equal to the fair market value of the property, or an amount sufficient to pay the first deed of trust. Contrary to Bank of America's suggestion, the HOA has no obligation to protect the owners and the lenders. The owners and the lenders can protect themselves. The owner can protect its interest by paying the amount of the delinquency or bidding at the sale; and the lender can protect its interest by paying the super priority portion of the lien or bidding at the sale. The same is true under NRS §107.080, et. seq. When a lender nonjudicially forecloses under its deed of trust, it has no obligation to sell the property for more than the amount owed on the loan, an amount equal to the fair market value of the property, or an amount sufficient to pay subordinate liens. The lender can sell the property at a public auction to the highest cash bidder for the amount owed in satisfaction of the debt. The purchase price is only relevant if the lender desires to obtain a deficiency judgment, and in those cases, the legislature has imposed an element of fairness by requiring the Court to consider any discrepancy between the purchase price and fair

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market value in determining the deficiency amount. See NRS §40.455.

DATED this28th day of August, 2013.

Meier & Fine, LLC

By:/s/ Marilyn Fine .
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**INDEX OF EXHIBITS**

**Exhibit 1:** State Bar Amicus Brief was submitted by the Real Property Section of the State Bar of Nevada in Eighth Judicial District Court Case No. A-13-678858 with letter from one of the drafters, Carl Lisman, in *Exhibit A*

**Exhibit 2:** Official Comments to the Uniform Common-Interest Ownership Act (UCOIA) of 1982 for §3-116

**Exhibit 3:** Excerpts from UCOIA Official Comments for §2-118

**Exhibit 4:** Preamble to Official Comments, Uniform Common-Interest Ownership Act of 1982, p. 6

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28th day of August, 2013, I did serve a copy of the above and foregoing OPPOSITION TO BANK OF AMERICA'S MOTION TO DISMISS by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

| | |
|---|---|
| Ariel E. Stern, Esq.<br>Jacob D. Bunkick, Esq.<br>AKERMAN SENTERFITT LLP<br>1160 Town Center Drive, Suite 330<br>Las Vegas, NV 89144<br><br>*Attorneys for Defendant* | |

/s/ Cynthia Kelley
Cynthia Kelley, An employee of MEIER & FINE, LLC

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# Exhibit 1

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee FOR BAFC 2006-I, a national association; COMMUNITY ONE FEDERAL CREDIT UNION, a federal credit union; DINO J. PETRONE, an individual;

Defendant.

**CASE NO.:** A-13-678858-C

**DEPT NO.:** XX

**AMICUS CURIAE BRIEF OF THE REAL PROPERTY SECTION OF STATE BAR OF NEVADA IN OPPOSITION TO U.S. BANK NATIONAL ASSOCIATION'S MOTION TO DISMISS**

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## EXHIBITS

# TABLE OF AUTHORITIES

## A. INTRODUCTION

By its letter of June 5, 2013, the Court invited the Common-Interest Committee, Real Property Section, State Bar of Nevada (the "*Section*") to consider the filing of briefs in *amicus curiae* to assist the Court on a particular issue in the present proceeding, a Motion to Dismiss Amended Complaint ("*Motion to Dismiss*") filed by Defendant, U.S. BANK NATIONAL ASSOCIATION ("*US Bank*"). The issue, whether a first security interest on real property is extinguished by operation of law as a result of an association's foreclosure of its assessment lien pursuant to NRS 116.3116 *et seq.* (the "*Lien Priority Issue*"), is of substantial interest to the members of the Section. Accordingly, the Section, through its Executive Committee, sought and obtained approval of the State Bar of Nevada ("*State Bar*"), pursuant to Section 7.11 of the Bylaws of the State Bar, to file this brief. This brief is not intended to take the side of either party to this proceeding but to assist the Court in deciding the Lien Priority Issue.

## B. BACKGROUND

1. **Status of Proceeding.** Pursuant to its Amended Complaint ("*Amended Complaint*"), Plaintiff, SFR Investments Pool 1, LLC ("*SFR*"), seeks (a) a judicial determination that it is the owner of a home it acquired (the "*Property*") through an association foreclosure sale, free from any lien or other interest claimed by defendants, (b) to prevent US Bank, as the holder of a first deed of trust lien against the Property, from foreclosing on the Property and evicting the current tenant and (c) to recover certain monetary damages from the defendants. US Bank's Motion to Dismiss contends that the association's foreclosure sale did not extinguish the bank's lien and that it continues to have a valid first mortgage[1] against the property. SFR and US Bank have each filed papers supporting and opposing the motion.

2. **Facts.** For purposes of this brief, in accordance with the authorities noted by SFR in its Opposition to Motion to Dismiss,[2] the factual allegations contained in the

[1] The terms "mortgage" and "deed of trust" are used interchangeably in this brief.

[2] Opposition to Motion to Dismiss (herein, "*Opposition*"), page 5, lines 20 — 27.

Amended Complaint will be deemed to be true. The facts and "inferences in favor of the moving party"[3] contained in the Amended Complaint relevant to the Lien Priority Issue are as follows:

(a) Prior to June 2005: The Property is made subject to the jurisdiction of Southern Highlands Community Association (*"Southern Highlands CA"*) and a declaration (the *"Master Declaration"*) recorded in the Official Records of the Clark County Recorder (*"Official Records"*). While not entirely clear, the Property also appears to be subject to the jurisdiction of Defendant Foothills at Southern Highlands Homeowners Association, which seems to be a "sub-association" within the Southern Highlands CA.

(b) June 27 2005: Defendants Dino J. Petrone and Connie L. Petrone purchase the Property and give PHH Mortgage Corp. (*"PHH"*) a first deed of trust on the Property (the *"First DOT"*). US Bank is the successor in interest to PHH.

(c) March 5, 2010: Southern Highlands CA records Notice of Delinquent Assessment Lien against the Property.

(d) September 12, 2012: Southern Highlands CA conducts a foreclosure sale of its statutory assessment lien (the *"Southern Highlands Foreclosure"*) at which SFR is successful bidder.

(e) September 24, 2012: A deed is recorded in favor of SFR based on the Southern Highlands Foreclosure.

(f) March 12, 2013: Notice of Trustee's Sale recorded with respect to the First DOT.[4]

(g) March 26, 2013: SFR files Amended Complaint.

3. The Issue. As requested by the Court, the purpose of this brief is solely to

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[3] *Id.*

[4] The Amended Complaint alleges certain discrepancies involving the identification of the trustee and the beneficiary under the First DOT. For purposes of this brief, the notices required to initiate and conduct a trustee's sale under the First DOT are presumed to have been valid.

assist the Court in deciding the effect of a foreclosure by an "association" (NRS 116.011) of its statutory lien pursuant to NRS 116.3116 *et seq.* on a first priority "security interest" (NRS 116.087, 116.3116(2)(b)).[5] The Lien Priority Issue concerns the interpretation and effect of language in NRS 116.3116(2) which defines the relative priority of the liens of an association for unpaid assessments and a first deed of trust. In particular, NRS 116.3116(2) carves out for special treatment "assessments for common expenses based on the periodic budget adopted by the association . . . 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 lien is commonly referred to as the "super priority" lien.[6]

Although the Amended Complaint seeks to quiet title in the plaintiff against the holder of a second deed of trust and the sub-association, these issues are not before this Court in the Motion to Dismiss, which is limited to the competing interests of (a) the purchaser at an association foreclosure sale and (b) the holder of an existing first mortgage.

This brief does not address the amount of the super priority lien. The Section is aware that different interpretations exist under NRS Chapter 116 regarding whether collection costs are part of the super priority. The Section takes no position on this issue.

4. **Assumptions.** In order to facilitate the discussion in this brief, and narrow its focus, we have assumed the following:

(a) The Southern Highlands Foreclosure was based on unpaid general assessments for common expenses, i.e., based on the association's periodic budget.

(b) The First DOT was "recorded before the date on which the assessment sought to be enforced [by the Southern Highlands Foreclosure] became delinquent." (See NRS 116.3116(2)(b).)

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[5] Unless otherwise provided, terms which are defined in NRS Chapter 116 have the same meanings when used in this brief.

[6] NRS 116.31032 also gives "super priority" status to certain amounts expended by an association to maintain abandoned units or abate certain nuisances. This so-called "abatement lien" is not intended to be addressed by this brief.

(c) The holder of the First DOT was properly notified of the Southern Highlands Foreclosure.

(d) There exists no language in the Master Declaration or the First DOT or in any other agreement between the association and the holder of the first deed of trust nor has there been any conduct by or between the parties that would resolve or otherwise affect the Lien Priority Issue.

5. **Section Position.** While not all amounts owed to an association are included within the association's super priority lien, the Section agrees with the Plaintiff that an association has a *first* priority lien in an amount equal to the super priority. Accordingly, the Southern Highlands Foreclosure operated, as would the foreclosure of any other senior lien, to extinguish all junior liens. Accordingly, the Motion to Dismiss should be denied.

## C. DISCUSSION

1. **The Effect of Lien Priority.** Fundamental to the Lien Priority Issue is the effect of foreclosure on existing liens. The rule is clearly stated in Restatement Third, Property (Mortgages) §7.1 (the "*Restatement of Mortgages*"):

> 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. Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed.

The Nevada Supreme Court appears to take this result as given in *Brunzell v. Lawyers Title Insurance Corporation*, 101 Nev. 395, 396-97, 705 P2d. 642, 644 (1985) and *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350, 352, 512 P.2d 1236, 1238 (1973), but it is worthwhile noting that both *Brunzell* and *Erickson* involve priority determinations between a deed of trust and a statutory mechanics' lien, thus confirming that the general rule applies to both security interests and statutory liens, which include not only mechanics' liens under NRS 108.221 *et seq.*, but also association liens under NRS 116.3116.

Accordingly, if Southern Highlands CA's lien is prior to the lien of the First DOT, the Southern Highlands Foreclosure extinguished the lien of the First DOT. As noted below[7] the holder of a first mortgage has the opportunity to prevent this result by payment to the association of the super priority amount.[8]

2. **Statutory Construction.** SFR and US Bank both cite authorities supporting the basic principle of statutory construction, namely, if the statute is clear the court should not go beyond the language of the statute to determine its meaning.[9] The Section believes the meaning of NRS 116.3116(2) is clear on its face. The Section also, however, can supply additional support for that "plain meaning."

3. **UCIOA.** NRS Chapter 116 (sometimes referred to herein as "*NUCIOA*") was originally introduced in 1991 with the stated purpose of "adopt[ing] the Uniform Common-Interest Ownership Act [herein *"UCIOA"*]."[10] In 1991, the only version of

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[7] See discussion at C. 12 below.

[8] At this point it deserves mentioning that a "super priority" exists only in the context of a foreclosure sale by the association or the first mortgagee. That is, at the time the association forecloses its lien it is foreclosing a first priority lien in the amount of the super priority. Similarly, a first mortgagee may pay off the super priority amount at the time of its foreclosure and cause title to be conveyed free and clear from association delinquencies not included in the super priority. Payment to the association of an amount equal to nine months of assessments outside the context of a foreclosure sale does not result in the extinguishment of super priority. This is no different than the situation in which holder of a second mortgage cures a default under a prior mortgage in order to avoid becoming "sold out." Unless the holder of the junior lien fully satisfies the prior lien, the prior lien can once again become delinquent, placing the holder of the junior lien in the same position as it was before. New assessments continue to accrue following a foreclosure by either the association or the first mortgagee, and the association lien is not extinguished (even by payment of the super priority) as long as the common interest community continues to exist. The remedies of the holder of a junior lien which is unable to fully satisfy a senior lien are noted in *Comment a.* to §7.6 of the Restatement on Mortgages:

> Where subrogation to a mortgage is sought, the entire obligation secured by the mortgage must be discharged. Partial subrogation to a mortgage is not permitted. . . . While a subordinate mortgagee who makes partial payments on a prior mortgage . . . may not have subrogation, such a mortgagee may add the payment to the balance owing on the subordinate mortgage, and may recover it in foreclosure or in an action on the debt or for reimbursement of the payment, as appropriate.

[9] Motion to Dismiss, p. 7, lines 15-20; Opposition, p. 6, Footnote 3.

[10] Preamble of AB 221, introduced January 24, 1991; statement of introduction of AB 221, Minutes of the Assembly Committee on Judiciary, February 20, 1991. See also, *D.R. Horton v. Eighth Judicial Dist. Court*, 125 Nev. 449, 215 P.3d 697 (2009)

UCIOA was the original act ("*1982 UCIOA*"), approved by the National Conference of Commissioners on Uniform State Laws (the "*Uniform Law Commissioners*") in 1982.[11] The Uniform Law Commissioners approved amended versions of UCIOA in 1994 ("*1994 UCIOA*") and 2008 ("*2008 UCIOA*"). UCIOA synthesizes common principles previously contained in the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act, which were separately applicable to the three different forms of ownership referred to in UCIOA as "common-interest communities" (NRS 116.021). These three forms are condominiums, planned communities and cooperatives; each involves ownership of a separate "unit" (NRS 116.093), membership in an "association" (NRS 116.011) which is responsible for maintaining "common elements" (NRS 116.017) and payment for certain "common expenses" (NRS 116.019).[12]

4. **The Association Lien.** NRS 116.3116(1)-(4), which creates the association lien and establishes the super priority, is based on 1982 UCIOA § 3-116(a)-(d) with no changes other than section numbering, minor language ordering, and optional other exemptions not adopted. Since 1991, NRS 116.3116 has been amended, among other reasons, to include construction penalties, add abatement charges to the association's lien and change the number of super priority months from six to nine. While these amendments have expanded the scope and content of an association's super priority lien, none of the changes have altered the existence or priority of the association's lien described in those sections.[13]

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[11] The title page of 1982 UCIOA identifies the members of the Committee who drafted the act. Those named include Carl Lisman, mentioned below at C.12. The title page further identifies advisors who participated in the preparation of the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act, upon which UCIOA is based. Advisors included representatives from, among others, the National Association of Home Builders, Veterans Administration, Mortgage Bankers Association of America, Department of Housing and Urban Development, American Land Title Association, Federal Home Loan Mortgage Corporation (i.e., Freddie Mac), Federal National Mortgage Association (i.e., Fannie Mae) and National Association of Realtors.

[12] While not particularly important to the case before the Court, the Southern Highlands CA is most likely a "planned community" (NRS 116.075) in which the "unit" is a legally subdivided lot and the "common elements" most likely consist of certain common landscaping or recreational facilities owned by the association.

[13] Certain members of the Section's Common Interest Committee (not the Committee or the Section itself) worked successfully with the 2011 Legislature to update NRS Chapter 116 with most of the 1994 and 2008 changes to UCIOA. The group avoided suggesting legislative policy changes, including 1994 UCIOA changes to NRS

Pursuant to NRS 116.3116(1), an association has a lien for (i) assessments[14], (ii) fines[15], (iii) construction penalties[16], and (iv) reasonable inspection fees, notification and collection costs and interest charged against an abandoned unit.[17] The matter before the Court involves only the lien for assessments for unpaid common expenses.

Relevant to the issue before the Court, NRS 116.3116 currently reads as follows (with emphasis added):

> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . 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. . . .[18]
>
> 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 . . .;
>
> (b) A first security interest on the unit recorded 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 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

116.3116(1) and (2) discussed below at C.8.

[14] NRS 116.3102(1)(b), 116.3115

[15] NRS 116.3102(1)(n), 116.31031

[16] NRS 116.3102(1)(1), NRS 116.310305

[17] NRS 116. 3102(1)(j), 116.310312, commonly referred to as an "association abatement lien."

[18] As noted in B.3 above, the Section does not address whether the amount of the super priority lien includes amounts other than the assessments themselves.

> 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. . . .

> 4. 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.

It is worthwhile noting that the Uniform Commissioners also reorganized 3-116 [NRS 116.3116] in 2008 UCIOA, in a manner that helps clarify the relationship between the lettered paragraphs of 3-116 (b) [NRS 116.3116(2)] and the unlettered paragraph at the end of 3-116(b). The current version of UCIOA (i.e., 2008 UCIOA) now reads (as it pertains to assessment liens) as follows, with the clarifications noted in italics:

> (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (1) liens and encumbrances recorded before the recordation of the declaration . . . ;
>
> (2) *except as otherwise provided in subsection (c),* a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ; and
>
> (3) liens for real estate taxes and other governmental assessments . . . ;
>
> (c) A lien under this section is also prior to all security interests described in subsection (b)(2) to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. . . .[20]

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[19] See the discussion in C.12 and C. 13 below concerning Fannie Mae guidelines.

[20] While a clarification of the language dealing with the relationship between 116.3116(2)(b) and the unlettered paragraph at the end of NRS 116.3116(2) would have been more in the nature of a "technical fix" than a policy

5. **Creation, Perfection and Priority in General.** NRS 116.3116(1) states, in pertinent part: "The association has a lien on a unit for ... any assessment levied against that unit . . . from the time the . . . assessment . . .becomes due." NRS 116.3116(4) states: "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."

a. **Creation or Attachment.** Enforcement of a lien involves the distinct concepts of *creation* or "attachment" and *perfection*. A lien, whether created by law (e.g., mechanic's lien or assessment lien) or agreement (e.g., a deed of trust) is fully enforceable between the affected parties whether or not it is *perfected*. Thus, an unrecorded conveyance is not declared to be ineffective between the parties but "shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded." NRS 111.325. The same concept is contained in Article 9 of the Uniform Commercial Code (*"Article 9"*): "A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment." NRS 104.9203.

b. **Perfection by Filing or Recording.** In order for a lien or security interest to be effective against persons who are not parties to the lien transaction itself, the lien or security interest must be *perfected*. *Black's Law Dictionary*, Ninth Edition (2009), defines "perfection" as "Validation of a security interest as against other creditors, usu. by filing a statement with some public office or by taking possession of the collateral." Perfection establishes the rank or *priority* of different liens or security interests in the same property. Typically perfection is accomplished by public filing or recording of a notice of the lien or security interest.

At common law, the basic rule regarding priority involving claims or interests involving real estate was known as "first in time, first in right." The rule has been changed

change, members of the Section who participated in the 2011 UCIOA amendments to NUCIOA avoided proposing any amendments to NRS 116.3116(1) or (2), but did support the addition of what now appears as NRS 116.3116(10).

by the enactment of modern recording statutes, as noted by the Nevada Supreme Court:

> At common law, where there were successive conveyances of the same legal interest in land, the first in time was superior in right. 6 R. Powell, The Law of Real Property 912 (1968). Recording statutes provide 'constructive notice' of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected. 'Constructive notice is that which is imparted to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know.' 8 Thompson on Real Property § 4293, at 245–46. . . . A duty of inquiry is said to arise 'when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose.' 4 American Law of Property § 17.11, at 565–66 (1952). In 8 Thompson, supra, § 4310 at 347, it is likewise said: 'A recital in an instrument of record charges subsequent purchasers with notice of all material facts which an inquiry suggested by that recital would have disclosed.
>
> *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 497-98, 471 P.2d 666 (1970).

Nevada permits the recording in the real property records of "Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected. . . ." NRS 111.315. "Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." These same statutes play a fundamental role in the establishment of the common-interest community, since, pursuant to NRS 116.1201, the community can only be created by "recording a declaration executed in the same manner as a deed."

c. **Date of Perfection.** Attachment and perfection of liens is not always straightforward. For example, under NRS 108.222, a contractor "has a lien upon the

property, any improvements for which the work, materials and equipment were furnished or to be furnished. . . ." Although the lien exists (i.e., it has been created) by virtue of the furnishing of work, materials or labor, it must be perfected in order to be enforced against the property. "To perfect a lien, a lien claimant must record a notice of lien in the office of the county recorder of the county where the property or some part thereof is located . . . . " NRS 108.226(1). Perfection of a mechanic's lien, however, *relates back* to the date work on the improvement commenced.

Pursuant to NRS 108.225 a mechanics' lien has priority over a lien or deed of trust which attaches to the applicable property "after the commencement of construction of a work of improvement" or of which "the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement." NRS 108.225(1). Moreover, the mechanics' lien is prior to "Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement . . . regardless of the date of recording the notices of liens." NRS 108.225(2).[21]

In other words, a mechanics' lien exists as of the date the work is commenced, but must be perfected in order to be enforced. In a somewhat similar fashion, a purchase money security interest in goods under Article 9 can relate back "if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter." NRS 104.9324.

**d. Priority Amounts.** The amount secured by the lien or security interest is often limited. Mechanics' lien statutes limit the amount of the lien to the contract amount or, if none, the fair market value of the work or materials. NRS 108.222(1). The amount of a real estate loan entitled to the priority of the mortgage is also limited. Non-obligatory advances secured by a deed of trust may be junior to

[21] There is no magic language necessary to create statutory priority. NRS 108.225, entitled "Priority of liens," states that a mechanics' lien is "preferred" over subsequent liens.

intervening liens:

> if STM were legally obligated to lend Renaissance additional funds to complete the project, all amounts loaned under the original acquisition and development loan and all subsequent advances made under interim construction loans would relate back to the security of the December 1981 deed of trust. Such circumstances would result in STM's holding a priority lien by its deed of trust which is superior to all other liens, including the mechanic's liens claimed by the named respondents. Therefore, the dispositive question in this case and on this appeal is whether the future advances made by STM were obligatory and thus secured by the December 1981 deed of trust. [Footnote omitted.]
>
> *Southern Trust Mortg. Co. v. K & B Door Co., Inc.*, 104 Nev. 564, 566, 763 P.2d 353, 354 (1988).

On the other hand, by electing to comply with NRS 106.360, lenders may avoid intervening liens by making optional future advances in accordance with NRS 106.300-106.400.[22]

6. *"Liens" and "Security Interests."* What is a lien? According to the Nevada Supreme Court, "a lien is a security device that binds property to a debt and puts a party on notice that someone besides the owner of the property has an interest in that property. It is 'a claim, encumbrance, or charge on property for the payment of some debt, obligation or duty.' Repayment of the debt evidenced by the lien does not occur until the property is sold or foreclosed upon. [Footnotes omitted.]" *State of Nevada Department of Human Resources v. Estate of Ullmer*, 120 Nev. 108, 117, 87 P.3d 1045, 1051 (2004).

Up to this point no distinction has been made between the terms "lien" and "security interest." Indeed, the terms usually mean the same thing, though a security interest is often considered to be a consensual lien whereas an involuntary charge, such as a tax lien or a mechanics' lien, is not usually referred to as a security interest. NRS Chapter 116 defines "security interest" to mean:

> an interest in real estate or personal property, created by

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[22] Pursuant to the holding in *In re Resort at Summerlin Litigation*, 122 Nev. 177, 127 P.3d 1076 (2006), application of the future advance priority rules of NRS 106.300 *et seq.* is optional not mandatory. NRS 106.360 provides that a borrower "may" execute a deed of trust which secures future advances. In contrast, NRS 116.3116 does not provide for optional super priority, the statute states that "the lien *is* also prior..."

> contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association and any other consensual lien or contract for retention of title intended as security for an obligation.
>
> NRS 116.087

7. **Liens and Security Interests in NRS 116.3116.** The absence of a legal distinction between a lien and a security interest does not mean that the two terms cannot be used to refer to different things Rules of grammar permit similar words to have different meanings depending upon their placement in the sentence and modifiers, which is the case in NRS 116.3116.

NRS 116.3116 uses both terms, as emphasized in the following provisions: "The association has *a lien* on a unit for . . . . any assessment." NRS 116.3116(1). The "*lien* under this section" is prior to all other "*liens and encumbrances*" except (a) "*Liens and encumbrances* recorded before the recordation of the declaration," (b) "A first *security interest* on the unit recorded before the date on which the assessment sought to be enforced became delinquent" and (c) "*Liens* for real estate taxes and other governmental assessments." NRS 116.3116(2)

The lien referred to as "*The lien*" or "*the lien*" in the last paragraph of NRS 116.3116(2) is clearly intended to refer to the association lien, which is the lien described in detail, and the only lien referenced, in NRS 116.3116(1). References to "the lien" or "a lien" throughout NRS 116.3116 are thus references to the association's lien, as can be seen from the context of the usage. In contrast, the "lien" of a deed of trust or mortgage is clearly identified in NRS 116.3116(2)(b) as a "security interest."

8. **Perfection of the Association Lien.** NRS 116.3116(4) states that *recordation* of the declaration *perfects* the association's lien. Perfection of a lien gives it priority over liens or security interests perfected later in time, and validates the lien interest against other creditors. NRS 116.3116(1) further states, however, that the

association "has a lien . . . *from the time the . . . assessment . . . becomes due.*" These last words appear to be inconsistent with the words in NRS 116.3116(4) stating that the recording of the declaration perfects the lien. The conflict is compounded by the fact that the common-interest community only comes into being when the declaration is recorded, a time as of which there can be no unpaid assessments, since the budget, which gives rise to assessments, cannot be adopted until the community is created. Therefore, an ambiguity exists as to the timing of the creation of an association's lien under NRS 116.3116. "A statute is ambiguous when it 'is capable of being understood in two or more senses by reasonably informed persons' or it does not otherwise speak to the issue before the court." *Attorney General v. Nevada Tax Commission*, 124 Nev. 232, 249, 181 P.3d 675, 681 (2008).

When interpreting an ambiguous statute, this court will review the legislative history to determine the Legislature's intent. *Id.* at 240. If "a statute is ambiguous, because it is susceptible to more than on reasonable interpretation, this court will construe a statute by considering reason and public policy to determine legislative intent." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009)* (citing *Cable v. EICON, 122 Nev. 120, 124-25, 127 P.3d 528, 531 (2006).*

While NRS Chapter 116 was adopted with scant legislative history, NUCIOA is based on UCIOA, which includes interpretive comments by the drafters to clarify the meaning of its provisions. 1982 UCIOA did not address the apparent conflict involving the date of the lien, but 1994 UCIOA did. Revisions in 1994 UCIOA deleted the language "from the time the assessment or fine becomes due" from 3-116(1). Comment 1 to § 3-116 states:

> Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities

identified in subsection (b) of the section [i.e., NRS 116.3116(2)]. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest communities.

As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

As the Comment from 1994 UCIOA (also contained in 2008 UCIOA) explains, the language "*from the time the assessment or fine becomes due*" as it appears in UCIOA 1982 § 3-116(a), adopted as NRS 116.3116(1) in 1991, always referred to the timing of the *enforceability* of the association's lien, while the lien itself *arises* (and is perfected without further notice) upon the recordation of the declaration.[23]

The association lien is in many ways similar to a mechanics' lien, which, as mentioned above, arises when work is begun, but is not enforceable unless payment for the work is not made. Property tax liens operate in a similar way. The lien exists, but the amount is determined annually, as set forth in the following provisions from NRS

[23] In addition to potential ambiguities in the statutes, customary terminology, industry usage or imprecise wording can give rise to misunderstanding. For example, the Amended Complaint (p. 3, line 16) refers to a Notice of Delinquent Assessment Lien as the "HOA Lien." In the experience of the authors of this brief, the common-interest community collection industry typically adds the word "lien" to the title of the notice required to be mailed to a unit's owner pursuant to NRS 116.31162(1)(a), to begin the non-judicial foreclosure process. The statute simply refers to this as a "notice of delinquent assessment" ("*NODA*"). The NODA is *not* required by statute to be recorded. In practice, however, some title and escrow companies have overlooked the fact that *recordation* of the declaration constitutes record notice and perfection of the lien, and in some escrow closings, the association lien was not paid, resulting in a new owner being pursued by the association for the unpaid assessment. To avoid this situation, collection companies began recording the NODA and adding the word "Lien" to the title. This causes the Clark County Recorder's Office to index the recorded NODA as a lien, and the result appears in a title search as a lien.

Some Nevada courts have mistakenly referred to a recorded NODA as a "lien" in their rulings. This misunderstanding is most clearly illustrated in *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.* (2013 WL 531092 (D. Nev.) (Feb. 11, 2013) in which the court states "the HOA recorded a lien (the 'Assessment Lien')" (presumably the NODA) and that the association foreclosure did not extinguish the first mortgage because "the Deed of Trust was recorded on August 30, 2007 and the Assessment Lien was recorded on January 24, 2011." Since it is the recording of the declaration, not the NODA, which creates and perfects the lien, a NODA is simply notice of an association's prior existing lien.

361.450:

> 1. Except as otherwise provided in subsection 3, every tax levied under the provisions of or authority of this chapter *is a perpetual lien* against the property assessed until the tax and any penalty charges and interest which may accrue thereon are paid. Notwithstanding the provisions of any other specific statute, such a lien and a lien for unpaid assessments imposed pursuant to chapter 271 of NRS is superior to all other liens, claims, encumbrances and titles on the property, including, without limitation, interests secured pursuant to the provisions of chapter 104 of NRS, whether or not the lien was filed or perfected first in time.
>
> 2. Except as otherwise provided in this subsection and NRS 361.739, the lien *attaches* on July 1 of the year for which the taxes are levied, upon all property then within the county. . . . [Emphasis added.]

9. **Priority of an Association's Lien.** NRS 116.3116(2) contains the rules governing the priority of the association's assessment lien. NRS 116.3116(2)(b) states that a first security interest, such as a First DOT recorded before an assessment sought to be enforced by an association becomes delinquent, is prior to the association lien. However, the last paragraph of NRS 116.3116(2), after subparagraphs (a) — (c), alters the previously stated priority and creates the super priority lien. The association super priority lien is actually a portion of the association's overall lien for unpaid assessments.

Two reported Washington cases address the effect of an association foreclosure on a first mortgage. Although the issue before the court in *Summerhill Village Homeowners v. Roughley*, 270 P. 3d 369 (Wash App., 2012) involved whether the holder of a first lien was entitled to redeem a foreclosed unit following a condominium association's judicial foreclosure sale, the court noted:

> Therefore, under the statute, Summerhill's 2008 assessment lien had priority over the 2006 deed of trust to the extent of Summerhill's assessments for common expenses. Deutsche Bank's predecessor, MERS, was included in and notified of the foreclosure action, but GMAC, as the loan servicer, did not facilitate payment of the assessment lien prior to the sheriff's sale. The sale extinguished the 2006 deed of trust. The question now is whether Deutsche Bank can redeem.

The Washington statute creating and providing for the foreclosure of the

association's lien is quite similar to NRS 116.3116.[24] The inability of the bank to redeem the property, however, was based on the wording of the redemption statute, not the condominium statute:

> The problem with [the lender's] argument is that the language of the [condominium] statute is unambiguous, and the expressed legislative intent is consistent with the language. The legislature created the super priority lien and did not amend the redemption statute. There is no sign of legislative confusion as to the difference between a lien subsequent in time and a lien prior in time but junior in priority. And it is evident from the official comment that the consequences of that difference were intentional: "As a practical matter, mortgage lenders will most likely pay the assessments . . . *rather than having the association foreclose on the unit and eliminate the lender's mortgage lien.*" [Footnote omitted; emphasis in original.]

In Footnote 17, the *Summerhill* court further observed: "GMAC did not attempt to pay the assessments; it waited silently until after the super priority lien was foreclosed, and then tried to redeem."[25]

In *BAC Home Loans Servicing, LP v. Fulbright*, 298 P. 3d 779 (Wash. Ct. App., April 8, 2013), the Washington Court of Appeals reaffirmed the *Summerhill* holding that an association foreclosure results in the elimination of the first deed of trust.[26] While

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[24] RCW 64.34.364 (2013) [See http://apps.leg.wa.gov/rcw/default.aspx?cite=64.34.364] reads in pertinent part:

> (1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.
>
> (2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. . . .
>
> (3) Except as provided in subsections (4) and (5) of this section, *the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association* pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract. . . .
>
> (7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. . . . [Emphasis added.]

[25] Nevada law governing non-judicial foreclosures does not provide for redemption from an association foreclosure sale. The association lien, like a deed of trust, may not be foreclosed non-judicially until the pre-sale notice periods have expired. The "redemption" period thus occurs before, rather than after, the sale.

[26] In contrast to the holding in *Diakonos*, discussed at Footnote 23 above, the Order Granting Preliminary Injunction

*B4C* case also involved application of the Washington redemption statute, both the court and the lender acknowledged that the association's foreclosure extinguished the first mortgage, even though the association's lien cannot arise until assessments become unpaid.

> The bank argues that lien comes into existence at the time the declaration of condominium is recorded because under subsection (7), the recording if the declaration "constitutes record notice and perfection of the lien for assessments." . . .
>
> The meaning of subsection (7) is that the recording of the condominium declaration "constitutes record notice and perfection of the lien for assessments" that may arise in the future as provided by subsection (1). Recording of the declaration does not accelerate when an actual lien for any given assessment arises or first exists. Recording of the declaration simply gives notice to the world that assessment liens may arise in the future against units in the condominium.

10. **Bifurcation.** The priority of an association's assessment lien may be said to be bifurcated. That is, an association has a first priority as to the super priority and a third priority as to the balance, with the amounts secured by the first security interest coming between the two portions of the associations lien.[27]

It may be argued that NRS 116.31164(3)(c), addressing how the proceeds of an association foreclosure sale are applied, conflicts with the concept of bifurcating the association's lien into a first and third priority lien. This statute provides that, after the sale, the person conducting the sale shall:

> Apply the proceeds of the sale for the following purposes in the following order:

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in *SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A.* (District Court, Nev., Case No. 2:13-cv-01153-APG-PAL, Filed July 25, 2013) concluded, in accord with *Summerhill* and *BAC*, that NRS 116.3116 is not ambiguous and that "the proper foreclosure of the Association's lien containing super priority amounts would have extinguished the Deed of Trust."

[27] In *Chartz v. Cardelli*, 52 Nev. 1, 279 P. 761, 763-764 (1929), the court found that the plaintiff, who held a first mortgage, had voluntarily advanced amounts to the mortgagor after having knowledge of a second mortgage. The Court concluded that although the plaintiff continued to hold a first mortgage in the amount of $2,000, a portion of the amounts due the plaintiff were subordinate to the second mortgage, thus the plaintiffs mortgage was a first and third lien and the "the chancellor was right in holding that the lien of the second mortgage was superior to that of the first, as to the sum of $435."

(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.[28]

If the association has a first and a third lien, subsection (3) above should be limited to the amount of the super priority.

NRS 116.31164(2) creates a similar conflict by providing that, at the time of the sale, "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."[29] Ordinarily, it is only the holder of the lien being foreclosed that may credit bid. All others must bid and pay in cash.[30] Thus permitting the association to credit bid up to the full amount of its assessment lien is inconsistent with the association foreclosing a first and a third lien. An argument may be made that the reference to the "association's lien" in NRS 116.31164(3)(c)(3) refers to the amount of the super priority and not the entire amount of the association lien; that proceeds of the sale in excess of the super priority lien

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[28] NRS 40.462, applicable to deeds of trust and mortgages, provides for a similar ordering of sales proceeds. Similar language appears in 1982 UCIOA, 1994 UCIOA and 2008 UCIOA, but only in connection with an association foreclosure on certain types of cooperatives. See, 1982 UCIOA and 1994 UCIOA Section 3-116(k)(3); 2008 UCIOA Section 3-12116 (1)(3).

[29] No similar provisions are found in UCIOA, other than in connection with certain co-op foreclosures, in this case simply permitting the association to buy at a public sale of the co-op being foreclosed.

[30] See, for example, NRS 107.030(6), which is one of the statutory provisions that may be incorporated into a deed of trust by reference:

> . . . the trustee may sell the property so advertised, or any portion thereof, at public auction . . . to the highest cash bidder. The beneficiary, obligee, creditor, or the holder or holders of the promissory note or notes secured thereby may bid and purchase at such sale.

should be paid to the holder of the first security interest.

These two statutes, dealing with sales proceeds and bidding procedures, raise interpretational issues about the association foreclosure sale procedure, not the effect of the sale on title. Thus, while the holder of a first security interest might argue that (i) an association that acquires a unit by a credit bid in excess of the super priority lien should pay to that holder cash in the amount by which the credit bid exceeds the super priority amount and (ii) in an all cash bid by a third party, the holder of the first security interest is entitled to receive cash proceeds in excess of the super priority amount, neither of these claims address the title acquired by the purchaser at an association lien foreclosure *vis a vis* the lien of the first mortgage in and to the unit.

Notwithstanding these ambiguities, it is also possible, of course, for the statute to mean precisely what it says, namely, that an association may credit bid the full amount of unpaid assessments and is entitled to all proceeds up to the amount of its lien.

11. **When the Super Priority Lien Amount is Determined; "Institution of an Action."** The amount of an association super priority lien is established by the assessments for common expenses based on the periodic budget during the 9 months immediately preceding institution of an action to enforce the association's lien. NRS 116.3116(2)( ). As previously pointed out, the words ". . . *institution of an action to enforce the lien*" at the end of the quoted language from NRS 116.3116(2)( ) refer to institution of an action to enforce the association's lien.

As examined more fully below, at C. 12 regarding the super priority lien, Comment 1 to 1982 UCIOA contains the following: "As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." The "6 months' assessments" refers to the super priority lien, and the sentence contemplates that a lender would pay the amount to protect its interest in a foreclosure sale by an association. Were not an association's foreclosure the "action" which determines a super priority lien, this statement would make no sense.

Drafters of 1982 UCIOA gave states a choice as to the "*action*" used by an

association to enforce its lien through foreclosure. 1982 UCIOA § 3-116(j) contained the following language regarding foreclosure of condominium and planned community units:

> (j) 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 by power of sale under [insert appropriate state statute] ];

The language in brackets indicated optional or alternative provisions. The Nevada Legislature chose the option of allowing associations to foreclose through the power of non-judicial trustee's sale. NRS 116.31162 through NRS 116.31168. The requirements of these sections closely track the requirements of the non-judicial foreclosure of deeds of trust contained within NRS 107.080 at the time NRS Chapter 116 was enacted.

*Black's Law Dictionary*, Ninth Edition (2009), defines "action" as "*The process of doing something; conduct or behavior.*" The process of foreclosing an assessment lien upon a unit in a common-interest community begins with the mailing by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, a notice of delinquent assessment, pursuant to NRS 116.31162(1)(a), and constitutes "*institution of an action*" for purposes of NRS 116.3116(2)(c)

12. **The History of Super Priority.** NRS 116.3116(2)(c) states that the association super priority lien is "*prior to*" all security interests described in paragraph (b) (i.e., a first security interest) in an amount of 9 months' assessments based upon the periodic budget. *Black's Law Dictionary*, Ninth Edition (2009), defines "priority" as "*The status of being earlier in time or higher in degree or rank; precedence.*" "Prior lien" is defined as "*A lien that is superior to one or more other liens on the same property, usu. because it was perfected first.*" NRS 116.3116(2)(c) provides that a limited portion of the association lien is prior to the first security interest: an amount determined when the association initiates action to enforce its lien, which was perfected prior in time to the first security interest by the recording of the declaration.

Comment 1 to the 1982 UCIOA § 3-116, from which NRS 116.3116(2) was

adopted, confirms the priority of an association super priority lien over a first security interest, and states, in pertinent part:

> To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. *However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose n the unit.*[31] If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary. [Emphasis added].

As noted above[32] Carl H. Lisman, Esq., who joined the Uniform Law Commission in 1976, was on the 1982 UCIOA drafting Committee, and was chair of that Committee in 1994 and 2008 when revisions to the UCIOA were adopted. In a letter to the Section's Common Interest Committee, dated May 29, 2013 ("*Lisman Letter*" attached as Exhibit A), he commented on the nature and effect of the association super priority lien, the "*equitable balance*" between the interests of associations and lenders described in the comments to UCIOA 1982, and his participation in the drafting of the UCIOA, as such:

> 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.

[31] Compare the language quoted in *Summerhill* in C. 8 above.

[32] See Footnote 11 above.

However, if the association's only realistic remedy is foreclosure, 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 enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of the lenders."

*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 borrower to escrow for association assessments in the same manner as lenders require escrow for property taxes and casualty insurance.

*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.*

*That 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."

[Footnotes omitted. Emphasis added.]

The Official Comments to 1982 UCIOA § 3-116 do not explicitly state that foreclosure of an association super priority lien extinguishes a first security interest, though that is clearly implied by the comment that "secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." There would be no need to pay the amount if there were no consequences to the lender's interests by the association's foreclosure if it failed to do so. As Lisman notes above, however, the first security interest is extinguished by the sale if the lender does not protect its collateral by paying the association super priority lien amount.

Neither NRS 116.31166, nor NRS 107.080, regarding association foreclosure sales or lender trustee's sales respectively, explicitly state that the foreclosure of the superior interest extinguishes all junior liens and transfers absolute title to the purchaser. It is well-settled, however, that a foreclosure sale extinguishes all junior security interests against the property.[33] Thus it follows that a foreclosure of the association's super priority lien extinguishes the first security interest (as well as all other security interests and junior liens and encumbrances) since the association lien is "prior to" the first security interest.

On January 23, 2006, Lisman, in a presentation to the Maryland Task Force on Common Ownership Communities ---- Maryland Department of Housing and Community Development, explained that the concept of the association super priority lien came from an analogy to municipal taxes. He explained that a lender "will never want to see the property sold for unpaid property taxes," and that like municipal taxes, an association super priority lien has priority over a first security interest, and that the lender will pay the amount to the association, to avoid foreclosure of its interest, giving the association "some power of great importance" while allowing the lender to "get the comfort of good title" and avoid having "their mortgage lowered in priority." *Background on the formation & birth of The Uniform Common Interest Ownership Act*, Article available at http://epohoa.org/component/content/article/143-have-you-read/178-epohoa-library-birth-

[33] See discussion at C. 1 above.

of-ucioa (last checked June 16, 2013).

The analogy to municipalities and taxes, mentioned in the Official Comments to the 1994 and 2008 UCIOA § 3-116 above and the Lisman Letter, aligns with the purpose and function of common-interest communities. Although not "quasi-governmental agencies" by Black's Law definition (as they are not government sponsored), though often referred to in that manner, common-interest communities maintain vast amounts of infrastructure in Nevada that otherwise would be maintained by municipalities through tax revenue. When property taxes remain unpaid, the tax receiver, per the requirements of NRS 361.590, delivers to the County Treasurer a deed, free of all encumbrances, including any first security interest, except governmental liens and encumbrances, to hold in trust for sale. NRS 361.590(5). The property is then subject to non-judicial tax sale, following a redemption period, conducted by the County Treasurer, and the purchaser obtains a quitclaim deed discharged of any trust. NRS 361.595(4). Essentially the tax lien redemption period occurs before the sale as is the case with the association foreclosure; as a result, the purchaser in a tax sale obtains title of the unit's owner *"without equity or right of redemption."* The intent of the drafters of the UCIOA in non-judicial foreclosure of an association super priority lien, as to extinguishment of a first security interest, is analogous to municipal tax sales.

13. **Fannie Mae Guidelines.** The reference in the Lisman letter to Fannie Mae is consistent with Fannie Mae's current guidelines regarding the priority of assessment liens. Section B4-2.1-06, Priority of Common Expense Assessments (08/21/2012) states in part:

> Fannie Mae allows the greater of six months of regular common expense assessments, or the maximum amount permitted under applicable state law, to have limited priority over Fannie Mae's mortgage lien if the condo or PUD project is located in a jurisdiction that has enacted
>
> - the Uniform Condo Act;
> - the Uniform Common Interest Ownership Act; or
> - other similar statutes that provide for regular common

> expense assessments, as reflected by the project's operating budget, to have such priority over first mortgage liens."

14. **A First Mortgage Does Not Survive An Association Foreclosure.** U.S. Bank is correct in stating that a foreclosure of the first mortgage wipes out "any existing assessment lien . . . save for the super-priority portion thereof." On the other hand, US Bank's contention that the "Super-Priority Lien, therefore, does not eliminate the first mortgage, but simply creates a new lien on the property at the moment the first mortgage forecloses"[35] has no support in the statute. NRS 116.3116(4) clearly states that recordation of the declaration creates and perfects the lien; the association's super priority lien predates the lender's lien and does not depend for its existence upon the foreclosure of the first mortgage.

Moreover, NRS 116.31166(3), which is almost identical to NRS 107.080(5) pertaining to trustee's sales, states, "The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner *without equity or right of redemption.*" [Emphasis added]. The Court, in *In re Grant*, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) stated:

> The Nevada Supreme Court has held that sales without equity or right of redemption vest the purchaser with absolute title:
>
> [T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase; 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." (quoting *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867).)

At least one Nevada court has determined that foreclosure of an association super priority lien does not extinguish a first security interest, but instead, creates a lien "*in*

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[34] See, e.g., p. 23, The Secondary Market (FHA, VA, Fannie Mae, Freddie Mac) Requirements for Condominium Unit Loans. http://www.aksnlaw.com/documents/matrix201306June10.pdf

[35] Motion to Dismiss, P.3, lines 20-26.

*parity*" with the first security interest, such that when the first security interest is foreclosed, the association super priority lien is also not extinguished. If that were correct, then an association super priority lien and a first security interest would have equal priority. However, had the drafters of the UCIOA, and the Nevada Legislature when it enacted NRS Chapter 116, intended that the two interests be of equal priority, they would have said so, as they did in the situation in which two or more associations have liens for assessments. 1982 UCIOA § 3-116(c) states: "*Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.*" This language appears verbatim (except that "2" was changed to the alphabetical "two") and exists without amendment today as NRS 116.3116(3). Since the Nevada Legislature knew how to create "*equal priority*" or liens "*in parity*," but chose to state that the association super priority lien is "*prior to*," it can be assumed it knew the difference.

## D. CONCLUSION

As illustrated by the *Diakonos* case referred to in Footnote 23 above, much confusion exists regarding the actual creation of an association's lien. NRS 116.3116(4) clearly provides that the lien is created upon the recording of the declaration, not upon the giving or recording of a notice of delinquent assessments. Moreover, since a first mortgage on a unit within a common interest community can never be given until the common interest community is created by the recording of a declaration, the association will always have a perfected lien a portion of which is prior to a first security interest.

In the same way that the commencement of work on a parcel of real property gives rise to mechanics' liens and that municipal tax obligations give rise, in each case, to liens that can be enforced later for unpaid amounts, the recording of a declaration puts the world on notice that a perfected association lien exists which can be enforced later accruing unpaid assessments. The drafters of the UCIOA believed that association assessments, much like municipal taxes, are critical to fulfillment of an association's duty to maintain common elements for the benefit of residents in a common interest

community. As a result, they created a striking new proposal, giving an association assessment lien a limited priority over a first mortgage.

As the Comments to UCIOA and Carl Lisman's recollection show, the thought that a first mortgagee would do nothing when faced with an association foreclosure was not something even considered by the drafters. It was assumed that the first mortgagee would protect its interest in the property. Events of the Great Recession dramatically changed the residential housing landscape, resulting in delayed mortgage foreclosures and suffering associations.[36] Yet neither dramatic economic circumstances nor the acts of the parties can change the plain language of the law. An association has a first lien in an amount up to the super priority. US Bank and authorities it cites reveal a fundamental misunderstanding of NRS Chapter 116 in their assertion that an association foreclosure does not extinguish a first mortgage or somehow gives rise to a new lien. An association super priority lien is prior to a first security interest pursuant to the express language of the statute, and a basic principle of lien law is that foreclosure of a prior lien extinguishes all junior liens. An association foreclosure sale which includes its priority lien results in a new title, free of all junior claims.

In sum, if an association super priority lien is not satisfied prior to foreclosure sale by the association, the association foreclosure extinguishes a first security interest on that real property by operation of law. Accordingly, US Bank's Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED:
FENNEMORE CRAIG JONES VARGAS

By: _____
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[36] An excellent discussion of the current state of association finances resulting from the great number of mortgage defaults throughout the country may be found in Community Collateral Damage: A Question of Priorities, Andrea J. Boyack, 43 Loyola University Chicago Law Journal 53-140.

## CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing *AMICUS CURIAE BRIEF OF THE REAL PROPERTY SECTION OF STATE BAR OF NEVADA IN OPPOSITION TO U.S. BANK NATIONAL ASSOCIATION'S MOTION TO DISMISS* was served upon the following person(s), at their last known address by mailing a copy thereof, first class mail, postage prepaid, ☒ Regular, ☐ Certified, or ☐ Registered, return receipt requested, on this 1st day of August, 2013, as follows:

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An employee of Kemmemore Craig Jones Vargas

# EXHIBIT

# A

LISMAN LECKERLING, P.C.

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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

26961\001

# Exhibit 2

# UNIFORM COMMON INTEREST OWNERSHIP ACT

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

*at its*

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30-AUGUST 6, 1982

*WITH PREFATORY NOTE AND COMMENTS*

the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

**§ 3-116. Lien for Assessments**

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

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

(i) 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, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) 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 clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. 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. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) 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.

(e) 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.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, 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 owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) 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 by power of sale under [insert appropriate state statute] ];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute] ] [or by power of sale under subsection (k) ]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[ (4) In the case of foreclosure under [insert reference to state power of sale

statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[ (k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) 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 agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other

disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

## COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal

priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal

property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

**§ 3-117. Other Liens**

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] ], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may

# Exhibit 3

# UNIFORM COMMON INTEREST OWNERSHIP ACT

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT
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*WITH PREFATORY NOTE AND COMMENTS*

grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this [Act], no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this [Act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the common interest community, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential common interest community, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists the other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (c) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

## § 2-118. Termination of Common Interest Community

the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; *see* subsection (g). In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold, see subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; see subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (See subsection (f) ). In the remaining case, i.e., the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both a high rise building and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and either the declaration or the termination agreement should address the needs for easements of support and access for the high rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

9. Subsections (g), (h) and (i) deal with the very complex calculations and priorities which might result upon termination of a common interest community. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association.

Those subsections accord different treatment to these issues, depending upon the type of common interest community involved. The separate approaches continue the distinctive treatment which condominiums, planned communities and cooperatives have received under UCA, UPCA and MRECA, respectively. Each approach will be discussed and demonstrated in the comments below.

*Termination of Condominiums and Planned Communities*

10. Subsection (h) establishes general rules with respect to competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes

priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

*HYPOTHETICAL FOR EXAMPLES 1A-1H:* A planned community consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned by the association.

The declaration provides that the Act applies to this development (which would otherwise be exempt as a "small" planned community under Section 1-203). The documents also provide that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the planned community which were senior to the declaration, and the common elements were deeded to the association free of all liens.

A shopping center developer has offered $380,000 for the purchase of the entire planned community. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(j) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.

Unit 2: The owner's first mortgage had an unpaid balance of $40,000.

Unit 3: The owner's first mortgage had an unpaid balance of $25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.

Under the Act (Section 2-118(g) ), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for unit owners and holders of liens on the units as their interests may appear." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Owners | 30,000 | 40,000 | 55,000 | 80,000 | 80,000 |

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due Owners | 28,000 | 40,000 | 55,00 | 80,000 | 80,000 |

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to Unit 1 would have been as follows:

| | |
|---|---|
| Sales Proceeds | $50,000 |
| 6-Month Assessment Due Association | 600 |
| Balance | $49,400 |
| Paid to 1st Mortgage Holder | $49,400 |
| Loss to 1st Mortgage Lender | (600) |
| Loss to Association | (600) |

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112; and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder

against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due XYZ | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Due Owners | 8,800 | 20,000 | 35,000 | 60,000 | 60,000 |

EXAMPLE 1D:

All facts stated in Example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire planned community would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage

holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due XYZ | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| Due Owners | 8,800 | 20,000 | 35,000 | 10,000 | 60,000 |

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures

a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due XYZ | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| Tort Lien | 8,800 | 20,000 | 20,000 | 10,000 | 20,000 |
| Due Owners | -0- | -0- | 15,000 | -0- | 40,000 |

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note

that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | 8,800 | 10,000 | 10,000 | 10,000 | 10,000 |

| | | | | | |
|---|---|---|---|---|---|
| Tort Lien | -0- | 10,000 | 20,000 | -0- | 20,000 |
| Due Owners | -0- | -0- | 5,000 | -0- | 30,000 |

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units are not liable for the balance.

In the example, the common expense lien arises before the P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

EXAMPLE 1H:

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to $40,000, and the tort lien to $80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Liens | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 20,000 | 20,000 | 20,000 | 20,000 | -0- |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |

| | | | | | |
|---|---|---|---|---|---|
| P Paving Lien | 8,800 | 10,000 | 10,000 | 10,000 | -0- |
| Tort Lien | -0- | 10,000 | 20,000 | -0- | -0- |
| Due Owners | -0- | -0- | 5,000 | -0- | 80,000 |

All the results stated above would be the same as to a condominium.

EXAMPLE 2:

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Sale Proceeds | 66,666 | 66,666 | 66,666 | 66,666 | 133,332 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Lien | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 15,466 | 16,666 | 16,666 | 16,666 | 33,333 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | -0- | 10,000 | 13,333 | -0- | 26,666 |
| Tort Lien | -0- | 1,667 | 16,666 | -0- | 33,333 |
| Due Owners | -0- | -0- | -0- | -0- | 50,000 |

Note that *all* the liens are allocated in accordance with each unit's common expense

liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that Unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth $75,000. Three other units have remained at $50,000, while Unit 1 was neglected, and is now worth only $40,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1: (15.094331) $ 60,377 Unit 2: (18.867931) $ 75,472 Unit 3: (18.867931) $ 75,472
Unit 4: (18.867931) $ 75,472 Unit 5: (28.301881) $113,207 100.000001 $400,000

| *UNIT #* | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Sales Proceeds | 60,377 | 75,472 | 75,472 | 75,472 | 113,207 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Lien | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 9,177 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | -0- | 10,000 | 10,000 | 5,472 | 10,000 |
| Tort Lien | -0- | 5,472 | 20,000 | -0- | 20,000 |
| Due Owners | -0- | -0- | 472 | -0- | 63,207 |

# Exhibit 4

# UNIFORM COMMON INTEREST OWNERSHIP ACT (1982)

## PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or "common" ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives, and so-called "planned unit developments," or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate---units---are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership---they are owned on an undivided interest basis by the unit owners in condominiums, while the association "owns" the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives, and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different "bundles of rights" for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference's 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

## DEVELOPMENT OF THE ACT

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Bank of America, N.A. (**Bank of America**) replies in support of its motion to dismiss Las Vegas Development Group, LLC's (**LVDG**) second amended complaint with prejudice pursuant to Nevada Rule of Civil Procedure 12(b)(5).

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## INTRODUCTION

LVDG is a real estate investor seeking to have Bank of America's deed of trust declared void following an HOA foreclosure sale. LVDG's lawsuit is premised on its misguided theory that an HOA foreclosure sale eliminates a senior deed of trust.



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LVDG's position is illogical and fails as a matter of law. Moreover, LVDG has not acted equitably and should not be rewarded for engaging in real estate speculation. LVDG is an opportunistic entity that is attempting to get clear title to valuable collateral for almost nothing. The Court should dismiss each of LVDG's claims with prejudice because they rely on an erroneous theory and because LVDG is not entitled to equitable relief.

## II.

## LEGAL ARGUMENT

### A. The Mortgage Protection Clause is Enforceable

As Bank of America explained in its motion to dismiss, LVDG's claims fail because the HOA's governing documents (**CC&Rs**) contain a mortgage savings clause. In its opposition, LVDG argues that the mortgage savings clause is not enforceable because CC&Rs cannot vary, waive or evade the terms of NRS Chapter 116 unless the statute expressly permits such variation. *See* Opp'n, 14:13-16:2. In making this argument, LVDG relies on NRS 116.1104 and NRS 116.1206(1). LVDG's argument fails for four reasons.

**First**, LVDG does not cite any case law supporting its theory that a mortgage savings clause violates NRS 116.1104. Notably, Nevada's Supreme Court has never restricted the power of an HOA to subordinate an assessment lien, even though mortgage savings clauses are regularly included in CC&Rs. LVDG's position is not supported by any case law.

**Second**, LVDG's argument ignores the legislative history pertaining to Uniform Common Interest Ownership Act (**UCIOA**) § 1-104, the provision of the UCIOA on which NRS 116.1104 is based. In the drafters' comments, the drafters expressly state that § 1-104 is for a senior secured lender's protection:

> 1. The Act is generally designed to provide great flexibility in the creation of common interest communities and, to that end, the Act permits the parties to vary many of its provisions. **In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants**. Accordingly, this Section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

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*See* UCIOA 1-104, cmt. 1 (1982) (emphasis added), *available at* *http://www.uniformlaws.org/shared/docs/Common%20Interest%20Ownership/UCIOA82.pdf* (last visited on September 6, 2013). LVDG cannot use a provision designed to protect secured lenders to strip those very lenders of protections the CC&Rs promised them.

**Third**, LVDG's argument ignores NRS 116.3102(1)(t), which empowers HOAs to exercise "any other powers necessary and proper for the governance and operation of the association." *See* NRS 116.3102(1)(t). An HOA can surely subordinate an assessment lien to encourage lending to persons in the community without violating Chapter 116.

**Fourth**, other jurisdictions have held that a senior lender may enforce a mortgage protection clause:

> The HOA yielded any right to claim it had a superior lien position to the Bank's preexisting mortgage by virtue of the plain and unambiguous language of its Declaration, which the Bank had every right to rely upon when deciding to finance the homeowners' home in the Coral Lakes community. The trial court did not err in finding the Bank's first mortgage lien superior to the HOA's claim for unpaid assessments notwithstanding section 720.3085.

*Coral Lakes Community Ass'n v. Busey Bank*, 30 So.3d 579, 585-86 (Fla. Ct. App. 2010). Although Florida has not adopted the UCIOA, the lender here, like that in *Coral Lakes*, had every right to rely on the mortgage protection clause when it made its loan. LVDG was on record notice of the mortgage protection clause when it purchased the property. The mortgage savings clause is enforceable and expressly subordinates the HOA's lien to Bank of America's deed of trust.

### B. LVDG's Interpretation of NRS 116.3116 Contradicts the Plain Language

Even if the Court declines to enforce the CC&Rs, LVDG's claims fail. LVDG's claims are premised on its assertion that an HOA super priority lien foreclosure eliminates a senior lender's deed of trust. Despite LVDG's argument to the contrary, NRS Chapter 116 does not support this theory.

NRS 116.3116 provides in relevant part:

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

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> (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*** . . . .

NRS 116.3116 (emphasis added). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City Council of City of Reno v. Reno Newspapers, Inc*., 105 Nev. 886, 784 P.2d 974, 977 (1989) (citation omitted); *see also Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 94, 993 P.2d 50 (2000) ("[W]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.").

**First**, LVDG's mistaken interpretation renders the language "to the extent of any charges" in NRS 116.3116(2)(c) completely meaningless. The phrase "to the extent of any charges" is limiting language. LVDG erroneously seeks to elevate this phrase into a true super priority that can wipe out a senior deed of trust. Nevada's legislature merely created an order of payment scheme when it enacted Chapter 116. An HOA will necessarily get paid its 9 months of assessments after the senior lender forecloses because the senior lender will need to clear title before marketing the property for sale.[1] LVDG is attempting to re-write the statute.

[1] LVDG seemingly argues that the only way to ensure an HOA receives payment of a portion of its lien is to conclude that a super priority lien foreclosure eliminates a senior deed of trust. This is incorrect.

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**Second**, the legislature expressly gave first security interests priority in NRS 116.3116(2)(b). Whenever possible, a court should interpret a rule or statute in harmony with other rules and statutes. *See Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991), reversed in part on other grounds by *Albios v. Horizon Comms., Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006); *Reno Newspapers*, 105 Nev. at 892, 784 P.2d at 978. The Court should reject LVDG's interpretation because it renders section 2(b) nugatory. *See Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quoting *Glover v. Concerned Citizens for Fuji Park & Fairgrounds*, 118 Nev. 488, 492, 50 P.3d 546, 548 (2002)) (overruled in part on other grounds by *Garvin v. Dist. Ct.*, 118 Nev. 749, 765 n. 71, 59 P.3d 1180, 1190 n.71 (2002)) (No part of a statute should be rendered meaningless and its language "'should not be read to produce absurd or unreasonable results.'").

**Third**, LVDG's view that a super priority lien can attach (and be foreclosed) before a senior lienholder forecloses on its deed of trust makes no sense when the Court reviews the statutory order of payment applicable to HOA foreclosure proceeds. After an HOA forecloses on an assessment lien, NRS 116.31164 provides for the following order of payment:

> 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.

NRS 116.31164.

LVDG argues that the foregoing language "has nothing to do with the ranking of priority of liens." Opp'n, 18:11-14. This is not correct because whenever possible, a court should interpret a rule or statute in harmony with other rules and statutes. *See Bowyer v. Taack*, 107 Nev. 625, 627,

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817 P.2d 1176, 1177 (1991), reversed in part on other grounds by *Albios v. Horizon Comms., Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006). The only way to read the super priority statute in harmony with the order of payment statute is to hold that a super priority lien does not attach until after the senior deed of trust holder forecloses. This is so because NRS 116.3116(2)(b) makes plain that the senior deed of trust holder has priority over any claim for reasonable attorneys' fees, expenses, interest, and the association's lien (except for 9 months of assessments). LVDG's interpretation of NRS 116.3116 cannot be reconciled with NRS 116.31164 and violates the statute's plain language.[2]

**C. The Legislative History Does Not Support LVDG's Theory**

LVDG claims that the history of the UCIOA, the uniform law on which NRS Chapter 116 is based, supports its argument that an HOA foreclosure sale eliminates a senior deed of trust. LVDG quotes comments from the UCIOA, which provide, in relevant part:

> To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

*See* Opp'n, 10:19-11:2 (citation omitted).

This commentary does not support LVDG's legal theory. To the extent LVDG implies a lender would not pay off the super priority lien if an HOA foreclosure sale could not eliminate the lender's senior deed of trust, LVDG fails to recognize the numerous reasons a senior lender may

---

[2] LVDG attempts to rebut Bank of America's attachment argument by relying on Article 9 of the Uniform Commercial Code. Opp'n, 16:27-17:3. It concedes, however, that Article 9 does not apply to Bank of America's deed of trust. *Id.*, 17:12-15. Article 9's attachment provisions are not germane, and LVDG's argument is unavailing.

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wish to prevent a junior lienholder from foreclosing on its collateral. If a junior lienholder forecloses, the purchaser takes title subject to the senior lien. The purchaser (or a third-party to whom the purchaser leases the property) may not properly care for the collateral, thereby decreasing the lender's security. Moreover, in the event a junior lienholder leases the collateral, the senior lender may be forced into a landlord-tenant relationship with an unknown third-party following its own foreclosure sale. Lenders have numerous reasons to step in and prevent junior foreclosure sales, so the UCIOA comments on which LVDG relies do not establish that a super priority lien foreclosure can eliminate a lender's senior deed of trust.

As LVDG repeatedly asserts, the UCIOA aims to equitably balance the HOA's interests and the senior secured lender's interests. LVDG's interpretation actually disrupts this balance, however, as it would allow an HOA to wipe out a senior lien without ever telling the senior lender what it must do to protect its security interest (because NRS 116 does not require an HOA to identify the super priority component in its foreclosure notices). LVDG's position is grossly inequitable and undercuts the UCIOA's purpose.

**D. LVDG Ignores Scholarly Authority and Other States' Interpretation of the UCIOA**

The UCIOA is a uniform law that at least eight states have adopted. *See* Boyack, *infra*, at 100. Notwithstanding, LVDG does not cite to one case or legal article that agrees with its interpretation of the UCIOA. Bank of America is unaware of a single UCIOA state that allows a non-judicial HOA sale to eliminate a senior deed of trust. As Bank of America explained in its motion to dismiss, however, numerous Nevada district courts agree with Bank of America's interpretation of the UCIOA. LVDG's inability to find one case or legal article that supports its theory is telling.

A number of legal scholars have reviewed the UCIOA's super priority provision. They do not agree with LVDG's interpretation. For instance, in the Loyola University Chicago Law Journal, Andrea Boyack writes as follows:

> The six-month capped "super priority" provision of the association lien does not have a true priority status under UCIOA since the six-month assessment lien cannot be foreclosed as senior to a mortgage lien. Rather it creates a payment priority for some portion of unpaid assessments, which would take the first position in the foreclosure

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> repayment waterfall," or grants durability to some portion of unpaid assessments allowing the security for such debt to survive foreclosure.

Boyack, Andrea J., *Community Collateral Damage, A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 99 (2011).

LVDG does not cite any academic analyses or germane cases that support its position. This omission speaks volumes.

**E. Bank of America Had No Notice that the HOA Foreclosure Was a Super Priority Foreclosure, or How to Cure, Which Violates Due Process**

As Bank of America explained in its motion to dismiss, LVDG's interpretation of NRS 116.3116(2) does not comport with due process concerns. LVDG does not and cannot state that Bank of America ever received notice of what the putative super priority amount was, whom to pay, or how long it had to pay.

None of the HOA foreclosure notices identified what portion of the claimed lien constituted the super priority component. LVDG does not and cannot deny this. The notices did not even enable Bank of America to calculate the super priority component itself, as they do not identify the monthly common assessment. ***If*** NRS Chapter 116 allowed HOA foreclosure sales to eliminate senior deeds of trust, it would require, at a minimum, HOA foreclosure notices to identify the claimed super priority amount and a lender's options for paying off the lien. *See J.D. Constr. v. IBEX Int'l. Group, LLC*, 240 P.3d 1033, 1040 (Nev. 2010) (a mechanic's lien is a taking that entitles a senior deed of trust beneficiary to federal and state due process protection because the lien seeks to deprive the property owner of a significant property interest). This is because due process requires actual notice and an opportunity to be heard. *Id.* Procedural due process also requires that the notice given be of a quality actually intended to accomplish notice. *Kotecki v. Augusztiny*, 87 Nev. 393, 395, 487 P.2d 925, 926 (1971). That Chapter 116 does not require such notice supports Bank of America's position that an HOA foreclosure sale does not eliminate a senior deed of trust. An HOA foreclosure sale certainly cannot eliminate a senior deed of trust where, as here, the publicly recorded foreclosure notices did not apprise the lender that the HOA was attempting a super priority foreclosure sale, or how to prevent such a foreclosure.

/ / /

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**F. The Trustee's Sale Was Commercially Unreasonable**

Even if an HOA foreclosure sale could otherwise eliminate a senior deed of trust, which it cannot, the foreclosure sale in this case would be void as commercially unreasonable if it did, as LVDG claims, eliminate the senior deed of trust. Although LVDG claims that an HOA has no obligation to protect the homeowners or lenders when foreclosing on an HOA lien, Nevada law provides otherwise.

Nevada adopted the UCIOA in 1991. 1991 Nev. Stat., Page 535. Nevada's UCIOA imposes an express obligation of good faith on an HOA. NRS 116.1113 provides as follows:

> Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.[3]

As Bank of America explained in its motion to dismiss, *Will v. Mill Condominium Owner's Association*, 848 A.2d 336 (Vt. 2004), is a relatively recent case that has interpreted the obligation of good faith in the context of trustee's sales pursuant to homeowners association liens. In *Will*, the property was sold pursuant to a $3,510.10 homeowners association lien. *Id*. at 338. The fair market value of the property was $70,000.00. *Id*. Interpreting the same uniform act Nevada adopted, the

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[3] NRS 116.31164 provides express protections for parties affected by the sale and whose interests must be protected by the commercial reasonableness standard:

> 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.

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Vermont Supreme Court voided the trustee's sale because the sale was not conducted in a commercially reasonable manner. The purchase price was obscenely inadequate, and there was no evidence the trustee sought to obtain the highest price.

LVDG entirely ignores *Will*, likely because it establishes that the foreclosure sale in this case would be void as commercially unreasonable if it did, as LVDG claims, eliminate the senior deed of trust. The sales price of $4,001.00 demonstrates that it was not made in good faith as a matter of law, as the property secures a $360,000.00 deed of trust. The HOA's sale for 1.1% of the value of the secured senior deed of trust is indisputable evidence of a lack of good faith.

### G. No Factual Issues Preclude Dismissal

LVDG argues that the Court should refuse to dismiss this case because it has stated a claim for quiet title/declaratory relief that requires adjudication. By dismissing this case as to Bank of America, however, the Court will establish that LVDG took title subject to Bank of America's lien. This is the only adjudication the case requires, as least as to Bank of America. There is no need to prolong the litigation when LVDG's claims are based on incorrect legal theories that fail as a matter of law. LVDG has not and cannot identify any factual issues that preclude dismissal.

## III.

## CONCLUSION

LVDG's claims all fail because they are premised on LVDG's misreading of NRS 116.3116. LVDG's claims also fail because they are barred by the HOA's CC&Rs. The Court should dismiss the second amended complaint with prejudice.

DATED this 9th day of September, 2013.

**AKERMAN SENTERFITT LLP**

/s/ Natalie L. Winslow
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 9th day of September, 2013 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**, postage prepaid and addressed to:

Marilyn Fine, Esq.
Rachel E. Donn, Esq.
Peter E. Dunkley, Esq.
MEIER & FINE, LLC
2300 W. Sahara Avenue, Suite 1150
Las Vegas, NV 89102

*Attorneys for Plaintiff*

/s/ Eloisa Nuñez
An employee of AKERMAN SENTERFITT LLP

**IN THE SUPREME COURT OF NEVADA**

| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,<br><br>Appellant,<br><br>*vs.*<br><br>BANK OF AMERICA, N.A.,<br><br>Respondents. | Case No. 65083 |



# APPEAL

From the Eighth Judicial District Court,

The Honorable Stefany A. Miley, District Judge

District Court Case No. A-12-654840-C

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APPELLANT'S APPENDIX VOLUME 1

---

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Timothy E. Rhoda
Nevada Bar No. 7878
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# INDEX OF APPENDIX

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Attorneys for Plaintiff

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CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada Corporation;

Plaintiff,

v.

BANK OF AMERICA; BAC HOME LOANS SERVICING L.P.; and DOES 1 through 10, inclusive,

Defendants.

CASE NO: A-12-654840-C

DEPT NO.: XXIII

**COMPLAINT TO QUIET TITLE TO REAL PROPERTY**

**ARBITRATION EXEMPTION CLAIMED:**
**Pursuant to NAR 3(A)-**
**1. Action Concerning Title to Real Property; and**
**2. Action Seeking Equitable and/or Extraordinary Relief**

Plaintiff complains and for causes of action alleges as follows:

I.

**FIRST CAUSE OF ACTION**

**(For LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada Corporation, Against BANK OF AMERICA and BAC HOME LOANS SERVICING L.P.)**

1. Defendant BANK OF AMERICA and DOES 1 through 10, inclusive, are and at all time herein mentioned were residents of the City of Las Vegas, County of Clark, State of Nevada and/or doing business therein.

2. Defendant BAC HOME LOANS SERVICING L.P. and DOES 1 through 10, inclusive, are and at all time herein mentioned were residents of the City of Las Vegas, County of Clark, State of Nevada and/or doing business therein.

3. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC will amend this complaint to allege their true names and capacities when ascertained.

4. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believes and thereon alleges that at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

5. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is at all times herein mentioned the owner and/or entitled to possession of the property located at 6279 Downpour, Las Vegas, Nevada, 89110.

6. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believe and thereupon alleges that defendants and each of them, claim an interest in the property adverse to plaintiff herein. However, the claim of said Defendants are without any right whatsoever and said Defendants do not have legal or equitable right, claim, or interest in said property.

7. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC therefore seeks a declaration that the title to the subject property is vested in plaintiff alone and that the defendants herein, and each of them, be declared to have no estate, right title or interest in the subject property and that said defendants, and each of them, be forever enjoined from asserting any estate, right, title or interest in the subject property adverse to plaintiff herein.

## II.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiff prays for judgment against defendants and each of them as follows:

1. For an order compelling said Defendants, and each of the, to transfer legal title and possession of the subject property to Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC herein;
2. For a declaration and determination that LAS VEGAS DEVELOPMENT GROUP, LLC is the rightful holder of title to the property and that Defendants, and each of them, be declared to have no estate, right title or interest in said property;
3. For a judgment forever enjoining said defendants, and each of them, from claiming any estate, right, title or interest in the subject property;
4. For costs of suit and attorneys fees herein incurred; and
5. For such other and further relief as the Court may deem just and proper.

Dated: January 17, 2012

LAW OFFICE OF NICHOLAS A. BOYLAN, A.P.C.

By: _____

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Facsimile: (702) 673-1001

*Attorneys for Las Vegas Development Group, LLC*

**IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF CLARK**

**-o0o-**

| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,<br><br>Plaintiff,<br><br>v.<br><br>BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,<br><br>Defendants. | Case No. A-12-654840-C<br>Dept. No. XXIII<br><br>**SECOND AMENDED COMPLAINT**<br><br>Arbitration Exemption:<br>Title to Real Property,<br>Declaratory Relief |

COME NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Complaint against BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 through 20, and ROE CORPORATIONS 1through 20 as follows:

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

I.

**FIRST CAUSE OF ACTION**

**QUIET TITLE/ DECLARATORY RELIEF**
**NRS 30.010, NRS 40.010 and NRS 116.3116, et seq.**

1. Defendants BANK OF AMERICA; and DOES 1 through 10, inclusive are and at all times herein mentioned were residents of the City of Las Vegas, County of Clark, State of Nevada and/or doing business therein.

2. Defendant GENEVIEVE UNIZA-ENRIQUEZ is an individual, who at times relevant herein was a resident of Clark County, Nevada and/or owner or real property situated in Clark County, Nevada. Plaintiff is informed and believes that Defendant GENEVIEVE UNIZA-ENRIQUEZ is the former owner of the Property.

3. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these defendants by such fictitious names. Said Defendants are any and all other persons, unknown, claiming any estate, right, title, interest or lien in the Property (as defined herein). Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC will amend this complaint to allege their true names and capacities when ascertained.

4. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believes and thereon alleges that at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

5. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is presently the owner and/or entitled possession of the property located at 6279 Downpour, Las Vegas, Nevada 89110 (the "Property").

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

6. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believes and thereupon alleges that the Defendants and each of them, claim an interest in the property adverse to plaintiff herein. However, the claim of said Defendants are without any right whatsoever and said Defendants do not have legal or equitable right, claim, or interest in said property.

7. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC therefore seeks a declaration that the title to the subject property is vested in plaintiff alone and that the defendants herein, and each of them, be declared to have no estate, right title or interest in the subject property and that said defendants, and each of them, be forever enjoined from asserting any estate, right, title or interest in they subject property adverse to plaintiff herein.

8. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendants Does 1 through 20, inclusive, and Roe Corporations 1 through 20, inclusive, are unknown to Plaintiff, who therefore sues those Defendants by such fictitious names. Plaintiff is informed and believes, and upon such, alleges that each of the Defendants designated as Does or Roe Corporations assert an interest in the Property adverse to Plaintiff, LVDG. Plaintiff asks leave of this Court to amend this Complaint to insert the true names and capacities of said Does 1 through 20, inclusive, and Roe Corporations 1 through 20, inclusive, when the same have been ascertained by Plaintiff, together with the appropriate charging allegations, and to join these Defendants in this action.

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

**II.**

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC prays for judgment against defendants and each of them as follows:

1. For a declaration and determination that Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is the rightful holder of title to the property and that Defendants, and each of them, be declared to have no estate, right title or interest in said property;

2. For a judgment forever enjoining said defendants, and each of them, from claiming any estate, right, title or interest in the subject property.

3. For an order enjoining said defendants, and each of them, from proceeding with a foreclosure sale of the subject property;

4. For an order declaring any such completed foreclosure sale of the subject property void;

5. For costs of suit and attorneys fees herein incurred; and

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

DATED this 6th day of August, 2013.

Meier & Fine, LLC

By _____
MARILYN FINE, ESQ., #005949
RACHEL E. DONN, ESQ., #010568
PETER E. DUNKLEY, ESQ., #011110
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Las Vegas, Nevada 89102
*Attorneys for Plaintiff Las Vegas Development Group, LLC*

MEIER & FINE, LLC
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Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6th day of August, 2013, I did serve a copy of the above and foregoing SECOND AMENDED COMPLAINT by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

| | |
|---|---|
| Ariel E. Stern, Esq.<br>Jacob D. Bunkick, Esq.<br>AKERMAN SENTERFITT LLP<br>1160 Town Center Drive, Suite 330<br>Las Vegas, NV 89144<br><br>*Attorneys for Defendant* | |

Employee of MEIER & FINE, LLC

**ANS**
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Facsimile: (702) 792-9002

*Counsel for Defendants*
*Bank of America and BAC Home Loans Servicing LP*

**DISTIRCT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada Corporation,<br><br>Plaintiff,<br><br>v.<br><br>BANK OF AMERICA; BAC HOME LOANS SERVICING LP.; and DOES 1 through 10, inclusive,<br><br>Defendants. | CASE NO. A-12-654840-C<br><br>DEPT NO.: XXIII<br><br>**ANSWER** |

**COMES NOW** Defendants, BANK OF AMERICA AND BAC HOME LOANS SERVICING LP, ("B of A"), by and through their attorneys Greenberg Traurig LLP files this Answer to Plaintiff's Complaint, ("Complaint") filed herein, and responds as follows:

1. Answering Paragraph 1, Defendants admit the allegations contained in Paragraph 1 for jurisdictional purposes only.

2. Answering Paragraph 2, Defendants admit the allegations contained in Paragraph 2 for jurisdictional purposes only.

3. Answering Paragraph 3, Defendants are without knowledge or information sufficient form a belief as to the truth or falsity of the allegation in Paragraph 3 and, therefore, deny the same.

4. Answering Paragraph 4, Defendants deny each and every material allegation contained therein.

5. Answering Paragraph 5, Defendants are without sufficient knowledge information and knowledge to form a belief as to the accuracy of this allegation and avers that said allegation is a legal conclusion and therefore do not require a response. Except as expressly admitted, Defendants deny each and every material allegation contained in this Paragraph.

6. Answering Paragraph 6, Defendants admits that Defendants claim an interest in the property adverse to plaintiff herein. However, Defendants aver that the remaining paragraph states allegations that are legal conclusions and therefore do not require a response. Except as expressly admitted, Defendants deny each and every material allegation contained in this Paragraph.

7. Answering 7. Defendants aver that its allegations are legal conclusions and therefore do not require a response. Except as expressly admitted, Defendants deny each and every material allegation contained in this Paragraph.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff fails to state a claim for which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claim is barred by the doctrine of waiver.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claim is barred by the doctrine of estoppel.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claim is barred by the doctrine of laches.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff lacks standing to assert its claim to the extent it is not a party to the mortgage loan transaction and/or do not hold a valid interest in the subject property.

**SIXTH AFFIRMATIVE DEFENSE**

To the extent Plaintiff seeks equitable relief, such demand is barred because Plaintiff has an adequate remedy at law.

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**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff cannot recover on their claim against Defendant because it failed to perform adequate due diligent before purchasing the subject property.

**EIGHTH AFFIRMATIVE DEFENSE**

Pursuant to Nevada Rules of Civil Procedure, all possible affirmative defenses may have been alleged insofar as insufficient facts were not available after reasonable inquiry upon the filing of this Answer and, therefore, Defendants reserve the right to amend their Answer to allege additional Affirmative Defenses if subsequent investigation warrants.

WHEREFORE, Defendants pray for judgment as follows:

1. Plaintiff take nothing by way of their Complaint;
2. For an award of attorneys' fees and costs incurred in the defense of the Complaint and;
3. For such other and further relief as the Court may deem just and proper.

DATED this 12th day of April, 2012.

Respectfully submitted,

**GREENBERG TRAURIG, LLP**

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Laraine M. I. Burrell, Esq.
Nevada Bar No. 8771
Savera Sandhu-Smith (Bar No. 10741)
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*Counsel for Bank of America and BAC Home Loans Servicing LP*

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Facsimile: (702) 792-9002

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ANSWER** was electronically filed and served (via Wiznet) on April 12, 2012, and via U.S. Mail to all parties not on the Electronic Service List, postage prepaid as follows:

**VIA ELECTRONIC SERVICE**

Marina Vaisman
Law Office of Nicholas A. Boylan, APC
mv.nablawfirm@gmail.com

**VIA FIRST CLASS U.S. MAIL**

Nicolas A. Boylan, Esq.
Law Office of Nicholas A. Boylan, APC
450 A. Street, Suite 400
San Diego, CA 92101

DATED this _____ day of April, 2012.

_____
An employee of Greenberg Traurig, LLP

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Telephone: (702) 792-3773
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**MOT**
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*Attorneys for Defendant Bank of America*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

**BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Bank of America, N.A. (**BANA**) moves to dismiss Las Vegas Development Group, LLC's second amended complaint with prejudice pursuant to Nevada Rule of Civil Procedure 12(b)(5).

DATED this 15th day of August, 2013.

**AKERMAN SENTERFITT LLP**

/s/ Natalie L. Winslow
JACOB D. BUNDICK, ESQ.
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TEL.: (702) 634-5000 – FAX: (702) 380-8572

**NOTICE OF MOTION**

TO: ALL INTERESTED PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Court will hear defendants' motion for summary judgment on the 17 day of Sept., 2013, at the hour of 9:30 .m., or as soon thereafter as counsel may be heard in Department XXIII of the above-entitled Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada.

DATED this 15th day of August, 2013.

**AKERMAN SENTERFITT LLP**

/s/ Natalie L. Winslow
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TEL.: (702) 634-5000 – FAX: (702) 380-8572

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I**

**INTRODUCTION**

This case is another attempt by a real estate investor, Las Vegas Development Group, LLC (**LVDG**), to have a lender's deed of trust declared void following an HOA foreclosure sale. The former property owner purchased the property by obtaining a **$360,000.00** loan, which she secured with a deed of trust encumbering the property in January of 2006. Over five years later, on April 12, 2011, LVDG purchased the property for **$4,001.00** at an HOA foreclosure sale. LVDG took title to the property subject to the senior lien. However, LVDG, a real estate speculator, now claims that the HOA's foreclosure eliminated the senior deed of trust. LVDG is wrong as a matter of law.

**First**, LVDG's assertion that an HOA sale can wipe out a preexisting senior deed of trust is based on an erroneous interpretation of NRS 116.3116. **Second**, even if a "super priority" lien foreclosure could sometimes eliminate a lender's deed of trust, the sale at issue in this case was not a

"super priority" foreclosure sale. **Third**, the sale at issue here would be commercially unreasonable if it did, as LVDG claims, eliminate the senior deed of trust. **Fourth**, LVDG's claims are barred by the HOA's own governing documents.

LVDG's claims are each based on its assertion that the HOA foreclosure sale eliminated the senior deed of trust, an assertion that fails as a matter of law. The Court should dismiss LVDG's second amended complaint with prejudice for failure to state a claim.

## II

## FACTUAL BACKGROUND

### A. Senior Deed of Trust History

On June 22, 2006, Genevieve Uniza-Enriquez (the **borrower**) purchased certain real property located at 6279 Downpour Court, Las Vegas, Nevada 89110. The borrower secured her purchase of the property with a deed of trust for $360,000.00 against the property. Deed of Trust, **Exhibit A**. MERS substituted ReconTrust as trustee under the deed of trust on July 14, 2006. Substitution, **Exhibit B**. On June 25, 2010, ReconTrust recorded a first notice of default against the property. First Notice of Default, **Exhibit C**. On June 30, 2010, ReconTrust assigned the deed of trust to BAC Home Loans Servicing, LP. Assignment, **Exhibit D**. ReconTrust rescinded the first notice of default on March 30, 2011. Rescission, **Exhibit E**. On April 5, 2011, ReconTrust recorded a second notice of default. Second Notice of Default, **Exhibit F**. On December 29, 2011, the Nevada Foreclosure Mediation Program recorded its certificate, indicating that "[t]he Beneficiary may proceed with the foreclosure process." Certificate, **Exhibit G**. ReconTrust recorded a notice of trustee's sale on December 29, 2011, and additional notices of trustee's sale on April 12, 2012 and July 25, 2012. Notices of Trustee's Sale, composite **Exhibit H**.

### B. Palo Verde's Foreclosure History

On April 1, 2010, Absolute Collection Services, LLC (**ACS**), as agent for Palo Verde Ranch Homeowners' Association (**Palo Verde**), recorded a lien against the property in the amount of $754.56. Notice of Delinquent Lien, **Exhibit I**. The notice specifically stated that "[a]dditional monies shall accrue under this claim at the rate of the claimant's periodic assessments, *plus permissible late charges, costs of collection and interest and other charges*, if any, that shall accrue

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subsequent to the date of this notice." *Id.* (emphasis added). The lien did *not* provide the amount attributable to assessments only – the only amount subject to Nevada's super priority lien statute.

On July 14, 2010, ACS recorded a notice of default against the property. Notice of Default, **Exhibit J**. Palo Verde represented that the amount due had ballooned to $1,749.65. *Id.* On November 18, 2010, ACS recorded a notice of foreclosure sale. Notice of Foreclosure Sale, **Exhibit K**. Palo Verde stated that $2,873.86 was required to pay off its lien to avoid the HOA foreclosure sale. *Id.*

On April 13, 2011, LVDG purchased the property at the HOA foreclosure sale. Foreclosure Deed, **Exhibit L**. The HOA foreclosure sale states that LVDG purchased the property for the total amount of $4,001.00. *Id.*

On January 17, 2012, LVDG initiated this action, alleging, *inter alia*, that BANA's deed of trust was extinguished by virtue of the HOA foreclosure sale.

## III

## LEGAL STANDARD

Nevada Rule of Civil Procedure 12(b)(5) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." When passing on such a motion, the factual allegations in the complaint are treated as true, and all inferences are drawn in favor of the non-moving party. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (BANAng *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)). A complaint should only be dismissed if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief. *Id.* at 190, 929 P.2d at 967 (BANAng *Vacation Village*, 110 Nev. at 484, 874 P.2d at 746).

The Supreme Court of the United States has clarified the applicable standard in the parallel federal rule, Federal Rule of Civil Procedure 12(b)(6). *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based largely upon their federal counterparts). "A plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic

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recitation of the elements of a cause of action will not do." *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965. In *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009), the Court further explained that a complaint must offer more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* The facts actually pled must give rise to a plausible claim for relief. *Id.*

## IV

## ARGUMENT

### A. The CC&Rs Contain a Mortgage Savings Clause which Bars LVDG's Claims

LVDG's claims each fail because, as a matter of law, an HOA foreclosure sale cannot eliminate a senior lender's deed of trust under NRS Chapter 116. Even if it could, LVDG's claims would be barred in this case because the HOA's governing documents (**CC&Rs**) contain a "mortgage savings clause." *See* CC&Rs, **Exhibit M**.

The CC&Rs clearly state that an HOA foreclosure sale does not eliminate a lender's senior deed of trust. Specifically, the CC&Rs provide that when a regular assessment goes unpaid, it may be reduced to a lien and foreclosed upon pursuant to NRS Chapter 116. *Id.*, § 5.07. The CC&Rs further provide that "[n]otwithstanding any other provision of this Declaration, no lien created under this Article V or under any other Article of this Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent." *Id.*, § 5.08.

The deed of trust at issue here was recorded on January 30, 2006. *See* Exhibit A. The HOA recorded its lien on April 1, 2010, more than four years later. *See* Exhibit I. According to the CC&Rs, BANA's previously recorded first mortgage was senior and prior to the HOA lien on which the HOA foreclosed. LVDG's assertion that the HOA foreclosure eliminated BANA's deed of trust fails as a matter of law.

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**B. LVDG's Complaint Should Be Dismissed Because the Super Priority Lien Does Not Attach Until After the Senior Deed of Trust Holder Forecloses**

LVDG's lawsuit is premised on its theory that an HOA super priority lien foreclosure eliminates a senior lender's deed of trust. LVDG's position is flawed because the super priority lien does not even attach until **after** a senior lender forecloses under its senior deed of trust. NRS 116.3116 provides in relevant part:

> 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*** . . . .[1]

NRS 116.3116 (emphasis added). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974, 977 (1989) (citation omitted); *see also Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 94, 993 P.2d 50 (2000) ("[W]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent."). The plain language of the statute demonstrates that the super priority lien attaches once a senior lender forecloses.

---

[1] The amount identified in bold italics is commonly referred to as the "super priority" lien.

**First**, NRS 116.3116 does not state that a super priority lien attaches prior to foreclosure by the senior deed of trust holder. LVDG is reading language into the statute that the legislature did not include.

**Second**, LVDG's view that a super priority lien can attach before a senior lienholder forecloses on its deed of trust makes no sense when the Court reviews the statutory order of payment applicable to HOA foreclosure proceeds.[2] After an HOA forecloses on an assessment lien, NRS 116.31164 provides for the following order of payment:

> 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.

NRS 116.31164.

The only way to read the super priority statute in harmony with the order of payment statute is to hold that a super priority lien does not attach until after the senior deed of trust holder forecloses. If it could attach before a senior deed of trust holder foreclosed, the payment priority statute would require that subordinate liens be paid excess sale proceeds first. This is so because NRS 116.3116(2)(b) makes plain that the senior deed of trust holder has priority over any claim for reasonable attorneys' fees, expenses, interest, and the association's lien (except for 9 months of

---

[2] Whenever possible, a court should interpret a rule or statute in harmony with other rules and statutes. *See Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991), *reversed in part on other grounds by Albios v. Horizon Comms., Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006)); *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989).

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assessments). NRS 116.31164 contradicts LVDG's assertion that an HOA super priority lien can attach (and be foreclosed) before a lender forecloses on its deed of trust.

LVDG's complaint misconstrues Chapter 116 and asks the Court to ignore parts of the statute in favor of others. Dismissal is warranted because the HOA super priority lien does not attach before a senior lienholder forecloses.

### C. The HOA Foreclosure Did Not Eliminate BANA's Deed of Trust

Even if the Court concludes that the super priority lien attaches before a senior deed of trust holder forecloses, LVDG's claims fail. For numerous reasons, the HOA foreclosure sale did not wipe out BANA's deed of trust.

#### 1. The Nevada Canons of Construction Demonstrate that Foreclosure Under NRS 116.3116 Does Not Eliminate a Senior Deed of Trust

LVDG's view of NRS Chapter 116 does not comport with Nevada's canons of construction. In Nevada, statutory language "'should not be read to produce absurd or unreasonable results.'" *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quoting *Glover v. Concerned BANAzens for Fuji Park & Fairgrounds*, 118 Nev. 488, 492, 50 P.3d 546, 548 (2002)), *overruled in part on other grounds by Garvin v. Dist. Ct.*, 118 Nev. 749, 765 n. 71, 59 P.3d 1180, 1190 n.71 (2002)).

The Court should reject LVDG's theory that the HOA foreclosure eliminated BANA's deed of trust because LVDG's interpretation of NRS 116.3116 would lead to unreasonable, inequitable, and absurd results. LVDG argues that an HOA or purchaser may use 116.3116(2) to eliminate a lender's senior security interest by paying off a *de minimis* assessment lien. LVDG advocates an interpretation that would encourage the very real estate speculation that led to the recent collapse of Nevada's real estate market. This cannot be what NRS 116.3116(2) means.

Many Nevada judges recognize the errors in LVDG's interpretation. As Judge Denton recently found, a purchaser at an HOA foreclosure sale purchases a possessory right to the property, subject to the mortgage holder's lien. Minute Order, *Oliver Sage Drive Trust v. BAC Home Loan Serv. LP, et al.*, No. A674872 (Nev. Dist. Ct. Feb. 21, 2013), attached as **Exhibit N**. This result is logical, as an NRS 116.3116 foreclosure sale "vests in the purchaser the title of the unit's owner,"

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and a unit owner's title is subject to the senior lender's deed of trust. *See* NRS 116.31166(3). Similarly, in the federal district court case of *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, No. 2:12-cv-00949-KJD-RJJ, 2013 WL 531092 (D. Nev. Feb. 11, 2013) (**Exhibit O**), Judge Dawson concluded that while an HOA may initiate nonjudicial foreclosure, the "purchaser at the sale takes the property subject to the security interest." *Id.* at *3. Nevada courts have repeatedly rejected the theory that an HOA foreclosure sale eliminates a senior deed of trust. *See Sanucci Ct. Trust v. Elevado, et al.*, No. A-12-670423-C (Nev. Dist. Ct. Mar. 20, 2013) (HOA foreclosure does not eliminate senior deed of trust, but entitles HOA to payment priority) (**Exhibit P**); *SBW Invest. LLC v. Elsinore LLC et al.*, No. A675541 (Nev. Dist. Ct. Apr. 17, 2013) (minute order, finding that HOA foreclosure does not eliminate senior deed of trust, but entitles HOA to payment priority) (**Exhibit Q**); *Centeno v. Maverick Valley Props.*, No. A654878 (Nev. Dist. Ct. May 15, 2012) (HOA foreclosure sale does not eliminate senior deed of trust) (**Exhibit R**); *U.S. Bank Nat'l Assoc. v. Steele Weniger*, No. A676501 (Nev. Dist. Ct. May 9, 2013) (rejecting theory that HOA foreclosure sale can eliminate senior deed of trust because, *inter alia*, "it does not make sense that someone can pay five thousand dollars and it terminates the first mortgage lien") (**Exhibit S**); *SFR Invest. Pool 1 LLC v. First Horizon Home Loans*, A674958 (Nev. Dist. Ct. May 7, 2013) (**Exhibit T**). These Nevada courts refuse to embrace LVDG's interpretation of NRS 116.3116, an interpretation that would lead to absurd and inequitable results.

Because BANA's deed of trust preceded the HOA lien, LVDG could only purchase what the borrower had immediately preceding the sale – property subject to BANA's deed of trust. Under NRS 116.3116(2), LVDG did not, as it would have this Court believe, receive the property from the HOA free and clear for the opportunistic purchase price of $4,001.00. At most, it received the temporary right to possess the property.

**2. LVDG's Statutory Interpretation Violates Due Process**

LVDG's interpretation of NRS 116.3116(2) also does not comport with due process concerns. Senior deed of trust holders must receive notice of the super priority amount so they can cure and protect their secured interest in the property. LVDG does not and cannot state that BANA ever received notice of what the putative super priority amount was, whom to pay, or how long it

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had to pay. In fact, none of the HOA foreclosure notices identified what portion of the claimed lien constituted the super priority component, or even that the HOA was attempting a super priority lien foreclosure. It is an erroneous reading of the statute to declare that a senior deed of trust holder can be wiped out for not paying nine months of assessments without ever receiving notice of how to protect its interest in the property. This result is a clear violation of due process. Judge Allf, at a preliminary injunction hearing, recently confirmed that lack of notice in the HOA foreclosure context is a constitutional violation:

> Both State and Federal constitutional due process guarantees are offended if the first security mortgagee's interest may be voided by non-judicial foreclosure for an assessment lien, relatively nominal in value, without notice to the otherwise senior interest mortgagee, and if an opportunity is not provided to the mortgagee to argue its position, or to pay the assessment amounts in order to avoid the risk of losing, in this case, an $885,000.00 first security interest in the subject property.

Minute Order, *SFR Investments Pool1 LLC v. US Bank et al.*, No. A673671 (Nev. Dist. Ct. Mar. 12, 2013), attached as **Exhibit U**. A similar conclusion is warranted here.

### 3. In this Case, the HOA Foreclosure Was Not a Super Priority Foreclosure

Even if the Court concludes that an HOA foreclosure could eliminate a senior deed of trust, it would not do so in this case because the HOA foreclosure sale was not a super priority foreclosure.

NRS 116.3116 clearly states that a first position deed of trust has priority over an assessment lien. The only portion of an HOA assessment lien that is prior to a first position deed of trust is an amount equal to nine times the common assessments. *See* NRS 116.3116(2)(c). This amount, therefore, should not change over time (unless the common assessment amount changes).[3]

In this case, and in the case of most HOA foreclosure sales, the lien, HOA default, and HOA notice of sale did not specify the amount of the super priority component. *See* Exhibits I, J, K. The lien stated that the HOA assessment lien totaled $754.56. *See* Exhibit I. It did not identify a super priority component. By the time the HOA recorded its default, the lien amount had purportedly

[3] LVDG must concede that the statute clearly states that first position deeds of trust have priority over the majority of an HOA's assessment lien. LVDG makes a leap in logic, however, and maintains that an HOA can foreclose on a lien, regardless of whether it includes the correct super priority amount, and wipe out a first position deed of trust holder.

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increased to $1,749.65. *See* Exhibit J. Again, the HOA default did not identify the super priority portion. When the HOA recorded the notice of sale, the lien had purportedly increased to $2,876.83. *See* Exhibit K. Again, the HOA notice of sale did not parse out the super priority portion of the HOA lien.

Although the HOA did foreclose on a lien, it did not foreclose on a super priority lien. The lien itself states that it could include outstanding collection costs, interest, and late fees, none of which are part of a super priority lien. *See* Exhibit I; *see also* NRS 116.3116(2)(c). Moreover, the claimed lien amount almost quadrupled between the time the lien was recorded and the time the HOA recorded the notice of sale, again demonstrating that the HOA foreclosure was not a super priority lien foreclosure. *See* NRS 116.3116(2)(c) (the super priority lien is equal to nine times the budgeted common assessments). LVDG's assertion that the HOA foreclosure eliminated BANA's deed of trust is wrong, as the foreclosure at issue was not a super priority foreclosure.

**4. The Trustee's Sale is Commercially Unreasonable.**

Even if an HOA foreclosure sale could otherwise eliminate a senior deed of trust, which it cannot, the foreclosure sale in this case would be void as commercially unreasonable if it did, as LVDG claims, eliminate the senior deed of trust. Nevada adopted the Uniform Common-Interest Ownership Act in 1991 (**UCIOA**). 1991 Nev. Stat., Page 535. Nevada's UCIOA imposes an express obligation of good faith on an HOA. NRS 116.1113 provides as follows:

> Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.[4]

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[4] NRS 116.31164 provides express protections for parties affected by the sale and whose interests must be protected by the commercial reasonableness standard:

> 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

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The term "commercial reasonableness" has been interpreted in Nevada in several cases involving public sales:

> In addition to giving reasonable notice, a secured party must, after default, proceed in a commercially reasonable manner to dispose of collateral. NRS 104.9504(3); *Jones v. Bank of Nevada*, 91 Nev. 368, 535 P.2d 1279 (1975). Every aspect of the disposition, including the method, manner, time, place, and terms, must be commercially reasonable. NRS 104.9504(3). Although the price obtained at the sale is not the sole determinative factor, nevertheless, it is one of the relevant factors in determining whether the sale was commercially reasonable . . . . ***A wide discrepancy between the sale price and the value of the collateral compels close scrutiny into the commercial reasonableness of the sale***.

*Levers v. Rio King Land & Invest. Co.*, 93 Nev. 95, 98-99, 560 P.2d 917, 919-20 (1977) (citations omitted) (emphasis added); *see also Dennison v. Allen Group Leasing Corp.*, 110 Nev. 181, 185-86, 871 P.2d 288, 291 (1994).

*Will v. Mill Condominium Owner's Association*, 848 A.2d 336 (Vt. 2004), is a relatively recent case that has interpreted the obligation of good faith in the context of trustee's sales pursuant to homeowners association liens. In *Will*, the property was sold pursuant to a $3,510.10 homeowners association lien. *Id.* at 338. The fair market value of the property was $70,000. *Id.* Interpreting the same uniform act Nevada adopted, the Vermont Supreme Court voided the trustee's sale because the sale was not conducted in a commercially reasonable manner. The purchase price was obscenely inadequate, and there was no evidence the trustee sought to obtain the highest price.

The foreclosure sale in this case would be void as commercially unreasonable if it did, as LVDG claims, eliminate the senior deed of trust. The HOA made no effort to obtain the best price or to protect either the borrower or BANA. The sales price of $4,001.00 demonstrates that it was not made in good faith as a matter of law, as the property secures a $360,00.00 loan. *See* Exhibit A.

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> 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.

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The HOA's sale for 1.1% of the value of the senior deed of trust is indisputable evidence of a lack of good faith. The HOA sale in this case cannot eliminate a $360,000.00 deed of trust.

### C. Because the HOA Sale Did Not Eliminate BANA's Deed of Trust, LVDG's Claims Fail

The HOA foreclosure sale did not eliminate BANA's deed of trust for the numerous reasons discussed above. As a result, LVDG's claims each fail.

#### 1. LVDG's Quiet Title Claim Warrants Dismissal

LVDG asserts a claim for quiet title. "A quiet title claim requires a plaintiff to allege that the defendant is unlawfully asserting an adverse claim to title to real property." *Kemberling v. Ocwen Loan Servicing, LLC*, No. 2:09-cv-00567, 2009 WL 5039495, at *2 (D. Nev. Dec. 15, 2009). "The very object of the proceeding assumes that there are other claimants adverse to the Plaintiff, setting up titles and interests in the land or other subject-matter hostile to his [own]." *See Clay v. Scheeline Banking & Trust Co.*, 40 Nev. 9, 16, 159 P. 1081, 1082 (1916). Where such adverse claims exist, the party seeking to have another party's right to property extinguished bears the burden of overcoming the "presumption in favor of the record titleholder." *See Breliant v. Preferred Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996); *see Clay*, 40 Nev. at 16, 159 P. at 1082.

LVDG cannot state a quiet title claim against BANA. LVDG's quiet title claim is wholly unavailing, given that LVDG took title subject to BANA's deed of trust.

LVDG's quiet title claim also fails for an additional reason: it has not acted equitably. Because an action to quiet title is equitable in nature, *see MacDonald v. Krause*, 77 Nev. 312, 317-18, 362 P.2d 724 (1961), LVDG must show its right to such equitable relief. *See Transaero Land & Dev. Co. v. Land Title Co. of Nev., Inc.*, 108 Nev. 997, 1001, 842 P.2d 716 (1992) ("[I]n seeking equity, a party is required to do equity.") (internal quotation omitted). LVDG purchased the property for a pittance, then brought this action seeking to eliminate BANA's secured interest in the property. LVDG is engaging in real estate speculation at its worst. The Court should deny LVDG's request for equitable relief because it has not behaved equitably.

#### 2. LVDG's Requests for Declaratory and Injunctive Relief Fail to State a Claim

LVDG also seeks declaratory and injunctive relief. These claims fail for two reasons. **First**, these "claims" are actually remedies and not causes of action. *Goodwin v. Exec. Trustee Servs.*,

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3:09-cv-00306-ECR-PAL, slip op. at 10 (D. Nev. Dec. 2, 2010) (injunctive and declaratory relief); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D. Nev. 1996). For that reason alone, these "claims" should be dismissed.

**Second**, LVDG is not entitled to declaratory or injunctive relief because the requests are entirely derivative of LVDG's substantive claim, which fails for the reasons explained above. Because LVDG fails to state a quiet title claim, the derivative claims for relief also must be dismissed. *See Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 WL 3157160, at *12 (D. Ariz. Sept. 24, 2009) (holding that because none of the "substantive" claims stated a claim for relief, claims for injunctive and declaratory relief "must likewise fail"); *Vargas v. Countrywide Home Loans, Inc.*, No. CV 09-2309-JFW (CWX) (C.D. Cal. May 14, 2010) ("Plaintiff's claims for injunctive relief and declaratory relief are remedies, and not separate claims for relief. Because the underlying claims for relief against Defendants have been dismissed . . . any remedies that would have been available against Defendants are also necessarily dismissed"). This Court should dismiss LVDG's declaratory and injunctive relief claims.

## V

## CONCLUSION

For all of the above reasons, the Court should dismiss LVDG's second amended complaint with prejudice pursuant to Nevada Rule of Civil Procedure 12(b)(5).

DATED this 15th day of August, 2013.

**AKERMAN SENTERFITT LLP**

/s/ Natalie L. Winslow

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# EXHIBIT A

EXHIBIT A

C22

PIN #: 140-34-413-075
After Recording Return To:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100
SALT LAKE CITY, UT 84107
ATTN: FUNDING DEPARTMENT

Grantee:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107

Mail Tax Statement To:
UTAH FINANCIAL, INC.
4001 SOUTH 700 EAST STE 100
SALT LAKE CITY, UT 84107

1

20060630-0002110

Fee: $35.00
N/C Fee: $25.00

06/30/2006 09:39:29
T20050115643
Requestor:
FIRST AMERICAN TITLE COMPANY OF NEVAD

Frances Deane DGI
Clark County Recorder Pgs: 22

|Space Above This Line For Recording Data|

# DEED OF TRUST

UNIZA-ENRIQUEZ
Loan #: 5946
MIN: 100254105060621040
PIN: 140-34-413-075

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **"Security Instrument"** means this document, which is dated JUNE 22, 2006, together with all Riders to this document.
(B) **"Borrower"** is GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY.. Borrower is the trustor under this Security Instrument.
(C) **"Lender"** is UTAH FINANCIAL, INC.. Lender is a CORPORATION organized and existing under the laws of UT. Lender's address is 4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107.
(D) **"Trustee"** is FIRST AMERICAN TITLE.
(E) **"MERS"** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) **"Note"** means the promissory note signed by Borrower and dated JUNE 22, 2006. The Note states that Borrower owes Lender THREE HUNDRED SIXTY THOUSAND AND 00/100 Dollars (U.S. $360,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JULY 1, 2036.
(G) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."

**(H) "Loan"** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
**(I) "Riders"** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

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

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

TRANSFER OF RIGHTS IN THE PROPERTY

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

Jurisdiction):
**SEE EXHIBIT "A"**
which currently has the address of **6279 DOWNPOUR COURT, LAS VEGAS**, Nevada **89110** ("Property Address").

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

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

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

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

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

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

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

reduce the principal balance of the Note.

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

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

**3. Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

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

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

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to

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

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

**4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

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

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

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as

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

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

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

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

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

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

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

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

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

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of

making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

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

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

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

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

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

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

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

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

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this

Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

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

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

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

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

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

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

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

20) and benefit the successors and assigns of Lender.

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

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

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

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

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

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

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

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower

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

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

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

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

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

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

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

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

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

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

**If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lenders' election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on**

Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

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

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

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

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

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

Genevieve Uniza-Enriquez 10/23/06

- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

[Space Below This Line for Acknowledgment]

STATE OF Nevada

COUNTY OF Clark

This instrument was acknowledged before me on June 23rd 2006 by Genevieve Nunez Chapman.

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
K. SIMPSON
Appt. No. 04-93488-1
My Appt. Expires March 30, 2008

Notary Public

My Commission Expires: 3/30/08

## EXHIBIT 'A'

**PARCEL I:**

**LOT 75 OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA**

**PARCEL II:**

**A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT, LANDSCAPING AND PUBLIC UTILITIES PURPOSES ON, OVER AND ACROSS THE "PRIVATE DRIVES/ P.U.E." AND "COMMON AREAS" AS DELINEATED ON SAID MAP, AND AS FURTHER DEFINED BY THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT AND RESERVATION OF EASEMENTS FOR PALO VERDE RANCH RECORDED MARCH 12, 2004 IN BOOK 20040312, AS DOCUMENT NUMBER 01067, OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.**

# PLANNED UNIT DEVELOPMENT RIDER

UNIZA-ENRIQUEZ
Loan #: 5945
MIN: 100254105060621040

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 22ND day of JUNE, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to UTAH FINANCIAL, INC., (the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

6279 DOWNPOUR COURT, LAS VEGAS, NV 89110

[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in THE COVENANTS, CONDITIONS AND RESTRICTIONS FILED OF RECORD THAT AFFECT THE PROPERTY (the "Declaration"). The Property is a part of a planned unit development known as

CHARLESTON & POGO

[Name of Planned Unit Development]

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

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

**A. PUD Obligations.** Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituents Documents" are the: (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

**B. Property Insurance.** So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the

provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

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

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

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

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

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

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

**F. Remedies.** If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

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

Genevieve Uniza-Enriquez 10/23/04

- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

Doc ID#:

# ADJUSTABLE RATE RIDER
**(MTA-Twelve Month Average Index - Payment Caps)**

UNIZA-ENRIQUEZ
Loan #: 5946
PIN: 140-34-413-075
MIN: 100254105060621040

THIS ADJUSTABLE RATE RIDER is made this 22ND day of JUNE, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to UTAH FINANCIAL, INC. ("Lender") of the same date and covering the property described in the Security Instrument and located at:

6279 DOWNPOUR COURT, LAS VEGAS, NV 89110
[Property Address]

**THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE MAXIMUM LIMIT STATED IN THE NOTE.**

**ADDITIONAL COVENANTS:** In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agrees as follows:

**A. INTEREST RATE AND MONTHLY PAYMENT CHANGES**
The Note provides for changes in the interest rate and the monthly payments, as follows:

**2. INTEREST**
**(A) Interest Rate**

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 1.750%. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of the Note.

**(B) Interest Rate Change Dates**

The interest rate I will pay may change on the 1ST day of AUGUST, 2006, and on that day every month thereafter. Each date on which my interest rate could change is called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. The interest rate may change monthly, but the monthly payment is recalculated in accordance with Section 3.

**(C) Index**

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

**(D) Calculation of Interest Rate Changes**

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE AND ONE-HALF percentage point(s) 3.500% ("Margin") to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). This rounded amount will be my new interest rate until the next Interest Rate Change Date. My interest will never be greater than 9.950%. Beginning with the first Interest Rate Change Date, my interest rate will never be lower than the Margin.

**3. PAYMENTS**

**(A) Time and Place of Payments**

I will make a payment every month.

I will make my monthly payments on the 1ST day of each month beginning on AUGUST 1, 2006. I will make these payments every month until I have paid all the Principal and Interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on JULY 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 4001 SOUTH 700 EAST STE 100, SALT LAKE CITY, UT 84107 or at a different place if required by the Note Holder.

**(B) Amount of My Initial Monthly Payments**

Each of my initial monthly payments until the first Payment Change Date will be in the amount of U.S. $1,286.08 unless adjusted under Section 3(F).

**(C) Payment Change Dates**

My monthly payment may change as required by Section 3(D) below beginning on the 1ST day of AUGUST, 2007, and on that day every 12th month thereafter. Each of these dates is called a "Payment Change Date." My monthly payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different monthly payment. The "Minimum Payment" is the minimum amount Note Holder will accept

for my monthly payment which is determined at the last Payment Change Date or as provided in Section 3(F) or 3(G) below. If the Minimum Payment is not sufficient to cover the amount of the interest due then negative amortization will occur.

I will pay the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

**(D) Calculation of Monthly Payment Changes**

At least 30 days before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the maturity date in substantially equal payments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." Unless Section 3(F) or 3(G) apply, the amount of my new monthly payment effective on a Payment Change Date, will not increase by more than 7.5% of my prior monthly payment. This 7.5% limitation is called the "Payment Cap." This Payment Cap applies only to the Principal and Interest payment and does not apply to any escrow payments Lender may require under the Security Instrument. The Note Holder will apply the Payment Cap by taking the amount of my Minimum Payment due the month preceding the Payment Change Date and multiplying it by the number 1.075. The result of this calculation is called the "Limited Payment." Unless Section 3(F) or 3(G) below requires me to pay a different amount, my new Minimum Payment will be the lesser of the Limited Payment and the Full Payment. I also have the option to pay the Full Payment for my monthly payment.

**(E) Additions to My Unpaid Principal**

Since my monthly payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations described in Section 3(D), my Minimum Payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal, and interest will accrue on the amount of this difference at the interest rate required by Section 2. For each month that the monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

**(F) Limit on My Unpaid Principal; Increased Monthly Payment**

My unpaid Principal can never exceed the Maximum Limit equal to **ONE HUNDRED FIFTEEN** percent (**115.000%**) of the Principal amount I originally borrowed. My unpaid Principal could exceed that Maximum Limit due to Minimum Payments and interest rate increases. In that event, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment. This means that my monthly payment may change more frequently than annually and such payment changes will not be limited by the 7.5% Payment Cap. The new Minimum Payment will be in an amount that would be sufficient to repay my then unpaid Principal in full on the Maturity Date in substantially equal payments at the current interest rate.

**(G) Required Full Payment**

On the **FIFTH** Payment Change Date and on each succeeding fifth Payment Change Date thereafter, I will begin paying the Full Payment as my Minimum Payment until my monthly payment changes again. I also will begin paying the Full Payment as my Minimum Payment on the final Payment Change Date.

**(H) Payment Options**

After the first Interest Rate Change Date, Lender may provide me with up to three (3) additional payment options that are **greater** than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

(i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option and it is only available if the interest portion exceeds the Minimum Payment.
(ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (Principal and Interest) at the Maturity Date in substantially equal payments.
(iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (Principal and Interest) within a fifteen (15) year term from the first payment due date in substantially equal payments. This monthly payment amount is calculated on the assumption that the current rate will remain in effect for the remaining term.

These Payment Options are only applicable if they are greater than the Minimum Payment.

**B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER**

Section 18 of the Security Instrument entitled "Transfer of the Property or a Beneficial Interest in Borrower" is amended to read as follows:

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

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

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

5946

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

Genevieve Uniza-Enriquez 10/23/06

- BORROWER - GENEVIEVE UNIZA-ENRIQUEZ - DATE -

# EXHIBIT B

EXHIBIT B

20060714-0001826

Fee: $15.00
N/C Fee: $0.00

07/14/2006 11:27:24
T20060123146
Requestor:
RECONTRUST COMPANY NA

Frances Deane RMM
Clark County Recorder Pgs: 2

Tax ID: 140-34-413-075

# SUBSTITUTION OF TRUSTEE AND FULL RECONVEYANCE

WHEREAS, GENEVIEVE UNIZA-ENRIQUEZ
was the original Trustor, under that certain Deed of Trust dated 08/16/2004 and recorded 08/20/2004, as Instrument or Document No. 20040820-0003881, in Book N/A, Page N/A, of Official Records of the County of CLARK, State of Nevada.

WHEREAS, the undersigned, Mortgage Electronic Registration Systems, Inc. , as the present Beneficiary(s) under said Deed of Trust hereby substitutes a new Trustee, ReconTrust Company, N.A., under said Deed of Trust, and ReconTrust Company, N.A. as Trustee under said Deed of Trust does hereby reconvey, without warranty, to the person or persons legally entitled thereto, the estate now held by Trustee under said Deed of Trust.

Dated: 07/03/2006

**New Trustee:**
ReconTrust Company, N.A.

By: _____
Peter Lopez
Assistant Secretary

**Current Beneficiary:**
Mortgage Electronic Registration Systems, Inc.

By: _____
Roxanne Bermea
Assistant Secretary

DOCID#000664629842005N

Mail tax statements and
When recorded return to:
GENEVIEVE UNIZA-ENRIQUEZ
6279 Downpour Ct
Las Vegas, NV 89110

Recording Requested By:
ReconTrust Company, N.A.
1330 W. Southern Ave.
MS: TPSA-88
Tempe, AZ 85282-4545
(800) 540-2684

STATE OF ARIZONA
COUNTY OF MARICOPA

On 07/03/2006, before me, Leela Turek, Notary Public, personally appeared Peter Lopez and Roxanne Bermea, both personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entities upon behalf of which the persons acted, executed the instrument.

Witness my hand and official seal.

Leela Turek

Leela Turek
Notary Public for said State and County
Expires: 08/11/2009

OFFICIAL SEAL
LEELA TUREK
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Comm. Expires Aug. 11, 2009

DOCID#000664629842005N

Mail tax statements and
When recorded return to:
GENEVIEVE UNIZA-ENRIQUEZ
6279 Downpour Ct
Las Vegas, NV 89110

Recording Requested By:
ReconTrust Company, N.A.
1330 W. Southern Ave.
MS: TPSA-88
Tempe, AZ 85282-4545
(800) 540-2684

# EXHIBIT C

EXHIBIT C

Inst #: 201006250003864
Fees: $215.00
N/C Fee: $0.00
06/25/2010 03:11:13 PM
Receipt #: 403579
Requestor:
FIDELITY NATIONAL DEFAULT S
Recorded By: ARO Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

RECORDING REQUESTED BY:
WHEN RECORDED MAIL TO:
RECONTRUST COMPANY
2380 Performance Dr, TX2-985-07-03
Richardson, TX 75082

TS No. 10-0071205
Title Order No. 100375035NVGTI
APN No. 140-34-413-075
Property Address:
6279 DOWNPOUR COURT
LAS VEGAS, NV 89110

## NEVADA IMPORTANT NOTICE

## NOTICE OF DEFAULT/ELECTION TO SELL UNDER DEED OF TRUST

NOTICE IS HEREBY GIVEN THAT: RECONTRUST COMPANY, N.A., is acting as an agent for the Beneficiary under a Deed of Trust dated 06/22/2006, executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY. as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as beneficiary recorded 06/30/2006, as Instrument No. 0002110 (or Book 20060630, Page ) of Official Records in the Office of the County Recorder of Clark County, Nevada. Said obligation including ONE NOTE FOR THE ORIGINAL sum of $360,000.00. That a breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of :
FAILURE TO PAY THE INSTALLMENT OF PRINCIPAL, INTEREST AND IMPOUNDS WHICH BECAME DUE ON 10/01/2008 AND ALL SUBSEQUENT INSTALLMENTS OF PRINCIPAL, INTEREST AND IMPOUNDS, TOGETHER WITH ALL LATE CHARGES, PLUS ADVANCES MADE AND COSTS INCURRED BY THE BENEFICIARY, INCLUDING FORECLOSURE FEES AND COSTS AND/OR ATTORNEYS' FEES. IN ADDITION, THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 07/01/2036 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE.

That by reason thereof, the present beneficiary under such deed of trust has deposited with RECONTRUST COMPANY, N.A. such deed of trust and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

**NOTICE**

You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the payment of the amounts required by the statutory section without requiring payment of that portion of principal and interest which would not be due had no default occurred. Where reinstatement is possible, if the default is not cured within 35 days following recording and mailing of this Notice of Trustor or Trustor's successor in interest, the right of reinstatement will terminate and the property may there after be sold. The Trustor may have the right to bring court action to assert the non existence of a default or any other defense of Trustor to acceleration and sale.

To determine if reinstatement is possible and the amount, if any, to cure the default, contact: BAC Home Loans Servicing, LP, c/o RECONTRUST COMPANY, 2380 Performance Dr.,TX2-985-07-03, Richardson, TX 75082, PHONE: (800) 281-8219. Should you wish to discuss possible options for loan modification, you may contact the Home Retention Division at 1-800-669-6650. If you meet the requirements of Section NRS 107.085, you may request mediation in accordance with the enclosed Election/Waiver of Mediation Form and instructions. You may also contact the Nevada Fair Housing Center at 1-702-731-6095 or the Legal Aid Center at 1-702-386-1070 for assistance.

RECONTRUST COMPANY, as agent for the Beneficiary

By: LSI Title Agency, Inc., as Agent
**Anselmo Pagkaliwangan**

State of: California
County of: Orange

On JUN 25 2010, before me, **Debra Pedley**, Notary Public, personally appeared Anselmo Pagkaliwangan, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature _____ (Seal)

**Debra Pedley**

DEBRA PEDLEY
Commission # 1852997
Notary Public - California
Los Angeles County
My Comm. Expires Jun 8, 2013

# EXHIBIT D

EXHIBIT D

FIDELITY NATIONAL

RECORDING REQUESTED BY:
RECONTRUST COMPANY, N.A.
**AND WHEN RECORDED MAIL DOCUMENT TO:**
BAC Home Loans Servicing, LP
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065

Inst #: 201006300004065
Fees: $14.00
N/C Fee: $0.00
06/30/2010 03:27:38 PM
Receipt #: 409485
Requestor:
FIDELITY NATIONAL DEFAULT S
Recorded By: DXI Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

**TS No. 10-0071205**
**TITLE ORDER#: 100375035NVGTI**
APN 140-34-413-075

---

**CORPORATION ASSIGNMENT OF DEED OF TRUST NEVADA**

FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFER TO:
**BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP**

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 06/22/2006, EXECUTED BY: GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY.,TRUSTOR: TO FIRST AMERICAN TITLE., TRUSTEE AND RECORDED AS INSTRUMENT NO. 0002110 ON 06/30/2006, IN BOOK 20060630, OF OFFICIAL RECORDS IN THE COUNTY RECORDER'S OFFICE OF CLARK COUNTY, IN THE STATE OF NEVADA.

DESCRIBING THE LAND THEREIN: AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST.

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE UNDER SAID DEED OF TRUST/MORTGAGE.

DATED: June 25, 2010

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

State of: Texas )
County of: Tarrant )

BY: _____
Khadija Gulley, Assistant Secretary

JUN 2 8 2010

On _____ before me Elsie E. Kroussakis, personally appeared Khadija Gulley, Asst. Secty, know to me (or proved to me on the oath of _____ or through _____) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
Witness my hand and official seal.

_____
Notary Public's Signature

ELSIE E KROUSSAKIS
Notary Public
STATE OF TEXAS
My Comm. Exp. 10-14-11

# EXHIBIT E

EXHIBIT E

Inst #: 201103300004230
Fees: $15.00
N/C Fee: $0.00
03/30/2011 02:41:42 PM
Receipt #: 722999
Requestor:
LSI TITLE AGENCY INC.
Recorded By: SOL Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

**RECORDING REQUESTED BY:**
**WHEN RECORDED MAIL TO:**
Genevieve Uniza
6279 DOWNPOUR COURT
LAS VEGAS, NV 89110

**TS No. 10-0071205**
**Title Order No. 100375035NVGT1**

APN 140-34-413-075

**RESCISSION OF ELECTION TO DECLARE DEFAULT**
**NEVADA**

NOTICE IS HEREBY GIVEN that RECONTRUST COMPANY, N.A., Trustee for the Beneficiary does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell hereinafter described, provided, however, that this rescission shall not be construed as waiving, curing, extending to, or affecting any default, either past, present or future, under such Deed of Trust, or as impairing any right or remedy thereunder, and it is and shall be deemed to be, only an election without prejudice not to cause a sale to be made pursuant to such Notice of Default and Election to Sell, and it shall not in any way alter or change any of the rights remedies or privileges secured to Beneficiary and/or Trustee under such Deed of Trust, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations therein contained.
Said NOTICE OF DEFAULT AND ELECTION TO SELL under Deed of Trust specifically described therein was:
Recorded on 06/25/2010, as Instrument No. 0003864, in Book 20100625, Page _____, of Official Records of Clark County, Nevada.
The DEED OF TRUST affected by this notice recorded on 06/30/2006 as Instrument No. 0002110 in Book 20060630 Page ., executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY. , as Trustor in Clark County, Nevada.

DATED: March 29, 2011

RECONTRUST COMPANY, N.A.

BY: _____ 3/29/11
Sharon Iseminger, Authorized Signer

State of: Texas )
County of: Tarrant )

On 3/29/2011 before me Elsie E. Kroussakis, personally appeared Sharon Iseminger Authorized Signer, know to me (or proved to me on the oath of _____ or through TO DL) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
Witness my hand and official seal.

Elsie E Kroussakis
Notary Public's Signature

ELSIE E KROUSSAKIS
Notary Public
STATE OF TEXAS
My Comm. Exp. 10-14-11

# EXHIBIT F

EXHIBIT F

Inst #: 201104050002463
Fees: $215.00
N/C Fee: $0.00
04/05/2011 01:15:55 PM
Receipt #: 729583
Requestor:
LSI TITLE AGENCY INC.
Recorded By: RNS Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

FIDELITY NATIONAL TITLE
**RECORDING REQUESTED BY:**
**WHEN RECORDED MAIL TO:**
**RECONTRUST COMPANY**
**2380 Performance Dr, TX2-984-0407**
**Richardson, TX 75082**
NVNOD_2011.3.0.2_03/2011
**TS No. 10-0071205**
**Title Order No. 100375035NVGTI**
**APN No. 140-34-413-075**
**Property Address:**
**6279 DOWNPOUR COURT**
**LAS VEGAS, NV 89110**

## NEVADA IMPORTANT NOTICE

## NOTICE OF DEFAULT/ELECTION TO SELL UNDER DEED OF TRUST

NOTICE IS HEREBY GIVEN THAT: RECONTRUST COMPANY, N.A., Trustee for the Beneficiary under a Deed of Trust dated 06/22/2006, executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY. as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as beneficiary recorded 06/30/2006, as Instrument No. 0002110 (or Book 20060630, Page ) of Official Records in the Office of the County Recorder of Clark County, Nevada. Said obligation including ONE NOTE FOR THE ORIGINAL sum of $360,000.00. That a breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of :
FAILURE TO PAY THE INSTALLMENT OF PRINCIPAL, INTEREST AND IMPOUNDS WHICH BECAME DUE ON 10/01/2008 AND ALL SUBSEQUENT INSTALLMENTS OF PRINCIPAL, INTEREST AND IMPOUNDS, TOGETHER WITH ALL LATE CHARGES, PLUS ADVANCES MADE AND COSTS INCURRED BY THE BENEFICIARY, INCLUDING FORECLOSURE FEES AND COSTS AND/OR ATTORNEYS' FEES. IN ADDITION, THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 07/01/2036 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE.

That by reason thereof, the present beneficiary under such deed of trust has deposited with RECONTRUST COMPANY, N.A. such deed of trust and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

**NOTICE**

You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed Of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the payment of the amounts required by that statutory section without requiring payment of that portion of principal and interest which would not be due had no default occured. Where reinstatement is possible, if the default is not cured within 35 days following recording and mailing of this Notice to Trustor or Trustor's successor in interest, the right of reinstatement will terminate and the property may there after be sold. The Trustor may have the right to bring court action to assert the non existence of a default or any other defense of Trustor to acceleration and sale.

To determine if reinstatement is possible and the amount, if any, to cure the default, contact: BAC Home Loans Servicing, LP, c/o RECONTRUST COMPANY, N.A. 2380 Performance Dr, TX2-984-0407, Richardson, TX 75082, PHONE: (800) 281-8219. Should you wish to discuss possible options for loan modification, you may contact the Home Retention Division at 1-800-669-6650. If you meet the requirements of Section NRS 107.085, you may request mediation in accordance with the enclosed Election/Waiver of Mediation Form and instructions. You may also contact the Nevada Fair Housing Center at 1-702-731-6095 or the Legal Aid Center at 1-702-386-1070 for assistance.

DATED:March 31, 2011

RECONTRUST COMPANY, N.A.

BY: Laura Dalley 3/31/11
Laura Dalley, Authorized Signer

State of: TEXAS )
County of: TARRANT )

On 3/31/11, before me Paula Y. Vance, personally appeared Laura Dalley, Auth. Sgn, known to me (or proved to me on the oath of — or through DL) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

WITNESS MY HAND AND OFFICIAL SEAL

Paula Y Vance
Notary Public's Signature

PAULA Y. VANCE
MY COMMISSION EXPIRES
August 13, 2014

# EXHIBIT G

EXHIBIT G

APN: **140-34-413-075**
Alt. APN:
Recording requested by:

When recorded, mail to:
ReconTrust Company, N.A.
NV Mediation Team
P.O. Box 660874
Dallas, TX 75266-0874

10037 5035

Inst #: 201112290000315
Fees: $17.00
N/C Fee: $0.00
12/29/2011 08:05:20 AM
Receipt #: 1020481
Requestor:
LSI TITLE AGENCY INC.
Recorded By: ECM Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

# CERTIFICATE

STATE OF NEVADA FORECLOSURE MEDIATION PROGRAM

Property Owner(s):
**UNIZA-ENRIQUEZ, GENEVIEVE**

Property Address:
**16279 DOWNPUUR CT**
**Las Vegas, NV 89110**
**Clark Co.**

Trustee:
**ReconTrust**
**NV Mediation Team**
**PO Box 660874**
**Dallas, TX 752660874**

Instrument Number:
**0002110**

Deed of Trust Doc Number:
**06/22/2006**

Book: **20060630** Page:

☐ **Mediation Waived:** The Beneficiary may proceed with the foreclosure process.

■ **Non-Applicable Property:** The Beneficiary may proceed with the foreclosure process.

☐ **No Agreement:** A Foreclosure Mediation Conference was held on **N/A**. The parties were unable to agree to a resolution of this matter. The Beneficiary may proceed with the foreclosure process.

☐ **Relinquish the Property:** A Foreclosure Mediation Conference was held on **N/A**. The parties agreed homeowner would voluntarily relinquish the property. The mediation required by law has been completed in this matter. The Beneficiary may proceed with the foreclosure process.

☐ **Grantor Non-Compliance:** The Grantor or person who holds the title of record did not attend the Foreclosure Mediation Conference or failed to produce the necessary disclosure forms. The Beneficiary may proceed with the foreclosure process.

☐ **Certificate Reissuance:** The Beneficiary may proceed with the foreclosure process.

☐ **Court Ordered:** The Beneficiary may proceed with the foreclosure process.

NOD Date: 04-05-2011 Proof of Service Date: 04-11-2011

Certificate Issued Date: 12-06-2011

## FMP CERT: 2011-12-06-0140

STATE OF NEVADA FORECLOSURE MEDIATION PROGRAM
VERISE V. CAMPBELL
DEPUTY DIRECTOR

# EXHIBIT H

EXHIBIT H

Inst #: 201112290000316
Fees: $18.00
N/C Fee: $0.00
12/29/2011 08:05:20 AM
Receipt #: 1020481
Requestor:
LSI TITLE AGENCY INC.
Recorded By: ECM Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

WHEN RECORDED MAIL TO:
RECONTRUST COMPANY
2380 Performance Dr, TX2-984-0407
Richardson, TX 75082

TS No. 10-0071205
Title Order No. 100375035NVGTI

APN No.:140-34-413-075

# NEVADA NOTICE OF TRUSTEE'S SALE

**YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 06/22/2006. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.**

Notice is hereby given that RECONTRUST COMPANY, N.A., as duly appointed trustee pursuant to the Deed of Trust executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY., dated 06/22/2006 and recorded 06/30/2006, as Instrument No. 0002110, in Book 20060630, Page , of Official Records in the office of the County Recorder of CLARK County, State of Nevada, will sell on 01/17/2012 at 10:00 AM, at At the front entrance to Nevada Legal News located at 930 S. 4TH Street, Las Vegas, NV 89101 at public auction, to the highest bidder for cash(in the forms which are lawful tender in the United States, payable in full at time of sale), all right, title, and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 6279 DOWNPOUR COURT, LAS VEGAS, NV 89110. The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein.

The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $448,418.85. It is possible that at the time of sale the opening bid may be less than the total indebtedness due.

In addition to cash, the Trustee will accept cashier's checks drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state. In the event tender othere than cash is accepted, the Trustee may withhold the issuance of the Trustee's Deed until funds become available to the payee or endorsee as a matter or right. Said sale will be made, in an "AS IS" condition, but without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the indebtedness secured by said Deed of Trust, advances thereunder, with interest as provided therein, and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as provided in said Note, plus fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust.

DATED: December 27, 2011
RECONTRUST COMPANY NA, Trustee
2380 Performance Dr., TX 2-984-04-07
Richardson, TX 75082
Phone/Sale Information (800)281-8219

By: _____ 12/27/11
DeEdra Williams, Assistant Vice President

RECONTRUST COMPANY NA is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

Inst #: 201204120002494
Fees: $18.00
N/C Fee: $0.00
04/12/2012 03:16:58 PM
Receipt #: 1128636
Requestor:
LSI TITLE AGENCY INC.
Recorded By: ANI Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

WHEN RECORDED MAIL TO:
RECONTRUST COMPANY
2380 Performance Dr, TX2-984-0407
Richardson, TX 75082

TS No. 10-0071205
Title Order No. 100375035NVGT1

APN No.:140-34-413-075

# NEVADA NOTICE OF TRUSTEE'S SALE

**YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 06/22/2006. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.**

Notice is hereby given that RECONTRUST COMPANY, N.A., as duly appointed trustee pursuant to the Deed of Trust executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY., dated 06/22/2006 and recorded 06/30/2006, as Instrument No. 0002110, in Book 20060630, Page , of Official Records in the office of the County Recorder of CLARK County, State of Nevada, will sell on 05/01/2012 at 10:00 AM, at At the front entrance to Nevada Legal News located at 930 S. 4TH Street, Las Vegas, NV 89101 at public auction, to the highest bidder for cash(in the forms which are lawful tender in the United States, payable in full at time of sale), all right, title, and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 6279 DOWNPOUR COURT, LAS VEGAS, NV 89110. The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein.

The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $452,557.77. It is possible that at the time of sale the opening bid may be less than the total indebtedness due.

In addition to cash, the Trustee will accept cashier's checks drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state. In the event tender othere than cash is accepted, the Trustee may withhold the issuance of the Trustee's Deed until funds become available to the payee or endorsee as a matter or right. Said sale will be made, in an "AS IS" condition, but without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the indebtedness secured by said Deed of Trust, advances thereunder, with interest as provided therein, and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as provided in said Note, plus fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust.

DATED: April 11, 2012
RECONTRUST COMPANY N.A, Trustee
2380 Performance Dr., TX 2-984-04-07
Richardson, TX 75082
Phone/Sale Information (800)281-8219

By: _____ 4/11/12
DeEdra Williams, Assistant Vice President

RECONTRUST COMPANY NA is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

Inst #: 201207250002736
Fees: $18.00
N/C Fee: $0.00
07/25/2012 02:48:22 PM
Receipt #: 1247414
Requestor:
LSI TITLE AGENCY INC.
Recorded By: BGN Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

WHEN RECORDED MAIL TO:
RECONTRUST COMPANY
2380 Performance Dr, TX2-984-0407
Richardson, TX 75082

TS No. 10-0071205
Title Order No. 100375035NVGTI

APN No.:140-34-413-075

# NEVADA NOTICE OF TRUSTEE'S SALE

**YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 06/22/2006. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.**

Notice is hereby given that RECONTRUST COMPANY, N.A., as duly appointed trustee pursuant to the Deed of Trust executed by GENEVIEVE UNIZA-ENRIQUEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY., dated 06/22/2006 and recorded 06/30/2006, as Instrument No. 0002110, in Book 20060630, Page , of Official Records in the office of the County Recorder of CLARK County, State of Nevada, will sell on 08/14/2012 at 10:00 AM, at At the front entrance to Nevada Legal News located at 930 S. 4TH Street, Las Vegas, NV 89101 at public auction, to the highest bidder for cash(in the forms which are lawful tender in the United States, payable in full at time of sale), all right, title, and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 6279 DOWNPOUR COURT, LAS VEGAS, NV 89110. The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein.

The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $456,025.06. It is possible that at the time of sale the opening bid may be less than the total indebtedness due.

In addition to cash, the Trustee will accept cashier's checks drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state. In the event tender other than cash is accepted, the Trustee may withhold the issuance of the Trustee's Deed until funds become available to the payee or endorsee as a matter or right. Said sale will be made, in an "AS IS" condition, but without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the indebtedness secured by said Deed of Trust, advances thereunder, with interest as provided therein, and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as provided in said Note, plus fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust.

DATED: July 24, 2012
RECONTRUST COMPANY N.A, Trustee
2380 Performance Dr., TX 2-984-04-07
Richardson, TX 75082
Phone/Sale Information (800)281-8219

By: 7/24/12
DeEdra Williams, Assistant Vice President

RECONTRUST COMPANY NA is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

# EXHIBIT I

EXHIBIT I

Return to:
Attn: Kelly Mitchell
Absolute Collection Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394 phone

APN # 140-34-413-075

Inst #: 201004010001086
Fees: $15.00
N/C Fee: $0.00
04/01/2010 10:50:35 AM
Receipt #: 294131
Requestor:
CAMCO
Recorded By: BGN Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

# Notice of Delinquent Assessment Lien

**This NOTICE OF DELINQUENT ASSESSMENT** is being given pursuant to N.R.S. 117.70 et seq. or N.R.S. 116.3115 et. Seq. and N.R.S. 116.3116 through 116.31168 et. Seq. and the provisions of the Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the Homeowners Association as follows:

Association Claimant: Palo Verde Ranch HOA Declarations of CC&Rs recorded 3/12/04 Instrument No: 01067, Book No.: 20040312, Page No:__ County of CLARK, and any and all amendments or annexations of record thereto.

The description of the common interest development unit against which this notice is being recorded is as follows: Legal Unit No.: 6279 Downpour Ct., Charleston & Fogg Plat Book 113 Page 40 Lot 75

The reputed owner is: GENEVIEVE UNIZA-ENRIQUEZ

Common address: 6279 Downpour Ct., Las Vegas NV 89110

Owner's mailing address: Same

**DELINQUENCY #A1259**

| | |
|---|---|
| Total Amount due as of 03/31/10 | $754.56 |

Additional monies shall accrue under this claim at the rate of the claimant's periodic assessments, plus permissible late charges, costs of collection and interest and other charges, if any, that shall accrue subsequent to the date of this notice.

The acting agency for enforcement on this lien is:

ABSOLUTE COLLECTION SERVICES, LLC
PO BOX 12117
LAS VEGAS NV 89112
(702) 531-3394

DATED: 03/31/2010

RICHARD KAYE, Trustee Sales Officer

STATE OF NEVADA
COUNTY OF CLARK

On 3/31/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, RICHARD KAYE personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

KELLY MITCHELL, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

# EXHIBIT J

EXHIBIT J

Return to:
Attn: Kelly Mitchell
Absolute Collections Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394

APN # 140-34-413-075
TS NO: A1259
Title Order No:

Inst #: 201007140001222
Fees: $16.00
N/C Fee: $0.00
07/14/2010 09:49:23 AM
Receipt #: 424836
Requestor:
CAMCO
Recorded By: GILKS Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

# NOTICE OF DEFAULT AND ELECTION TO SELL UNDER NOTICE OF DELINQUENT ASSESSMENT

**WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!** You may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default may be recorded or mailed. The amount is **$1749.65** as of **July 13, 2010** and will increase until your account becomes current. Upon your written request, **Palo Verde Ranch HOA** will give you a written itemization of the entire amount you must pay. You and the Association may mutually agree in writing prior to the time the notice of sale is posted to, amount other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2). Following the expiration of the time period previously referred to, unless a separate written agreement between you and the Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by the Association.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, contact the following trustee who has been authorized by the Association to enforce its lien by sale: Absolute Collection Services, LLC, PO Box 12117, Las Vegas, NV 89112, 702-531-3394.

THIS NOTICE is given pursuant to NRS 117.070 et. Seq. or NRS 116.3115 et. Seq. and NRS 116.3116 through 116.31168 et. Seq., and pursuant to that certain Notice of

Delinquent Assessment Lien, recorded on **4/01/10** as Document no. 0001086 book **20100401** of Official Records in the office of the Recorder of Clark County, State of Nevada.

Owner: **Genevieve Uniza-Enriquez**
Property Address: **6279 Downpour Ct, Las Vegas, NV 89110**

Legal Description-shown on the Subdivision map recorded in Book No.**113** Page(s) **40** Inclusive, of Maps of the County of Clark, State of Nevada.

If you have any questions, you should contact a lawyer. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

## REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION

NOTICE IS HEREBY GIVEN THAT: Absolute Collection Services, LLC, is the duly appointed Trustee/Agent authorized by the Association, pursuant to the terms contained in that certain Declaration of Covenants, Conditions and Restrictions, Recorded on **3/12/04** as document number **01067-20040312** of Official Records in the Office of the Recorder of Clark County, Nevada, and any and all amendments or annexations of record thereto, describing the land therein. That the beneficial Interest under said Notice of Delinquent Assessment is presently held by the Association. That a breach of, and default in, the obligation for which said Covenants, Conditions and Restrictions as security has occurred in that the payment(s) have not been made of:

Periodic assessments, less credits and offsets, plus any late charges, interest, fees, charges, collection costs, trustee's fees, and attorney fees, if any.

That by reason thereof, the present Association under such Covenants, Conditions and Restrictions, has executed and delivered to said Trustee, a written Declaration and Demand for Sale, and has deposited with said duly appointed Trustee, such Covenants, Conditions and Restrictions and all documents evidencing the obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the herein described property, liened by said Association, to be sold to satisfy the obligations secured thereby.

PLEASE NOTE THAT WE ARE A DEBT COLLECTOR.

Date: 7/13/10

Absolute Collection Services, LLC as Trustee

Richard Kaye, Trustee Sale Officer

STATE OF NEVADA
COUNTY OF CLARK

On 7/13/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

Kelly Mitchell, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

# EXHIBIT K

EXHIBIT K

Return to:
Attn: Kelly Mitchell
Absolute Collections Services, LLC
PO Box 12117
Las Vegas, NV 89112
(702) 531-3394

APN # 140-34-413-075
TS NO: A1259
Title Order No: 072210-4-J
HOA: Palo Verde Ranch HOA

Inst #: 201011180001542
Fees: $15.00
N/C Fee: $25.00
11/18/2010 09:18:10 AM
Receipt #: 582556
Requestor:
CAMCO
Recorded By: ARO Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

# NOTICE OF TRUSTEE'S SALE

**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 ABSOLUTE COLLECTION SERVICES, LLC AT 702-531-3394. IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION AT 877-829-9907 OR 702-486-4480 IMMEDIATELY.**

You are in default under a Notice of Delinquent Assessment LIEN, dated APRIL 1, 2010. Unless you take action to protect your property, it may be sold at public sale. If you need an explanation of the nature of the proceedings against you, you should contact a lawyer.

NOTICE IS HEREBY GIVEN THAT: On JANUARY 11, 2011 at 4:00 PM, at the front entrance to Absolute Collection Services, LLC, 1820 E Sahara Ave #111, Las Vegas NV 89104, under the power of sale pursuant to the terms of those certain covenants conditions and restrictions recorded on MARCH 12, 2004 as instrument number 01067 Book 20040312 of official records of Clark County, as the duly appointed agent and pursuant to Notice of Delinquent Assessment LIEN, recorded on 4/1/10 as Document No. 0001086 in Book 20100401 of Official Records in the Office of the Recorder of Clark County, Nevada, **WILL SALE AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH**, (payable at time of sale in lawful money of the United States) all right, title and interest in the following commonly known property as:

Address: 6279 DOWNPOUR CT.
City, State, Zip: LAS VEGAS NV 89110

The owner(s) of said property as of the date of the recording of said lien is purported to be:

GENEVIEVE UNIZA-ENRIQUEZ

The undersigned agent disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein. Said sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum due under said Notice of Delinquent Assessment Lien, with interest thereon, as provided in said notice, advances, if any, estimated fees, charges, and expenses of the Trustee, to-wit:

$2,873.86 Estimated Accrued interest and additional advances, if any, will increase this figure prior to sale.

The Notice of Default and Election to Sell the described property was recorded on JULY 14, 2010 as instrument 0001222 Book 20100714 in the official records of Clark County.

PLEASE NOTE THAT WE ARE A DEBT COLLECTOR

Date: 11/18/10

Absolute Collection Service, LLC
1820 E Sahara Ave #111
Las Vegas NV 89104
702-531-3394

Richard Kaye, Trustee's Sale Officer

STATE OF NEVADA
COUNTY OF CLARK

On 10/19/10 before me, the undersigned, a Notary Public in and for said county, personally appeared, Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Kelly Mitchell, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

# EXHIBIT L

EXHIBIT L

Inst #: 201104130000953
Fees: $16.00 N/C Fee: $0.00
RPTT: $22.95 Ex: #
04/13/2011 09:13:03 AM
Receipt #: 738696
Requestor:
CAMCO
Recorded By: MSH Pgs: 4
DEBBIE CONWAY
CLARK COUNTY RECORDER

**APN: 140-34-413-075**

WHEN RECORDED MAIL DEED AND TAX STATEMENTS TO:

Las Vegas Development Group, LLC
397 3rd Ave, Ste A
Chula Vista CA 91910

Title No. A1259
Account NO. 77983
TS No. 072210-4-J

---

**SPACE ABOVE THIS LINE FOR RECORDER'S USE**

## TRUSTEE'S DEED UPON SALE

The undersigned declares:

| | | |
|---|---|---|
| 1) | The grantee herein WAS NOT the foreclosing beneficiary | |
| 2) | The amount of the unpaid debt together with costs was | $4,001.00 |
| 3) | The amount paid by the grantee at the trustee sale was | $4,001.00 |
| 4) | The documentary transfer tax is | $ 22.95 |
| 5) | City Judicial District of LAS VEGAS | |

And **Absolute Collection Services, LLC.**, as the duly appointed Trustee under the Notice of Delinquent Assessment hereinafter described, does hereby GRANT and CONVEY, but without warranty, express or implied, to: **Las Vegas Development Group, LLC, 397 3rd Ave, Ste A, Chula Vista CA 91910**

(herein called Grantee), all of its right, title and interest in and to that certain property situated in the County of CLARK, State of NEVADA, described as follows:

**6279 Downpour Ct., Las Vegas NV 89110**

Legal Description-shown on the Subdivision map recorded in Book No. 113 Page(s) 40 Inclusive, of Maps of the Country of Clark, State of Nevada; See Exhibit A Attached

AGENT STATES THAT:
This conveyance is made pursuant to the powers granted to PALO VERDE RANCH HOA and conferred upon appointed trustee by the provisions of the Nevada Revised Statutes, the PALO VERDE RANCH HOA governing documents (CC&R's) recorded as instrument number 01067 Book 20040312 on MARCH 12. 2004 and that certain Notice of Delinquent Assessment Lien recorded on APRIL 1, 2010 instrument number 0001086

Book 20100401 Official Records of CLARK County; and pursuant to NRS 117.070 et Seq. or NRS 116.3115 et Seq and NRS 116.3116 through 116.31168 et Seq. The name of the owner(s) of the property (trustor) was: GENEVIEVE UNIZA-ENRIQUEZ

Default occurred as set forth in a Notice of Default and Election to Sell, recorded on JULY 14, 2010 as instrument 0001222 Book 20100714 which was recorded in the office of the recorder of said county. Absolute Collection Services, LLC. Has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of PALO VERDE RANCH HOA at public auction on April 12, 2011 at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $4,001.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated:April 13, 2011

By Richard Kaye on behalf of Absolute Collection Services

STATE OF NEVADA )
COUNTY OF CLARK )

On 4/13/11 before me, Kelly Mitchell, personally appeared Richard Kaye personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

Kelly Mitchell, Notary Public

KELLY MITCHELL
Notary Public, State of Nevada
Appointment No. 08-7504-1
My Appt. Expires July 10, 2012

# EXHIBIT "A"

THE LAND REFERRED TO IN THIS REPORT IS SITUATED IN THE STATE OF NEVADA, COUNTY OF CLARK, CITY OF LAS VEGAS, AND DESCRIBED AS FOLLOWS:

PARCEL I:
LOT 75 OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY); AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA

PARCEL II:
A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT, LANDSCAPING AND PUBLIC UTILITIES PURPOSES ON, OVER AND ACROSS THE "PRIVATE DRIVES/ P.U.E." AND "COMMON AREAS" AS DELINEATED ON SAID MAP, AND AS FURTHER DEFINED BY THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT AND RESERVATION OF EASEMENTS FOR PALO VERDE RANCH RECORDED MARCH 12, 2004 IN BOOK 20040312, AS DOCUMENT NUMBER 01067, OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA

**STATE OF NEVADA**
**DECLARATION OF VALUE FORM**

1. Assessor Parcel Number(s)
   a. 140-34-413-075
   b. _____
   c. _____
   d. _____

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

**FOR RECORDER'S OPTIONAL USE ONLY**
Book: _____ Page: _____
Date of Recording: _____
Notes:

3. a. Total Value/Sales Price of Property $ 4001.00
   b. Deed in Lieu of Foreclosure Only (value of property) (_____)
   c. Transfer Tax Value: $ 4001.00
   d. Real Property Transfer Tax Due $ 22.95

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

5. Partial Interest: Percentage being transferred: _____ %

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

Signature: _____ Capacity: Member, Grantee

Signature: _____ Capacity: _____

**SELLER (GRANTOR) INFORMATION**
**(REQUIRED)**

Print Name: Absolute Collection Services
Address: PO Box 12117
City: Las Vegas
State: NV Zip: 89112

**BUYER (GRANTEE) INFORMATION**
**(REQUIRED)**

Print Name: Las Vegas Development Group LLC
Address: 397 3rd Ave Suite
City: Chula Vista
State: CA Zip: 91910

**COMPANY REQUESTING RECORDING**
Print Name: CAMCO
Address: PO Box 12117
City: Las Vegas

Escrow #: N/A - foreclosure
State: NV Zip: 89112

As a public record this form may be recorded/microfilmed

# EXHIBIT M

EXHIBIT M

APN: 140-34-403-004, 005, 007, 008

WHEN RECORDED RETURN TO:

SANTORO, DRIGGS, WALCH,
KEARNEY, JOHNSON & THOMPSON
400 S. Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attention: David G. Johnson, Esq.

LD

20040312
.01067

CLARK COUNTY, NEVADA
FRANCES DEANE, RECORDER

RECORDED AT THE REQUEST OF:

NORTH AMERICAN TITLE COMPANY

03-12-2004 09:21 ADF

OFFICIAL RECORDS

BOOK/INSTR:20040312-01067

PAGE COUNT: 60

FEE: 73.00
RPTT: .00

# DECLARATION
# OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR
# PALO VERDE RANCH

20040312
.01067

**PALO VERDE RANCH**
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# DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR PALO VERDE RANCH

THIS DECLARATION (the "Declaration") is made by Greystone Nevada, LLC, a Nevada limited liability company (the "Declarant").

## I.

## Recitals

**1.01** Real Property. Declarant is the owner of certain real property located entirely in Clark County, Nevada, more particularly described in Exhibit "A" attached hereto (the "Property"). The Property shall include any additional real property that may from time to time be annexed thereto.

**1.02** Planned Community. Declarant desires to develop the Property and, if Declarant so elects, the adjacent land described in Section 2.02 (the "Annexable Area") as a residential community and to establish covenants, conditions, and restrictions relating to the use, enjoyment, maintenance, improvement, and occupancy of the Property. The residential community shall be developed as a planned community under a general plan of development pursuant to the Act (as hereinafter defined) and shall be named Palo Verde Ranch (the "Development"). If the entire Annexable Area is annexed as provided herein, the planned community will consist of up to a maximum of Ninety Three (93) Lots (as hereinafter defined).

**1.03** Owners Association. Declarant desires to establish Palo Verde Ranch Homeowners' Association, a Nevada nonprofit corporation (the "Association"), for the purpose of maintaining and administering the Common Area (as hereinafter defined) of the Property, administering and enforcing these covenants, conditions, and restrictions, and collecting and disbursing funds pursuant to Assessments and charges established by these covenants, conditions, and restrictions. Each Lot shall have appurtenant to it a membership in the Association.

**1.04** The Development. Declarant contemplates developing the Property, constructing the Development, and conveying the Association Property (as hereinafter defined) to the Association in a planned multi-phase development. Although Declarant contemplates completing all phases of the Development and subjecting the Annexable Area to this Declaration, there is no guarantee that any or all of the phases of the Development or that any or all of the Annexable Area will be developed by Declarant.

**1.05** Covenants Running With Land. This Declaration shall run with the Property and all parts and parcels thereof and shall be binding on all parties having any right, title, or interest in the Property and their heirs, successors, successors-in-title, and assigns and on the Association and all of its successors in interest and shall inure to the benefit of each

owner or member thereof. Each of the limitations, easements, uses, obligations, covenants, conditions, and restrictions imposed hereby shall be deemed to be and construed as equitable servitudes enforceable by any of the owners of any portion of the Property subject to this Declaration against any other owner, tenant, or occupant of the Property or portion thereof similarly restricted by this Declaration.

**1.06** Declaration. Declarant hereby declares that all of the Property shall be held, sold, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of the Property.

## II.

## Definitions

In addition to the terms elsewhere defined herein, the following terms shall have the following meanings whenever used in this Declaration.

**2.01** "Act" shall mean the Nevada Common Interest Ownership Act, NRS 116.1101 et seq.

**2.02** "Annexable Area" shall mean the real property described in Exhibit "B" hereto.

**2.03** "Architecture Committee" shall mean the committee created by Article VII of this Declaration.

**2.04** "Articles" shall mean the articles of incorporation of the Association as may be amended from time to time.

**2.05** "Assessment" shall mean those Assessments set forth in Article V of this Declaration.

**2.06** "Association" shall mean Palo Verde Ranch Homeowners' Association, a Nevada nonprofit corporation, and its successors and assigns.

**2.07** "Association Property" shall mean all property, real and personal, owned or leased by the Association, including, without limitation, the Common Area.

**2.08** "Board" shall mean the Board of Directors of the Association.

**2.09** "Bylaws" shall mean the Bylaws of the Association as may be amended from time to time.

**2.10** "Common Area" shall mean all real property (including the improvements thereto) designated as common elements on the Site Development Plan (as hereinafter defined) or any Subdivision Map of the Property, that is now or hereafter conveyed by Declarant to the Association, including (as applicable) any private streets, sewer and water lines, easements, landscaped greenbelt areas, park areas, trails, playground areas, entry gates, and other such property.

**2.11** "Declarant" shall mean Greystone Nevada, LLC, a Nevada limited liability company, and its successors and assigns.

**2.12** "Design Guidelines" shall mean the guidelines adopted by the Architecture Committee as set forth in Article VII.

**2.13** "Development" shall mean the residential community referred to as Palo Verde Ranch being developed by Declarant as a planned community pursuant to the Act.

**2.14** "Eligible Holder" shall mean the Persons (as hereinafter defined) described in Article VIII of this Declaration.

**2.15** "Improvement" shall mean the buildings, structures, improvements, roadways, parking areas, lighting fixture, fences, walls, hedges, plantings, planted trees and shrubs, swimming pool, and all other structures or landscaping of every type and kind upon the Property.

**2.16** "Lessee" shall mean any Person who rents, leases, or subleases any Lot from an Owner (as hereinafter defined) or a Person in privity with an Owner.

**2.17** "Lot" shall mean each of the lots, with the exception of the Common Area, shown on the Site Development Plan or any subsequent subdivision or parcel map of the Property, and all Improvements erected, constructed, or located thereon.

**2.18** "Member" shall mean each of those Owners who are members of the Association.

**2.19** "Mortgage" shall mean a mortgage or deed of trust that encumbers any Lot.

**2.20** "NRS" shall mean the Nevada Revised Statutes.

**2.21** "Owner" shall mean the record owner, whether one or more persons or entities, of a fee simple title to any Lot, including contract sellers but excluding those having such interest merely as security for the performance of an obligation.

**2.22** "Party Walls" shall mean those walls, other than Perimeter Walls (as hereinafter defined), located anywhere on the Development that form Lot boundaries.

**2.23** "Perimeter Walls" shall mean those walls all or a part of which are located on Association Property or separate a Lot from Association Property.

**2.24** "Person" shall mean a person, partnership, corporation, trustee, or other legal entity.

**2.25** "Property" shall mean that real property located entirely in Clark County, Nevada, more particularly described in Exhibit "A" attached hereto. The Property shall include any additional real property that may from time to time be annexed thereto.

**2.26** "Record, "Recording," or "Recorded" shall mean to file, the filing, or filed of record a legal instrument in the Office of the Recorder of Clark County, Nevada, or such other place as may be designated as the official location for recording deeds, plats, and similar documents affecting title to real property in Clark County, Nevada.

**2.27** "Residence" shall mean and refer to any dwelling constructed on a Lot in accordance with all local, state, and federal laws and this Declaration.

**2.28** "Restrictions" shall mean this Declaration, the Articles, the Bylaws, the Rules and Regulations of the Association, the Design Guidelines, and any rules and regulations of the Architecture Committee from time to time in effect.

**2.29** "Rules and Regulations" shall mean the rules and regulations adopted by the Board from time to time pursuant to Section 4.10 of this Declaration.

**2.30** "Site Development Plan" shall mean the general plot plan of the Development attached hereto as Exhibit "C."

**2.31** "Subdivision Map" shall mean that certain Final Map of Palo Verde Ranch, and any other maps or plats of the Development Recorded or to be Recorded in the Office of the Recorder of Clark County, Nevada.

## III.

## Property and Property Rights

**3.01** Description of the Property. The Property shall consist of the Lots and the Common Area.

**3.02** Lots.

(a) Reciprocal Easements. Each Lot and its Owner shall have an easement and the same is hereby granted by the Declarant over all adjoining parcels for the purpose of accommodating any encroachment due to engineering errors, errors in original construction,

settlement or shifting of the land, or any other cause; provided, however, that in no event shall an easement for encroachment be created in favor of an Owner or Owners if the encroachment occurred due to construction or alteration by the Owner (except Declarant) or the negligence or willful misconduct of the Owner. In the event a structure on any Lot is partially or totally destroyed and then repaired or rebuilt, the Owners of each Lot agree that minor unintentional encroachments over adjoining Lots not to exceed one (1) foot shall be permitted and that there shall be easements for the maintenance of the encroachments so long as they shall exist.

(b) Association Easements. There are hereby reserved to the Association such easements across the Property as are necessary to perform the duties and obligations of the Association.

(c) Utilities Easement. There is hereby granted in favor of Declarant, the Association, and their respective licensees an easement across each Lot for purposes of installing, facilitating, maintaining, repairing, replacing, or inspecting sewer, drainage, underground power lines, cable television systems, or other utilities over, under, and across the Property. All utility hook-ups and fixtures and improvements relating thereto shall be the property of the Association.

(d) Emergency Repairs Easement. In addition to all other easements reserved or granted herein, there is hereby reserved to the Association an easement across each Lot as is necessary to permit a reasonable right of entry onto each Lot for the purpose of performing emergency repairs or to do other work reasonably necessary for the proper maintenance of the Development.

(e) Maintenance Obligation of Owners. It shall be the duty of each Owner at its sole cost and expense, subject to the provisions of this Declaration requiring approval of the Architecture Committee, to maintain, repair, replace, and restore (including any maintenance, repairs, replacement, or restoration required as a result of any damage or destruction of the Property by casualty or otherwise) any Residence, Improvements, and landscaping located on its Lot and the Lot itself in a neat, sanitary, and attractive condition and in accordance with the Restrictions. If any Owner shall permit any Residence, Improvements, or the Lot to fall into disrepair or to become unsafe, unsightly, or unattractive or otherwise violate the Restrictions, the Association shall have the right to seek any remedies at law or in equity it may have. In addition, the Board shall have the right, but not the duty, if such unacceptable maintenance is not corrected within thirty (30) days of written notice from the Association (or such longer period if reasonably necessary under the circumstances, provided the owner is diligently performing such maintenance or repairs), to enter upon such Owner's Lot and make such repairs and perform such maintenance and charge the costs thereof to Owner. Such costs shall be enforced, including penalty fees and costs, as an Assessment on the Lot pursuant to Article V hereof.

(f) Insurance Obligations of Owners. Each Owner shall insure the Residence and Improvements on its Lot against loss or damage by fire or by any other casualty in an

amount as near as practical to the full replacement value of the Residence and pertinent Improvements, without deduction for depreciation or coinsurance.

**3.03** Association Property.

(a) Conveyance of Association Property. The Declarant hereby covenants for itself, its successors, and assigns, at the time of the conveyance of the twelfth (12th) Lot in the Property to an Owner not the Declarant, that it will convey title to the Association Property on the Property to the Association free and clear of all encumbrances and liens, except utility easements, covenants, conditions, and reservations then of record, including, without limitation, those set forth in this Declaration. Similar conveyances shall be made to the Association at the time of the conveyance to an Owner not the Declarant of the first Lot in each subsequent phase of the Development.

(b) Common Area Ownership. The Common Area shall be owned by the Association in fee simple for the use, enjoyment, and convenience of the Owners and shall contain the private roadways, walkways, landscaped areas, recreational areas, parking areas, storage and trash areas, utility easements, all Perimeter Walls, and all other areas of the Property not a part of the Lots. Each Lot and its Owner shall have an easement over all of the Common Area, and such easement is hereby granted, transferred, and conveyed to all Owners by the Declarant for the benefit of the Lots, the Owners, and each of them, and for their respective families, guests, and invitees for all of the foregoing purposes. In furtherance of the establishment of this easement, the individual deeds to the Lots may, but shall not be required to, set forth the foregoing easements.

(c) Use. Each Member or Lessee who resides on the Property and their respective families, guests, and invitees who reside with them shall be entitled to use the Common Area subject to the following:

(i) the right of the Association to charge reasonable dues, use fees, and other fees for those facilities or amenities for which fees are normally charged or assessed;

(ii) the right of the Association to suspend the rights to the use of any Association Property by any Member or Lessee and their families, guests, and invitees for any period during which any Assessment against the Member's property remains past due and unpaid, and after notice and hearing by the Board, the right of the Association to invoke any remedy set forth in Article V of this Declaration;

(iii) the right of the Association to require that security deposits be made and deposited with the Association to secure all sums payable to the Association and to guarantee performance of all duties due and owing or to become due and owing to the Association;

(iv) the right of the Association to allow the general public, or certain segments thereof, to use any Association Property, and in the discretion of the Board, to

charge use or other fees therefor subject to subsection (i) above provided that the Association may not charge fees for access to public parks and sport fields;

(v) such rights to use the Association Property as may have been granted by the Association to others;

(vi) such covenants, conditions, and restrictions as may have been imposed by the Association or prior owners on the Association Property;

(vii) such rules and regulations for the use of the Association Property as may be imposed by the Association from time to time; and

(viii) the right of Declarant to use the Common Area for sales, development, and related activities pertaining to the Development.

(d) Maintenance of Association Property. The Association shall be responsible for all of the costs and maintenance of the Association Property. The Association may at any time and without any approval of the Owners being required:

(i) reconstruct, repair, replace or refinish any Improvement, structure, fixture, or facility located on the Common Area or any portion thereof in accordance with: (A) the last plans thereof approved by the Board; (B) the original plans for development of the Property; or (C) if neither (A) nor (B) is applicable and if such Improvement was previously in existence, then in accordance with the original designs, plans, finishing, or standards of construction of such Improvement as it was originally constructed;

(ii) construct, reconstruct, repair, replace, or refinish any road improvement or surface upon any portion of the Common Area used as a road, street, walk, or parking area;

(iii) replace injured and diseased trees or other vegetation on the Common Area and plant trees, shrubs, and ground cover to the extent that the Board deems necessary for the conservation of water and soil and for aesthetic purposes;

(iv) place and maintain upon any such area such signs, markers, and lights as the Board may deem appropriate for the proper identification, use, and regulation thereof;

(v) remove all papers, debris, and refuse from the Common Area, wash or sweep paved areas as required, and clean and relamp lighting fixtures as needed;

(vi) repaint striping, markers, directional signs, and similar devices as necessary;

(vii) maintain, repair, and replace, as necessary, the Perimeter Walls; notwithstanding the foregoing, Owners of Lots bounded by Perimeter Walls shall be responsible for all aesthetic maintenance and repair of that side of the Perimeter Walls bounding the Owners' respective Lots;

(viii) pay all real estate and personal property taxes and Assessments on the Common Area;

(ix) pay all electrical, water, gas, sewer, trash collection, telephone, and other utility charges or fees for services furnished to the Common Area and all water charges or fees for services furnished to the Lots;

(x) pay for and keep in force at the Association's expense public liability, casualty, and fire insurance with companies acceptable to the Association in amounts and with limits of liability desired by the Owners or required of the Owners pursuant to any other recorded document affecting the Property, such insurance to name the Association, the Owners, or both as named insureds; and

(xi) do all such other and further acts that the Board deems necessary to preserve and protect the Common Area and the beauty thereof in accordance with the general purposes for use and enjoyment of the Property described in this Declaration;

The Board shall be the sole judge as to the appropriate maintenance of all portions of the Common Area. Nothing herein shall be construed so as to preclude the Association from delegating its powers set forth above to a manager.

(e) Improvements on Common Area. Any other provision of this Declaration to the contrary notwithstanding, until Declarant has sold ninety percent (90%) of the Lots, no land within the Common Area may be improved by any Improvement, used, or occupied except in such manner as shall have been approved by Declarant in its sole and absolute discretion. Declarant may delegate its right to grant such approvals to the Board. No approval shall be granted that would be in contravention of the zoning or other local regulation then in effect for the area in question.

(f) Damages. Each Owner or Lessee shall be liable to the Association for any damage to the Association Property that may be sustained by reason of the negligent or intentional misconduct of such Owner or Lessee or of its family, guests, or invitees. If the Lot, the ownership or leasing of which entitles the Owner or Lessee thereof to use the Association Property, is owned or leased jointly or in common, the liability of all such joint or common Owners or Lessees shall be joint and several. The amount of such damage may, in addition to any other rights or remedies, be assessed against such Person's real and personal property on or within the Property, including the leasehold estate of any Lessee, and may be collected as provided in Article V below for the collection of Assessments.

(g) Damage and Destruction. In the case of destruction of or damage to the Association Property by fire or other casualty, the Board shall have the following rights and privileges.

(i) Liberty to Reconstruct. If the cost to repair or replace the Association Property, over and above all insurance proceeds, is less than Twenty Thousand Dollars ($20,000), the Board may, without the consent of the Members, determine to repair or replace the damaged property with property substantially the same as those that were destroyed or damaged.

(ii) Decision to Reconstruct. If the cost to repair or replace the Association Property, over and above all insurance proceeds, is equal to or greater than Twenty Thousand Dollars ($20,000) and the Board determines to rebuild any Association Property destroyed or damaged in the form substantially the same as those that were destroyed or damaged, it shall prepare plans and obtain bids following the notice proceeding for a special Assessment as set forth in Article V hereof. The Board shall submit the plans and bids to the Members for approval, which approval shall require the affirmative vote of sixty-seven percent (67%) of the Members entitled to vote. The Board will modify the plans until the required vote is obtained or the restoration becomes subject to subsection 3.03(g)(i) or (iii) hereof. If approved, the Board shall cause the repairs or replacements to be done and assess the Members for the costs as a special Assessment.

(iii) Decision Not to Reconstruct. If the Board determines not to rebuild any Association Property so destroyed or damaged or to build facilities substantially different from those that were destroyed or damaged, it shall submit its decision to the Members for their approval or disapproval, which approval shall require the consent of eighty percent (80%) of the Members entitled to vote. If the Members elect to approve the decision, the Board shall act accordingly; but if the Members do not approve the decision, the Board shall proceed to repair or rebuild the damaged or destroyed facility pursuant to subsection 3.03(g)(i) or (ii) hereof.

(iv) Damage During Declarant Control Period. Should any Association Property become destroyed or damaged before Declarant has sold all of the Lots, the Association shall rebuild or repair such Association Property in a manner consistent with its original condition as constructed by Declarant.

(v) Damage or Destruction by Owner. In the event any portion of the Common Area is damaged or destroyed by an Owner, a Lessee, or any of their respective guests, tenants, licensees, or agents, the Board may repair said damaged area. In the event the Board determines to repair said damage, the amount necessary for such repairs shall be paid by the Owner or Lessee, upon demand, to the Board. If said amounts are not immediately paid, they shall be deemed to be Assessments, and the Board may enforce collection of same in the same manner as provided in Article V hereof for collection and enforcement of Assessments.

**3.04** Special Declarant's Rights. Declarant and its agents shall have the following rights and privileges, all of which shall terminate immediately upon the sale by Declarant of the last Lot within the Property:

(a) Easement for Repairs. A nonexclusive easement over the Association Property for the purpose of making repairs to the Association Property and the Lots if access thereto is not reasonably available;

(b) Easement for Sales. A nonexclusive easement over the Association Property (which easement shall extend to the sales agents, customers, prospective customers, guests, and representatives of Declarant) for sales, display, access, ingress, egress, exhibits, and other purposes deemed useful by Declarant and its agents in advertising and promoting the sale of Lots (including the erection of signs, flags, and banners) until all Lots are sold by Declarant. In exercising the easement, Declarant shall not unreasonably interfere with the rights and enjoyment of the Owners;

(c) Easement for Development. A nonexclusive easement over the Association Property (which easement shall be in favor of Declarant and its agents, contractors, and licensees) for access, ingress, and egress over, in, upon, under, and across the Association Property, including, but not limited to, the right to store materials thereon and to make such other use thereof as may be reasonable, necessary, or incidental to Declarant's development of the Property; provided, however, that no such rights or easements shall be exercised in such a manner as to reasonably interfere with the occupancy, use, enjoyment, or access by any Owner;

(d) Right to Lease. The right to lease any unsold Lot. Furthermore, anything herein to the contrary notwithstanding, Declarant and its affiliates reserve the right to continue to use one (1) or more Lots and the Residences constructed thereon as model Lots and Residences for other communities developed by Declarant or its affiliates pursuant to sale-leaseback or other similar arrangements even after Declarant sells the last Lot in the Property to an Owner other than Declarant, in which case all of the rights and easements set forth in this Section 3.04 shall continue in full force and effect; and

(e) Other Rights. Each of the developmental rights and special declarant's rights set forth in NRS 116.11034 and 116.110385.

## IV.

## Owners' Association; Membership and Voting Rights

**4.01** Association.

(a) Organization. The Association is a nonprofit Nevada corporation created for the purposes, charged with the duties, and vested with the powers prescribed by law

or set forth in its Articles and Bylaws or in this Declaration. Neither the Articles nor Bylaws shall for any reason be amended or otherwise changed or interpreted so as to be inconsistent with this Declaration.

(b) Successor Associations. In the event the Association is dissolved at any time this Declaration is in force or effect, a nonprofit unincorporated association shall automatically and without further action or notice be formed to succeed to all the rights and duties of the Association. The successor unincorporated association shall be governed by the laws of the State of Nevada and, to the extent not inconsistent therewith, by the Articles and Bylaws of the Association as if they were created for the purpose of governing the affairs of an unincorporated association. In the event an unincorporated association is formed pursuant to this subsection 4.01(b), the appropriate officers of the Association or the successor association shall take all reasonable efforts to restore or reincorporate the Association as a nonprofit Nevada corporation.

**4.02** Membership Rights. Only Owners, including Declarant, shall be Members of the Association. Each Owner shall automatically be a Member of the Association without the necessity of any further action on its part, and membership in the Association shall be appurtenant to and shall run with the property interest ownership that qualifies the Owner to membership in the Association. Membership in the Association may not be severed from or in any way transferred, pledged, mortgaged, or alienated except with the title to the property ownership interest that qualifies the Owner thereof to membership and then only to the transferee of title to the property interest. Any attempt to make a prohibited severance, transfer, pledge, mortgage, or alienation shall be void. Subject to subsection 4.03(d) and Section 5.07 hereof and as set forth in the Articles, each Member shall be entitled to one (1) vote for each Lot owned by that Member.

**4.03** Control of Association.

(a) Period of Declarant Control of Association. Notwithstanding any other provision of this Declaration or of the Bylaws, and subject to subsection (b) below, there shall be a period during which Declarant shall control the Association, and Declarant or a Person designated by Declarant may appoint and remove all or some of the officers and directors of the Association. The period of Declarant control of the Association terminates no later than the earlier of:

(i) sixty (60) days after the conveyance by Declarant of seventy-five percent (75%) of the Lots that may be created within the Property to Owners other than the Declarant;

(ii) five (5) years after the Declarant has ceased to offer Lots for sale in the ordinary course of its business; or

(iii) five (5) years after any right to annex new Lots was last exercised by Declarant.

Provided, however, that Declarant may, but is not obligated to, voluntarily surrender the right to appoint and remove officers and Board members as provided herein before the termination period set forth above, provided that Declarant may require that specified actions of the Association or the Board may require Declarant approval prior to becoming effective. Such surrender of rights shall only be by a recorded instrument.

(b) Composition of the Board. Not later than sixty (60) days after conveyance by Declarant of twenty-five percent (25%) of the Lots that may be created within the Property to Owners other than Declarant, at least one (1) member of the Board and not less than twenty-five percent (25%) of the members of the Board must be elected by Owners other than Declarant. Not later than sixty (60) days after conveyance by Declarant of fifty percent (50%) of the Lots that may be created within the Property to Owners other than Declarant, not less than thirty-three and one-third percent (33-1/3%) of the members of the Board must be elected by Owners other than Declarant. Upon expiration of the Declarant control period set forth in subsection (a) above, one hundred percent (100%) of the Board shall be elected by Owners other than Declarant.

(c) Removal of Board Members. Notwithstanding any provision of this Declaration or the Bylaws to the contrary, the Owners, by a two-thirds (2/3) vote of all Persons present and entitled to vote at any meeting of the Owners at which a quorum (as determined by reference to the Bylaws) is present, may remove any member of the Board with our without cause, other than a member appointed by the Declarant.

(d) Joint or Common Ownership. If any property interest, ownership of which entitles the Owner thereof to vote, is held jointly or in common by more than one (1) Person, the vote or votes to which such property interest is entitled shall also be held jointly or in common in the same manner. However, the vote or votes for such property interest shall be cast, if at all, as a unit, and neither fractional votes nor split votes shall be allowed. In the event joint or common Owners are unable to agree among themselves as to how their vote or votes shall be cast as a unit, they shall lose the right to cast their vote or votes on the matter in question. In the event more than one vote is cast for a particular membership, none of the votes shall be counted, and all such votes shall be deemed void. Any joint or common Owner shall be entitled to cast the vote or votes belonging to the joint or common Owners unless another joint or common Owner shall have delivered to the Secretary of the Association prior to the time for casting such vote a written statement to the effect that the Owner wishing to cast the vote or votes has not been authorized to do so by the other joint or common Owner or Owners.

(e) Proxy Voting. Except as otherwise provided in this Section, votes allocated to a Lot may be cast pursuant to a revocable written proxy executed by the Owner thereof, authorizing the holder to cast the Owner's votes on any matter. An Owner may give a proxy only to a member of his immediate family, his Lessee who resides in the Development, another Owner who resides in the Development, or any other Person permitted by the Act. If a Lot is owned by more than one Person, each Owner of the Lot may vote or register protest to the casting of votes by the other Owners of the Lot through a proxy. A vote may not be cast

by proxy if: (i) it is not dated; (ii) it purports to be revocable without notice; (iii) it does not designate the meeting for which it is executed; (iv) it does not designate the agenda item or items for which the Owner has executed a proxy, except that this requirement shall not apply if the proxy is to be used solely for establishing whether a quorum (as determined by reference to the Bylaws) is present for the meeting; or (v) the holder of the proxy does not disclose at the beginning of the meeting for which the proxy is executed, the number of proxies pursuant to which he will be casting votes and the voting instructions received for each proxy. If a proxy is for more than one agenda item, the proxy should designate whether the vote on that matter must be cast in the affirmative or in the negative. If the proxy does not so provide for a particular agenda item, the proxy must be treated as if the Owner were present but did not vote on that item. Every proxy shall terminate immediately after the conclusion of the meeting for which it was executed. An Owner may revoke a proxy only by actual notice of revocation to the person presiding over a meeting of the Association. A vote may not be cast pursuant to a proxy for the election or removal of a member of the Board. Any proxy that fails to comply with the requirements of this Section shall be void.

**4.04** Meetings of Members. The Association shall hold an annual meeting of the Members. The annual meeting of the Members shall be held on or about one (1) year after the date of the last annual meeting. If the Members have not held a meeting for one (1) year, a meeting of the Members must be held in accordance with the Act. The Association shall also hold at least one (1) regular meeting other than the annual meeting each year. Special meetings of the Members may be called at any reasonable time and place by notice by the President of the Association, the Board, or Members having ten percent (10%) or more of the total votes.

(a) Notice. Not less than ten (10) days (twenty-one (21) days in the event of a meeting at which an Assessment for a capital improvement or commencement of a civil action is to be considered or action is to be taken on such an Assessment) nor more than sixty (60) days in advance of each meeting of the Members, the Secretary shall cause notice of the meeting to be hand-delivered or sent prepaid by United States mail to the mailing address of each Lot or to any other mailing address designated in writing by the Lot Owner. The notice of the meeting must state the time and place of the meeting and include a copy of the agenda for the meeting. The notice must also include notification of the right of an Owner (i) to have a copy of the minutes or a summary of the minutes of the meeting distributed to the Owner upon request and, if required by the Board, upon payment to the Association of the cost of making the distribution, and (ii) to speak to the Association.

(b) Agenda. The agenda for each meeting of the Owners must consist of (i) a clear and complete statement of the topics scheduled to be considered during the meeting, including, without limitation, any proposed amendment to the Declaration or Bylaws, any fees or Assessments to be imposed or increased by the Association, any budgetary changes, and any proposal to remove an officer or member of the Board, (ii) a list describing the items on which action may be taken and clearly denoting that action may be taken on those items, and (iii) a period devoted to comments by Owners and discussion of those

comments. In an Emergency (as hereinafter defined), the Owners may take action on an item which is not listed on the agenda. The notice, agenda, and Owner comment requirements of subsection 4.04(a) and this subsection 4.04(b) apply to both regular and special meetings of the Members.

(c) Emergency. As used in this Section 4.04, "Emergency" means any occurrence or combination of occurrences that (i) could not have been reasonably foreseen, (ii) affects the health, welfare, and safety of the Owners, (iii) requires the immediate attention of, and possible action by, the Board, and (iv) makes it impracticable to comply with the notice provisions of this Section.

(d) Organization. The Chairman of the Board, or in his or her absence the Vice-Chairman, shall call meetings of Members to order and act as chairman of such meetings. In the absence of both of said officers, any Member entitled to vote thereat or any proxy of any such Member may call the meeting to order, and a chairman of the meeting shall be elected. The Secretary of the Association, or in his or her absence the Assistant Secretary, shall act as secretary of the meeting. In the absence of both the Secretary and the Assistant Secretary, a secretary shall be selected in the same manner as that provided above for selecting a chairman of the meeting.

(e) Action by Members. Except as provided otherwise in this Declaration or the Bylaws, any action (including any approvals required under this Declaration) may be taken at any legally convened meeting of the Members at which a quorum (as determined by reference to the Bylaws) is present upon the affirmative vote of the Members having a majority (or such greater percentage as may be required elsewhere in this Declaration for approval of the Members of any matter) of the total votes present at such meeting in person or by proxy. Only votes cast in person, by secret ballot, or by proxy may be counted.

(g) Minutes. Not more than thirty (30) days after any meeting of the Members, the Secretary shall cause the minutes or a summary of the minutes of the meeting to be made available to the Members. A copy of the minutes or a summary of the minutes must be provided to any Member who pays the Association the cost of providing the copy.

**4.05** Duties of the Association. Subject to and in accordance with this Declaration, the Association shall have and perform each of the following duties for the benefit of the Members of the Association:

(a) Members. The Association shall accept all Owners as Members.

(b) Recreation and Open Space Areas and Common Area. The Association shall accept, own, operate, and maintain all recreation and open space and Common Area that may be conveyed, leased, licensed, or otherwise enjoyed by it, together with all Improvements of whatever kind and for whatever purpose that may be located in said areas. The Association shall accept, own, operate, and maintain all other property easements or

rights of use, whether real or personal, for which the Association, the Members, or the Property receive any benefits, whether aesthetic or tangible.

(c) Title to Property Upon Dissolution. The Association shall pay over or convey, upon dissolution of the Association, the assets of the Association to one or more exempt organizations of the kind described in Section 501(c) of the Internal Revenue Code of 1986, as amended from time to time.

(d) Repair and Maintenance of Association Property. The Association shall maintain in good repair and condition the Common Area and other Association Property enjoyed by, owned by, licensed to, or leased to the Association.

(e) Payment of Taxes. The Association shall pay all real and personal property taxes and other taxes and Assessments levied upon or with respect to any Association Property to the extent that such taxes and Assessments are not levied directly upon the Members. The Association shall have all rights granted by law to contest the legality and the amount of such taxes and Assessments.

(f) Insurance. The Association shall obtain and maintain in effect policies of insurance of such kind and in such amounts as the Board, in its opinion, deems adequate or desirable, but in no event less than that required by law, including the requirements of NRS § 116.3113 and, so long as the Federal National Mortgage Association ("FNMA") or the Government National Mortgage Association ("GNMA") holds a security interest in a Lot, the requirements of FNMA or GNMA. Without limiting the generality of the preceding sentence, during any time Declarant is the owner of more than five (5) Lots such policies of insurance shall include:

(i) Fire and extended coverage insurance on all Improvements owned by or leased to the Association in an amount not less than one hundred percent (100%) of the aggregate full insurable value, meaning actual replacement cost exclusive of the costs of excavations, foundations, and footings. Such insurance shall insure the Association and any mortgagees, as their interests may appear. As to each such policy that will not be thereby voided or impaired, the Association hereby waives and releases all claims against the Board and Declarant, and the officers, agents, and employees of each thereof, with respect to any loss covered by such insurance, whether or not caused by negligence or breach of any duty or agreement by said Persons, but only to the extent that insurance proceeds are received in compensation for the loss. If the foregoing exculpatory clause is held to be invalid, then the liability of the insurance company shall be primary, and the liability of the Board, Declarant, and the officers, agents, and employees of the Board and of Declarant shall be secondary;

(ii) Liability insurance, with limits in amounts reasonably determined by the Board, insuring against liability for bodily injury or property damage arising from activities of the Association or with respect to the Association Property, including, if obtainable, a cross-liability endorsement insuring each insured against liability to each other insured. The liability insurance policies referred to above shall name as separately protected insureds

Declarant, the Association, the Board and each of its members, the Architecture Committee and each of its members, and the manager of the Property, if any, and such policies may also name some or all of the respective officers, employees, and agents of the foregoing;

(iii) Workers' compensation insurance to the extent necessary to comply with all applicable laws;

(iv) A fidelity bond in an amount determined by the Board naming the members of the Board and such other Persons as may be designated by the Board as principals and the Association as obligee; and

(v) Such other insurance, including indemnity and other bonds, as the Board shall deem necessary or desirable to carrying out the Association's functions.

The Association shall be deemed trustee of the interests of all Members in all insurance proceeds and shall, subject to the requirements of law, including NRS §§ 116.31133, 116.31135 and any successor statutes, have full power to receive, hold, and disburse such proceeds.

(g) Architecture Committee. The Board shall appoint and remove members of the Architecture Committee as provided in Article VII hereof and ensure that at all reasonable times there is available a duly constituted and appointed Architecture Committee.

(h) Enforcement. The Association shall enforce, in its own behalf and on behalf of all Owners, all of the covenants, conditions, and restrictions set forth in this Declaration under an irrevocable agency (which is hereby granted) coupled with an interest as beneficiary of said covenants, conditions, and restrictions and as assignee of Declarant. The Association shall perform all other acts, whether or not anywhere expressly authorized, as may be reasonably necessary to enforce any of the provisions of the Rules and Regulations or the Design Guidelines.

(i) Long-Term Financing. The Association may, subject to compliance with NRS § 116.3112, execute mortgages and deeds of trust, both construction and permanent, for construction of facilities, including Improvements, on property owned by or leased to the Association. Such financing may be effected through conventional mortgages or deeds of trust, the issuance and sale of development or other bonds, or in any other form or manner as may be deemed appropriate by the borrower, whether that be Declarant or the Association. The mortgage, deed of trust, or other security interest given to secure repayment of such debt may consist of a first lien or a second or other junior lien, as shall be deemed appropriate by such borrower, whether that be Declarant or the Association, on the Improvement or other facility to be constructed, together with such underlying and surrounding lands as Declarant or the Association, as the case may be, deems appropriate. The debt secured by such mortgage, deed of trust, or other security instrument may be retired from revenues generated by dues, use fees, Assessments of the Members of the Association, or otherwise or any combination thereof as may be deemed appropriate by Declarant or the Association, as the case may be, but subject to the limitations imposed by this Declaration and the Act.

(j) Audit. Within one hundred twenty (120) days of the end of the Association's fiscal year, the Association shall, at its own cost, conduct an annual audit by an independent certified public accountant of the accounts of the Association and make a copy of such audit available to each Member during normal business hours at the principal office of the Association. Upon written request, the Association shall provide to any Eligible Holder, insurer, or guarantor of any Mortgage a copy of the annual audit. Any Member may at any time and at its own expense cause an audit or inspection to be made of the books and records of the Association by a certified public accountant provided that such audit or inspection is made during normal business hours and without unnecessary interference with the operations of the Association. The Association shall maintain copies of the then current Declaration, Articles, Bylaws, and Rules and Regulations, as amended, at the principal office of the Association, and the same shall be available during normal business hours for inspection by Declarant, any Owner, prospective purchasers of Lots, Eligible Holders, insurers, and any guarantors of a Mortgage.

(k) Books and Records. The Board shall, upon the request of a Member, make available for review at the business office of the Association or other suitable location during the regular working hours of the Association, the books, records and other papers of the Association, including, without limitation, (i) the financial statement of the Association, (ii) the budgets of the Association, and (iii) the study of the reserves of the Association required to be conducted pursuant to subsection 5.03(b) of this Declaration. The Board shall provide a copy of any of the records to a Member within fourteen (14) days after receiving a written request therefor. The Board may charge a fee to cover the actual costs of preparing a copy, but not to exceed twenty-five cents ($.25) per page. The provisions of this subsection 4.05(k) do not apply to the personnel records of the employees of the Association and the records of the Association relating to another Owner.

(l) Other. The Association shall carry out all duties of the Association set forth in the Rules and Regulations, the Articles, or the Bylaws.

**4.06** Powers and Authority of the Association. The Association shall have all of the powers of a nonstock, nonprofit corporation organized under the laws of the State of Nevada in operating for the benefit of its members, subject only to such limitations upon the exercise of such powers as are expressly set forth in the Articles, the Bylaws, or this Declaration. It shall have the power to do any and all lawful things which may be authorized, required, or permitted to be done under and by virtue of this Declaration and to do and perform any and all acts that may be necessary or proper for or incidental to the exercise of any of the express powers of the Association for the peace, health, comfort, safety, or general welfare of the Owners. Without in any way limiting the generality of the foregoing, the Association and the Board shall have the following powers and authority to exercise in their discretion:

(a) Right of Entry and Enforcement. Subject to any limitations or restrictions imposed by FNMA, which are incorporated herein by this reference, the Board and its agents and representatives shall have the power and right to enter upon any Lot and the Improvements thereon without liability to any Owner for the purpose of enforcing any of the provisions of this Declaration or for the purpose of maintaining and repairing the Improvements located

on said Lot as provided in this Declaration or if the Owner thereof fails to maintain and repair any portion of a Lot as required by this Declaration. The Association shall also have the power and authority from time to time in its own name, on its own behalf, or on the behalf of any Owner or Owners who consent thereto to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration and to enforce, by mandatory injunction or otherwise, all of the provisions of this Declaration. The costs of any such action or suit, including reasonable attorneys' fees, shall be paid to the prevailing party as part of its judgment.

(b) Civil Actions. Except as otherwise provided in this subsection 4.06(b), the Association may commence a civil action only upon a vote or written agreement of the Members holding at least a majority of the voting power of the Association. The Association shall provide written notice to each Owner of a meeting at which commencement of a civil action is to be considered at least twenty-one (21) days before the meeting. The provisions of this subsection do not apply to a civil action that is commenced: (i) to enforce the payment of an Assessment; (ii) to enforce the provisions of the Declaration, Bylaws, or Rules and Regulations; (iii) to proceed with a counterclaim; or (iv) to protect the health, safety and welfare of the Members. If a civil action is commenced pursuant to this subsection without the required vote or agreement, the action must be ratified within ninety (90) days after the commencement of the action by a vote or written agreement of the Members holding at least a majority of the voting power of the Association. If the Association, after making a good faith effort, cannot obtain the required vote or agreement to commence or ratify such a civil action, the Association may thereafter seek to dismiss the action without prejudice for that reason only if a vote or written agreement of the Members holding at least a Majority of the voting power of the Association was obtained at the time the approval to commence or ratify the action was sought. At least ten (10) days before an Association commences or seeks to ratify the commencement of a civil action, the Association shall provide a written statement to all Members that includes reasonable estimate of the costs of the civil action, including reasonable attorney's fees, an explanation of the potential benefits of the civil action and the potential adverse consequences if the Association does not commence the action or if the outcome of the action is not favorable to the Association, and all disclosures that are required to be made upon the sale of property within the Development. No Person other than an Owner may request the dismissal of a civil action commenced by the Association on the ground that the Association failed to comply with any provision of this subsection.

(c) Easements and Rights-of-Way. The Board shall have the power to grant and convey to any third party easements, licenses, and rights-of-way, in, on, over, or under any Common Area conveyed or otherwise transferred to the Association or under its jurisdiction, subject to the conditions contained in NRS § 116.3112.

(d) Employment of Manager. The Board shall have the power to employ, by written agreement, the services of a manager or management company, subject to the direction and control of the Board, to manage and carry out the affairs of the Association and, to the extent consistent with the laws of the State of Nevada and upon such conditions as are otherwise deemed advisable by the Board, to delegate to the manager any of the

powers of the Board or the officers of the Association. In no event shall any management agreement be for a term greater than one (1) year, except with the approval of a majority of the Members, and any such agreement shall provide for termination without penalty on a minimum of thirty (30) days written notice. Except as otherwise provided in the Act, any manager so appointed must hold either a permit to engage in property management pursuant to NRS Chapter 645 or a certificate issued by the Nevada Real Estate Commission.

(e) Services. The Board shall have the power to provide for and engage the services of others for the maintenance, protection, and preservation of the Association Property, including the Common Area, such as grounds keepers, painters, plumbers, and such other maintenance personnel, as the nature and character of the Common Area may require and including any such necessary personnel as the nature and character of any recreational facilities within the Common Area may require; provided, however, that no contract for such services shall be for a duration of more than one (1) year, except with the approval of a majority of the Members, and any such agreement shall provide for termination without penalty on a minimum of ninety (90) days written notice.

(f) Utilities. The Board shall have the power to contract, use, and pay for utility services to the Association Property.

(g) Other Property. The Board shall have the power to acquire and hold, as trustee for the benefit of the Members, tangible and intangible personal property and to dispose of the same by sale or otherwise.

(h) Mergers. The Association shall have the power, to the extent permitted by NRS § 116.2121, to participate in mergers and consolidations with other nonprofit corporations organized for the same purposes as the Association.

(i) Dedication. The Board shall have the power to dedicate any of the Association Property to an appropriate public authority for public use, provided that any such dedication shall comply with NRS § 116.3112, and that such dedication is subject to the existing easements and rights of use of all of the Members.

(j) Delegation. The Board may delegate any of its powers to any committees, officers, or employees as it deems necessary and proper.

(k) Construction on Association Property. The Board shall have the power to construct new Improvements or additions to the Association Property or demolish existing Association Property or Improvements subject to the approval of the Architecture Committee as is required in this Declaration.

(l) Maintenance of Entry and Exit Measures. The Board shall have the power to implement measures regulating entrance and exit at all points of entry and exit to or from the Property, which may or may not be guarded.

(m) Conveyances. The Board shall have the power to grant and convey to any Person real property and interests therein, including fee title, leasehold estates, easements, rights of way, mortgages, and deeds of trust, out of, in, on, over, or under any Association Property for the purpose of constructing, erecting operating, maintaining, or repairing thereon, therein or thereunder:

(i) parks, parkways, or other recreational facilities;

(ii) roads, streets, ways, driveways, trails, and paths;

(iii) lines, cables, wires, conduits, pipelines, or other devices for utility purposes;

(iv) sewers, water systems, storm water drainage systems, sprinkler systems, and pipelines; and

(v) any similar public, quasi-public, or private improvements or facilities.

Nothing above contained, however, shall be construed to permit use or occupancy of any land, Improvement, or other facility in a way that would violate applicable zoning or use and occupancy restrictions imposed thereon by other provisions of this Declaration or by city, county, or other applicable public agency.

(n) Legal and Accounting Services. The Board shall have the power to retain and pay for legal and accounting services necessary or proper in the operation of the Association, the operation and management of the Association Property, the enforcement of the Rules and Regulations, or in the performance of any other duty, right, power, or authority of the Association.

(o) Association Property Services. The Board shall have the power to pay for water, sewer, garbage removal, electricity, telephone, gas, snow removal, landscaping, gardening, and all other utilities, services, and maintenance for the Association Property.

(p) Other Areas. The Board shall have the power to maintain and repair easements, roads, roadways, rights of way, parks, parkways, median strips, sidewalks, paths, trails, ponds, lakes, entry details, entry houses, Perimeter Walls, perimeter landscaped areas, or other Common Area whether owned by or leased to the Association and to contribute toward the cost of operation and maintenance of private roads and any other Improvements or other facilities owned by or leased to the Association.

(q) Recreational Facilities. The Board shall have the power to operate and maintain any and all types of facilities owned by or leased to the Association for both active and passive recreation within the Common Area including, but not limited to: swimming pools; community clubs; picnic areas; parks and playgrounds; trails for hiking, bicycles, or other

uses; lakes and ponds for swimming, fishing, and other water sports; and other similar and dissimilar recreational facilities.

(r) Other Services and Properties. The Board shall have the power to obtain and pay for any other property and services and to pay any other taxes or Assessments that the Association or the Board is required to secure or to pay for pursuant to applicable law, the Rules and Regulations, the Articles, or the Bylaws.

(s) Contracts. The Board shall have the power to enter into contracts with Declarant and other Persons, on such terms and provisions as the Board shall determine, to operate and maintain any Common Area and Improvements thereon or to provide any service to the Property (including, but not limited to, cable television and laundry facilities).

**4.07** Indemnification.

(a) Indemnification. The Association shall indemnify any Person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, by reason of the fact that it is or was a director, officer, employee, servant, or agent of the Association against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by it in connection with such action, suit, or proceeding until and unless it is proved that it acted with willful or wanton misfeasance or with gross negligence and provided it acted in good faith and in a manner it reasonably believed to be in or not opposed to the best interests of the Association, and with respect to any criminal action or proceeding, had no reasonable cause to believe its conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that the Person did not act in good faith or in a manner it reasonably believed to be in or not opposed to the best interests of the Association, or with respect to any criminal action or proceeding, had reasonable cause to believe that its conduct was unlawful.

Board members are not liable to the victims of crimes that may occur on the Property. Punitive damages may not be recovered against the Association but may be recovered only from Persons whose intentional activities are proved to have resulted in damages.

(b) Determination. Any indemnification that the Association has elected to provide under this Section 4.07 (unless ordered by a court) shall be made by the Association only as authorized in the specific case by a determination that indemnification of the officer, director, employee, servant, or agent is proper in the circumstances because it has met the applicable standard of conduct set forth in subsection 4.07(a). Such determination shall be made: (i) by the Board by a majority vote of a quorum consisting of directors who were not parties to such action, suit, or proceeding; or (ii) if such a quorum is not obtainable, or even if obtainable and a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; provided, however, that if a director, officer, employee, servant,

or agent of the Association has been successful on the merits or otherwise in the defense of any action, suit, or proceeding referred to in subsection 4.07(a), or in defense of any claim, issue, or matter therein, then to the extent that the Association has elected to provide indemnification, it shall automatically be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by it in connection therewith without the necessity of any such determination that it has met the applicable standard of conduct set forth in subsection 4.07(a).

(c) Payment in Advance. Expenses incurred in defending a civil or criminal action, suit, or proceeding may, upon action by the Board in accordance with subsection 4.07(b), be paid by the Association in advance of the final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of the director, officer, employee, servant, or agent to repay such amount unless it shall ultimately be determined that it is entitled to be indemnified by the Association as authorized in this Section 4.07.

(d) Insurance. The Board shall purchase and maintain insurance on behalf of any Person who is or was a director, officer, employee, servant, or agent of the Association against any liability asserted against it or incurred by it in any such capacity or arising out of its status as such, whether or not the Association would have the power to indemnify it against such liability hereunder or otherwise.

(e) Other Coverage. The indemnification provided by this Section 4.07 shall not be deemed exclusive of any other rights to which anyone seeking indemnification may be entitled under this Declaration, any agreement, vote of the Members, vote of disinterested directors, Nevada law, or otherwise, both as to action in its official capacity and as to action in another capacity while holding such office, and may continue as to a Person who has ceased to be a director, officer, employee, servant, or agent and may inure to the benefit of the heirs and personal representatives of such a Person.

**4.08** Diseased Trees. The Association may enter upon any part of the Property at any time to inspect for, prevent, and control diseased and insect infested trees and other plant life. If any diseased or insect infested trees or other plant life are found, the Association may spray, remove diseased trees and other plant life, or take such other remedial measures as it deems expedient. The cost thereof applicable to privately owned property may be levied by the Association as a special Assessment against such privately owned property pursuant to Section 5.04 hereof.

**4.09** Perimeter Walls. The Association may enter upon any part of the Property at any time to inspect for, prevent, or control damage to any Perimeter Walls and to maintain, repair, or replace, as necessary, the Perimeter Walls. Owners of Lots bounded by a Perimeter Wall shall be responsible for the cost of maintenance to Perimeter Walls as set forth in subsection 3.03(d)(vii) hereof. Notwithstanding the foregoing, an Owner causing any damage to any Perimeter Walls by its acts shall be solely responsible and liable for any maintenance, repair, or replacement, as required, and for any cost or liability necessary to repair such damaged Perimeter Walls.

**4.10** Rules.

(a) Rulemaking Power. The Board may, from time to time and subject to the provisions of this Declaration, propose, enact, and amend rules and regulations to be known as the "Rules and Regulations" that relate to the management, operation, and control of the Association or the Common Area. The Rules and Regulations shall become effective and binding on all Owners only after adoption by the Board. Such Rules and Regulations may concern, but need not be limited to, matters pertaining to use of the Common Area; signs; collection and disposal of refuse; minimum standards of maintenance of property; parking and traffic restrictions; limitations on maintenance of landscaping or other improvements on any property; standards for Residences; limitations on the type of furniture, fixtures, equipment, and other objects maintained on Lots in view of other Owners; limitations on the number and type of animals that may be allowed on the Property; limitations on the display of flags; and any other subject or matter within the jurisdiction of the Association as provided in this Declaration. The Rules and Regulations may restrict and govern the use of the Common Area by any Member or Lessee, by the family of such Member or Lessee, or by any invitee, licensee, or guest of such Member or Lessee. Declarant retains the right to establish rules relating to the use of any portion of the Common Area owned by it until annexation and conveyance to the Association, and the Association may incorporate such rules in its Rules and Regulations.

(b) Notification of Rules and Regulations. A copy of the Rules and Regulations, as they may be from time to time adopted, amended, or repealed, shall be mailed or otherwise delivered to each Member and may, but are not required to, be recorded. The adoption of the Rules and Regulations shall have the same force and effect as if they were set forth in and were a part of this Declaration. No Rules and Regulations may be adopted that materially impair the rights, preferences, or privileges of any Owner as specifically set forth herein.

**4.11** Breach of Rules, Regulations, or Restrictions. In the event of a breach of any provision of the Rules and Regulations or of any of the restrictions contained in this Declaration by an Owner its family, guests, employees, invitees, licensees, or Lessees, the Board, for and on behalf of itself and all other Owners, shall have the right to enforce the obligations of each Owner to obey the Rules and Regulations or the restrictions of this Declaration in any manner provided by law or in equity, including, but not limited to, appropriate hiring of legal counsel, the pursuing of legal action, suspension of the Owner's right to use the facilities of the Common Area for a reasonable time, or suspension of the Owner's voting rights for a reasonable time. Subject to Section 4.12 and 4.13 below and in addition to the other remedies herein set forth, including, without limitation, assessing the cost of repair of any damage resulting from a violation of the Rules and Regulations, the Board, by majority vote, may levy a fine or penalty against such Owner. After compliance with the requirements of Section 4.12 and 4.13, if the Board determines that a violation has occurred and that a fine or penalty shall be imposed, the determination of the Board shall be final. In the event legal counsel is retained or legal action is instituted by the Board pursuant to this Section, any settlement

prior to judgment or any judgment rendered in any such action shall include costs of collection, court costs, and reasonable attorneys' fees.

**4.12** Construction Penalties. In addition to its power to assess fines as set forth in this Declaration, the Association shall have the power to assess construction penalties upon the failure of an Owner to adhere to any time line setting forth time periods relative to the construction of any Improvement on any Lot as established by the Board, by the Architecture Committee, or by any other body of the Association authorized by the Restrictions, including, without limitation, for: (a) completion of the design of an Improvement to a Lot; (b) commencement of construction of a Residence or the construction of any Improvement to a Lot; (c) the completion of construction to a Residence or the construction of an Improvement to the Lot; or (d) the issuance of any permit which is necessary for the occupancy of a Lot or for the use of any Improvement to a Lot. The Owner shall receive notice of the alleged violation which informs such Owner that he or she has a right to a hearing on the alleged violation. The maximum amount that the Association may charge in construction penalties is one hundred dollars ($100) per day that each of the time period(s) in question is/are exceeded, up to one thousand dollars ($1,000) for each violation, exclusive of any interest costs, or charges that may be collected by the Association. If construction penalties are imposed pursuant to this Section and the violation is not cured within fourteen (14) days or such longer period as the Board establishes, the violation shall be deemed a continuing violation and the Board may impose additional construction penalties for the violation, not to exceed one hundred dollars ($100) for each seven (7) day period or part thereof the violation remains uncured. The Association may not separately assess any fines pursuant to Section 4.13 for failure of an Owner to adhere to any construction schedule. The Association may foreclose a lien by sale for the failure to pay construction penalties as provided in the Act.

**4.13** Fines. Every fine must be commensurate with the severity of the violation. The fine must not exceed one hundred dollars ($100) for each violation or a total amount of five hundred dollars ($500), whichever is less; provided, however, that the foregoing limitations do not apply to any interest, charges or costs that may be collected if the fine becomes past due. The Rules and Regulations may be enforced by the assessment of a fine only if: (a) at least thirty (30) days before the alleged violation, the Person in violation was given written notice of the rule or regulation (or any amendment to the rule or regulation) that the Person allegedly violated; and (b) within a reasonable time of discovery of the violation, the Person alleged to have violated the Rules and Regulations is provided with: (i) written notice specifying the details of the violation, the amount of the fine, and the date, time and location for a hearing on the violation, and (ii) a reasonable opportunity to contest the violation at the hearing. The Board must hold a hearing before it may impose the fine, unless the Person against whom the fine will be imposed: (a) pays the fine; (b) executes a written waiver of the right to a hearing; or (c) fails to appear at the hearing after being provided with notice of the hearing. If a fine is imposed pursuant to this Section and the violation is not cured within fourteen (14) days or such longer cure period as the Board establishes, the violation shall be deemed a continuing violation and the Board may thereafter impose additional fines for the violation not to exceed One Hundred Dollars ($100) per each seven (7) day period

or portion thereof that the violation remains uncured. Any additional fine may be imposed without notice and an opportunity to be heard.

Any past due fine: (y) shall bear interest at a rate determined by the Board, not to exceed the legal rate of interest; and (z) may include any collection fee, filing fee, recording fee, referral fee, postage or delivery fee, and any other fee or cost that the Association may reasonably incur for the collection of the past due fine, as well as costs incurred by the Association in bringing a civil action to enforce the payment of the past due fine. If the past due fine is for a violation that does not threaten the health, safety, or welfare of the residents, the past due rate established by the Association for the costs of collecting the fine: (i) may not exceed $20, if the outstanding balance of the underlying fine is less than $200; (ii) may not exceed $50, if the outstanding balance of the underlying fine is $200 or more but less than $500; (iii) may not exceed $100, if the outstanding balance of the underlying fine is $500 or more, but less than $1,000; (iv) may not exceed $250, if the outstanding balance of the underlying fine is $1,000 or more, but less than $5,000; and (v) may not exceed $500, if the outstanding balance of the underlying fine is $5,000 or more.

Except as otherwise provided herein, the Association may not foreclose a lien for the assessment of a fine for a violation of the Declaration, Bylaws, or Rules and Regulations, unless the violation is of a type that threatens the health, safety, or welfare of the residents of the Development.

**4.14** Liability of Members of Board. No member of the Board shall be personally liable to any of the other Board members, to the Members, or to any other Person, including Declarant, for any error or omission of the Association, its representatives and employees, or the Architecture Committee, provided that such Board member has, upon the basis of such information as may be possessed by him or her, acted in good faith.

**4.15** Amendment. Notwithstanding anything to the contrary in Section 10.03, the provisions of Sections 4.01, 4.02, 4.03, and 4.04 shall not be amended without the vote or written consent of two-thirds (2/3rds) of the Owners.

## V.

## Covenant for Maintenance Assessments

**5.01** Assessments. The Owner of any Lot, by acceptance of a deed therefor, covenants and agrees to pay to the Association annual Assessments and special Assessments for capital improvements, such Assessments to be established and collected as hereinafter provided. The annual Assessment, special Assessment, interest, costs, and reasonable attorneys' fees shall be a charge on the Lot and shall be a continuing lien upon the Lot against which each such Assessment is made until paid. Each Assessment, together with interest, costs, and reasonable attorneys' fees, shall also be the personal obligation of the Owner of the Lot at the time when the Assessment became due. The personal obligation for delinquent

Assessments shall not be extinguished upon the sale or the conveyance of a Lot, but any purchaser of a Lot shall not be liable for any unpaid Assessments or fee greater than the amounts set forth in the statement of unpaid Assessments described in Section 5.07.

**5.02** Purpose of Assessments. The Assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the residents of the Property, for the improvement and maintenance of the Common Area, and for the daily operating expenses of the Association.

**5.03** Regular Assessments.

(a) Annual Assessment. The Board shall fix the annual Assessment at an amount sufficient to cover the estimated budget of the Association prior to the beginning of each fiscal year. The Board may increase the annual Assessment by up to fifteen percent (15%) of the previous year's annual Assessment without the consent of the Owners. The Board shall, not less than thirty (30) days or more than sixty (60) days before the beginning of each fiscal year of the Association, prepare and distribute to each Owner a copy of the budget for the daily operation of the Association. The budget must include, without limitation, the estimated revenue and expenditures of the Association for the coming year and any contributions to be made to the reserve funds established by subsection 5.03(b) hereof. In lieu of distributing copies of the budget, the Board may distribute summaries of the budget, accompanied by a written notice that the budget is available for review at the business office of the Association or other suitable location and that copies of the budget will be provided upon request.

(b) Reserve. The annual Assessment of the Association shall, in addition to being sufficient to cover anticipated expenses, include adequate reserves for the repair, replacement, and restoration of the major components of the Common Area. The reserve funds may be used only for those purposes and not for daily maintenance. Money in the reserve accounts may not be withdrawn without the signatures of at least two (2) members of the Board or the signatures of at least one (1) member of the Board and one (1) officer of the Association who is not a member of the Board.

The Board shall, not less than thirty (30) days or more than sixty (60) days before the beginning of the fiscal year of the Association prepare and distribute to each Owner a copy of the reserve budget. In lieu of distributing copies of the reserve budget, the Board may distribute summaries of the budget, accompanied by a written notice that the budget is available for review at the business office of the Association or other suitable location and that copies of the budget will be provided upon request.

The reserve budget must include, without limitation: (i) the current estimated replacement cost, estimated remaining life, and estimated useful life of each major component of the Common Area; (ii) as of the end of the fiscal year for which the budget is prepared, the current estimate of the amount of cash reserves that are necessary, and the current

amount of accumulated cash reserves that are set aside, to repair, replace, or restore the major components of the Common Area; (iii) a general statement describing the procedures used for said estimation and accumulation of cash reserves, including, without limitation, the qualifications of the Person responsible for the preparation of the reserve studies required under this subsection; and (iv) a statement as to whether the Board has determined or anticipates that the levy of one or more Special Assessments will be required to repair, replace, or restore any major component of the Common Area or to provide adequate reserves for that purpose.

The Board shall cause to be conducted at least once every five (5) years, a study of the reserves required to be maintained by this subsection, review the results of that study at least annually to determine if those reserves are sufficient, and make any adjustments it deems necessary to maintain the required reserves. The study must be conducted by a person qualified by training and experience to conduct such a study, including a member of the Board, an Owner, or the manager of the Association who is so qualified. The study must include, without limitation: (i) a summary of an inspection of the major components of the Common Area that the Association is obligated to repair, replace, or restore; (ii) an identification of the major components of the Common Area that the Association is obligated to repair, replace, or restore which have a remaining useful life of less than thirty (30) years; (iii) an estimate of the remaining useful life of each major component so identified; (iv) an estimate of the cost of repair, replacement, or restoration of each major component so identified; and (v) an estimate of the total annual Assessments that may be required to cover the cost of repair, replacement, or restoration of the major components so identified after subtracting the reserves of the Association as of the date of the study.

(c) Increases of Annual Assessment. The annual Assessment may not be increased by more than fifteen percent (15%) of the annual Assessment for the previous year without a vote or written consent of fifty-one percent (51%) of the Members; provided, however, that following the termination of the Declarant control period described in subsection 4.03(a) hereof, any such increase shall have the vote or written consent of: (i) fifty-one percent (51%) of the Members, and (ii) fifty-one percent (51%) of the Members other than Declarant. In the event that the annual Assessment is increased by more than fifteen percent (15%) of the previous year's annual Assessment, the Board shall, within thirty (30) days after the adoption of any proposed budget, provide a summary of the budget to all Owners and shall set a date for a meeting of Owners to consider and ratify the budget not less than fourteen (14) nor more than thirty (30) days after the mailing of the summary. Unless a majority of all Owners at the meeting reject the budget (whether or not a quorum is present), the budget is ratified. If the budget is rejected, the budget last ratified shall continue to be the budget for the Association.

(d) Inadequacy of Annual Assessment. In the Board's sole and absolute discretion, should the annual Assessment be inadequate for any reason, including, without limitation, nonpayment of any Member's annual Assessment, to provide for the Association's costs and expenses, the Board may at any time and from time to time levy further Assessments in the same manner as described in this section 5.03.

(e) Financial Statement. A financial statement for the Association shall be prepared each fiscal year, which shall include a balance sheet showing the profit and loss of the Association and the funds held in reserve by the Association.

(f) Initial Contribution. In addition to the allocable portion of the installment of the regular Assessment for the month escrow closes on the sale of a Lot by Declarant to an Owner other than Declarant, each Owner shall be required to make at close of escrow an initial capital contribution to the reserve fund described in subsection (b) above in the amount of one hundred fifty dollars ($150.00). This initial capital contribution is not an advance payment on the Owner's annual Assessments and is not refundable to the Owner or its successors or assigns.

**5.04** Special Assessments. In addition to the annual Assessments authorized above, the Board may levy special Assessments for the purpose of construction, reconstruction, repair, or replacement of a capital Improvement upon the Common Area, including fixtures and personal property related thereto. Any such Assessment must be approved by a majority of the Members. The Association shall provide written notice to Owners of any meeting at which an Assessment for capital Improvements is to be considered at least twenty-one (21) calendar days before the meeting.

**5.05** Notice of Special Assessments; Time for Payment. The Association may, in its discretion, give written notice of special Assessments to each Owner, which notice shall specify the amount of the special Assessment and the date or dates of payment of the same. No payment shall be due fewer than fifteen (15) days after the written notice has been given. Failure of the Association to give notice of the special Assessment shall not affect the liability of the Owner of any Lot, but the date when payment shall become due in such a case shall be deferred to a date fifteen (15) days after the notice shall have been given.

**5.06** Collection of Assessments. Annual Assessments shall commence with respect to each Lot in the original Property on the first (1st) day of the month immediately following the first (1st) close of escrow for the sale by Declarant to an Owner other than Declarant of a Lot in the original Property. Annual Assessments shall so commence with respect to each Lot in any Annexable Area annexed to the Property in accordance with Article IX hereof on the first (1st) day of the month immediately following the first close of escrow for the sale by Declarant to an Owner other than Declarant of a Lot in that portion of the Annexable Area so annexed.

**5.07** Unpaid Assessments. The amount of any delinquent Assessment, whether regular or special, assessed against any Lot, a late payment charge of five percent (5%) of the delinquent Assessment, plus interest on such Assessment and late payment charge at a rate not to exceed eighteen percent (18%) per annum simple interest, and the costs of collecting such Assessment, late payment charge, and interest, including reasonable attorneys' fees, shall be a lien upon the Lot assessed until paid. Such lien shall be prior

to any declaration of homestead, and except as provided in Section 5.08 hereof, such lien shall survive and not be affected by the conveyance of the Lot subject to the delinquent Assessment to a third-party purchaser. Such lien shall be created in accordance with NRS § 116.3116 and shall be foreclosed in the manner provided for in NRS § 116.31162-116.31168 as is now or hereafter may be in effect. A certificate executed and acknowledged by any two (2) members of the Board stating the indebtedness secured by such lien shall be conclusive upon the Association as to the amount of such indebtedness as of the date of the certificate in favor of all Persons who rely thereon in good faith, and such certificate shall be furnished to any Owner upon request at a reasonable fee not to exceed Ten Dollars ($10.00). In addition to foreclosure of the Assessment lien, the Association may, but is not obligated to, bring an action to recover judgment against the Member personally obligated to pay the delinquent regular or special Assessment after having provided to that Member thirty (30) days' written notice of the delinquency. The Board may suspend the voting rights in the Association and right to use any of the recreational facilities of the Common Area of any Owner during any period any Assessment due from such Owner is unpaid. Assessments may be payable in installments; but a lien in the full amount of the Assessment shall be a lien against the Lot from the time the first installment becomes due. In the event an Assessment is past due more than fifteen (15) days, the Board may declare immediately due and payable the total amount assessed against the Owner and the Lot for that fiscal year. The Association may foreclose a lien by sale for the failure to pay Assessments as provided in the Act.

**5.08** Mortgage Protection. Notwithstanding any other provision of this Declaration, no lien created under this Article V or under any other Article of this Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent. However, after the foreclosure of any such first Mortgage, such Lot shall remain subject to this Declaration and shall be liable for all regular Assessments and all special Assessments levied subsequent to the date six (6) months prior to the institution of an action to foreclose on any such first Mortgage.

**5.09** Effect of Amendments on Mortgages. Notwithstanding the provisions of Section 10.03 hereof, no amendment of Section 5.08 of this Declaration shall affect the rights of any beneficiary whose Mortgage has senior priority as provided in Section 5.08 and who does not join in the execution thereof, provided that its Mortgage is Recorded in the real property records of Clark County, Nevada, prior to the Recordation of such amendment; provided, however, that after foreclosure or conveyance in lieu of foreclosure, the property that was subject to such Mortgage shall be subject to such amendment.

**5.10** Annual Assessments Paid By Declarant. Declarant shall pay all Assessments on all Lots owned by Declarant (but not on any Lots in any Annexable Area until both of the following shall occur: (a) such Annexable Area is actually annexed to and becomes a part of the Property; and (b) the first day of the month following the close of the first sale

by Developer to an Owner other than Developer of a Lot within that particular portion of the Annexable Area); including those Lots owned by Declarant that have not been sold to Owners other than Declarant; provided, however, that Declarant may receive as a credit the costs or value of any maintenance or repair performed by Declarant on the Association Property.

## VI.

## Permitted Uses and Restrictions

In addition to all of the covenants contained herein, the use of the Property and each Lot therein is subject to the following:

**6.01** Improvements and Use. Except as expressly provided herein, the Lots shall be used exclusively for single-family residential purposes. Timesharing is prohibited. No mobile home may be placed or located on any Lot.

**6.02** Animals. No animals of any kind shall be raised, bred, or kept on any Lot, except that a reasonable number of dogs, cats, or other household pets may be kept on a Lot provided that they are not kept, bred, or maintained for any commercial purpose nor in violation of any applicable local ordinance or any other provision of this Declaration. A "reasonable number" shall ordinarily mean three (3) or fewer pets per Lot. All pets within the Property shall be leashed or otherwise under the direct control of the pet owner when not within an enclosed area of a Lot. It shall be the absolute duty and responsibility of each Owner or Lessee to remove any solid animal waste after such animals have used any portion of the Property or any public property in the vicinity of the Property. No pet shall be permitted to be kept within any portion of the Property if it makes excessive noise or is otherwise determined by the Board to be a nuisance. If a pet is determined to be a nuisance, the Board may give notice to the Owner or Lessee to resolve the offending problem within seventy-two (72) hours, and if the problem is not resolved during that period of time, order the removal of the pet.

**6.03** Commercial Activities. No commercial, professional, industrial, institutional, or other non-residential use (including residential day care facilities, and transient commercial uses) shall be conducted on any Lot without the written approval of the Board, except such temporary uses as shall be permitted by Declarant while the Development is being constructed and Lots are being sold by Declarant. Any owner wishing to conduct any commercial, institutional, or other non-residential uses on any Lot shall first apply to the Board for approval of such use and shall provide to the Board any information deemed necessary by the Board to evaluate the impacts of such use on the neighborhood. The Board shall determine if such use diminishes the residential character of the Lot or neighborhood or imposes a nuisance on the neighborhood. The decision of the Board shall be final and conclusive. The Board may review, and repeal, any such approval from time to time at the discretion of the Board if, in the opinion of the Board, the use has changed or increased to a level not consistent with the original approval. This provision may not be amended or deleted without the approval

of all of the Members. As used herein, the term "transient commercial uses" shall mean the use of a Lot, for remuneration, as a hostel, inn, motel, resort, vacation rental, or other form of transient lodging.

**6.04** Utility Service. No lines, wires, or other devices for the communication or transmission of electric current or power, including telephone, television, and radio signals, shall be erected, placed, or maintained anywhere in or on any Lot unless the same shall be contained in conduits or cables installed and maintained underground or concealed in, under, or on buildings or other structures approved in writing by the Board. All temporary utility outlets shall be installed and maintained in accordance with applicable provisions of the Rules and Regulations. No provision hereof shall be deemed to forbid the erection of the temporary power or telephone installations incident to the construction of approved buildings or structures.

**6.05** Nuisances. No noxious, illegal, or offensive activity shall be carried out on or upon any Lot or any part of the Property, nor shall anything be done thereon that may be or may become an annoyance or nuisance, public or private, to the neighborhood, that shall in any way interfere with the quiet enjoyment of each of the Owners of their respective Lots, or that shall in any way increase the rate of insurance for the Association or for the Owners.

**6.06** Garbage. No rubbish, trash, garbage, or other waste shall be kept except in sanitary containers. All equipment for the storage or disposal of such materials shall be kept in a clean and sanitary condition and shall be enclosed so as not to be visible from any public street or from any other Lot or the Common Area.

**6.07** Outside Antennae. Subject to any regulations issued by the Federal Communications Commission and other applicable governmental authorities, there shall be no outside television or radio antennae, satellite dishes, poles, or flag poles constructed or maintained on any Lot or the Common Area for any purpose without the prior written approval of the Board.

**6.08** Signs. No signs other than one (1) sign of customary and reasonable dimensions advertising a Lot for sale or rent shall be displayed on any Lot so that it is visible from any other Lot, public street, or the Common Area without prior written consent of the Board. No signs shall be displayed on the Common Area except signs approved by the Board.

**6.09** Equipment and Machinery. No power equipment, hobby shops, or car maintenance (other than emergency maintenance) shall be permitted on the Property except with prior written approval of the Board. No equipment, machinery, junk, debris, building materials, or similar matter shall be placed, stored, or kept in or on any Lot, parking area, or street within or adjoining the Property.

**6.10** Laundry. Outside clotheslines or other outside facilities for drying or airing clothes shall not be erected, placed, or maintained on any Lot. No washing machine or dryer shall be kept on any Lot, except within a Residence, without the prior written approval of the Board.

**6.11** Propane Tanks. Only propane tanks used in connection with barbecue grills shall be permitted on any Lot; provided, however, that such tanks are in compliance with all applicable codes and laws.

**6.12** Maintenance of Lawn and Plants. All Lots, landscaping, driveways, and exteriors must be kept neat and tidy at all times. No landscape trimmings shall be placed for removal on or near any public road within the Property or in a place upon the Lot where they are visible from any other Lot or the Common Area.

**6.13** Vehicle Parking.

(a) Owner and Occupant Parking; Priorities. It is the intent of this Subsection to limit on-street parking within the Property. Accordingly, each Owner and the occupants of his Residence shall park all of their vehicles first within the garage and then on the driveway adjacent the Owner's Lot; provided, however, that the number of vehicles parked on any driveway adjacent to a Lot shall not exceed the maximum number of three (3). Garage doors must be kept closed at all times, except as reasonably required for ingress and egress to and from the garage. Only after all parking areas first within the garage and then on the driveway are full shall an Owner be allowed to park a vehicle on the streets within the Property. In addition, no Owner shall park, store, or keep anywhere within the Property any vehicle or vehicular equipment, mobile or otherwise, deemed to be a nuisance by the Board, in its sole and absolute discretion.

(b) Guest Parking. Notwithstanding the provisions of Subsection 6.13(a), Persons other than Owners and occupants of the Property, including, without limitation, their guests, invitees, and licensees, may park their vehicles on the streets of the Property between the hours of 7:00 a.m. and 10:00 p.m. Pacific Standard Time. During times other than these hours, including overnight stays, vehicles of such other persons must be parked in accordance with the provisions of Subsection 6.13(a).

(c) Campers, Boats, RVs, Trailers and Non-Passenger Vehicles. No campers, boats, trailers, trailer coaches, camp trailers, recreational vehicles, camper units, house/cars, motor homes, mobile homes, aircraft, jet skis, wave runners, four-wheelers, off-road vehicles, buses, recreational trailers, non-passenger vehicles, or any other similar vehicles, rolling stock, equipment, implements, or accessories shall be parked, stored, or kept anywhere within the Property except within a fully-enclosed garage located on a Lot, and approved by the Board and Architectural Committee pursuant to the terms hereof, or, as applicable, in locations within the Development specifically designated for such purposes by the Board and otherwise in full compliance with any Rules and Regulations from time to time promulgated

by the Board, as well as and including any federal, state, or local laws, rules, or ordinances. The use of any areas within the Property designated for purposes of parking recreational vehicles or the other vehicles described above are subject to the imposition of monthly fees by the Board, as reasonably determined by the Association and as adjusted from time to time. The Board shall have the right to deny any Owner the use of any such parking area for reasons of non-payment and for reasons of violations of any Rules and Regulations promulgated by the Board.

(d) Commercial Vehicles. No commercial vehicles, including, but not limited to, any dump truck, cement mixer truck, oil or gas truck, or delivery truck, shall be kept or stored on or near any Lot unless approval of the Board is granted. For purposes of this Subsection 6.13(d), "commercial vehicle" shall mean any vehicle: (i) designed, maintained, or used primarily for the transportation of property or passengers in furtherance of any commercial enterprise; (ii) that is over eight thousand five hundred (8,500) pounds gross unloaded weight; or (iii) that bears commercial insignia, names, or other common indicia indicating that the vehicle is used for commercial purposes and that is larger than a nineteen (19) foot van or three-quarter (3/4) ton pickup truck. Commercial vehicles that are temporarily parked on or near any Lot for the sole purpose of serving such Lot are exempt from this restriction. The Board shall have the absolute authority to grant approval for storing or keeping a commercial vehicle on or near a Lot. Any Owner wishing to keep a commercial vehicle on or near any Lot shall apply for approval to the Board, and shall provide such information as the Board, in its sole authority, may require. The Board may from time to time in its sole discretion review the approval to keep a commercial vehicle on or near any Lot to determine if the vehicle complies with the intent of the original approval. Upon an adverse determination by the Board, any vehicle shall be removed or otherwise brought into compliance with the requirements of this Section 6.13.

(e) Disabled, Inoperable and Unregistered Vehicles. No disabled, inoperable or unregistered vehicles, campers, boats, trailers, recreational vehicles, or other types of non-passenger vehicles, equipment, implements, or accessories may be kept or stored on any street within the Property for any period in excess of forty-eight (48) hours, nor placed on or near any Lot unless fully screened from view.

(f) Vehicle Maintenance. No dismantling, assembling or maintenance (other than emergency maintenance) of motor vehicles, boats, trailers, recreational vehicles, or other machinery, implements, accessories or equipment shall be permitted in the streets within the Property, or in any parking area, driveway or yard adjacent to a street, or that is not screened from view.

(g) Authority to Review. The Board shall have the absolute authority to determine from time to time whether a vehicle or accessory is operable, adequately screened from public view, and otherwise in compliance with the provisions of this Section 6.13. Upon an adverse determination by the Board, the vehicle or accessory shall be removed or otherwise brought into compliance with this Section 6.13.

(h) Parking Rules and Regulations. The Board may adopt Rules and Regulations consistent with this Section 6.13 to further regulate vehicle parking in the Property.

**6.14** Lease Restrictions.

(a) Hotel and Transient Purposes. No Lot or any portion thereof shall be rented or leased for hotel or transient purposes. A lease for a period of less than six (6) months shall be deemed to be for transient purposes. A lease pursuant to which the lessor provides any services normally associated with a hotel, including, but not limited to, room service, maid service, laundry or linen services, or bellboy services, shall be deemed to be for hotel purposes.

(b) Entire Lot and Parking Space. No Owner or resident of a Lot shall rent or lease less than the entire Lot. Additionally, no Owner or resident shall rent or lease any exclusive use areas, including any garage or parking area that the Owner has the exclusive right to use, separate and apart from the Lot to which these areas are appurtenant.

(c) Percentage Limitations. No more than ten percent (10%) of the total number of Lots in the Property shall be rented or leased at any given time, or used for any purpose other than as the primary residence of the Owner, as determined by the Board in its discretion.

(d) Board Approval Required. All leases shall be subject to Board approval, and prior to entering into any lease agreement, the Owner shall contact the Board to confirm that entering into the lease agreement does not violate the lease restrictions imposed by this Section 6.14.

(e) Requirements for Lease Agreements. All leases shall be in writing, have a term of at least six (6) months, be executed by all parties thereto, and expressly provide that the lease is subject in all respects to the Restrictions and that any failure of the Lessee to comply with the terms of the Restrictions shall be a default under the lease.

(f) Submission of Lease Agreements. Copies of all leases shall be submitted by the Owner to the Board within fifteen (15) days after the lease is executed. Additionally, Declarant may, in its discretion, require potential purchasers of Lots in the Property to execute a disclosure form stating whether they intend to reside in the Residence on the Lot or instead use the Lot and Residence for investment and rental purposes. Finally, all leases, and the Lessees thereunder, shall be registered with the Association, and the Association shall have the right to charge each leasing Owner an appropriate registration fee, as determined by the Board, for each new Lessee registered with the Association.

(g) Hardship Exemption. Anything herein to the contrary notwithstanding, any Owner may petition the Board for an exemption from the lease restrictions set forth in

this Section 6.14 upon a showing of hardship. The Board shall determine whether a hardship sufficient to warrant an exemption exists after providing the petitioning Owner with notice and an opportunity for a hearing before the Board on the matter in accordance with the Restrictions.

(h) Enforcement. The Board is hereby empowered with the right to enforce the lease restrictions set forth in this Section 6.14 by pursuing any remedies available under the Restrictions, at law, or in equity, including, without limitation, imposing fines upon the violating Owner and his Lot in accordance with the Restrictions and/or seeking an injunction to prevent a violation or threatened violation of the lease restrictions, it being expressly agreed and understood that any violation of the lease restrictions would irreparably harm Declarant, the Association, the Owners, and their respective interests in the Property. Any Owner who leases his Lot in violation of any lease restriction set forth in this Section 6.14 shall be subject to enforcement action. Without limiting the generality of the foregoing, any Owner who fails to provide the Association with a copy of the lease agreement for any Lot within the applicable time period set forth above shall, until such time as the Association receives a copy of the lease, be deemed to be in violation of the lease restrictions set forth in this Section 6.14 and subject to enforcement action. Additionally, if a lease is entered into at a time when less than ten percent (10%) of all the Lots in the Property are being rented or leased but is not disclosed to or discovered by the Association until after more than ten percent (10%) of all the Lots in the Property are being rented or leased, then the Owner shall be in violation of the lease restrictions set forth in this Section 6.14 and subject to enforcement action.

(i) Responsibility for Violations. Notwithstanding the execution of a lease, the Owner shall be fully responsible and liable to the Association for all violations of the Restrictions by his Lessees and, without limitation, shall be responsible for payment of any assessments, fines, charges, or costs imposed upon his Lot or incurred by his Lessees. In the event an Owner rents or leases any Lot, the Owner shall provide the Lessee with a copy of the Restrictions and a list of the members of the Board. The Association may, after notice to the Owner of the Lot and in addition to any other rights or remedies it may have at law or equity, enforce against the Lessee any remedies set forth in the Restrictions and may evict the Lessee if within a twelve (12) month period the Lessee commits three (3) or more material violations of the Restrictions, regardless of whether such violations are cured. In the event the Association engages an attorney or takes any legal action against a Lessee for any violation of the Restrictions, the Owner as well as the Lessee shall be subject to the costs and expenses set forth in subsection 10.04(f) hereof.

(j) Model Home and Declarant Exemption. Anything herein to the contrary notwithstanding, the provisions of this Section 6.14 shall not apply to any Lot: (i) owned by Declarant or an affiliate of Declarant; or (ii) any Lot the Residence of which is then being used as a model home for the Development or for any other community developed by Declarant or an affiliate of Declarant, whether such Lot is owned by Declarant, its affiliate, or some other Owner pursuant to a sale-leaseback or other similar arrangement.

**6.15** Resubdivision. No Lot shall be resubdivided nor shall less than an entire Lot be sold.

**6.16** Improvements. All Lot Improvements, including any species of plant material and placement of plants, shall be subject to the control and approval of the Architecture Committee as set forth in Article VII of this Declaration.

**6.17** Taxes. Each Owner shall pay when due and before delinquency all taxes, Assessments, levies, fees, and all other public charges and utility fees and charges of every kind and nature imposed upon or assessed against its Lot.

**6.18** Rules and Regulations. The Board is hereby expressly authorized to establish all rules and regulations as it shall deem necessary for the purpose of implementing, enforcing, and administering the purposes of this Declaration.

**6.19** Hazardous Substances. No activity shall be permitted on any Lot or the Common Area that, in the sole opinion of the Board, will create or emit offensive, hazardous, or excessive quantities of dust, dirt, ash, smoke, noise, fumes, odors, or vibrations or create risk of fire, explosion, or other hazards or is not in harmony and consistent with the Property. Activities prohibited hereunder include, but are not limited to, activities that result in the disposal of hazardous substances in any form upon the Property. For the purposes of this Declaration, the term "Hazardous Substance" shall mean any product, substance, chemical, material, or waste whose presence, nature, quantity, or intensity of existence, use, manufacture, disposal transportation, spill, release, or effect, either by itself or in connection with other materials expected to be found upon any Lot, is either: (i) potentially injurious to the public health, safety, or welfare or the environment or the Property; (ii) regulated or monitored by any governmental authority; or (iii) a basis for liability of Declarant or any Owner to any governmental agency or third party under any applicable state or common law principle.

**6.20** Party Walls. Owners of Party Walls shall share equally the responsibility and cost of all maintenance, repair, or replacement, as necessary, of their respective Party Walls. Notwithstanding the foregoing, an Owner causing any damage to any Party Walls by its acts shall be solely responsible and liable for any maintenance, repair, or replacement, as required, and for any cost or liability necessary to repair such damaged Party Walls.

**6.21** Sight Visibility Zones and View Obstructions. No walls, fences, trees, shrubs, utility appurtenances, or other landscaping or sight-restricting Improvements of any kind, other than traffic control devices or street lights, shall be constructed, installed, or encroach upon or over any area of the Property (whether on the Common Area or on any Lot) designated on the Site Development Plan or any Subdivision Map of the Property as a Sight Visibility Zone or the like, unless such landscaping or Improvement is maintained at less than twenty-four inches (24") in height measured from the top of the curb and otherwise in full compliance with any other restrictions imposed by any Subdivision Map. Compliance with the foregoing sight visibility restriction shall be determined by the Association and/or the City of Las Vegas

(the "City") in their sole and absolute discretion. Due to the safety hazard which may result to vehicular and pedestrian traffic as a result of any violation of the foregoing sight visibility restriction, the Association and/or the City shall have the right to immediately enter upon any Lot, with or without the Lot Owner's permission, and remove any such violation. Additionally, no vegetation, improvement, or other obstruction shall be planted, constructed, or maintained on any Lot in such location or of such height as to unreasonably obstruct the view from any other Lot. Each Owner and resident of a Lot shall be responsible for periodic trimming, pruning and thinning of all hedges, shrubs, and trees located on the Lot so as to unreasonably obstruct the view of other Owners or residents. If an Owner or resident fails to perform necessary trimming, pruning or thinning, the Association shall have the right, but not the obligation, to enter upon such Lot for purposes of performing such work and to charge the Owner of the Lot a special assessment for any costs incurred for performing or having such work performed. Each Owner, by accepting a deed to a Lot, hereby acknowledges that any construction or installation by Declarant may impair the view of such Owner and hereby consents to such impairment.

**6.22** Compliance with City Requirements. Any violation of the conditions, restrictions, or other requirements set forth on the Subdivision Map or otherwise imposed on the Property by the City, as the same may be amended or modified from time to time, by any Owner or occupant of the Property, or by any of their respective guests, licensees, or invitees, shall be deemed a violation of the Declaration enforceable in accordance with this Declaration to the fullest extent permitted by law.

**6.23** Exterior Holiday Decorations. Lights or decorations may be erected on a Lot in commemoration or celebration of publicly observed holidays provided that such lights or decorations do not unreasonably disturb the peaceful enjoyment of Owners of adjacent Lots by illuminating bedrooms, creating noise or attracting sight-seers. Holiday decorations or lights for any publicly observed holiday between December 1 and December 31 of any year, may not be displayed before November 15 of any year. For other holidays, decorations or lights may not be displayed more than two (2) weeks in advance of the holiday. All lights and decorations that are not permanent fixtures of a Lot which are part of the original construction or have been properly approved as permanent improvements by the Architecture Committee shall be removed within thirty (30) days after the date the lights and decorations are put upon display, and in no event more than thirty (30) days after the holiday has ended. The Board shall have the right, upon thirty (30) days prior written notice to designate a party to enter upon any Unit and summarily remove exterior lights or decorations displayed in violation of this provision. The Board, and the individuals removing the lights and decorations, shall not be liable to the Owner for trespass, conversion, or damages of any kind except intentional misdeeds and gross negligence. Exterior holiday decorations including decorations on the inside of a window may be put up thirty (30) days prior to the holiday and must be removed twenty (20) days after the holiday.

**6.24** Blinds and Windows. All Residences must have permanent window coverings installed within ninety (90) days after Close of Escrow on the initial purchase of each Residence.

Window treatments other than draperies, curtains or blinds (horizontal or vertical) are subject to the prior written approval of the Board. Aluminum foil and similar material shall not be permitted in any exterior windows. Window tinting shall require the prior written approval of the Board, and shall be properly installed and maintained so as not to become damaged, scratched, discolored, or otherwise unsightly.

## VII.

## Architecture Committee

**7.01** Establishment of Committee. There shall be an architectural and landscape control committee (the "Architecture Committee"), and except as to construction of Improvements by Declarant, no Improvement shall be made or placed on a Lot until plans and specifications showing the nature, kind, shape, colors, materials, and location of the Improvement have been submitted to and approved in writing by the Architecture Committee.

**7.02** Members of Committee. The Architecture Committee shall consist of three (3) members, all of whom shall first be appointed by Declarant. There shall also be two (2) alternate members of the Architecture Committee, who shall be designated by the Architecture Committee, to act as substitutes on the Architecture Committee in the event of absence or disability of any member. Each member of the Architecture Committee shall hold office until such time as he or she has resigned or has been removed or his or her successor has been appointed, as provided herein. Members of the Architecture Committee may be removed at any time without cause. Until ninety percent (90%) of all Lots have been sold, Declarant shall have the sole power to appoint and remove the members of the Architecture Committee. Thereafter, the Board shall have the power to appoint and remove all members of the Architecture Committee. Members of the Architecture Committee need not be Members of the Association.

**7.03** Architectural Design Guidelines. The Architecture Committee shall from time to time and in its sole discretion adopt, amend, and repeal by unanimous vote rules and regulations to be known as "Design Guidelines," which shall interpret and implement the provisions of this Declaration, set forth fees to be charged, and promulgate procedures and design and construction criteria to be followed in submitting proposals to the Architecture Committee. A copy of the Design Guidelines as they may from time to time be adopted, amended, or repealed, certified by any member of the Architecture Committee, shall be maintained at the office of the Association and shall be available for inspection and copying by any Member at any reasonable time during the business hours of the Association. The following minimum standards and restrictions shall apply to all Improvements made on the Property:

(a) all Improvements shall be constructed in full compliance with all applicable zoning laws, building codes, and other laws, ordinances, and regulations applicable to the construction, use, and occupancy of Improvements; and

(b) all Improvements shall be constructed in accordance with the Design Guidelines.

**7.04** Landscape Standards. The Architecture Committee shall, as part of the Design Guidelines, establish guidelines for plant and landscaping material that shall reflect desert landscaping to the extent practicable. Such guidelines may restrict the species and placement of any tree, plant, bush, ground cover, or other growing thing planted or placed on the Property. The Architecture Committee shall adopt a list of approved plant species that may be altered or augmented from time to time.

**7.05** Review of Proposed Improvements. Whenever in this Declaration or in any supplemental declaration the approval of the Architecture Committee is required, it shall have the right to consider all of the plans and specifications for the Improvement or proposal in question and all other facts that in its sole discretion are relevant. Except as provided in Section 7.01, prior to commencement of construction of any Improvement upon the Property, the plans and specifications therefor shall be submitted to the Architecture Committee, and construction or placement thereof may not commence unless and until the Architecture Committee has approved such plans and specifications in writing. The Architecture Committee shall consider and act upon any and all plans and specifications submitted for its approval pursuant to this Declaration and perform such other duties assigned to it by this Declaration or as from time to time shall be assigned to it by the Board, including the inspection of construction or placement in progress to assure its conformance with plans and specifications approved by the Architecture Committee. The Architecture Committee shall approve plans and specifications submitted for its approval only if it deems that the construction, alterations, or additions contemplated thereby in the locations indicated will not be detrimental to the surrounding area or to the Property as a whole, that the appearance of any structure affected thereby will be in harmony with the surrounding structures, and that the upkeep and maintenance therefor will not become a burden on the Association. The Architecture Committee may condition its approval of plans and specifications on such changes therein as it deems appropriate and may require submission of additional plans and specifications or other information prior to approving or disapproving the material submitted. The Architecture Committee may also issue rules or guidelines regarding anything relevant to its functions, including, but not limited to, minimum standards and procedures for the submission of plans and specifications for approval. The Architecture Committee, in its sole discretion, may require a reasonable fee to accompany each application for approval, which shall be used to cover the Architecture Committee and its members' reasonable costs. The Architecture Committee may require such detail in plans and specifications submitted for its review and such other information as it deems proper.

**7.06** Meetings of the Committee. The Architecture Committee shall meet from time to time as necessary to perform its duties hereunder, but such meetings shall be held at least annually. The Architecture Committee may from time to time by resolution unanimously adopted in writing designate one of its members to take any action or perform any duties for and on behalf of the Architecture Committee, except the granting of variances pursuant

to Section 7.11. In the absence of such designation, the vote of a majority of all of the members of the Architecture Committee or the written consent of a majority of all of the members of the Architecture Committee taken without a meeting shall constitute an act of the Architecture Committee.

**7.07** No Waiver of Future Approvals. The approval or consent of the Architecture Committee to any plans or specifications for any work done or proposed or in connection with any other matter requiring the approval or consent of the Architecture Committee shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any plans or specifications or other matter whatsoever subsequently or additionally submitted for approval or consent by the same or a different Person.

**7.08** Compensation of Members. The members of the Architecture Committee shall be entitled to reasonable compensation from the Association for services rendered, together with reimbursement for expenses incurred by them in the performance of their duties hereunder. Such compensation shall be determined by Declarant while it has the right to appoint or remove the members of the Architecture Committee pursuant to Section 7.02 hereof, and thereafter, such compensation shall be determined by the Board.

**7.09** Inspection of Work.

(a) Completed Work. Inspection of completed work and correction of defects therein shall proceed as follows:

(i) Upon the completion of any Improvement for which approved plans or specifications are required under this Declaration, the Owner shall give written notice of completion to the Architecture Committee within fifteen (15) days of completion.

(ii) Within such reasonable time as the Architecture Committee may set, but not to exceed thirty (30) days thereafter, the Committee or its duly authorized representative may inspect such Improvement. If the Committee finds that such work was not done in strict compliance with all approved plans and specifications submitted or required to be submitted for its prior approval, it shall notify the Owner in writing of such noncompliance within such period, specifying in reasonable detail the particulars of noncompliance, and shall require the Owner to remedy the same.

(iii) If, upon the expiration of thirty (30) days from the date of such notification, the Owner shall have failed to remedy such noncompliance, the Architecture Committee shall notify the Board in writing of such failure. Upon notice and hearing before the Board, the Board shall issue a ruling determining whether there is a noncompliance, and if such noncompliance is found to exist, the Board shall determine the estimated cost of correcting or removing the same. The Owner shall remedy or remove the same within a period of not more than forty-five (45) days from the date of announcement of the Board ruling. If the Owner does not comply with the Board's ruling within such period, the Board,

at its option, may either remove the noncomplying Improvement or remedy the noncompliance, and the Owner shall reimburse the Association upon demand for all expenses incurred in connection therewith. If such expenses are not promptly repaid by the Owner to the Association, the Board shall levy a special Assessment against such Owner and the Improvement in question and the Lot upon which the Improvement is situated for reimbursement, and the special Assessment shall constitute a lien upon such Lot and Improvement.

(iv) If for any reason after receipt of said written notice of completion from the Owner, the Architecture Committee fails to notify the Owner of any noncompliance within the period provided in subsection 7.09(a)(ii) hereof, the Improvement shall be deemed to be in accordance with said approved plans and specifications.

(b) Work in Progress. The Architecture Committee may inspect all work in progress and give notice of noncompliance as provided above in subsection 7.09(a)(ii). If the Owner denies that such noncompliance exists, the procedures set out in subsection 7.09(a)(iii) shall be followed, except that, pending resolution of the dispute, no further work shall be done that would hamper correction of the noncompliance if the Board should find that such noncompliance exists.

**7.10** Nonliability of Committee Members. Neither the Architecture Committee nor any member thereof nor the Board nor any member thereof shall be liable to the Association or to any Owner or to any other Person for any loss, damage, or injury arising out of or in any way connected with the performance of the Architecture Committee's or the Board's respective duties under this Declaration, except for the willful misconduct or bad faith of the Architecture Committee or its members or the Board or its members, as the case may be. Except insofar as its duties may be extended with respect to a particular area by a supplemental declaration filed by Declarant, the Architecture Committee shall review and approve or disapprove all plans and specifications submitted to it for any proposed Improvement, including the construction, alteration, or addition thereof or thereto, solely on the basis of aesthetic considerations and the overall benefit or detriment that would result to the surrounding area and the Property generally. In granting its approval or disapproval to plans and specifications for a proposed Improvement, the Architecture Committee shall take into consideration the aesthetic aspects of the architectural designs, landscaping, color schemes, exterior finishes, and materials and similar features. The approval of the Architecture Committee shall not be construed to be, nor shall the Architecture Committee be responsible for, approval of the structural safety, engineering soundness, or conformance with zoning, building, or other codes that may be applicable.

**7.11** Variances. The Architecture Committee may authorize variances from compliance with any of the architectural provisions of this Declaration or any supplemental declaration, including restrictions upon height, bulk, size, shape, land area, placement of structures, setbacks, building envelopes, colors, materials, or similar restrictions when circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations may, in its sole and absolute discretion, warrant. Such variances must be consistent with

any and all applicable laws. Such variances must be evidenced in writing and must be signed by at least a majority of all of the members of the Architecture Committee. If such a variance is granted, no violation of the covenants, conditions, or restrictions contained in this Declaration or any supplemental declaration shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such a variance shall not operate to waive any provisions of this Declaration, the Design Guidelines, or any supplemental declaration for any purpose except as to the particular property and particular provision and in the particular instance covered by the variance.

**7.12** Obligations with Respect to Zoning and Subdivisions. The Architecture Committee shall require all Persons to comply fully with the zoning and master plan designations and any special use permits and with all applicable federal, state, and local laws, regulations, and ordinances insofar as the same are applicable and as the same may hereafter be amended from time to time.

**7.13** Indemnification of Architecture Committee. The members of the Architecture Committee shall be deemed the appointed agents of the Board, and the Architecture Committee is hereby authorized to carry out and adhere to the provisions of this Article VII. The Owners hereby collectively agree that the members of the Architecture Committee shall be indemnified and held harmless for any liability, damages, or other obligation (including reasonable attorneys' fees) resulting from the reasonable and prudent exercise of their duties as members of the Architecture Committee as specified in this Article VII.

**7.14** Prohibited Balconies. Notwithstanding any other provision in this Declaration, at no time shall balconies be permitted by the Architecture Committee, Declarant, its successors or assigns or the Association on Lots 3 through, and including, 17, as identified on the Site Development Plan.

## VIII.

## Mortgagee Provisions

The following provisions are for the benefit of holders, insurers, and guarantors of first Mortgages on Lots. The provisions of this Article apply to both this Declaration and to the Bylaws notwithstanding any other provisions contained therein.

**8.01** Notices of Action. An institutional holder, insurer, or guarantor of a first Mortgage who provides written request to the Association (such request to state the name and address of such requestor and the street address of the Lot to which its interest relates, thereby becoming an "Eligible Holder") will be entitled to timely written notice of:

(a) Any condemnation loss or any casualty loss that affects a material portion of the Property or that affects any Lot on which there is a first Mortgage held, insured, or guaranteed by such Eligible Holder;

(b) Any delinquency in the payment of Assessments or charges owed by an Owner of a Lot subject to the Mortgage of such Eligible Holder when such delinquency has continued for a period of sixty (60) days, or any other violation of this Declaration or the Bylaws relating to such Lot or the Owner that is not cured within sixty (60) days. Notwithstanding this provision, any holder of a first Mortgage is entitled to written notice upon request from the Association of any default in the performance by an Owner of a Lot of any obligation under this Declaration or the Bylaws that is not cured within sixty (60) days;

(c) Any lapse, cancellation, or material modification of any insurance policy maintained by the Association; or

(d) Any proposed action that would require the consent of a specified percentage of Eligible Holders.

**8.02** Special Provision. Unless at least sixty-seven percent (67%) of the Eligible Holders and voting Members representing at least sixty-seven percent (67%) of the total Association consent, the Association shall not:

(a) By act or omission seek to abandon, partition, subdivide, encumber, sell, or transfer all or any portion of the real property comprising the Common Area that the Association owns directly or indirectly. The granting of easements for public utilities or other similar purposes consistent with the intended uses of the Common Area shall not be deemed a transfer within the meaning of this subsection;

(b) Change the method of determining the obligations, Assessments, dues, or other charges that may be levied against an Owner of a Lot;

(c) By act or omission change, waive, or abandon the Subdivision Map or this Declaration or change, waive, or abandon any scheme of regulations or enforcement relating to architectural design, exterior appearance, or maintenance of the Lots and the Common Area. The issuance and amendment of architectural standards, procedures, rules and regulations, or use restrictions shall not constitute a change, waiver, or abandonment within the meaning of this provision;

(d) Fail to maintain insurance as required by this Declaration; or

(e) Use hazard insurance proceeds for any Common Area losses for other than the repair, replacement, or reconstruction of such property.

First Mortgagees may, jointly or singly, pay taxes or other charges that are in default and that may or have become a charge against the Common Area and may pay overdue premiums of property insurance policies, or secure new property insurance coverage upon the lapse of an Association policy, and first Mortgagees making such payments shall be entitled to immediate reimbursement from the Association.

**8.03** Other Provisions for First Mortgages. To the extent possible under Nevada law:

(a) Any restoration or repair of the Property after a partial condemnation or damage due to an insurable hazard shall be performed substantially in accordance with this Declaration and the original plans and specifications unless the approval is obtained of the Eligible Holders on Lots to which at least fifty-one percent (51%) of the votes of Lots subject to Mortgages held by such Eligible Holders are allocated.

(b) Any election to terminate the Association after substantial destruction or a substantial taking in condemnation shall require the approval of the Eligible Holders on Lots to which at least fifty-one percent (51%) of the votes of Lots subject to Mortgages held by such Eligible Holders are allocated.

(c) Any election to terminate the Association other than for the causes described in subsection 8.03(b) shall require the approval of the Eligible Holders on Lots to which at least sixty-seven percent (67%) of the votes of the Lots subject to the mortgages held by such Eligible Holders are allocated.

**8.04** No Priority. No provision of the Declaration or the Bylaws gives or should be construed as giving any Owner or another party priority over any rights of the first Mortgagee of any Lot in the case of distribution to such Owner of insurance proceeds or condemnation awards for losses to or a taking of the Common Area.

**8.05** Notice to Association. Upon request, each Owner shall be obligated to furnish to the Association the name and address of the holder of any Mortgage encumbering such Owner's Lot.

**8.06** Amendment by Board. Should the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation subsequently delete any of its respective requirements that necessitate the provisions of this Article or make any such requirements less stringent, the Board, without the approval of the Owners, may Record an amendment to this Article to reflect such changes.

**8.07** Applicability. Nothing contained in this Article shall be construed to reduce the percentage vote that must otherwise be obtained under this Declaration, the Bylaws, or Nevada law for any of the acts set out in this Article.

**8.08** Failure of Mortgagee to Respond. Any Mortgagee who receives a written request from the Board to respond to or consent to any action shall be deemed to have approved such action if the Association does not receive a written response from the Mortgagee within thirty (30) days of the date of such Mortgagee's receipt of the Association's request, provided such request is delivered to the Mortgagee by certified or registered mail, return receipt requested.

## IX.

## Annexation

**9.01** Annexation of Additional Property by Association. Upon the approval of two-thirds (2/3) or more of the Members of the Association, the owner of any real property who desires to subject that property to the covenants, conditions, and restrictions of this Declaration and subject that property to the jurisdiction of the Association may Record a Declaration of Annexation, which shall extend the covenants, conditions, and restrictions of this Declaration to such property.

**9.02** Annexation by Declarant. If within seven (7) years of the date of the recording of this Declaration in the Official Records of the Clark County Recorder Declarant desires to develop additional phases in the Annexable Area, such additional phases or any portion thereof may be added to the Property, be subjected to this Declaration, and be included within the jurisdiction of the Association by action of Declarant without the consent of the Members or Eligible Holders. All Common Area Improvements in each phase of the Annexable Area will be substantially completed prior to annexation. Improvements constructed or located in the Annexable Area shall be consistent in terms of quality of construction and architectural design with the Improvements located elsewhere on the Property.

**9.03** Procedure for Annexation. Any annexation may be accomplished by the Recording of a Declaration of Annexation, which shall state that Owners of Lots in the Annexable Area shall also be Members. At the time of Recording of the Declaration of Annexation, Declarant shall also by deed or assignment, as the case may be, transfer to the Association the Association Property in the area being annexed. The obligation of an Owner to pay Assessments or fees to the Association and the right of an Owner to exercise voting rights in the Association in any Annexable Area shall not commence until both of the following occur: (a) such portion of the Annexable Area containing the Lot owned by the Owner is actually annexed to and becomes a part of the Property; and (b) the first day of the month following the close of the first sale of a Lot by Declarant to an Owner other than Declarant in that particular portion of the Annexable Area.

**9.04** Deannexation. Declarant may delete all or any portion of the phase of development from coverage of this Declaration and the jurisdiction of the Association so long as Declarant is the owner of all of that phase and provided that:

(a) the Notice of Deannexation is Recorded in the same manner as the applicable Declaration of Annexation was Recorded;

(b) Declarant has not exercised any rights to vote with respect to any portion of such phase;

(c) Assessments have not yet commenced with respect to any portion of such phase;

(d) no Lot has been sold in such phase to a member of the general public; and

(e) the Association has not made any expenditures or incurred any obligation respecting any portion of such phase.

## X.
## General Provisions

**10.01** Term. This Declaration, including all of the covenants, conditions, and restrictions hereof, shall run until the date fifty (50) years hereafter, unless amended as herein provided. After the date fifty (50) years hereafter, this Declaration, including all such covenants, conditions, and restrictions, shall be automatically extended for successive periods of ten (10) years each, unless amended or extinguished by a written instrument executed by at least two thirds (2/3) of the Owners and recorded in the Official Records of the County Recorder of Clark County, Nevada.

**10.02** Resale of Lots. The seller of any Lot shall furnish to the purchaser before execution of any contract for the sale of the Lot or otherwise before conveyance:

(a) a copy of this Declaration, the Articles, Bylaws, and Rules and Regulations;

(b) a statement setting forth the amount of the annual Assessments for common expenses and any unpaid Assessment of any kind currently due from the selling Owner; and

(c) a copy of the current operating budget of the Association.

The selling Lot Owner shall also at such time notify the Association of the proposed sale and provide the Association with the name and address of the new Owner and the proposed date of sale. Nothing in this Section 10.02 shall be construed to require any approval by the Association of the sale of any Lot.

**10.03** Amendment.

(a) Majority Vote. Except as provided in subsection 10.03(c), no amendment of this Declaration shall be effective unless adopted by a majority of the Members.

Notwithstanding the foregoing, the consent of sixty-seven percent (67%) of the Members entitled to vote and of Declarant, so long as the Declarant owns any land subject to this Declaration, and the approval of Eligible Holders on Lots to which at least fifty-one percent (51%) of the votes of Lots subject to a Mortgage shall be required to materially amend any provisions of this Declaration, the Bylaws, Articles, or to add any material provisions thereto that establish, provide for, govern, or regulate any of the following:

(i) voting;

(ii) Assessments, Assessment liens, or subordination of such liens;

(iii) reserves for maintenance, repair, and replacement of the Common Area;

(iv) insurance or fidelity bonds;

(v) rights to use the Common Area;

(vi) responsibility for maintenance and repair of the Property;

(vii) expansion or contraction of the Property or the annexation or withdrawal of real property to or from the jurisdiction of the Association;

(viii) boundaries of any Lot;

(ix) leasing of Lots;

(x) imposition of any restrictions on an Owner's right to sell or transfer its Lot;

(xi) establishment of self-management by the Association after professional management has been required by an Eligible Holder;

(xii) any provisions in this Declaration, the Bylaws, or Articles that are for the express benefit of Eligible Holders, guarantors, or insurers of first Mortgages on Lots;

(xiii) reallocation of interests in the Common Area; or

(xiv) convertibility of Lots into Common Area or vice versa.

(b) Board Amendment. Notwithstanding anything herein to the contrary, the Board may unilaterally amend this Declaration to comply with the Act, as the Act may be amended from time to time.

(c) Recording of Amendment. Every amendment of this Declaration must be recorded in the Official Records of the Clark County Recorder, and no amendment of this Declaration shall be effective until executed and so Recorded. Every amendment must be indexed in the grantee's index in the name of the Association and in the grantor's index in the name of the party executing the amendment. Every amendment of this Declaration must be prepared, executed, recorded, and certified on behalf of the Association by the officer of the Association designated in the Bylaws for that purpose, or in the absence of such designation, by the President of the Association.

(d) Persons Entitled to Amend. This Declaration may be amended in accordance with NRS §§ 116.2109, 116.2110 by Declarant for the purpose of exercising any developmental rights as set forth in this Declaration.

(e) Restrictions on Amendment. Except to the extent expressly permitted or required by the provisions of the Act, no amendment may change the boundaries of any particular Lot, the allocated interests of a particular Lot, or the uses to which a particular Lot is restricted in the absence of the consent of the Owner of the Lot affected and the consent of a majority of the Owners of the remaining Lots. No action to challenge the validity of an amendment adopted by the Association pursuant to NRS § 116.2117 may be brought more than one (1) year after the amendment is recorded.

(f) Declarant Amendment. Notwithstanding any provision of this Declaration to the contrary, for so long as Declarant owns any portion of the Property, but no later than five (5) years from Recordation of this Declaration, Declarant may unilaterally amend this Declaration by Recording a written instrument signed by Declarant in order to correct technical errors, for clarification, and to conform this Declaration to the requirements of the City of North Las Vegas, the Veterans Administration, the Department of Housing and Urban Development, the Federal Housing Administration, the Federal Home Loan Mortgage Corporation, FNMA, or GNMA.

(g) Delivery of Amendments to Owners. If any change is made to this Declaration or any of the other governing documents of the Association, the Secretary of the Association shall, within thirty (30) days after the change is made, prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each Lot or to any other mailing address designated in writing by the Lot Owner, a copy of the change that was made.

**10.04** Enforcement and Nonwaiver.

(a) Right of Enforcement. Subject to NRS Chapter 38 and except as otherwise provided herein, any Owner (at its own expense), Declarant, and the Board shall have the right to enforce, by any proceeding at law or in equity and including arbitration proceedings and other forms of mediation, all of the restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration against

any property within the Property and the Owners thereof. Such right of enforcement shall include both damages for and injunctive relief against the breach of any such provision. The right of any Owner to so enforce such provisions shall be equally applicable without regard to whether the property (or other interest) of the Owner seeking such enforcement or the property (or other interest) whereon or with respect to which a violation of such provision is alleged is initially set forth on Exhibit "A" or is hereafter subjected to this Declaration pursuant to Article IX hereof.

(b) Violation as a Nuisance. Every act or omission by which any provision of this Declaration is violated in whole or in part is hereby declared to be a nuisance and may be enjoined or abated by any Owner (at its own expense), by Declarant, or by the Board, whether or not the relief sought is for negative or affirmative action. However, only Declarant, the Board, and the duly authorized agents of either of them may enforce by self-help any of the provisions of this Declaration and then only if such self-help is preceded by reasonable notice to the Owner in question.

(c) Violation of Law. Any violation of any federal, state, or local law, ordinance, or regulation pertaining to the ownership, occupancy, or use of any property within the Property is hereby declared to be a violation of this Declaration and subject to all of the enforcement procedures set forth herein.

(d) Remedies Cumulative. Each remedy provided by this Declaration is cumulative and not exclusive.

(e) Nonwaiver. The failure to enforce any provision of this Declaration at any time shall not constitute a waiver of the right thereafter to enforce any such provision or any other provision herein.

(f) Attorneys' Fees. In the event the Board engages legal counsel or takes any legal action, including, but not limited to, arbitration proceedings pursuant to NRS Chapter 38, to enforce the provisions of this Declaration, it shall be entitled to its costs, including reasonable attorneys' fees, incurred in connection therewith.

**10.05** Notices. Any notice or communication to be given under the terms of this Declaration shall be in writing and shall be personally delivered or sent by facsimile, overnight delivery, or registered or certified mail, return receipt requested. Notice shall be effective: (a) if personally delivered, when delivered; (b) if by facsimile, on the day of transmission thereof on a proper facsimile machine with confirmed answerback; (c) if by overnight delivery, on the day after delivery thereof to a reputable overnight courier service; and (d) if mailed, at midnight on the third (3rd) business day after deposit in the mail, postage prepaid. Notices shall be addressed to the Person at the address given by such Person to the Association for the purpose of service of notices or to the residence of such Person if no address has been given to the Association. Such address may be changed from time to time by notice in writing given by such Person to the Association.

**10.06** Construction.

(a) Restrictions Severable. Each of the provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision.

(b) Singular Includes Plural. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular; and the masculine, feminine, or neuter shall each include the masculine, feminine, and neuter.

(c) Captions. All captions and titles used in this Declaration are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of the Sections or Articles hereof.

(d) Liberal Construction. It is the intention of Declarant that this Declaration be liberally construed to promote the purpose of a well-planned community, reserving to Declarant the rights necessary to develop the Property and to insure the integrity of the interrelated land uses.

**10.07** State Law. The provisions of this Declaration shall be governed and interpreted according to the laws of the State of Nevada.

**10.08** Priorities, Inconsistencies. If there are conflicts or inconsistencies between this Declaration and either the Articles or the Bylaws, the terms and provisions of this Declaration shall prevail.

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**10.09** Severability. The provisions hereof shall be deemed independent and severable, and a determination of invalidity or partial invalidity or unenforceability of any one (1) provision or portion hereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provisions hereof.

Declarant has executed this Declaration this 23 day of February, 2004.

**DECLARANT**

Greystone Nevada, LLC,
a Nevada limited liability company

By: _____
(Signature)

Name: Tim Kent
(Print Name)

Title: President
(Print Title)

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

On the 23 day of February, 2004, before me, a Notary Public in and for said County and State, personally appeared Tim Kent, known to me to be the President of Greystone Nevada, LLC, a Nevada limited liability company, and who acknowledged to me that he/she executed the within instrument.

LISA ECKHARDT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 02-76774-1
My Appt. Expires Aug. 1, 2006

_____
Notary

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# EXHIBIT "A"

## LEGAL DESCRIPTION OF THE PROPERTY

**LOTS TWELVE (12) THROUGH FIFTEEN (15); LOTS THIRTY-ONE (31) THROUGH THIRTY-FOUR (34); LOTS SIXTY-SIX (66) THROUGH EIGHTY-ONE (81) AND LOTS EIGHTY-FOUR (84) THROUGH EIGHTY-SIX (86) OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY) AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.**

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# EXHIBIT "B"

## LEGAL DESCRIPTION OF THE ANNEXABLE PROPERTY

**LOTS ONE (1) THROUGH ELEVEN (11); LOTS SIXTEEN (16) THROUGH THIRTY (30); LOTS THIRTY-FIVE (35) THROUGH SIXTY-FIVE (65); LOTS EIGHTY-TWO (82), EIGHTY-THREE (83) AND EIGHTY-SEVEN (87) THROUGH NINETY-THREE (93) OF CHARLESTON AND FOGG (A COMMON INTEREST COMMUNITY) AS SHOWN BY MAP THEREOF ON FILE IN BOOK 113 OF PLATS, PAGE 40, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.**

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**Exhibit "C"**

**Site Development Plan**

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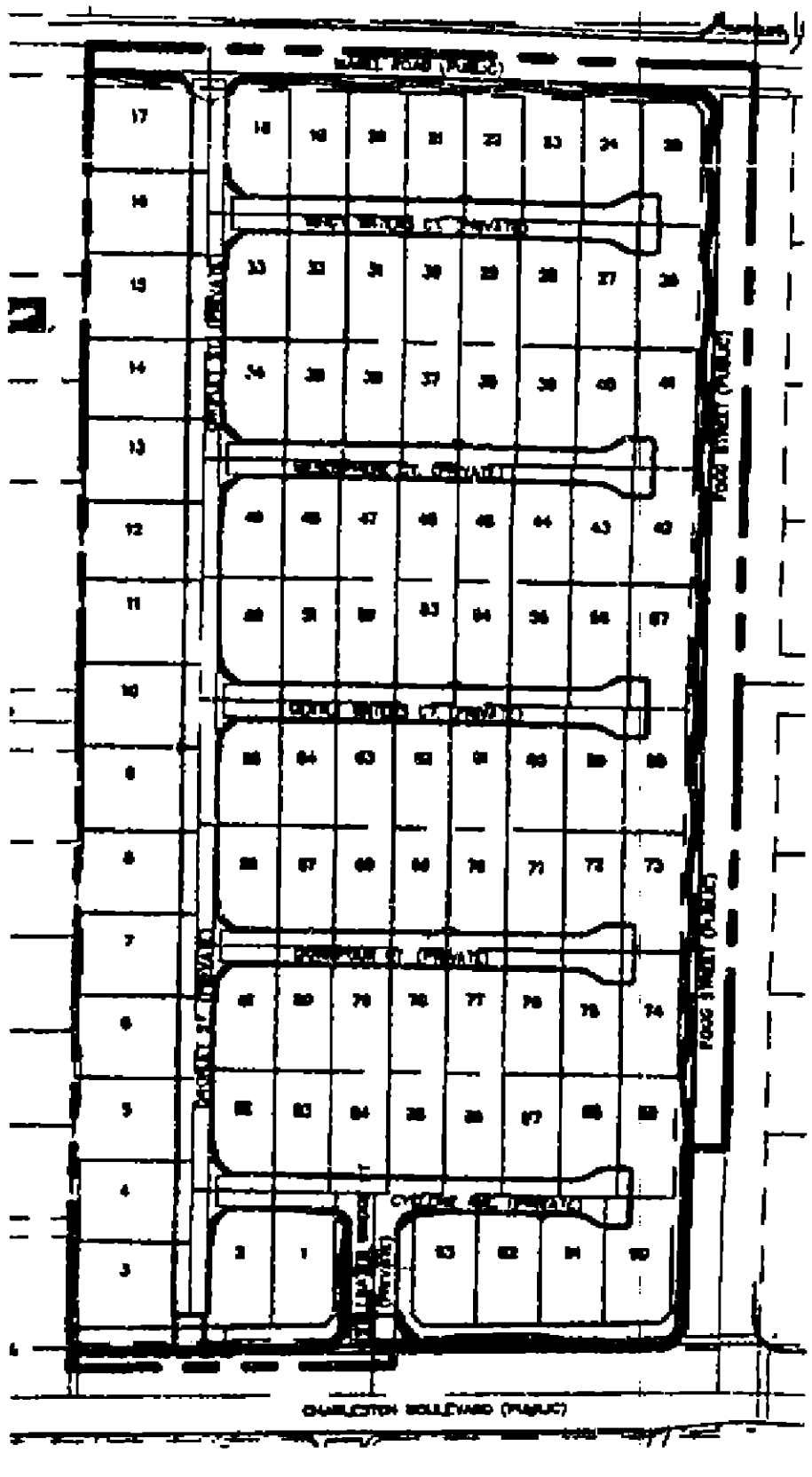


RECORDER'S MEMO
POSSIBLE POOR RECORD DUE TO
QUALITY OF ORIGINAL DOCUMENT

Book 113 of Plats
Page 40

DATE: 02/25/04

88162001

Stantec Consulting Inc.
7251 W. Charleston Blvd.
Las Vegas NV U.S.A.
89117-1580
Tel. 702.258.0115
Fax. 702.258.4956
www.stantec.com

Client/Project
GREYSTONE
CHARLESTON & FOGG

Figure No.
1 OF 1

Title
EXHIBITS

# EXHIBIT N

EXHIBIT N

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| Title to Property | COURT MINUTES | February 21, 2013 |
|---|---|---|
| A-13-674872-C | Oliver Sage Drive Trust, Plaintiff(s)<br>vs.<br>BAC Home Loan Servicing LP , Defendant(s) | |
| February 21, 2013 | 9:00 AM | Preliminary Injunction Hearing |

**HEARD BY:** Denton, Mark R. **COURTROOM:** RJC Courtroom 12A

**COURT CLERK:** Linda Denman

**RECORDER:** Cynthia Georgilas

**PARTIES PRESENT:**

| | |
|---|---|
| Bohn, Michael F | Attorney for Plaintiff |
| Chang, Edward T | Attorney for BAC Home Loan |
| Vigil, Abran E. | Attorney for BAC Home Loan |

JOURNAL ENTRIES

- Argument by Counsel on PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION. Mr. Bohn argued Plaintiff purchased a property at a homeowner association's foreclosure sale for $1200 and was requesting the preliminary injunction to prevent Bank of America, as lender on the Deed of Trust, to foreclose. Argument as to statutory interpretation of the super-priority lien over the first secured deed of trust; remedies available to lenders to preserve their rights, and whether the new purchaser extinguishes the Banks lien automatically. Upon Court's inquiry into the status of the parties following foreclosure sales by both the HOA and the Bank, Mr. Vigil advised a buyer of the HOA foreclosure purchases a possessory right subject to the first lien and that does not give the buyer a lien right. Upon Court's further inquiry, Mr. Bohn stated there are no genuine facts as to status of the parties left in the case.

Following discussion, COURT STATED ITS FINDINGS that it agreed with defendant's position but wanted to rule in such a way that allowed plaintiff to file an immediate appeal. COURT ORDERED preliminary injunction DENIED; TRO extended for THIRTY (30) DAYS AFTER notice of entry of this Court's Order and previous bond STANDS.

Mr. Vigil to prepare proposed Order with appropriate findings of facts; Mr. Bohn to approve as to form and content.

# EXHIBIT O

EXHIBIT O

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DIAKONOS HOLDINGS, LLC,

Plaintiff,

v.

COUNTRYWIDE HOME LOANS, INC., *et al.*,

Defendants.

Case No. 2:12-CV-00949-KJD-RJJ

**ORDER**

Before the Court is the Motion to Dismiss (#17) filed by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., and Mortgage Electronic Registration Systems, Inc. (Collectively "Defendants"). Plaintiff Diakonos Holdings, LLC filed an opposition and Countermotion to Remand (#23, #24). Defendants responded (#25) and Plaintiff replied (#27). The Court directed Defendants to file a further reply (#37).

I. Background

Luis and Mirna Alfaro owned a property at 2704 Coventry Green Avenue, Henderson, Nevada 89074 (the "Property"). In 2007, the Alfaros took out a mortgage on the Property and secured it with a Deed of Trust. Defendant Bank of America subsequently obtained all beneficial interest in under the Deed of Trust.

The Alfaro's defaulted on their HOA dues and the HOA recorded a lien (the "Assesment Lien") on January 24, 2011. The Alfaros did not pay off the Lien and the property was sold to Plaintiff at a foreclosure auction on March 9, 2012. Defendants did not appear at the foreclosure sale.

On April 14, 2012, Defendants filed a Notice of Trustee's sale pursuant to the Deed of Trust. The Foreclosure Sale was scheduled for May 21, 2012. Plaintiff filed this action in state court seeking an injunction precluding the May 21, foreclosure sale and quieting title in its favor. Judge Adair entered a preliminary injunction prohibiting Defendants from conducting the sale. Defendants then removed the action here.

II. Motion to Remand

Plaintiff asks this court to use its discretion to remand this case to state court. Plaintiff acknowledges that no articulated abstention doctrine applies in this case. However, Plaintiff urges that the Court remand this case based on "principles identified by the United States Supreme Court in Burford v. Sun Oil, 319 U.S. 315 (1043)." Specifically, Plaintiff claims that federal adjudication would be disruptive to Nevada's efforts to establish a cohesive policy of interpretation and application of NRS116.3116.

The Court declines to exercise its discretion to remand this case. District courts regularly predict how state courts would rule on issues of statutory interpretation. As discussed below, NRS 116.3116 is clear and the Court sees no reason that the issues in this case cannot be properly adjudicated here. Accordingly, the Countermotion to remand is denied.

III. Motion to Dismiss

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require

detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). "Factual allegations must be enough to rise above the speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (citation omitted).

In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. Id. at 1949. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. Twombly, 550 U.S. at 570.

B. NRS 116.3116

N.R.S. 116.3116(2)(b) relates to liens by homeowner's associations and reads 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 statute also provides that:

> 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 . . .

Plaintiff argues that this statute operates so that foreclosure of a delinquent assessment lien by the HOA extinguishes the first security interest on the property.[1] According to Plaintiff, because Defendants were provided with notice of the foreclosure sale and chose not to take any action, their lien was extinguished when the HOA completed its non-judicial foreclosure. Plaintiff argues that foreclosure by the HOA must extinguish all other liens, including the first security interest, or else HOAs would be unable to initiate foreclosure and would not be able to recover any deficiencies until the holder of the first deed of trust foreclosed. In support of this argument, Plaintiff cites Summerhill Village Homeowners Ass'n v. Roughly, 270 P.3d 639 (Wash.App. Div. 1, Feb. 21, 2012) (opinion corrected and superseded by Summerhill Village Homeowners Ass'n v. Roughly, 289 P.3d 645) (Wash.App. Div. 1, Feb. 21, 2012). In Summerhill, the court held that a judicial foreclosure had the effect of extinguishing the interest held by the first deed of trust. However, Summerhill does not support Plaintiff's contentions. The Washington statute at issue in that case specifically provides that when an association pursues nonjudicial foreclosure, it is not entitled to lien priority which would extinguish the first security interest. Nevada's statutory scheme does not draw such a distinction, and even if it did, the foreclosure in this case was nonjudicial.

NRS 116.3116(2)(c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest. Contrary to Plaintiff's assertion, the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses. Instead, as in this case, the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the purchaser at the sale takes the property subject

---

[1] Plaintiff does not address the language of subsection 2(b) which specifically states that HOA liens do not extinguish a first security interest recorded prior to the time the assessment became delinquent.

to the security interest. There is no dispute that the Deed of Trust was recorded on August 30, 2007, and the Assessment Lien was recorded on January 24, 2011. Accordingly, the Deed is prior to the Assessment Lien and Plaintiff's claims for quiet title and declaratory relief fail as a matter of law.

IV. Conclusion

**IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (#17) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's Countermotion to Remand (#24) is **DENIED**.

DATED this 11th day of February 2013.

Kent J. Dawson
United States District Judge

# EXHIBIT P

EXHIBIT P

ORIGINAL

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CLERK OF THE COURT


ORDR
GARY E. SCHNITZER, ESQ.
Nevada Bar No. 395
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
CHASON COHAN, ESQ.
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Attorneys for *BANK OF AMERICA, N.A.*


**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SANUCCI CT TRUST,<br><br>Plaintiff,<br>vs.<br><br>JOSEPH ELEVADO, an individual; MELANIE ELEVADO, an individual; BANK OF AMERICA, NATIONAL ASSOCIATION; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No. A-12-670423-C<br>Dept. No. 30<br><br>Date of Hearing: February 21, 2013<br><br>Time of Hearing: 9:00 a.m. |


KRAVITZ, SCHNITZER, SLOANE & JOHNSON, CHTD.
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**ORDER**

The matter of Defendant, Bank of America, N.A.'s Motion to Dismiss having come before this Honorable Court on February 21, 2013, at 9:00 a.m.; Plaintiff appearing by and through MICHAEL V. INFUSO, ESQ. of GREENE INFUSO, LLP, and Defendant, Bank of America, N.A., appearing by and through MELANIE D. MORGAN, ESQ., of KRAVITZ, SCHNITZER, SLOANE & JOHNSON, CHTD.

After reviewing the moving papers and hearing oral argument, the Court hereby makes the following findings:

1. Plaintiff's Complaint for quiet title and declaratory relief fails to state a claim

upon which relief may be granted pursuant to Nev. Rule Civ. Pro. 12(b)(5). Specifically, the allegations in the Complaint are not legally sufficient to constitute the elements of the claim asserted.

2. The "super priority" lien established by NRS §116.3116(2) is not a standalone lien that a homeowners association can foreclose upon constituting a senior position to all prior first security interests.. Rather, the "super priority" lien establishes a payment priority relative to a first security interest, meaning that the homeowners association is entitled to payment of the "super priority" amount prior to payment of a foreclosing first security interest lienholder.

3. Foreclosure by a homeowners association of its "super priority" lien does not extinguish a first security interest on the property recorded before the date on which the assessment sought to be enforced became delinquent.

4. Because there are multiple defendants in this matter, the Court finds that there is no just reason to delay entry of final judgment as to Defendant Bank of America, N.A.

In consideration of the above findings,

**IT IS HEREBY ORDERED** that Defendant Bank of America, N.A.'s Motion to Dismiss is **GRANTED.**

///

///

KRAVITZ, SCHNITZER, SLOANE & JOHNSON, CHTD.
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(702) 362-6666

**IT IS FURTHER HEREBY ORDERED** that, there being no just reason for delay, this Order of Dismissal is certified as final pursuant to Nev. Rule Civ. Pro. 54(b).

DATED this 18th day of March, 2013.

DISTRICT COURT JUDGE

Submitted by:

KRAVITZ, SCHNITZER,
SLOANE & JOHNSON, CHTD.

By: _____
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Attorneys for Plaintiff
*BANK OF AMERICA, N.A.*

Reviewed as to form and content:

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# EXHIBIT Q

EXHIBIT Q

A-13-675541-C

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| Title to Property | COURT MINUTES | April 17, 2013 |
|---|---|---|
| A-13-675541-C | SBW Investments LLC, Plaintiff(s)<br>vs.<br>Elsinore LLC, Defendant(s) | |

**April 17, 2013** 8:30 AM **Defendant Elsinore LLC's Motion to Dismiss**

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Carol Donahoo

RECORDER: Michelle Ramsey

REPORTER:

PARTIES
PRESENT: Olson, Bob L. Attorney
Tobler, Richard L Attorney

JOURNAL ENTRIES

- This is the time set for hearing on Defendant Elsinore LLC's Motion to Dismiss. Arguments by Counsel.

Court noted it is clear that the Deed of Trust was recorded prior to the HOA lien. The Statute is clear, in that it does not set forth that the HOA lien extinguishes the senior lien in this matter; i.e, it does not extinguish the Deed of Trust. The property here, was purchased subject to the Deed of Trust and was duly recorded.

The COURT FINDS, that the Statute merely sets forth the priority as to payment of the foreclosure proceeds. Therefore, COURT ORDERED, the Motion to Dismiss is GRANTED. The issues of wrongful foreclosure and negligence are conceded. There is no basis for a receiver under the facts of this particular case. It is a matter of law that the Deed of Trust is not extinguished in this particular case because it was recorded and all parties were on notice of it. Otherwise, this Court adopts the argument by Elsinore in this matter. Mr. Olson to prepare the Order consistent with the Court's decision today.

# EXHIBIT R

EXHIBIT R

John T. Steffen (4390)
Richard L. Doxey (9005)
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*Attorneys for Defendant*
*Maverick Valley Properties, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MARTIN CENTENO and RICARDO ROJAS,<br><br>Plaintiffs,<br><br>v.<br><br>MAVERICK VALLEY PROPERTIES, LLC; RECORDER'S OFFICE of Clark County, Nevada; and ASSESSOR'S OFFICE of Clark County, Nevada, their assignees and/or successors; DOE individuals A through X, inclusive, and ROE Corporations A through X, inclusive, and all other persons unknown and claiming any right, title, estate, lien or interest in the real property described in this Complaint adverse to Plaintiff's ownership or any cloud upon Plaintiff's title thereto.<br><br>Defendants. | CASE NO.: A654878<br>DEPT NO.: XXIV<br><br>**ORDER GRANTING MAVERICK VALLEY PROPERTIES, LLC'S MOTION TO DISMISS AND EXPUNGE LIS PENDENS AND DENYING PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT** |

The Motion to Dismiss and Expunge Lis Pendens filed by Defendant Maverick Valley Properties, LLC, on March 14, 2012 ("Maverick Valley's Motion") and Plaintiffs' request for summary judgment came on for hearing before the Court on April 18, 2012. Attorney Richard L Doxey of HUTCHISON & STEFFEN appeared on behalf of Defendant Maverick Valley Properties, LLC. Martin Centeno and Ricardo Rojas each appeared. The Court having reviewed Maverick Valley's Motion, its exhibits, the opposition/counter motion, reply and the pleadings and papers on file, considered the oral arguments and good cause appearing, hereby enters the following order:

IT IS HEREBY ORDERED that Defendant's Maverick Valley Properties, LLC's Motion to Dismiss and Expunge Lis Pendens is granted.

IT IS HEREBY ORDERED, that Plaintiffs' countermotion for summary judgment is denied.

IT IS HEREBY ORDERED, that Plaintiffs lis pendens recorded with the Clark County recorder's office is expunged and forever released from the Property.

This Order is based on the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Maverick Valley Properties is a third party purchaser of real property at a NRS Chapter 107 nonjudicial foreclosure sale. The real property subject to this action is commonly known as, 5455 Criollo Dr., Las Vegas, Nevada 89122 and more particularly described as:

Parcel I

Lot Sixty-Six (66) of Stallion Mountain estates II unite 3, as shown by map thereof on file in Book 128 of Plats, page 27, in the Office of the County Recorder of Clark County, Nevada.
Reserving therefrom a non-exclusive easement for ingress, egress, and enjoyment upon and over that portion of said subdivision delineated on the plat as "private Street and U.E" and "Common Lots".

Parcel II

A non-exclusive easement for ingress, egress and enjoyment upon and over that portion of said subdivision delineated on the plat as "Private Street and U.E." and Common Lots" and further described in that certain Declaration of Covenants, Conditions and Restrictions of Estates at Stallion Mountain, recorde4d May 13, 2005 in Book 20050513 as Document No. 03795 of Official Records.

APN No. 161-16-813-003

(hereinafter "Property").

2. Prior to Maverick Valley Properties purchase of the Property, it was purchased by a certain Jon P. Dullano who obtained a Grant Bargain Sale Deed on August 4, 2006, which is recorded in the official records of the Clark County Recorder on August 4, 2006 in book number 20060804-0001511.

3. To purchase the Property, Mr. Dullano obtained a loan in the amount of $310,210.00



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which was secured a certain Deed of Trust ("First DOT") recorded with the Clark County Recorder on August 4, 2006 in book number 20060804-0001514.

4. Mr. Dullano defaulted on the loan and as a result a Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust ("NOD") was recorded on December 14, 2009, in book number 20091214-0000670.

5. According to the NOD, MTC Financial Inc. dba Trustee Corps is authorized to act as an agent of the beneficiary of the First DOT.

6. The Property was in a homeowners association ("HOA") and a Notice of Delinquent Assessment ("HOA Lien") dated December 22, 2010 was recorded with the Clark County Recorder on January 4, 2010 in book number 20100104-0002094.

7. An assignment of the First DOT from MERS to EMC Mortgage Corporation dated December 12, 2009 was recorded in the Clark County Recorder on January 21, 2010 in book number 20100121-0003472.

8. A Substitution of Trustee for the First DOT dated December 13, 2009 was recorded in the Clark County Recorder on January 11, 2010 in book number 20100111-0001033. The substitution documents that Trustee Corps (the dba of MTC Financial Inc.) was appointed the trustee of the First DOT.

9. A Notice of Default and Election to Sell Under Homeowners Association Lien (HOA NOD) was recorded with the Clark County Recorder on September 9, 2010 in book number 20100909-0001115.

10. A Notice of Trustee's Sale for the HOA ("HOA Notice of Sale") was recorded with the Clark County Recorder on March 29, 2011 in book number 20110329-0002927.

11. A Trustee's Deed Upon Sale from the HOA sale ("HOA Trustee's Deed") vesting Criollo Family Trust with title to the Property was recorded on August 2, 2011 with the Clark County Recorder in book number 20110802-0002927.

12. The HOA Trustee's Deed is without warranty and conveyed to the Criollo Family Trust all title of the unit owner, which in this matter was Jon P. Dullano.

13. Jon P. Dullano's interest in the Property, which was obtained by the Criollo Family

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Trust, was at all times subject to the First DOT.

14. The First DOT was not extinguished by the HOA foreclosure.

15. An assignment of the First DOT from EMC Mortgage Corporation to JP Morgan Chase Bank, N.A. dated October 4, 2011 was recorded in the Clark County Recorder on December 5, 2011 in book number 20111205-0001432.

16. A certificate from the State of Nevada Foreclosure Mediation Program for the First DOT was recorded on December 5, 2011 with the Clark County Recorder in book number 20111205-0001431.

17. A Notice of Trustees Sale for the First DOT ("First DOT Notice of Sale") was recorded with the Clark County Recorder on December 5, 2011 in book number 20111205-0001433.

18. A Trustee's Deed Upon Sale from the First DOT sale ("First DOT Trustee's Deed") vesting Maverick Valley Properties, LLC with title to the Property was recorded on January 19, 2012 with the Clark County Recorder in book number 20120119-0003147.

19. Criollo Family Trust was on title to the Property at the time of the NRS 107 foreclosure sale, but its title only consisted of the title previously owned by John P. Dullano which at all times was subject to the First DOT.

20. The title held by the Criollo Family Trust was not superior to the First DOT.

21. Neither of the Plaintiffs are attorneys licenced to practice in the State of Nevada.

22. Neither of the Plaintiffs tendered the undisputed amount due and owing on the First DOT.

23. The Plaintiffs filed an amended complaint on January 25, 2012 with the following cause of actions: Maverick Valley Properties is Not a Buyer in Good Faith; The Trustee's Sale to Defendant Maverick Valley Properties is Null and Void; Defendant's Predecessor-in-interest, MTC Financial Inc., Has No Power or Right to Sell Subject Property in a Trustee's Sale; Cancellation of Trustee Sale and Quieting of Title of Plaintiff; Issuance of Temporary Restraining order and/or Injunction.

24. The Plaintiffs also filed a lis pendens with the Court on January 25, 2012 which, if

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recorded shall be expunged and forever released from the Clark County Recorder's office.

25. Any finding of fact set forth herein that is more appropriately categorized as a conclusion of law shall be deemed to be a conclusion of law.

## CONCLUSIONS OF LAW

1. Pursuant to NRCP Rule 12(b)(5) a court may dismiss a complaint for failure to state a claim upon which relief can be granted. The court construed the complaint liberally and accepted all its factual allegations as true. See *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 845, 858 P. 2d 1258, 1260 (1993).

2. In addition to the complaint's allegations, the Court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. See *Breliant*, 109 Nev. at 847, 858 P.2d at 1261.

3. The court took into consideration, with no opposition by Plaintiffs, the documents of public record that were attached to Maverick Valley's Motion.

4. The Court also applied the summary judgment standard to Plaintiffs' request for summary judgment and they are not entitled to summary judgment as a matter of law.

5. Although a person is entitled to represent himself or herself in the district court, no rule or statute permits a person to represent any other person, a company, a trust, or any other entity in the district courts or in this court. See *Salman v. Newell* 110 Nev. 1333, 1336, 885 P.2d 607, 608 (Nev.,1994).

6. The HOA Trustee's Deed vested Criollo Family Trust with Mr. Dullano's interest in the Property and as a matter of law Plaintiffs cannot represent the Criollo Family Trust's interest in this action as they are not attorneys licenced to practice law in Nevada. To the extent Plaintiffs are attempting to represent the Criollo Family Trust the matter must be dismissed as Plaintiffs are not attorneys authorized to represent a trust in Nevada.

7. Even if Plaintiffs did have a right in the Property, their claims also fail as the title obtained from the HOA foreclosure was not superior to the First DOT.



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8. Statutes should be construed so that no part is rendered meaningless. *See Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dept.* 124 Nev. 138, 147, 179 P.3d 542, 548 (Nev.,2008).

9. NRS 116.3116(2)(b) expressly provides:

> 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 enforce became delinquent

10. The First DOT was a first security interest on the Property recorded before the date on which the assessment sought to be enforced became delinquent.

11. NRS 116.3116(2) also contains the following language:

> 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.

12. Pursuant to NRS 116.31162, an HOA may foreclose on a lien.

13. Pursuant to NRS 116.31166(3), when a HOA conducts a foreclosure the person conducting the sale can only deliver to the purchaser a deed without warranty which conveys to the purchaser all title of the unit's owner to the unit. The unit owner's title, in this case, was at all time subject to the First DOT. A purchaser that obtains a title pursuant to NRS 116.31166(3) does not receive an interest in the Property that is senior to a first security interest as defined in NRS 116.3116(2)(b).

14. The additional language in NRS 116.3116(2) allows an HOA to collect the sums due



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and owing, as defined in the additional language, by way of a lien which acts as a right to payment. However, when the HOA proceeds to foreclose on its lien the purchaser only receives the title of the unit owner. Just as a unit owner who grants a first security interest in a property must payoff the obligation underlying a first security interest to obtain a reconveyance of a first security interest; likewise, the grantee receiving all the title of the unit owner by way of a HOA foreclosure deed also must payoff the obligation underlying the first security interest in order to release the first security interest. Accordingly, here, the HOA Trustee's Deed was at all times subject to the First DOT.

15. The first cause of action fails as a matter of law because the First DOT was not extinguished by the HOA foreclosure sale and Maverick Valley Properties' First DOT Trustee's Deed establishes that it is entitled all rights to the Property.

16. Likewise, Plaintiffs' second cause of action fails as a matter of law. Maverick Valley Properties' First DOT Trustee's Deed is valid as the prior HOA foreclosure sale did not extinguish the First DOT.

17. Plaintiffs' third cause of action fails as a matter of law because Plaintiffs failed to tender the undisputed amount due and owing on the First DOT. Additionally, Plaintiffs failed to provide any legal authority refuting or rebutting, *Wittrig v. First National Bank of Nevada* 2011 WL 5598321, 1 (D.Nev.) (D.Nev.,2011).

18. Plaintiffs' fourth cause of action fails as a matter of law because Maverick Valley Properties' First DOT Trustee's Deed is valid as the prior HOA foreclosure sale did not extinguish the First DOT.

19. Plaintiffs' fifth cause of action fails as a matter of law because Maverick Valley Properties' is entitled to the Property and Plaintiffs' are not entitled to any restraining order or injunction that allows them to interfere with the Property.

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20. Any conclusion of law set forth herein that is more appropriately categorized as a finding of fact shall be deemed to be a finding of fact.

DATED this 15 day of May 2012

District Court Judge

Submitted by:

HUTCHISON & STEFFEN, LLC

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# EXHIBIT S

EXHIBIT S

McCARTHY & HOLTHUS, LLP
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Facsimile: (866) 339-5691

Attorney for Plaintiff

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSMC MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-7,<br><br>Plaintiff,<br><br>v.<br><br>STEELE WENIGER; SFR INVESTMENTS POOL I, LLC; DOES I-X; and ROES 1-10 inclusive,<br><br>Defendants | CASE NO. A-13-676501-C<br><br>DEPT. NO: XXX<br><br>**ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM** |

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Plaintiff's Motion to Dismiss the Counterclaim of Defendant, SFR Investments Pool I, LLC, ("SFR") came on for hearing before the Court at 9:00 a.m. on May 9, 2013. Diana S. Cline, Esq. and Howard C. Kim, Esq., appeared on behalf of SFR and Christopher M. Hunter, Esq., appeared on behalf of Plaintiff. The Court, having considered the moving papers, its own files, and good cause appearing, makes the following findings of law:

1. The super priority lien provided by NRS 116.3116 and the consequences of a nonjudicial foreclosure of that lien are unclear.

2. In addition, a nonjudicial foreclosure of an HOA super priority lien which results in the elimination of a first security interest is in equitable and, further, makes no sense.

ACCORDINGLY, THE COURT ORDERS that Plaintiff's Motion to Dismiss the Counterclaim of SFR to quiet title to the property is granted with prejudice.

DATED this 14th day of May, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:
McCarthy & Holthus, LLP

Christopher M. Hunter, Esq.
Nevada SBN 8127
9510 W. Sahara, Suite 110
Las Vegas, Nevada 89117

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# EXHIBIT T

EXHIBIT T

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| Title to Property | COURT MINUTES | May 07, 2013 |
|---|---|---|
| A-13-674958-C | SFR Investments Pool 1 LLC, Plaintiff(s)<br>vs.<br>First Horizon Home Loans, Defendant(s) | |

May 07, 2013 9:30 AM Motion to Dismiss

HEARD BY: Walsh, Jessie COURTROOM: RJC Courtroom 14B

COURT CLERK: Teri Braegelmann

RECORDER: Victoria Boyd

REPORTER:

PARTIES
PRESENT:

| | |
|---|---|
| Chang, Edward T | Attorney |
| Cline, Diana S. | Attorney |
| Gilbert, Jacqueline | Attorney |

JOURNAL ENTRIES

- Following arguments by counsel, Court stated its findings and ORDERED, Defendant First Horizon Home Loans' Motion to Dismiss, GRANTED IN ITS ENTIRETY. Ms. Cline requested a Stay pending appeal. Mr. Chang stated his opposition. Colloquy regarding Judge Gate's previous ruling. COURT ORDERED, Oral request for Stay, DENIED. Court notes counsel can file the appropriate motion. Mr. Chang to prepare the order and submit to opposing counsel for review before final submission to the court.