**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| NATIONSTAR MORTGAGE LLC,<br><br>Appellant,<br><br>vs.<br><br>SATICOY BAY LLC SERIES 4641 VIAREGGIO CT,<br><br>Respondent. | Supreme Court No. 77874<br>District Court Case No. A689240 |



**APPEAL**

From the Eighth Judicial District Court, Department XIV
The Honorable Adriana Escobar, District Judge
District Court Case No. A-13-689240-C

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# JOINT APPENDIX, VOLUME I

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DATED June 17, 2019.

**AKERMAN LLP**

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## CERTIFICATE OF SERVICE

I certify that I electronically filed on June 17, 2019, the foregoing **JOINT APPENDIX, VOLUME I** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

*/s/ Carla Llarena*
An employee of Akerman LLP

# CIVIL COVER SHEET A-13-689240-C

CLARK County, Nevada

V

Case No. _____

*(Assigned by Clerk's Office)*

## I. Party Information

| Plaintiff(s) (name/address/phone): | Defendant(s) (name/address/phone): |
|---|---|
| SATICOY BAY LLC SERIES 4641 | NATIONSTAR MORTGAGE, LLC; COOPER CASTLE |
| VIAREGGIO CT | LAW FIRM, LLP; AND MONIQUE GUILLORY |
| | |
| | |
| Attorney (name/address/phone): | Attorney (name/address/phone): |
| MICHAEL F. BOHN, Esq. | |
| 376 E. Warm Springs Road Suite 125 | |
| Las Vegas, NV 89119 | |
| (702) 642-3113 | |

## II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

### Civil Cases

**Real Property**

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☒ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

**Torts**

Negligence

- ☐ **Negligence -- Auto**
- ☐ **Negligence -- Medical/Dental**
- ☐ **Negligence -- Premises Liability** (Slip/Fall)
- ☐ **Negligence -- Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair competition

**Probate**

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

**Other Civil Filing Types**

- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** *(also check applicable civil case box)*
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment - Civil
  - ☐ Other Personal Property
  - ☐ Recover of Property
  - ☐ Stockholder Suit
  - ☐ Other Civil Matters

## III. Business Court Requested (Please check applicable category; *for Clark and Washoe Counties only.* )

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

September 25, 2013

Date

Signature of initiating party or representative

***See other side for family-related case filings.***

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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A-13-689240-C<br>DEPT NO.: V<br><br>**EXEMPTION FROM ARBITRATION:**<br>**Title to real property** |

**COMPLAINT**

Plaintiff, Saticoy Bay LLC Series 4641 Viareggio Ct, by and through it's attorney, Michael F. Bohn, Esq. alleges as follows:

1. Plaintiff is the owner of the real property commonly known as 4641 Viareggio Court, Las Vegas, Nevada.

2. Plaintiff obtained title by foreclosure deed recorded September 6, 2013.

3. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Naples Community Homeowners Association, pursuant to NRS Chapter 116.

4. Nationstar Mortgage, LLC is the beneficiary of a deed of trust which was recorded as an encumbrance to the subject property on January 25, 2007.

5. Cooper Castle Law Firm, LLP is the trustee on the deed of trust.

6. Defendant Monique Guillory was the former owner of the subject real property.

7. The interest of each of the defendants has been extinguished by reason of the foreclosure sale resulting from a delinquency in assessments due from the former owner, Monique Guillory to the Naples Community Homeowners Association, pursuant to NRS Chapter 116.

8. Nonetheless, defendant Nationstar Mortgage, LLC has recorded a notice of default and election to sell under it's deed of trust pursuant to NRS 107.080.

9. Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding.

10. The plaintiff is entitled to an award of attorneys fees and costs.

**SECOND CLAIM FOR RELIEF**

11. Plaintiff repeats the allegations contained in paragraphs 1 through 10.

12. Plaintiff is entitled to a determination from this court, pursuant to NRS 40.010 that the plaintiff is the rightful owner of the property and that the defendants have no right, title, interest or claim to the subject property.

13. The plaintiff is entitled to an award of attorneys fees and costs.

**THIRD CLAIM FOR RELIEF**

14. Plaintiff repeats the allegations contained in paragraphs 1 through 13.

15. Plaintiff seeks a declaration from this court, pursuant to NRS 40.010, that title in the property is vested in plaintiff free and clear of all liens and encumbrances, that the defendants herein have no estate, right, title or interest in the property, and that defendants are forever enjoined from asserting any estate, title, right, interest, or claim to the subject property adverse to the plaintiff.

16. The plaintiff is entitled to an award of attorneys fees and costs.

**FOURTH CLAIM FOR RELIEF**

17. Plaintiff repeats the allegations contained in paragraphs 1 through 16.

18. Defendant Monique Guillory_ was served with a 3 day notice to quit.

19. The defendant has failed to vacate the premises despite the notice that have been served upon him.

20. The defendant has remained in possession of said property up to and including the present time.

21. The plaintiff is entitled to a Writ of Restitution of the restoring possession to the plaintiff.

22. Plaintiff is entitled to an award of attorneys fees and costs of suit.

WHEREFORE, plaintiff prays as follows:

**ON ACCOUNT OF THE FIRST CLAIM FOR RELIEF**

1. For injunctive relief;

2. For an award of attorneys fees and costs; and

3. For such other and further relief as the Court may deem just and proper.

**ON ACCOUNT OF THE SECOND CLAIM FOR RELIEF**

1. For a determination and declaration that plaintiff is the rightful holder of title to the property, free and clear of all liens, encumbrances, and claims of the defendants.

2. For an award of attorneys fees and costs; and

3. For such other and further relief as the Court may deem just and proper.

**ON ACCOUNT OF THE THIRD CLAIM FOR RELIEF**

1. For a determination and declaration that the defendants have no estate, right, title, interest or claim in the property.

2. For a judgment forever enjoining the defendants from asserting any estate, right, title, interest or claim in the property; and

3. For such other and further relief as the Court may deem just and proper.

/ / /

/ / /

/ / /

**ON ACCOUNT OF THE FOURTH CLAIM FOR RELIEF**

1. For restitution and possession of the premises;

2. For reasonable attorneys fees and costs of Court; and

3. For such other and further relief as the Court may deem proper.

DATED this 25th day of September 2013.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

**VERIFICATION**

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

Iyad Haddad, being first duly sworn, deposes and says;

That he is the authorized representative of the plaintiff Limited Liability Company in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters, he believes them to be true.

IYAD HADDAD

SUBSCRIBED and SWORN to before me
this 25th day of September, 2013

NOTARY PUBLIC in and for said
County and State

MAURIZIO MAZZA
Notary Public State of Nevada
No. 05-94588-1
My Appt. Exp. Feb. 1, 2017

**IAFD**
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(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; AND MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A-13-689240-C<br>DEPT NO.: V |

**INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, filing fees are submitted for the party appearing in the above-entitled action as indicated below:

| | |
|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT | $270.00 |
| TOTAL REMITTED: | $270.00 |

DATED this 25th day of September 2013.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

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# DISTRICT COURT,
# CLARK COUNTY, NEVADA

CLERK OF THE COURT

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|---|---|---|
| **SATICOY BAY LLC SERIES 4641 VIAREGGIO CT** | **Plaintiff** | |
| **vs** | | **CASE NO: A-13-689240-C** |
| | | **HEARING DATE/TIME:** |
| **NATIONSTAR MORTGAGE, LLC, ET AL** | **Defendant** | **DEPT NO: V** |

## AFFIDAVIT OF SERVICE

DOUGLAS DEMOTTA 0830109 being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received copy(ies) of the SUMMONS; COMPLAINT, on the 9th day of October, 2013 and served the same on the 11th day of October, 2013, at 08:00 by:

delivering and leaving a copy with the servee MONIQUE GUILLORY at (address) 7605 CRUZ BAY COURT, LAS VEGAS NV 89128

DESCRIPTION; 5'4" TALL, 120LBS, DARK HAIR, DARK SKINNED FEMALE, 25 PLUS YEARS OLD.

**Pursuant to NRS 53.045**

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

**EXECUTED this** 11 **day of** Oct, **20** 13.

**DOUGLAS DEMOTTA 0830109**

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AOS

# DISTRICT COURT,
# CLARK COUNTY, NEVADA

CLERK OF THE COURT

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| **SATICOY BAY LLC SERIES 4641 VIAREGGIO CT** | **Plaintiff** | |
| | | **CASE NO: A-13-689240-C** |
| **vs** | | **HEARING DATE/TIME:** |
| **NATIONSTAR MORTGAGE, LLC, ET AL** | **Defendant** | **DEPT NO: V** |

## AFFIDAVIT OF SERVICE

JACK RILEY 3015835 being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received copy(ies) of the SUMMONS; COMPLAINT, on the 30th day of September, 2013 and served the same on the 3rd day of October, 2013, at 14:01 by:

serving the servee THE COOPER CASTLE LAW FIRM, LLP C/O REGISTERED AGENT THE COOPER CASTLE LAW FIRM, LLP by personally delivering and leaving a copy at (address) 5275 SO. DURANGO DR., LAS VEGAS NV 89113 with I. VANTILBURG, RECEPTIONIST pursuant to NRS 14,020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

**Pursuant to NRS 53.045**

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

**EXECUTED this** 7 **day of** October, **20** 13.

**JACK RILEY 3015835**

**CVAOS**

DISTRICT COURT

CLARK COUNTY, NEVADA

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| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A689240<br>DEPT NO.: V |

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CLERK OF THE COURT

## AFFIDAVIT OF SERVICE

SATE OF NEVADA )
SS:
COUNTY OF CLARK)

Maurizio Mazza, being duly sworn, says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made.

The affiant received 1 copy of the Summons and Complaint on the 21ST day of October, 2013 and served the same on the 24th day of October, 2013, on defendant, **Nationstar Mortgage LLC.,** By Serving its Resident Agent, **CSC Services of Nevada Inc., at 2215-B Renaissance Drive Las Vegas NV 89119, By Delivering and leaving a copy with Frances Guitierrez, a person lawfully designated by statute to accept service of process,.**

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 29th day of October, 2013

By: _____
Maurizio Mazza

**DFLT**
MICHAEL F. BOHN
Nevada Bar No.: 1641
LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
376 E. Warm Springs Road, Ste. 125
Las Vegas, NV 89119
(702) 642-3113

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT

Plaintiff(s),

-vs-

NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY

Defendant(s).

CASE NO. A689240

DEPT NO. V

## DEFAULT

It appearing from the files and records in the above entitled action that MONIQUE GUILLORY, Defendant(s) herein, being duly served with a copy of the Summons and Complaint on October 11th, 2013 that more than 20 days, exclusive of the day of service, having expired since service upon the Defendant(s); that no answer or other appearance having been filed and no further time having been granted, the default of the above-named Defendant(s) for failing to answer or otherwise plead to Plaintiff's Complaint is hereby entered.

**STEVEN D. GRIERSON, CLERK OF COURT**

**By:** _____
**Deputy Clerk** **Date**

**Submitted By:**

MICHAEL F. BOHN, ESQ
Nevada Bar No.: 1641
LAW OFFICES OF MICHAEL F. BOHN, ESQ
376 E. Warm Springs Road, Ste. 125
Las Vegas, NV 89119
(702) 642-3113

**MTD**
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Nevada Bar No. 10183
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(702) 877-7424 Facsimile
E-Mail: japeck@ccfirm.com
*Attorneys for Defendants Nationstar Mortgage, LLC and The Cooper Castle Law Firm, LLP*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP and MONIQUE GUILLORY<br><br>Defendants. | Case No: A-13-689240-C<br><br>Dept. No. V |

**DEFENDANTS NATIONSTAR MORTGAGE, LLC AND THE COOPER CASTLE LAW FIRM, LLP'S MOTION TO DISMISS**

Defendants Nationstar Mortgage, LCC and The Cooper Castle Law Firm, LLP, by and through their attorney The Cooper Castle Law Firm, LLP, move to dismiss Plaintiff's Complaint pursuant to NRCP 12(b)(5). This motion is made and based on the papers and

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pleadings on file, the attached Memorandum of points and authorities, and any oral argument that this Court may hear.

DATED this 22nd day of November, 2013.

THE COOPER CASTLE LAW FIRM, LLP

*/s/ Jason Peck, Esq.*
Jason M. Peck, Esq.
Nevada Bar No. 10183
5275 S. Durango Drive
Las Vegas, Nevada 89113
(702) 435-4175 Telephone
*Attorneys for Defendants Nationstar Mortgage, LLC and The Cooper Castle Law Firm, LLP*

**NOTICE OF MOTION**

TO: ALL PARTIES OF INTEREST

PLEASE TAKE NOTICE that on the 24 day of January, ~~2013~~ 2014, at the hour of 9:00 a.m., in Department V, or as soon thereafter as counsel may be heard, the undersigned will bring the foregoing MOTION TO DISMISS for hearing before the above-referenced Court.

DATED this 22nd day of November, 2013.

THE COOPER CASTLE LAW FIRM, LLP

*/s/ Jason Peck, Esq.*
Jason M. Peck, Esq.
Nevada Bar No. 10183
5275 S. Durango Drive
Las Vegas, Nevada 89113
(702) 435-4175 Telephone
*Attorneys for Defendants Nationstar Mortgage, LLC and The Cooper Castle Law Firm, LLP*

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiff is a Nevada business entity that purchased a home at an HOA foreclosure for just $5,563.00, and is now seeking, through this quiet title action, to nullify Defendant, Nationstar Mortgage, LLC ("Nationstar")'s Deed of Trust that secured the $258,400 loan to the homeowner. Plaintiff's Complaint must be dismissed because Nationstar's Deed of Trust is not extinguished by the HOA foreclosure. Instead, Plaintiff takes ownership of the property subject to Nationstar's security interest.

## II. FACTS

Monique Guillory purchased a home located at 4641 Viareggio Court, Las Vegas, Nevada 89147 (the "Subject Property") on or about January 22, 2007. See Grant, Bargain, Sale Deed attached hereto as **"Exhibit A"**.[1] Guillory financed the purchase of the Subject Property by executing a note and deed of trust. The Deed of Trust secured $258,400 and was recorded January 25, 2007 as instrument 20070125-0003593. See **"Exhibit B"**. The Deed of Trust was subsequently assigned to Defendant Nationstar. See **"Exhibit C"**. Defendant

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[1] Under NRS 47.130, this Court is authorized to take judicial notice of facts that are generally known or capable of accurate and ready determination to sources whose accuracy cannot reasonably be questioned. This Court may take notice of publically filed documents without transforming the current Motion from a Motion to Dismiss to a Motion for Summary Judgment. *See Gonzalez v. Home Am. Mortg. Corp.*, No. 2:08-CV-00244-BES-RJJ, 2009 U.S. Dist. LEXIS 131632, at *3 (D. Nev. Mar. 12, 2009) (taking judicial notice of property records in Clark County Recorder's Office in context of motion to dismiss, pursuant to NRS § 47.130(2)); *see also Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1544 n. 1 (9th Cir. 1994) ("On motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a [motion to dismiss] to one for summary judgment" (citation omitted)); *Fleeger v. Bell*, 95 F. Supp. 2d 1126, 1129 (D. Nev. 2000) (noting court may consider "public records and other judicially noticeable evidence" when hearing a motion to dismiss).

Cooper Castle Law Firm ("CCLF") is the trustee under the Deed of Trust, and has no ownership interest in the Subject Property. See Substitution of Trustee attached hereto as **"Exhibit D"**.

On August 18, 2011, Naples Community Homeowners Association ("Naples HOA") recorded a Notice of Delinquent Assessment Lien, claiming Guillory was delinquent in her HOA dues. See **"Exhibit E"**. Naples HOA later foreclosed and sold the property to Plaintiff for only $5,563.00. See Foreclosure Deed attached hereto as **"Exhibit F"**.

Plaintiff now seeks to nullify Nationstar's senior lien position through this quiet title action. Plaintiff alleges that Nationstar's lien "has been extinguished by reason of the foreclosure sale resulting from a delinquency in assessments due from the former owner, Monique Guillory to the Naples Community Homeowners Association, pursuant to NRS Chapter 116." See Complaint ¶ 7. Defendants file this Motion to Dismiss because the HOA foreclosure does not extinguish Nationstar's Deed of Trust, which was recorded first in time, and which is expressly given priority over the HOA lien pursuant to Nevada statute. Furthermore, CCLF has no ownership interest in the Subject Property, and should be dismissed.

## III. LEGAL ARGUMENT

### A. Legal Standard for NRCP 12(b)(5) Motion to Dismiss.

NRCP 12(b)(5) provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." Simpson v. Mars Inc., 113 Nev. 188 (1997). When a court reviews the sufficiency of a complaint, the sole issue is whether the allegations set forth a claim for relief. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484 (1994). When considering a motion to dismiss, "all factual allegations of the complaint must be

accepted as true." *Id.* While a court must accept as true the *factual* allegations of the complaint, a court does not, however, assume the truth of *legal conclusions* merely because the plaintiff casts them in the form of factual allegations. See Altabet v. Cleantech Biofuels, Inc., 2010 U.S. Dist. LEXIS 74210 (D. Nev. July 21, 2010).

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation' of the elements of a cause of action will not do." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (2007)). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting *Twombly*, 550 U.S. at 557). To "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Id. (quoting *Twombly*, 550 U.S. at 555). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950 (quoting *Twombly*, 550 U.S. at 556). Therefore, dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief. Rocker v. KPMG LLP, 122 Nev. 1185, 1192 (2006).

Additionally, a court is within its discretion to deny a party leave to amend if it determines that further attempts to amend would not be productive and/or futile (i.e., the defect in the complaint is incurable). See United States ex rel Roop v. Hypogaurd USA, Inc., 559 F.3d 818 (8th Cir. 2008); Lucente v. International Business Machines Corp., 310 F.3d 243 (2nd Cir. 2002); Ruffolo v. Oppenheimer & Co., 987 F.2d 129 (2nd Cir. 1993).

**B. Plaintiff's Complaint Should Be Dismissed Because Nationstar's First Position Deed Of Trust Lien Was Not Extinguished By The HOA Foreclosure.**

1. Quiet Title

To quiet title, "[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse

claim." NRS § 40.010. In a quiet title action, the burden of proof rests with the plaintiff to prove good title to himself. Breliant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev. 1996). Because quiet title is equitable in nature, see MacDonald v. Krause, 77 Nev. 312, 317-18, 362 P.2d 724 (1961), the plaintiff 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). The often quoted maxim is that "in seeking equity, a party is required to do equity." Transaero Land & Dev. Co. 108 Nev. 997 at 1001.

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, Case 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).

2. HOA Liens Generally.

In Nevada, a homeowners association can place a lien for unpaid homeowners association fees on a property that is subject to the association. NRS 116.3116(2). When the fees remain unpaid, the association can foreclose on its lien. NRS 116.3116(1). Under Nevada law, there are two ways to foreclose on a homeowners association lien. First, the foreclosure sale may be conducted at an auction, requiring no judicial oversight. *See* NRS § 116.31164. This process is commonly referred to as a "non-judicial" foreclosure. Alternatively, the association can seek a judicial foreclosure by filing an action in the courts to enforce the lien. NRS 116.4117(1).

As a general rule, a foreclosure of a lien extinguishes liens recorded after the foreclosed lien, but the purchaser at foreclosure takes title subject to any prior recorded liens. *See* CJS Mortgages § 838. This is the common law rule of priority, often called the "first in time, first in right" rule. George L. Blum, J.D., 51 Am, Jur. 2D Liens § 68 Priorities (2012) ("liens created by contract or statute are subordinate to all existing rights in the property, and are generally governed by the rule, 'first in time, first in right.'").

In conformity with this well established rule, an association's lien is junior to a prior-recorded deed of trust. The applicable statute makes this very clear. NRS §116.3116(2)(b) states:

> 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;

(emphasis added). Therefore, under NRS §116.3116(2)(a), an assessment lien is only considered to be senior to a deed of trust if the assessment lien was recorded first. Anything contrary results in the first position deed of trust remaining on the property as an encumbrance.

In this case, the Deed of Trust was recorded January 25, 2007, which was prior to Naples HOA's notice of lien recorded August 18, 2011.

3. <u>HOA "Super-Priority" Lien Does Not Create a Superior Lien Over a First Mortgage, But Rather an Entitlement to Payment Over a First Mortgage.</u>

While a deed of trust is superior to the HOA lien, NRS 116.3116(2) has carved out a narrow and limited exception to the priority of a first mortgage or security interest over an HOA lien. Specifically, NRS 116.3116(2)(c) provides:

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

(Emphasis added).

The exception is commonly referred to as the "super-priority lien" and is meant to allow an HOA to recover at least a portion of its lien upon the foreclosure by the first mortgage holder. See March 6, 2009 Assembly Committee on Judiciary minutes pg. 40 attached hereto as **"Exhibit G"** (Assemblyman Segerblom stating "In regards to the banks owning these properties, at least under current law what they owe for six months would be a super lien which you would collect when the property is sold."). When a homeowner defaults on mortgage, the homeowner will likely also default on HOA dues. Traditionally, the bank would foreclose and the HOA is wiped out, receiving nothing. The NRS 116.3116(2) super-priority lien resolved or lessened the hardship on the HOA by providing that it will recover 9 months of assessments, plus any out-of-pocket costs it incurred for certain maintenance or nuisance abatement. This ensures that HOAs, which operate on limited, fixed budgets, will receive something as a result of a foreclosure.

However the narrow exception of NRS 116.3116(2)(c) does not state, and is not intended to extinguish the first position Deed of Trust. The statute states that an HOA's unpaid charges pursuant to NRS 116.310312 (for certain maintenance and nuisance abatement) and assessments incurred during the 9 months prior to an action to enforce the lien continue to encumber the property after the foreclosure by the first position Deed of Trust.

In interpreting the Uniform Common Interest Community Act super-priority exception, which Nevada has adopted, professor Andrea Boyack refers to the super-priority lien as a "payment priority", explaining:

> The drafters of the Uniform Common Interest Ownership Action ("UCIOA"), recognizing that assessment liens would ordinarily be junior in priority to individual first mortgage liens, crafted an "innovative" solution to the problem of assessment nonpayment during mortgage default: the six-month "limited priority lien."
> The six-month capped "super priority" portion of the association lien does not have a true priority status under UCIOA since this six month assessment lien cannot be foreclosed as senior to a mortgage lien. Rather, it either creates ***a payment priority*** for some portion of unpaid assessments, which would take the first position in the foreclosure repayment "waterfall," or grants *durability* to some portion of unpaid assessments, allowing the security for such debt to survive foreclosure.

Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 Loy. U. Chi. L.J. 53, 98 (Fall 2011) (emphasis added). Thus, as explained by Professor Boyack, the super-priority exception provides for a "payment priority" over a first mortgage, but not lien priority.

This interpretation of NRS 116.3116 has been consistently applied by the Nevada federal and state courts. See Diakonos Holdings, LLC v. Countrywide Home Loans, Inc. 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (holding that when an HOA holds a non-judicial foreclosure sale, the buyer takes the property subject to the first security interest); Weeping Hollow Ave., Trust v. Spencer, 2013 WL 2296313, 5 (D. Nev. may 24, 2013) (stating that the super-priority lien does not extinguish the first position deed of trust); 9320 Pokeweed Ct. Trust v. Wells Fargo Bank, Case No A-13-677406-C (holding that the super-priority lien created under NRS 116.3116 is merely a payment priority lien that does not extinguish a first recorded Deed of Trust upon a sale by a Homeowners Association.).

This interpretation has also recently been explained by Federal District Court Judge Robert Jones as follows:

> . . . an HOA lien arising *before* a first mortgage is recorded is senior to the first mortgage in all traditional respects, i.e., it survives a foreclosure of the first mortgage, and its own foreclosure extinguishes the first mortgage. But an HOA lien arising *after* a first mortgage is recorded operates unorthodoxly in relation to traditional liens. The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to extinguishment, i.e., the foreclosure of neither extinguishes the other.
>
> * * * * *
>
> In summary, an HOA may effectively have two liens; a super-priority lien, and a sub-priority lien. The foreclosure of neither a super-priority lien nor a first mortgage extinguishes the other. They are in parity with one another in this regard. But a super-priority lien must be satisfied first out of the proceeds of the foreclosure of a junior lien. It is "first amongst equals" in this regard. The sub-priority lien, on the other hand, like any other junior lien, is extinguished by the foreclosure of either the super-priority lien or the first mortgage.
>
> * * * * *
>
> It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

See Order attached hereto as **"Exhibit H"**.

Judge Jones goes on further to explain why an interpretation of the statute as Plaintiff suggests in this case is not reasonable.

> The Court agrees with Bayview that interpreting the statutes as SFR Pool 1 does reads the first mortgage rule[2] out of the statutes. The statute creating the HOA lien (subsection 116.3116(1)) is the rule. The first mortgage rule (subsection (2)(b)) is an exception to the rule. The super-priority rule (the unnumbered paragraph following subsection (2)(c)) is an exception to the exception. Because the exception to the exception here necessarily includes all instances of the rule itself – there can be no subsection (1) lien that does not include some super-priority amount, because that amount includes virtually every kind of assessment that could be delinquent, except for collection fees and costs arising therefrom – the exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless if its operation were not limited in a way that permits the exception to have some application. That is, in order to give each

[2] Judge Jones refers to NRS 116.3116(2)(b) which gives the first security interest priority over the HOA lien as the "first mortgage rule".

part of the statutes some effect, the Court must read them together to mean that the super-priority rule affects the priority of reimbursement, but not extinguishment. Reading the super-priority rule to affect extinguishment would read the first mortgage rule out of the statutes almost entirely.

Id.

Based on the above, Plaintiff's Complaint should be dismissed because Nationstar's lien is not extinguished by the HOA sale.

4. Even If An HOA Foreclosure of Its Super-priority Lien Did Extinguish a Deed of Trust, A Lawsuit Must Be Filed To Do So.

The language of the statute creating the super-priority interest in nine months of common assessments is clear, namely that the interest is created upon the "institution of action to enforce the lien." See NRS 116.3116(2)(c). Statutory terms are generally interpreted according to their ordinary meaning unless otherwise defined in the statute. Perrin v. United States, 444 U.S. 37, 42 (1979). The term "action" in the ordinary sense means to file or bring a lawsuit. See NRCP 2 and 3; see also Seaborn v. First Judicial Dist. Court, 29 P.2d 500, 505 (Nev. 1934) ("An 'action' is a judicial proceeding, either in law or equity, to obtain certain relief at hands of court"); BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) ("The key terms in this provision – 'action' and 'complaint' – are ordinarily used in connection with judicial, not administrative, proceedings"); Black's Law dictionary (8th ed. 2004) (the phrase "bring an action" is defined as "to sue; institute legal proceedings").

In addition, other portions of NRS 116.3116 refer to the term "action" as a judicial proceeding. Specifically, NRS 116.3116(7) states "[a] judgment or decree in any *action* under this section must include costs and reasonable attorney's fees for the prevailing party." (Emphasis added). Even further NRS 116.3116(10) provides that an HOA may institute an action to collect delinquent assessments and to foreclose a lien and the court may appoint a

receiver to collect rents during the pendency of the action. The plain meaning and the context of the term "action" under NRS 116.3116 therefore means to commence or institute a lawsuit or judicial action.

Furthermore, the use of the term "action" was deliberately *not* used in NRS 116.3116(5), which is the section that sets a 3-year period for an HOA to enforce the lien or lose it. That section states: "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." (Emphasis added). The use of the word "proceedings" instead of "action" is consistent with the intent to differentiate between enforcement of the lien granted by NRS 116.3116(1) and enforcement of the super-priority portion granted pursuant to NRS 116.3116(2)(c). "Proceedings" to enforce the non super-priority portion can be accomplished through the non-judicial foreclosure. However, an "action" (i.e. civil lawsuit) is required for the super-priority lien.

Other jurisdictions have also held that an HOA must commence a judicial action before it attains super-priority status. Massachusetts courts interpreting its similar super-priority statute have held that "the institution of an action by a condominium association is a condition precedent to achieving 'super-priority' status for the condominium lien." Trustees of MacIntosh Condominium Association v. FDIC, 908 F. Supp. 58, 63 (D. Mass. 1995); see also In Re Stern, 44 B.R. 15, 19 (Bankr. D. Mass. 1984) ("the establishment of the lien is not dependent on the commencement of a lawsuit, which is only a step necessary to elevate the state of the lien to a position superior to other encumbrances, other than municipal lien and first mortgages"). The State of Washington also requires "an action for judicial foreclosure" by the

HOA before an HOA lien attains super-priority status. See Summerhill Vill. Homeowners Ass'n v. Roughley, 289 P.3d 645, 649 (Wash. Ct. App. 2012); see also RCW 64.34.364.

The requirement that the HOA commence judicial foreclosure prior to attaining super-priority status on its lien makes logical sense from a due process standpoint under the statutory scheme. A judicial foreclosure action requires the service of a summons and complaint on all interested parties in the case, including junior lien holders. See Arabia v. BAC Home Loans Servicing, LP, 208 Cal. App. 4th 462, 474, 145 Cal. Rptr. 3d 678, 687 ("When a junior lienholder has been omitted from a senior judicial foreclosure action and sale, "[t]he foreclosure and sale are not void but are ineffective in foreclosing as far as the junior lien is concerned"); citing Carpentier v. Brenham, 40 Cal. 221, 225-226 (1870); Fox v. California Title Ins. Co., 120 Cal. App. 264, 266-267, 7 P.2d 722 (1932). This undoubtedly affords the first mortgage an opportunity to appear and/or protect its lien interest in the property with the supervision of the court.

However, under a non-judicial foreclosure of an HOA lien, the HOA is not absolutely required to send notice of the lien and sale to the first mortgage lien holder. See NRS 116.311635(1)(b)(2). This is at odds with the general non-judicial foreclosure procedures under a deed of trust where all junior lien holders or subordinate interests to the foreclosing deed of trust must be sent notice of default and sale. See NRS 107.090(3)-(4). Thus, the non-judicial foreclosure process on HOA liens does not afford first mortgage lien holders adequate due process to protect it lien interest unlike a judicial foreclosure action. Accordingly, the Court must construe NRS 116.3116(2)(c) to require a judicial action to be filed prior to an HOA foreclosing on a super-priority lien interest.

Here, Plaintiff did not purchase the Subject Property at a judicial foreclosure sale. Instead, Plaintiff purchased pursuant to a non-judicial foreclosure conducted by the HOA. See Foreclosure Deed attached hereto as "Exhibit F." Accordingly, NRS 116.3116(2)(c) does not apply to extinguish Defendant's lien.

## IV. CONCLUSION

Based on the foregoing, Defendants request that Plaintiff's Complaint be dismissed against Nationstar and CCLF in its entirety.

DATED this 22nd day of November, 2013.

THE COOPER CASTLE LAW FIRM, LLP

*/s/ Jason Peck, Esq.*

Jason M. Peck, Esq.
Nevada Bar No. 10183
5275 S. Durango Drive
Las Vegas, Nevada 89113
(702) 435-4175 Telephone
*Attorneys for Defendants Nationstar Mortgage, LLC and The Cooper Castle Law Firm, LLP*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22nd day of November, 2013, I served a true and correct copy of the **DEFENDANTS NATIONSTAR MORTGAGE, LLC AND THE COOPER CASTLE LAW FIRM, LLP'S MOTION TO DISMISS**, via First Class U.S. Mail, postage pre-paid, to the parties listed below.

Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Suite 125
Las Vegas, Nevada 89119
Attorneys for Plaintiff

*/s/ Jennifer Shumway*
An employee of
THE COOPER CASTLE LAW FIRM, LLP

# Exhibit "A"

Exhibit "A"

APN: 163-19-311-015
Affix R.P.T.T.: $1,647.30
Escrow NO.: 07-01-6578DH
**WHEN RECORDED MAIL DEED AND TAX STATEMENTS TO:**
Monique Guillory
4641 Viareggio Court
Las Vegs, NV 89147

8-2

Acknowledgment copy attached

20070125-0003582

Fee: $19.00 RPTT: $1,647.30
N/C Fee: $0.00

01/25/2007 13:30:50
T20070014336
Requestor:
GREAT AMERICAN TITLE

Debbie Conway KXC
Clark County Recorder Pgs: 8

# GRANT, BARGIN, SALE DEED

THIS INDENTURE WITNESSETH: That Bakers Financial Power Group LLC, A Limited Liability

For valuable consideration, receipt of which is hereby acknowledged, hereby Grant, Bargain, Sell and Convey to Monique Guillory, A Single Woman

All that real property situated in the County of Clark, State of Nevada, bounded and described as follows:

SEE EXHIBIT "A"

SUBJECT TO: 1. Taxes for the current fiscal year.
2. Rights of way, reservations, restrictions, easements and conditions of record.

Together with all an singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my/our hand(s) this 22 day of January, 2007

**Bakers Financial Power Group, LLC**

By: Justin Baker, President

STATE OF NEVADA
COUNTY OF CLARK

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KATIE HOLDEN
No. 05-95567-1
My Appt. Expires June 15, 2009

On January 22, 2007 personally appeared before me, a Notary Public, Justin Baker, personally known (or proven) to me to be the person(s) whose name(s) is/are subscribed to the within instrument and who acknowledged that he/she/they executed the instrument.

Notary Public

**EXHIBIT "A"**

**PARCEL ONE (1):**

**Lot Seventy (70) in Block One (1) of CONQUISTADOR/TOMPKINS-UNIT 2, as shown by map thereof on file in Bokk 93 of Plats, Page 1, in the Office of the County Recorder of Clark County, Nevada.**

**PARCEL TWO (2):**

**A non exclusive easement for ingress, egress and Public Utility Purposes on, over and Across the Private Streets on the Map Referenced Hereinabove, which easement is Appurtenant to parcel one (1).**

*Clarification copy*

APN: 163-19-311-015
Affix R.P.T.T.: $1,647.30
Escrow NO.: 07-01-6578DH
**WHEN RECORDED MAIL DEED AND TAX STATEMENTS TO:**
Monique Guillory
4641 Viareggio Court
Las Vegs, NV 89147

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Together with all an singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my/our hand(s) this 22 day of January, 2007

**Bakers Financial Power Group, LLC**

Justin Bh

By: Justin Baker, President

STATE OF NEVADA
COUNTY OF CLARK

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KATIE HOLDEN
No: 05-
My A
Expires
25, 2009

On January 22, 2007 personally appeared before me, a Notary Public, Justin Baker, personally known (or proven) to me to be the person(s) whose name(s) is/are subscribed to the within instrument and who acknowledged that he/she/they executed the instrument.

Notary Public

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PARCEL TWO (2):

A non exclusive easement for ingress, egress and Public Utility Purposes on, over and Across the Private Streets on the Map Refereuced Hereinabove, which easement is Appurtenant to parcel one (1).

**STATE OF NEVADA**
**DECLARATION OF VALUE**

1. **Assessor Parcel Number(s):**
   a) 163-19-311-015
   b) _____
   c) _____
   d) _____

**For recorders optional use only**
**Document/Instrument#:**_____
**Book**_____**Page:**_____
**Date of Recording:**_____
**Notes:**_____

2. **Type of Property**
   a) ☐ Vacant Land  b) ☑ Single Fam. Res.
   c) ☐ Condo/Twnhse  d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg  f) ☐ Comml/Indl
   g) ☐ Agricultural  h) ☐ Mobile Home

3. **Total Value/Sales Price of Property** $323,000.00
   Deed in Lieu of Foreclosure Only ( value of property) $
   Transfer tax value $323,000.00
   Real Property Transfer Tax Due: $1,647.30

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 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 Seller

Signature _____ Capacity Agent

| SELLER (GRANTOR) INFORMATION (REQUIRED) | | BUYER (GRANTEE) INFORMATION (REQUIRED) | |
|---|---|---|---|
| Print Name: | Bakers Financial Power Group, LLC | Print Name: | Monique Guillory |
| Address: | 4641 Viareggio Court | Address: | 4641 Viareggio Court |
| City: | Las Vegas NV 89147 | City: | Las Vegas, NV 89147 |

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)
Great American Title
3137 E. Warm Springs, Suite 200
Las Vegas NV, 89120

Escrow No 07-01-6578DH (AS A PUBLIC RECORD THIS FORM MAY BE RECORDED)

3582 Cont

**STATE OF NEVADA**
**DECLARATION OF VALUE**

1. **Assessor Parcel Number(s):**
   a) 163-19-311-015
   b) _____
   c) _____
   d) _____

5

**For recorders optional use only**
**Document/Instrument#:**_____
**Book**_____**Page:**_____
**Date of Recording:**_____
**Notes:**_____

2. **Type of Property**
   a) ☐ Vacant Land  b) ☒ Single Fam. Res.
   c) ☐ Condo/Twnhse  d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg  f) ☐ Comml/Indl
   g) ☐ Apricultural  h) ☐ Mobile Home

3. **Total Value/Sales Price of Property** $323,000.00
   Deed in Lieu of Foreclosure Only ( value of property) $
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   Real Property Transfer Tax Due: $1,647.30

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Signature _____ Capacity Seller

Signature _____ Capacity Agent

| SELLER (GRANTOR) INFORMATION (REQUIRED) | | BUYER (GRANTEE) INFORMATION (REQUIRED) | |
|---|---|---|---|
| Print Name: | Bakers Financial Power Group, LLC | Print Name: | Monique Guillory |
| Address: | 4641 Viareggio Court | Address: | 4641 Viareggio Court |
| City: | Las Vegas NV 89147 | City: | Las Vegas, NV 89147 |

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)
Great American Title
3137 E. Warm Springs, Suite 200
Las Vegas NV, 89120

Escrow No 07-01-6578DH (AS A PUBLIC RECORD THIS FORM MAY BE RECORDED)

3582

# Exhibit "B"

# Exhibit "B"

Assessor's Parcel Number:
163-19-311-015
Return To:
FIRST MAGNUS FINANCIAL CORPORATION

603 N. WILMOT
TUCSON, AZ 85711

Prepared By:

FIRST MAGNUS FINANCIAL CORPORATION
603 N. WILMOT
TUCSON, AZ 85711

~~Recording Requested By:~~
FIRST MAGNUS FINANCIAL CORPORATION

07-01-6578DH [Space Above This Line For Recording Data]

21

20070125-0003583

Fee: $40.00
N/C Fee: $0.00

01/25/2007 13:30:50
T20070014336
Requestor:
GREAT AMERICAN TITLE

Debbie Conway KXC
Clark County Recorder Pgs: 27

4

# DEED OF TRUST

[redacted]
ESCROW NO.: 07-01-6578DH

MIN 100039250407822414
MERS Phone: 1-888-679-6377

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 JANUARY 17, 2007 , together with all Riders to this document.
(B) "Borrower" is
MONIQUE GUILLORY, A SINGLE WOMAN

Borrower is the trustor under this Security Instrument.
(C) "Lender" is
FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION

Lender is a CORPORATION
organized and existing under the laws of ARIZONA

Lender's address is
603 North Wilmot Road, Tucson, AZ 85711
(D) "Trustee" is
GREAT 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 JANUARY 17, 2007
The Note states that Borrower owes Lender
TWO HUNDRED FIFTY EIGHT THOUSAND FOUR HUNDRED AND NO/100 X X X X X X X X X
Dollars
(U.S. $ 258,400.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than FEBRUARY 01, 2037
(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]:

| | | |
|---|---|---|
| [XX] Adjustable Rate Rider | [ ] Condominium Rider | [ ] 1-4 Family Rider |
| [ ] Graduated Payment Rider | [XX] Planned Unit Development Rider | [ ] Biweekly Payment Rider |
| [ ] Balloon Rider | [ ] Rate Improvement Rider | [ ] Second Home Rider |
| [XX] Other(s) [specify] | INTEREST-ONLY ADDENDUM TO ADJUSTABLE RATE RIDER<br>ADDENDUM TO ADJUSTABLE RATE RIDER | |

(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]:

LEGAL DESCRIPTION ATTACHED HERETO AND MADE PART HEREOF .....AND BEING MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

Parcel ID Number: 163-19-311-015 which currently has the address of

4641 VIAREGGIO COURT [Street]

LAS VEGAS [City], Nevada 89147 [Zip Code]

("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. 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.**

Initials: _____

(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.

Initials: MM6

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.

Initials: MM6

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.

Initials: MG

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 Lender's 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. $ .

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.

Witnesses:

_____
-Witness

_____
-Witness


MONIQUE GUILLORY (Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

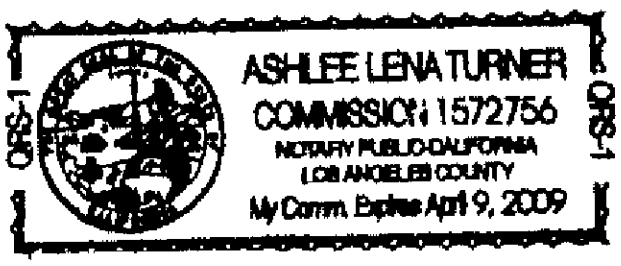
_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

STATE OF ~~NEVADA~~ California
COUNTY OF Los Angeles

This instrument was acknowledged before me on January 19, 2007 by
MONIQUE GUILLORY




Notary Public

Mail Tax Statements To:

CLARK COUNTY

PO BOX 551220
LAS VEGAS, NV 89155-0000

# Exhibit "C"

# Exhibit "C"

Inst #: 201102110002654
Fees: $15.00
N/C Fee: $0.00
02/11/2011 11:01:31 AM
Receipt #: 674859
Requestor:
LSI TITLE AGENCY INC.
Recorded By: SCA Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

Assessor's/Tax ID No. 163-19-311-015

Recording Requested By:
AURORA LOAN SERVICES

When Recorded Return To:
ASSIGNMENT PREP
AURORA LOAN SERVICES
P.O. Box 1706
Scottsbluff, NE 69363-1706
100797063

## CORPORATE ASSIGNMENT OF DEED OF TRUST

**Clark, Nevada**
**SELLER'S SERVICING #:0040026742** "GUILLORY"
**OLD SERVICING #: FC**

**MERS #: 100039250407822414 VRU #: 1-888-679-6377**

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THIS DOCUMENT SUBMITTED FOR RECORDING DOES NOT CONTAIN PERSONAL INFORMATION ABOUT ANY PERSON.

Date of Assignment: February 1st, 2011
Assignor: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION IT'S SUCCESSORS AND ASSIGNS at 1901 E VOORHEES STREET, SUITE C, DANVILLE, IL 61834
Assignee: AURORA LOAN SERVICES LLC at 2617 COLLEGE PARK, SCOTTSBLUFF, NE 69361

Executed By: MONIQUE GUILLORY, A SINGLE WOMAN To: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION
Date of Deed of Trust: 01/17/2007 Recorded: 01/25/2007 in Book: 20070125 as Instrument No.: 0003583 In the County of Clark, State of Nevada.

Assessor's/Tax ID No. 163-19-311-015

Property Address: 4641 VIAREGGIO COURT, LAS VEGAS, NV 89147

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and NO/100ths DOLLARS and other good and valuable consideration, paid to the above named Assignor, the receipt and sufficiency of which is hereby acknowledged, said Assignor hereby assigns unto the above-named Assignee, the said Deed of Trust having an original principal sum of with interest, secured thereby, with all moneys now owing or that may hereafter become due or *RRG*RRGALSI*02/01/2011 07:59:51 AM* ALSI01ALSIA0000000000000000701648* NVCLARK* 0040026742 NVCLARK_TRUST_ASSIGN_ASSN * *RRGALSI*

owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Deed of Trust.

TO HAVE AND TO HOLD the said Deed of Trust, and the said property unto the said Assignee forever, subject to the terms contained in said Deed of Trust. IN WITNESS WHEREOF, the assignor has executed these presents the day and year first above written:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION IT'S SUCCESSORS AND ASSIGNS
On February 1st, 2011

By:
JAN WALSH, Vice-President

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. CORPORATE SEAL 1995 DELAWARE

STATE OF Nebraska
COUNTY OF Scotts Bluff

ON February 1st, 2011, before me, IRENE GUERRERO, a Notary Public in and for the County of Scotts Bluff County, State of Nebraska, personally appeared JAN WALSH, Vice-President, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature 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,

GENERAL NOTARY - State of Nebraska
IRENE GUERRERO
My Comm. Exp. Sept. 14, 2013

IRENE GUERRERO
Notary Expires: 09/14/2013

(This area for notarial seal)

Mail Tax Statements To: MONIQUE GUILLORY, 4641 VIAREGGIO COURT, LAS VEGAS, NV 89147

*RRG*RRGALSI*02/01/2011 07:59:51 AM* ALS!01ALSIA0000000000000000701648* NVCLARK* 0040026742 NVCLARK_TRUST_ASSIGN_ASSN * *RRGALSI*

Inst #: 201210180000833
Fees: $17.00
N/C Fee: $25.00
10/18/2012 08:07:07 AM
Receipt #: 1348388
Requestor:
CASTLE STAWIARSKI, LLC - NE
Recorded By: GILKS Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

Requested and Prepared by:
**The Cooper Castle Law Firm**

When Recorded Mail To:
Cooper Castle Law Firm, LLP
5275 S. Durango Drive
Las Vegas, NV 89113

A.P.N.: 163-19-311-015
TS NO: 12-08-45830-NV

Property Address: 4641 Viareggio Court
Las Vegas, NV 89147

## ASSIGNMENT OF DEED OF TRUST

**For Value Received, the undersigned corporation hereby grants, assigns, and transfers to: Nationstar Mortgage, LLC all beneficial interest under that certain Deed of Trust dated: January 17, 2007 executed by Monique Guillory, a single woman, as Trustor(s), Great American Title as Trustee, and recorded as 20070125-0003583 on January 25, 2007 of Official Records, in the office of the County Recorder of Clark County, Nevada, with all moneys now owing or that may hereafter become due or owing in respect thereof and also all rights accrued or to accrue under said Deed of Trust.**

**Date of Execution:** 10-8-12

**Nationstar Mortgage LLC, as attorney in fact for Aurora Loan Services LLC**

10-8-12
By: Sean McKenzie
Title: Assistant Secretary

Acknowledgement:
State of Texas
County of Denton

On 10/8/12 before me Matthew J. Johnstone, personally appeared Sean McKenzie who provided to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they 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.
I certify under PENALTY OF PERJURY under the laws of the State of Texas that the foregoing paragraph is true and correct.
WITNESS my hand and official seal.

Signature _____

MATTHEW J. JOHNSTONE
Notary Public, State of Texas
My Commission Expires
June 20, 2016

# Exhibit "D"

# Exhibit "D"

Inst #: 201305160003105
Fees: $17.00
N/C Fee: $0.00
05/16/2013 11:02:08 AM
Receipt #: 1617660
Requestor:
COOPER CASTLE LAW FIRM- NEV
Recorded By: ECM Pgs: 1
DEBBIE CONWAY
CLARK COUNTY RECORDER

When Recorded Mail To:
**The Cooper Castle Law Firm**
**5275 S. Durango Drive**
**Las Vegas, Nevada 89113**
Attn: Foreclosure Department

**T.S. No.:** 12-08-45830-NV
**APN:** 163-19-311-015
**TITLE REPORT No.:** 7009192

# SUBSTITUTION OF TRUSTEE

**WHEREAS, Monique Guillory, a single woman,** the original Trustor, **Great American Title** was the original Trustee, and **Mortgage Electronic Registration Systems, Inc. solely as nominee for First Magnus Financial Corporation and its successors and assigns** was the original Beneficiary under that certain Deed of Trust dated **January 17, 2007** and recorded on **January 25, 2007**, as **20070125-0003583** of Official Records of **Clark** County, Nevada; and

**WHEREAS,** the undersigned is the present Beneficiary under said Deed of Trust, and

**WHEREAS,** the undersigned desires to substitute a new Trustee under said Deed of Trust in place and instead of said original Trustee, or Successor Trustee, thereunder, in the manner in said Deed of Trust provided,

**NOW, THEREFORE,** the undersigned hereby substitutes Cooper Castle Law Firm, LLP, A Multi-Jurisdictional Law Firm, as Trustee under said Deed of Trust.

The Beneficiary hereby ratifies and confirms all action taken on the Beneficiary's behalf by the instant and/or Successor Trustee prior to the recording of the substitution of trustee.

Date: 5/13/13

**Nationstar Mortgage, LLC**

5/13/13
Lacy Reasons — Assistant Secretary

Acknowledgement:
State of Texas
County of Denton

On 5/13/13 before me, Kiandra Meshae Gildon, personally appeared Lacy Reasons, who provided to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they 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.
I certify under PENALTY OF PERJURY under the laws of the State of Texas that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature 5-13-13

Monique Guillory / 12-08-45830-NV

KIANDRA MESHAE GILDON
Notary Public, State of Texas
My Commission Expires
June 20, 2016

# Exhibit "E"

# Exhibit "E"

Inst #: 201108180002904
Fees: $15.00
N/C Fee: $0.00
08/18/2011 02:30:03 PM
Receipt #: 884554
Requestor:
LEACH JOHNSON SONG & GRUCHC
Recorded By: MGM Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

**When Recorded, Mail To:**

JOHN E. LEACH, ESQ.
LEACH JOHNSON SONG & GRUCHOW
8945 W. Russell Road, Suite 330
Las Vegas, Nevada 89148

APN No.: 163-19-311-015

---

## NOTICE OF DELINQUENT ASSESSMENT LIEN

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of the Nevada Revised Statutes, NAPLES COMMUNITY HOMEOWNERS ASSOCIATION claims a lien upon the real property and buildings, improvements or structures thereon, described in Paragraph 2 below, and states the following:

1. The amount of the assessment, late charge, interest, costs and penalties is $1,288.86, as of August 17, 2011, and currently increases at the rate of $40.00 per month for regular assessments, plus late charges for each late payment, plus interest on any delinquent amount, as well as additional attorney fees and fees of the agent for the management body, including such fees incurred in connection with preparation, recording and foreclosure of this lien and/or which may thereafter accrue.

2. The property against which the assessment is assessed is described as follows:

> Lot Seventy (70) in Block One (1) of Conquistador/Tompkins – Unit 2, as shown by map thereof on file in Book 93 of Plats, Page 1, all in the Office of the County Recorder of Clark County, Nevada, more commonly known as: 4641 Viareggio Court, Las Vegas, Nevada 89147.

3. The name of the record owner(s) is: Monique Guillory, a single woman, as evidenced by a Grant, Bargain, Sale Deed, recorded January 25, 2007, in Book No. 20070125, as Instrument No. 0003582.

DATED this 17th day of August, 2011.

NAPLES COMMUNITY HOMEOWNERS ASSOCIATION

By _____
JOHN E. LEACH, ESQ., as Authorized Agent for Naples Community Homeowners Association

STATE OF NEVADA )
) ss.
COUNTY OF CLARK )

JOHN E. LEACH, ESQ., being first duly sworn, deposes and says:

That I am the Authorized Agent for NAPLES COMMUNITY HOMEOWNERS ASSOCIATION in the above-entitled matter; that I have read the foregoing, **Notice of Delinquent Assessment Lien**, and know the contents thereof, and that the same is true to the best of my knowledge, except as to those matters therein stated on information and belief, and as to those matters, I believe them to be true.

_____
JOHN E. LEACH, ESQ.

SUBSCRIBED and SWORN to before me
this 17th day of August, 2011.

_____
NOTARY PUBLIC, in and for said
County and State
**Notary Appointment No.: 02-73274-1**
**Notary Seal Expiration: December 30, 2013**

HEATHER L. KELLEY
Notary Public State of Nevada
No. 02-73274-1
My appt. exp. Dec. 30, 2013

# Exhibit "F"

# Exhibit "F"

When recorded return to, and
Mail Tax Statements to:

Saticoy Bay LLC Series 4641 Viareggio Ct.
900 S. Las Vegas Blvd., Suite 810
Las Vegas, NV 89101

APN: 163-19-311-015

Inst #: 201309060000930
Fees: $18.00 N/C Fee: $25.00
RPTT: $640.05 Ex: #
09/06/2013 09:03:24 AM
Receipt #: 1761079
Requestor:
RESOURCES GROUP
Recorded By: LEX Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

## FORECLOSURE DEED

NAPLES COMMUNITY HOMEOWNERS ASSOCIATION ("Naples"), pursuant to NRS 116.31164(3), does hereby grant and convey, but without covenant or warranty, express or implied regarding title, possession or encumbrances, to SATICOY BAY LLC SERIES 4641 VIAREGGIO CT. (herein called Grantee), the real property in the County of Clark, State of Nevada, described as follows:

> Lot 70 in Block 1 of Conquistador/Tompkins – Unit 2, as shown by map thereof on file in Plat Book 93, Page 1, of the records of the County Recorder of Clark County, NV, more commonly known as: 4641 Viareggio Ct., Las Vegas, NV

This conveyance is made pursuant to the authority and powers vested to Naples by Chapter 116 of Nevada Revised Statutes and the provisions of the Declaration of Covenants, Conditions and Restrictions, recorded May 7, 2000 in Book 20000507 as Instrument No. 00911, in the Official Records of Clark County, Nevada, and any subsequent modifications, amendments or updates of the said Declaration of Covenants, Conditions and Restrictions, and Naples having complied with all applicable statutory requirements of the State of Nevada, and performed all duties required by such Declaration of Covenants, Conditions and Restrictions.

A Notice of Delinquent Assessment Lien was recorded on August 18, 2011 in Book 20110818, Instrument No. 02904 of the Official Records of the Clark County Recorder, Nevada, said Notice having been mailed by certified mail to the owners of record; a Notice of Default and Election to Sell Real Property to Satisfy Assessment Lien was recorded on January 24, 2012 in Book 20120124, Instrument No. 00764 in the Official Records, Clark County, Nevada, said document having been mailed by certified mail to the owner of record

and all parties of interest, and more than ninety (90) days having elapsed from the mailing of said Notice of Default, a Notice of Sale was published once a week for three consecutive weeks commencing on September 20, 2012, in the Nevada Legal News, a legal newspaper. Said Notice of Sale was recorded on July 30, 2012 in Book 20120730 as Instrument 01448 of the Official Records of the Clark County Recorder, Nevada, and at least twenty days before the date fixed therein for the sale, a true and correct copy of said Notice of Sale was posted in three of the most public places in Clark County, Nevada, and in a conspicuous place on the property located at 4641 Viareggio Ct., Las Vegas, NV

On August 22, 2013 at 10:00 a.m. of said day, at Nevada Legal News, a Nevada Corporation, Front Entrance Lobby, 930 South 4th Street, Las Vegas, Nevada, 89101, Naples, by and through its Agent, exercised its power of sale and did sell the above described property at public auction. Grantee, being the highest bidder at said sale, became the purchaser and owner of said property for the sum of FIVE THOUSAND FIVE HUNDRED SIXTY THREE ($5,563.00) Dollars, cash, lawful money of the United States, in full satisfaction of the indebtedness secured by the lien of Naples.

IN WITNESS WHEREOF, NAPLES COMMUNITY HOMEOWNERS ASSOCIATION caused its corporate name to be affixed hereto, and this instrument to be executed by its authorized agent.

Dated 8/27/13

NAPLES COMMUNITY HOMEOWNERS ASSOCIATION

By: _____
Kirby C. Gruchow, Jr., Esq., Authorized Agent

HEATHER L. KELLEY
Notary Public State of Nevada
No. 02-73274-1
My appt. exp. Dec. 30, 2013

STATE OF NEVADA )
COUNTY OF CLARK )

On 8/27/13, before me, the undersigned, a Notary Public in and for said State, personally appeared KIRBY C. GRUCHOW, JR., known (or proven) to me to be the authorized agent of NAPLES COMMUNITY HOMEOWNERS ASSOCIATION, and executed the within Foreclosure Deed on behalf of the corporation therein named.

Heather L. Kelley
NOTARY PUBLIC

**STATE OF NEVADA**
**DECLARATION OF VALUE**

1. Assessor Parcel Number(s)
   a. 163-19-311-015
   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 RECORDERS OPTIONAL USE ONLY |
|---|
| Book _____ Page: _____ |
| Date of Recording: _____ |
| Notes: |

3.a. Total Value/Sales Price of Property $ 125,057.00
b. Deed in Lieu of Foreclosure Only (value of property) (_____)
c. Transfer Tax Value: $ 125,057.00
d. Real Property Transfer Tax Due $ 640.05

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section _____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

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 _____ 8/27/13 Capacity: Agent for Seller
Kirby R. Gruchow, Jr., Esq.

Signature _____ Capacity: Agent for Buyer

| **SELLER (GRANTOR) INFORMATION (REQUIRED)** | **BUYER (GRANTEE) INFORMATION (REQUIRED)** |
|---|---|
| Print Name: Naples Community HOA | Print Name: SATICOY BAY LLC |
| Address: c/o Leach Johnson Song & Gruchow | Address: Series 4641 Viareggio Ct. |
| City: 8945 W. Russel Rd., Suite 330 | City: 900 S. Las Vegas Blvd., #810 |
| State: Las Vegas, NV Zip: 89148 | State: Las Vegas, NV Zip: 89101 |

**COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)**

| | |
|---|---|
| Print Name: SATICOY BAY LLC SERIES 4641 | Escrow # |
| Address: 900 S Las Vegas Blvd #810 VIAREGGIO CT | |
| City: L.V | State: NV Zip: 89101 |

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

# Exhibit "G"

# Exhibit "G"

# MINUTES OF THE MEETING
# OF THE
# ASSEMBLY COMMITTEE ON JUDICIARY

## Seventy-Fifth Session
## March 6, 2009

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

COMMITTEE MEMBERS PRESENT:

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

COMMITTEE MEMBERS ABSENT:

Assemblyman Richard McArthur (excused)

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

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

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

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

Bill Uffelman:
I have spoken with Mr. Sasser, who was acting as a representative of the sponsor of A.B. 188.

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

[A three-minute recess was called.]

I will open the hearing on Assembly Bill 204.

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

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

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

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

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

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

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

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

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

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

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

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

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

I want to share some comments with you and enter them into the record. Here is the first one: "Dollars not collected directly impact future assessment rates to compensate for the loss of projected income. Also, there is less operating cash to fund reserves or maintain the common area." That represented 2,001 homes in Las Vegas. Another one: "Our cash reserves are severely underfunded and we have serious landscaping needs." This is 120 homes in Reno that are affected. This one just really scared me: "Increase in bad debt expense over $100,000 per year has frustrated the majority of the owners who are now having to pay for those who are not paying, including the lenders who have foreclosed." That is from the Red Rock Country Club HOA, over 1,100 homes in Las Vegas. This last one: "The impact is that the HOA is cutting all services that are not mandated: water, trash, and other utilities. The impact is that drug dealers are moving into the complex, and homicides are on the rise, and the place looks horrible. Special assessments will not work. Those that are paying will stop paying if they are increased. The current owners are so angry that they are footing the bill for the deadbeat investors that they no longer have any pride or care for their units. I support this bill 100 percent. The assessments are an obligation and should not be reduced." That is from someone who manages several properties in Las Vegas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bill DiBenedetto, Private Citizen, Las Vegas, Nevada:
I moved to Nevada in 1975 when I was 11 years old. The first time I was here was in 1982 as a delegate to Boys State. If you told me at that time that I would be testifying, I would have said, No way, you have got to know what you are talking about. Well, I was up here at an event honoring the veterans, and I saw this bill. I serve as the secretary-treasurer of my HOA, Tuscany, in Henderson, Nevada. The reason I became a board member was I revolted against the developer's interests in raising our dues. You see, we were founded in 2004, and we are at 700 homes out of 2,000, which means we are under direct control of our declarant, Rhodes Homes. We are at their mercy if they went to give us a special assessment or raise our dues. The reason I am here today is I also serve as secretary-treasurer. I am testifying as a homeowner, not as a member of the board. As of last year, our accounts receivable were over $200,000, which represented 13 percent of our annual revenue. Out of our 600 homeowners, 94 percent went to collections. Out of those, there were eight banks. When a bank takes over a home, they turn off the water; the landscaping dies; our values go down. We need these two years of back dues. Anything less, I believe, would be a bailout for the banks that took a risk, just like the homeowners. When it comes right down to it, out of the 700 homes that we have, we have to fund a $6.2 million reserve. Why? Because the developer continued to build a recreation center, greenways, and other amenities. So, our budget is $1.5 million. We have $200,000 in receivables. We receive 90-day notices from our utility companies. We can barely keep the lights and the water on. Our reserve fund, by law, is supposed to be funded, but we cannot because we have to pay the utility bills. I moved into that community because it was unique! We have rallied the 700 homes. We are not looking for a handout, but we are looking for what is right. When the bank took over the homes, they assumed the contracts that were made: to pay the dues, the $145 a month. I have banks that are 15 months past due, 10 months past due, 12 months past due. Thank you for listening to me.

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

Bill DiBenedetto:
Yes, we have.

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

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

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

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

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

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

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

Bill DiBenedetto:
They do.

Assemblyman Cobb:
Do they have to start paying dues?

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

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

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

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

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

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

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

Chairman Anderson:
Thank you, sir.

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

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

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

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

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

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

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

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

Chairman Anderson:
Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED:

_____
Robert Gonzalez
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

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

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

# Exhibit "H"

# Exhibit "H"

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| BAYVIEW LOAN SERVICING, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>ALESSI & KOENIG, LLC et al.,<br><br>Defendants. | 2:13-cv-00164-RCJ-NJK<br><br>**ORDER** |

This quiet title action arises out of the foreclosure of a lien for delinquent homeowner's association ("HOA") fees. Pending before the Court are cross motions for summary judgment. For the reasons given herein, the Court grants Plaintiff's motion and denies Defendant's.

## I. FACTS AND PROCEDURAL HISTORY

Third-party Defendant Jesus Simiano ("Borrower") gave Third-party Defendant Silver State Financial Services ("Lender") a promissory note for $176,000, secured by a deed of trust ("DOT"), to refinance real property located at 5124 Lost Canyon Dr., North Las Vegas, NV 89031 (the "Property"). (Compl. ¶ 9, Jan. 30, 2013, ECF No. 1; DOT 1–3, July 27, 2004, ECF No. 1, at 9). Mortgage Electronic Registration Systems, Inc. ("MERS") was the beneficiary of the DOT and Lender's nominee for the purpose of transferring the beneficial interest in the promissory note. (*See* DOT 1–3). MERS later assigned both its own interest in the DOT and Lender's interest in the promissory note to Plaintiff Bayview Loan Servicing, LLC ("Bayview"). (Compl. ¶ 10; *see* Assignment, Apr. 14, 2010, ECF No. 1, at 27).

Defendant Alessi & Koenig, LLC ("A&K") later caused to be recorded a Notice of

Delinquent Assessment (Lien) ("NODA") against the Property on behalf of Defendant Hometown Ovation Owners Association ("HOOA") based upon $3391.58 in delinquent fees, assessments, interest, late fees, service charges, and collection costs. (Compl. ¶ 13; *see* NODA, Feb. 6, 2012, ECF No. 1, at 29). A&K then caused to be recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") against the Property on behalf of HOOA, alleging a total of $3541.58 in delinquencies. (Compl. ¶ 14; *see* NOD, Mar. 12, 2012, ECF No. 1, at 31). A&K then caused to be recorded a Notice of Trustee's Sale ("NOS") as to the Property on behalf of HOOA, indicating a sale for December 5, 2012 based upon a total delinquency of $4386.06. (Compl. ¶ 15; *see* NOS, Oct. 22, 2012, ECF No. 1, at 33).

Bayview contacted A&K concerning the NOS, and A&K postponed the sale until January 16, 2013. (Compl. ¶ 16). Bayview alleges it tendered the full amount due to A&K several times before that date, but that A&K refused to accept payment. (*See id.* ¶¶ 17–18). A&K sold the Property at the instruction of HOOA at the January 16, 2013 foreclosure sale to Defendant SFR Investments Pool 1, LLC ("SFR Pool 1") or Defendant SFR Investments, LLC ("SFR") (collectively, "SFR Defendants") for approximately $10,000. (*Id.* ¶¶ 19, 22). SFR later contacted Bayview and communicated its position that the sale had extinguished Bayview's DOT. (*Id.* ¶ 23).

Bayview sued A&K, HOOA, and SFR Defendants in this Court on two causes of action: (1) Wrongful Foreclosure; and (2) Declaratory Relief.[1] A&K and HOOA jointly moved for defensive summary judgment against the wrongful foreclosure claim, and while that motion was pending, SFR Pool 1 filed its Answer, which included counterclaims and third-party claims for quiet title against Bayview, Borrower, and Lender. The Court granted the motion for summary

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[1]The declaratory relief claim is essentially a quiet title claim. *See Kress v. Corey*, 189 P.2d 352, 364 (Nev. 1948). Plaintiff asks the Court to declare in the alternative that under state law the trustee's sale was void or that it did not extinguish the first mortgage. (*See id.* ¶¶ 34–36).

judgment as against the wrongful foreclosure claim. The parties have now moved for summary judgment on their remaining quiet title claims.

## II. LEGAL STANDARDS

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary judgment, a court uses a burden-shifting scheme:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

*C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

## III. ANALYSIS

In Nevada, HOAs have immediate liens against real property when HOA assessments or other costs against a unit become delinquent. *See* Nev. Rev. Stat. § 116.3116(1). Under Nevada law, a lien for delinquent HOA assessments is not prior to "[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent," *id.* § 116.3116(2)(b), except:

> *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 . . . .

*Id.* § 116.3116(2) (unnumbered paragraph following subsection (2)(c) (emphases added)).[2] In other words, a first mortgage recorded before HOA assessments become delinquent is senior to an HOA lien, except to the extent of nine months of regular HOA dues immediately preceding the action to enforce the HOA lien and any HOA fees and costs related to exterior maintenance of the unit at issue or the removal or abatement of a public nuisance related to the unit at issue.[3] It seems clear that the super-priority amount is unextinguished by foreclosure of a first mortgage, even if the first mortgage is otherwise senior under the first mortgage rule. The question is whether the foreclosure of an HOA lien including some super-priority amount extinguishes a first mortgage that has benefit of the first mortgage rule. The Court believes that the best interpretation of the statutes is that it does not.

Bayview's interpretation of the statute, with which the Court agrees, is that the first mortgage rule prevents a prior-recorded first mortgage from being extinguished by foreclosure of an HOA lien that contains a super-priority amount. Under this interpretation, an HOA lien arising *before* a first mortgage is recorded is senior to the first mortgage in all traditional respects, i.e., it survives a foreclosure of the first mortgage, and its own foreclosure extinguishes the first mortgage. But an HOA lien arising *after* a first mortgage is recorded operates unorthodoxly in relation to traditional liens. The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to

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[2]Section 116.310312 concerns HOA fines and costs imposed when an HOA must maintain the exterior of a unit in accordance with the CC&R or remove or abate a public nuisance on the exterior of the unit where the unit owner has failed to do so. *See id.* § 116.310312(2). Section 116.3115 governs regular HOA dues. *See id.* § 116.3115.

[3]The Court will refer to this amount as the "super-priority amount" and will refer to the section of the statute defining it as the "super-priority rule." The Court will refer to any excess portion of an HOA lien, i.e., the total amount of a lien under subsection (1) minus the super-priority amount, as the "sub-priority amount." The Court will refer to subsection (2)(b) as the "first mortgage rule."

extinguishment, i.e., the foreclosure of neither extinguishes the other.

In practice, two options present themselves under this theory when a first mortgage is recorded before an HOA lien arises. First, an HOA may of course foreclose its lien under the statutes so providing, but the first mortgagee's lien survives such a foreclosure, and the first mortgagee may later foreclose against the buyer at the HOA foreclosure sale if that buyer (or someone else) does not satisfy the first mortgage out of the proceeds of the HOA foreclosure sale or otherwise. An HOA conducting a foreclosure sale will be made whole under the statute so long as the super-priority amount is satisfied by the foreclosure sale price, and if an HOA's foreclosure sale leaves some portion of its "super-priority" lien unsatisfied—which circumstances are unlikely ever to occur—it must pursue the unit owner for the deficiency. Second, a first mortgagee may foreclose while an HOA lien exists. In such a case, the super-priority amount of the HOA lien survives foreclosure, and the HOA may later foreclose against the buyer at the foreclosure sale if that buyer (or someone else) does not satisfy the super-priority amount out of the proceeds of the foreclosure sale or otherwise. In either case, any sub-priority amount of an HOA lien is extinguished along with any other junior liens. Those junior liens are satisfied in sequence of priority out of the foreclosure proceeds after the lien upon which the foreclosure was based is fully satisfied, and junior lien holders must pursue the defaulted party for any deficiencies, if they can.

In summary, an HOA may effectively have two liens: a super-priority lien, and a sub-priority lien. The foreclosure of neither a super-priority lien nor a first mortgage extinguishes the other. They are in parity with one another in this regard. But a super-priority lien must be satisfied first out of the proceeds of the foreclosure of a junior lien. It is "first amongst equals" in this regard. The sub-priority lien, on the other hand, like any other junior lien, is extinguished by the foreclosure of either the super-priority lien or the first mortgage.

Another court of this District recently ruled consistently with this interpretation, though

with less discussion. *See Diakonos Holdings, LLC v. Countrywide Home Loans*, No. 2:12-cv-00949, 2013 WL 531092, at *2–3 (D. Nev. Feb. 11, 2013) (Dawson, J.) (ruling that the foreclosure of an HOA lien containing a super-priority amount does not extinguish a first mortgage protected by the first mortgage rule). Moreover, the real estate community in Nevada clearly understands the statutes to work the way the Court finds. In the current real estate market in Nevada, most homes sold at foreclosure are purchased by investors for cash in order to renovate the homes and then resell them for a quick profit or rent them. If investors believed that HOA foreclosures extinguished first mortgages, homes sold at HOA foreclosure sales would sell for significant fractions of their fair market value, not for the tiny fractions of their fair market value approximating the HOA lien at which HOA-foreclosed homes invariably sell. That investors will not pay significant amounts, i.e. fair amounts, for HOA-foreclosed homes indicates their perception that the first mortgage survives, preventing any profit through resale. If the actors in the real estate market in Nevada believed that an HOA foreclosure extinguished the first mortgage, one would expect the Property here to have sold for something on the order of $80,000 (assuming the home is worth roughly half of the $176,000 for which Borrower refinanced it in 2004). But the Property sold for a mere $10,000, only slightly more than HOOA's lien. This shows that the Nevada real estate community does not operate as if HOA foreclosures extinguish first mortgages recorded before the HOA delinquency arises.

SFR Pool 1's interpretation of the statute is different. Under its theory, the foreclosure of HOOA's lien completely extinguished Bayview's first mortgage in the same way that the foreclosure of a first mortgage extinguishes a second mortgage (although SFR Pool 1 presumably agrees that Bayview was entitled after HOOA's foreclosure sale to satisfy its first mortgage out of the proceeds after any super-priority amount was satisfied and before any sub-priority amount was satisfied). SFR Pool 1 argues that the foreclosure of an HOA lien that includes any super-priority amount—and they always will, as the super-priority amount is defined—extinguishes a

first mortgage. Under this theory, an HOA may foreclose its lien, and the first mortgagee's lien would not survive, though it would be entitled to satisfaction from the proceeds after the super-priority amount is satisfied and before any sub-priority amount is satisfied. And a first mortgagee could still foreclose the first mortgage while an HOA lien exists, but the super-priority amount of the HOA lien would survive.

SFR Pool 1 argues that the Division of Real Estate has interpreted the statutes this way. But a close look at the relevant document indicates no such authoritative interpretation. *See* Dep't of Business and Indus., Real Estate Div., Adv. Op. No. 13-01 (Dec. 12, 2012). The relevant advisory opinion answers three questions: (1) whether the super-priority amount includes "costs of collecting" as defined under section 116.310313 (no); (2) whether the super-priority amount may ever exceed nine months of regular dues plus removal, abatement, and maintenance costs (no); and (3) whether an HOA must institute a "civil action" as defined under Nevada Rules of Civil Procedure 2 and 3 to create the super-priority lien (no). There is *obiter dicta* on page nine of the advisory opinion supporting SFR Pool 1's view. *See id.* at 9 ("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."). The opinion quotes the comments to section 3-116 of the Uniform Act, noting that first mortgagees will typically pay HOA liens rather than suffer foreclosure. But that says nothing of extinguishment. A first mortgagee may pay an HOA lien rather than suffer foreclosure because it will inevitably have to foreclose itself anyway and does not wish to experience the hassle of waiting for the first foreclosure to be completed, or because it may wish to take a deed in lieu of foreclosure or authorize a short sale, and those options would be frustrated by an intermittent foreclosure by an HOA. A first mortgagee's practical desire to avoid an HOA foreclosure does not necessarily imply that the first mortgagee thinks its security would be lost thereby. The Real

Estate Division engaged in no further statutory analysis. Its *obiter dicta* in an advisory opinion directed to other issues is unpersuasive.

The Court rejects this reading of the statues. It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

The Court agrees with Bayview that interpreting the statutes as SFR Pool 1 does reads the first mortgage rule out of the statutes. The statute creating the HOA lien (subsection 116.3116(1)) is the rule. The first mortgage rule (subsection (2)(b)) is an exception to the rule. The super-priority rule (the unnumbered paragraph following subsection (2)(c)) is an exception to the exception. Because the exception to the exception here necessarily includes all instances of the rule itself—there can be no subsection (1) lien that does not include some super-priority amount, because that amount includes virtually every kind of assessment that could be delinquent, except for collection fees and costs arising therefrom—the exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless if its operation were not limited in a way that permits the exception to have some application. That is, in order to give each part of the statutes some effect, the Court must read them together to mean that the super-priority rule affects the priority of reimbursement, but not extinguishment. Reading the super-priority rule to affect extinguishment would read the first mortgage rule out of the statutes almost entirely.

It is true that under SFR Pool 1's interpretation, the first mortgage rule would continue to have effect in a limited class of cases when an HOA forecloses a lien containing some sub-priority amount. In such cases, the first mortgage rule will still ensure that the first mortgage is

satisfied before the sub-priority amount of the HOA lien, giving the first mortgage rule some effect. Imagine a property of fair market value V, with a first mortgage balance of M and an HOA lien with super-priority amount H1 and sub-priority amount H2. If the HOA forecloses, and if the foreclosure extinguishes the first mortgage, the order of reimbursement will be H1–M–H2. The first mortgagee is therefore no better off under the first mortgage rule in cases where V≥H1 + H2 + M, because in such cases the priority of reimbursement as between H2 and M is of no consequence—the first mortgagee will be made whole in either case. The first mortgagee is only better off under SFR Pool 1's interpretation of the first mortgage rule in cases where V<H1+H2+M, because in such cases the first mortgagee's losses are limited to H1, whereas without the first mortgage rule, the first mortgagee's losses would be H1 + H2. So SFR Pool 1's interpretation of the statutes does retain some effect for the first mortgage rule. But the effect is only seen in cases where the fair market value of the property at the time of foreclosure is less than the amount due on the first mortgage or no more than a few thousand dollars more. Although that circumstance is common today, it is not the historical norm, and it was not common when the statutes were first adopted in 1991, over a decade before the real estate market crash made "underwater" mortgages common. *See* 1991 Nev. Stat 535, 567–68.

The legislature cannot possibly have intended the super-priority rule to divest the equally or more conspicuous first mortgage rule of any effect except in a class of cases that was rare when the statutes were adopted. Not only would such an interpretation divest the first mortgage rule of any significant application, it would cause an extreme result that the Court does not believe the legislature intended in light of long-standing historical practice, including the practice of the actors in the real estate market even after the statutes were adopted.[4]

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[4]The Court also notes that the federal Contract Clause would likely be violated by any application of such a reading of the statutes, at least as to first mortgages recorded before the statutes took effect.

The Court rejects SFR Pool 1's argument that an HOA lien necessarily extinguishes a first mortgage because the HOA foreclosure statutes indicate, just as the general non-judicial foreclosure statutes do, that foreclosure gives the purchaser title "without equity or right of redemption." *Compare id.* § 116.31166(3), *with id.* § 107.080(5). These statutes have nothing to do with the extinguishment of junior liens. It simply means, in both cases, that a defaulted owner cannot redeem his default after the sale has occurred. These are simple and otherwise uninteresting recitations of the ancient common law rule that a sale after default "forecloses" (ends the possibility of) the "equity of redemption" (cure of the default). From here, SFR Pool 1 argues that it is indisputable that foreclosure of a senior lien extinguishes all junior liens. That is of course true as a general matter, but if the statutes in this case work as Bayview argues they do, and the Court believes they do, they work a twist on the general rule as between first mortgages and HOA liens. *See supra*. SFR Pool 1 also argues that Bayview's position that foreclosure of an HOA lien can never extinguish a first mortgage would render the last sentence of section 116.310312(4) meaningless. But this conclusion is both factually and legally wrong. Bayview does not appear to argue, and the Court does not believe, that foreclosure of an HOA lien can never extinguish a first mortgage. It seems plain that when delinquencies giving rise to an HOA lien occur *before* a first mortgage is recorded, foreclosure of the resulting HOA lien extinguishes the first mortgage, but SFR Pool 1 admits those circumstances are not present here.[5] Also, the sentence at issue reads, "The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive." *Id.* § 114.310312(4). A statute permitting foreclosure is not rendered meaningless simply because another statute permits some other lien to survive such a foreclosure. The State of Nevada may structure its foreclosure and priority laws however it sees fit. It may structure its

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[5]It appears undisputed that the DOT to Bayview's predecessor-in-interest was recorded on August 4, 2004, such that SFR Pool 1 is clearly not a bona fide purchaser protected from Bayview's interest by the recording statute, and Defendants admit that HOA dues did not become delinquent until 2006.

laws to ensure that prior-recorded first mortgagees do not entirely lose their interest upon an HOA foreclosure, while also ensuring that HOAs are protected for certain costs they have incurred and up to nine months of delinquent fees.

In conclusion, the Court believes Bayview's interpretation of the statutes is correct. Bayview's position appears to represent the dominant understanding of the actors in the real estate market. Bayview's interpretation also gives each section of the statutes significant application and avoids an extreme result that was almost certainly not intended by the state legislature, i.e., that the foreclosure of a small lien for even $1000 of delinquent HOA dues could extinguish an earlier-recorded security interest on the order of hundreds of thousands of dollars, when the purpose behind the super-priority statute was simply to ensure that HOA's are made whole up to a certain amount.

Finally, even if HOOA's foreclosure had extinguished Bayview's first mortgage, that would not end the matter here. Bayview would still have been entitled to satisfy its first mortgage out of the sale proceeds after satisfaction of the super-priority amount of HOOA's lien. It therefore has standing to challenge the commercial reasonableness of the foreclosure sale, and the sale for $10,000 of a Property that was worth $176,000 in 2004, and which was probably worth somewhat more than half as much when sold at the foreclosure sale, raises serious doubts as to commercial reasonableness. *See Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 919–20 (Nev. 1977).

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**CONCLUSION**

IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 33) is GRANTED. The mortgage of Bayview Loan Servicing, LLC against the Property at 5124 Lost Canyon Dr., North Las Vegas, NV 89031 was not extinguished by the foreclosure sale at which SFR Investments Pool 1, LLC obtained title to the Property.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 35) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

Dated this 6th day of June, 2013.

ROBERT C. JONES
United States District Judge

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP and MONIQUE GUILLORY<br><br>Defendants. | Case No: A-13-689240-C<br><br>Dept. No. V |

**INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above-entitled action as indicated below:

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| | |
|---|---|
| NATIONSTAR MORTGAGE, LLC | $223.00 |
| COOPER CASTLE LAW FIRM, LLP | $30.00 |
| TOTAL: | $253.00 |

DATED this 22nd day of November, 2013.

THE COOPER CASTLE LAW FIRM, LLP

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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

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| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP and MONIQUE GUILLORY<br><br>Defendants. | Case No: A-13-689240-C<br><br>Dept. No. V |

**AMENDED CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 3rd day of December, 2013, I served a true and correct copy of the **DEFENDANTS NATIONSTAR MORTGAGE, LLC AND THE COOPER CASTLE LAW FIRM, LLP'S MOTION TO DISMISS**, via First Class U.S. Mail, postage pre-paid, to the parties listed below.

Michael F. Bohn, Esq.
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Suite 125
Las Vegas, Nevada 89119

*/s/ Jennifer Shumway*
An employee of
THE COOPER CASTLE LAW FIRM, LLP

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CLERK OF THE COURT

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Attorney for plaintiff River Glider Avenue Trust

DISTRICT COURT

CLARK COUNTY, NEVADA

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|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A689240-C<br>DEPT NO.: V |

**OPPOSITION TO MOTION TO DISMISS; and COUNTERMOTION TO STAY CASE**

Plaintiff, Saticoy Bay LLC, Series 4641 Viareggio Ct, by and through it's attorney, Michael F. Bohn, Esq., opposes the motion to dismiss and countermoves to stay this case as follows.

**FACTS**

Plaintiff is the owner of the real property commonly known as 4641 Viareggio Court, Las Vegas, Nevada. Plaintiff obtained title by foreclosure deed recorded September 6, 2013. A copy of the deed is Exhibit 1.

The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Naples Community Homeowners Association, pursuant to NRS Chapter 116.

Nationstar Mortgage, LLC is the beneficiary of a deed of trust which was recorded as an encumbrance to the subject property on January 25, 2007. Cooper Castle Law Firm, LLP is the trustee on the deed of trust. Defendant Monique Guillory was the former owner of the subject real property.

Defendants Nationstar Mortgage and the Cooper Castle Law Firm have filed this motion to dismiss. However, the HOA foreclosure has extinguished any interest that the defendants had in the property, and the motion to dismiss must be denied.

## POINTS AND AUTHORITIES

### I. OPPOSITION TO MOTION TO DISMISS

**1. Standards on a motion to dismiss**

In the case of Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 874 P.2d 744 (1994) the Supreme Court stated:

> The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court " 'must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].' " Squires v. Sierra Nev. Educational Found., 107 Nev. 902, 905, 823 P.2d 256, 257 (1991) (quoting Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980)). All factual allegations of the complaint must be accepted as true. Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126 (1985). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

The defendant here has brought a motion to dismiss. However, the defendant has also alleged certain facts involving the transactions in questions, making the granting of a motion to dismiss improper.

**2. NRS 116.3116 granted to the HOA a super priority lien that takes priority over the defendant's deed of trust.**

NRS 116.3116 provides in part:

> **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. (emphasis added)**

By its clear terms, NRS 116.3116 (2) provides that the super-priority lien for 9 months of charges is "prior to all security interests described in paragraph (b)." The deed of trust held by Respondent falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

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 Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Additionally, courts must construe statutes to give meaning to all of

their parts and language, and courts are to read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). A statute should be interpreted to give the terms their plain meaning, considering the provisions as a whole, so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Southern Nevada Homebuilders v. Clark County 121 Nev. 446, 117 P.3d 171 (2005). A statute should be construed so that no part is rendered meaningless. Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008). Statutes must construed so as to avoid absurd results. In re Orpheus Trust 124 Nev. 170, 179 P.3d 562 (2008); Hunt v. Warden, 111 Nev. 1284, 903 P.2d 826 (1995).

The 9 month period in which the associations' lien is granted priority is commonly referred to as the "super priority" lien. In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34 (2012) the Supreme Court stated in a footnote defining "super priority" that:

> Priority status over certain types of encumbrances is granted to liens against units for delinquent assessments. NRS 116.3116(2); NRS 116.093 (defining "unit").

The plain language of the statute is that this 9 months "super priority" lien of the association's has priority over trust deeds. The statute is written in the negative. It first lists three categories of liens and encumbrances which the association's lien is not prior to:

> "A lien under this section is prior to all other liens and encumbrances on a unit except:"
>
> The statute then lists the three categories as
>
> (a) liens recorded before the CC & R's,
> (b) mortgage liens, and
> (c) liens for taxes and other governmental assessments or charges.

In the same paragraph, the statute then states that the "super priority" lien takes priority over "all security interests" described in paragraph (b), which exactly describes the first mortgage lien asserted by Respondent. The relevant portion of the statute states:

> 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 . . . .and to the extent of the assessments for common expenses . . . .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 specifies that the 9 month super priority lien is not "prior to" liens recorded before the CC&Rs or liens for real estate taxes and other governmental charges or charges. The only liens which are subject to the "super priority" exception are mortgage liens like the one held by Defendant.

3. **The HOA's foreclosure of it's super priority lien at the foreclosure sale held on June 27, 2012 extinguished the deed of trust held by Defendant.**

It is hornbook law that foreclosure of a superior lien extinguishes all junior liens. See McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC 121 Nev. 812, 123 P.3d 748 (2005); Brunzell v. Lawyers Title Ins. Co. 101 Nev. 395, 705 P.2d 642 (1985); Aladdin Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977); and Erickson Construction Co. v. Nevada National Bank, 89 Nev. 359, 513 P.2d 1236 (1973). At the time the HOA foreclosed it's "super priority" lien, all junior liens, which would include the defendant/defendant's formerly first mortgage lien, were extinguished.

This interpretation is the only rational, logical interpretation that would not lead to absurd results. The only way to make sure that the HOA gets payment from the first is if the first is in danger of losing it's security. This is exactly the same situation as when a junior mortgage holder seeks to protect it's security interest from foreclosure by a senior mortgage holder.

In the case of State Department of Business and Industry v. Nevada Association Services, 128 Nev. Adv. Op. 34 (2012), the Supreme Court upheld an injunction prohibiting the State Department of Business and Industry, Financial Institutions Division from enforcing it's declaratory order and advisory opinion regarding the amount of HOA lien fees associations could collect. The Supreme Court held that the Financial Institutions Division did not have jurisdiction or authority to interpret NRS Chapter 116, but that this jurisdiction and authority rested with the Real Estate Division. The decision states in part:

> The language of NRS 116.615 and NRS 116.623 is clear and unambiguous. . . . . Based on a plain, harmonized reading of these statutes, the responsibility of determining which fees may be charged, the maximum amount of such fees**, and whether they maintain a priority,** rests with the Real Estate Division and the CCICCH.
> . . . .
> **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.** Consequently, the Department lacked jurisdiction to issue an advisory opinion interpreting NRS Chapter 116. Therefore, the district court

> did not abuse its discretion in determining that NAS had a likelihood of success on the merits.
> . . . .
>
> 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.. . . (emphasis added)

The Supreme Court specifically noted that the responsibility to determine whether the fees "maintain a priority" rests with the Real Estate Division. In response to this decision, the Real Estate Division issued it's opinion interpreting NRS 116.3116. A copy of the opinion is Exhibit 2.

Section II of the opinion, cites to a portion of Section 2 to the commentary from the drafters of the Uniform Common-Interest Ownership Act (UCIOA).

The opinion letter from the Real Estate Division states, beginning on page 8:

> 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 department 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's assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage 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**. (emphasis added)

The Supreme Court has repeatedly held that courts should attach substantial weight to an administrative body's interpretation of statutes which it is charged to enforce. Folio v. Briggs 99 Nev. 30, 656 P.2d 842 (1983); Sierra Pacific Power Co. v. Department of Taxation 96 Nev. 295, 607 P.2d 1147 (1980); Clark County School District v. Local Government Employee Management Relations Board 90 Nev. 442, 530 P.2d 114 (1974).

The Supreme Court has frequently stated that when interpreting a statute, the court should review the legislative history to determine the Legislature's intent. State v. Tricas 128 Nev. Ad. Op. 62, 290 P.3d 255 (2012); Gold Ridge Partners v. Sierra Pacific Power Co. 128 Nev. Adv. Op. 47, 285 P.3d 1059 (2012).

Chapter 116 of the Nevada Revised Statutes is derived from the Uniform Common-Interest Ownership Act (UCIOA). The Supreme Court has referred to NRS Chapter 116 and to the Uniform Act in interpreting other provisions of NRS Chapter 116 in a number of cases. For example in Holcomb Condominium HOA v. Stewart Venture LLC 129 Nev. Adv. Op. 18 (2013), the Supreme Court stated "the term 'separate instrument' is not defined in NRS Chapter 116 or the Uniform Common-Interest Ownership Act (UCIOA)."

In Beazer Homes Holding Corp. v. District Court ,128 Nev. Adv. Op. 66, 291 P.3d 128 (2012), the Supreme Court stated "the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3-102 of the Uniform Common-Interest Ownership Act, upon which NRS 116.3102 is based."

In Boulder Oaks Community Association v. B&J Andrews 125 Nev. 397, 215 P.3d 27 (2009), the Supreme Court stated "...NRS Chapter 116 is Nevada's version of the Uniform Common-Interest Ownership Act (UCIOA).

Section 2 to the commentary from the drafters of the uniform act is the relevant portion pertaining to the "super priority" lien, and was cited in the opinion letter from the Real Estate Division. The entirety of section 2 reads:

> 2. To ensure prompt and efficient enforcement of the association's lien for un-paid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the associations's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposes for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant department from existing practice, the 6 months's 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 mortgage lenders. **As a practical matter, mortgage lenders will most likely pay the 6 months's assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage 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)

This language clearly shows the intent for the HOA lien to have priority over the first mortgage holder. Why else would the mortgage lender pay the assessments rather than have the unit go to foreclosure? Why else would the various state statutes have to be amended when necessary? Simply because the holder of the first would lose it's priority to the HOA lien.

The committee notes also state that the lender could provide for an escrow for assessments. This is commonly done for taxes and insurance. The language of the deed of trust specifically makes provisions for escrow of assessment payments.

Carl Lisman, Esq., who was one of the drafters of the original model law, has recently issued an opinion letter which states, in part, that it was the intent of the drafters that the mortgage holder's lien would be extinguished by foreclosure of the "super-priority" lien. A copy of the letter is Exhibit 3.

The Legislative Counsel Bureau has also issued an opinion letter that the effect of the statute is that foreclosure on the "super-priority" lien by an HOA extinguishes the mortgage holder's lien. A copy of that letter is Exhibit 4.

Fannie Mae REQUIRES that mortgage lenders to pay the association liens because it recognizes that the HOA lien has priority. A copy of the Servicing Guide Announcement dated June 10, 2011 is Exhibit 5. The servicing guide, page 302-2 provides in part:

> .... Generally, the borrower will pay special assessments directly, but if he or she fails to do so, the servicer must advance it's own funds to pay them if that is necessary to

> protect the priority of Fannie Mae's lien. ...
> When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days delinquent in the payment of assessments or charges levied by the association, the servicer should advance the funds to pay the charges if necessary to protect the priority of Fannie Mae's mortgage lien. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or similar statute that provides for up to six months of delinquent regaular condo assessments to have lien priority over the six months of such advances....

Fannie Mae certainly recognizes that a number of states have statutes which provide limited priority for HOA assessments and is requiring it's servicers to protect the priority of it's loans.

**4. A reported decision supports the plaintiff's position**

The court of appeals for the State of Washington in the case of Summerhill Village Homeowners Association v. Roughley, 166 Wash.App. 625, 270 P.3d 639 (2012) has recently ruled that under the similar Washington state version of the UCIOA that foreclosure of the priority lien of an association extinguishes the outstanding deeds of trust. The Washington State statute, 64.34.364. provides, in relevant part:

> **Lien for assessments**
>
> (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. A lien under this section is not subject to the provisions of chapter 6.13 RCW.
>
> (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.
>
> (4) The priority of the association's lien against units encumbered by a mortgage held by an eligible mortgagee or by a mortgagee which has given the association a written request for a notice of delinquent assessments shall be reduced by up to three months if and to the extent that the lien priority under subsection (3) of this section includes delinquencies which relate to a period after such holder becomes an eligible mortgagee or has given such notice and before the association gives the holder a written notice of

> the delinquency. 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.
>
> (5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section.

The biggest difference between the Nevada statute and the Washington state statute is that in Washington, the HOA has to conduct a judicial foreclosure to keep it's priority. The Washington Court of Appeals ruled that the HOA lien was prior to the first mortgage holder and that the foreclosure sale of the HOA lien extinguished the security interest of the mortgage holder. The court stated:

> The term "mortgage" includes a deed of trust. Thus, a condominium association's lien for common expense assessments has limited priority over deeds of trust recorded before the lien arises. This is often termed "super priority."
>
> ¶ 10 The official comments to RCW 64.34.364 reveal the expectation of the legislature: "As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien." FN6
>
> FN6. 2 SENATE JOURNAL, 51st Leg., Reg., 1st & 2nd Spec. Sess., at 2080 (Wash.1990); *see also* 1 SENATE JOURNAL, 51st Leg. Sess., Reg. Sess., at 376 (Wash.1990). It appears the Senate adopted the Washington State Bar Association comments, which are substantially identical to the official comments to the Uniform Condominium Act concerning this section.
>
> ¶ 11 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 sheriffs sale. **The sale extinguished the 2006 deed of trust**. The question now is whether Deutsche Bank can redeem. (emphasis added).

In a case involving an HOA lien from the state of Virginia, Board of Directors v. Wachovia Bank 581 S.E. 2d 201 (Va. 2003), the court held that the bank's mortgage lien had priority over the lien held by the HOA. In that case, however, the Virginia statute specifically held that the mortgage lien had priority. The statute in question provides:

> 55-79.84. Lien for assessments
>
> A. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the

> provisions of this chapter and all lawful provisions of the condominium instruments. **The said lien, once perfected, shall be prior to all other liens and encumbrances except** (i) real estate tax liens on that condominium unit, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) **sums unpaid on any first mortgages or first deeds of trust recorded prior to the perfection of said lien for assessments and securing institutional lenders.** The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. (emphasis added)

If the Nevada legislature wanted to be clear that the bank's lien would survive the foreclosure of the HOA's super priority lien, it could have specifically stated so in the Nevada statute. Instead, the clear language of the Nevada statute is that the nine month "super priority lien" has priority over Defendant's first deed of trust.

The advisory opinion of the Real Estate Division is consistent with the plain language of the statute, the intent of the statute as demonstrated by the committee advisory notes, and the judicial decision from the state of Washington interpretation a substantially similar statute. The plaintiff's title should be found to be free and clear of any lien or encumbrances asserted by Defendant.

**5. The HOA was not required to file a civil action to enforce it's super priority lien.**

The Summerhill case is cited for the proposition that the foreclosure of the HOA lien extinguishes the first mortgage lien. A number of district court judges have relied on the Summerhill case to claim that the HOA lien must be foreclosed upon by judicial foreclosure. By its terms, NRS 116.3116(2)( c ) does not require the filing of a "judicial" action; it only requires "institution of an action to enforce the lien."

There is no provision for judicial foreclosure of HOA liens in NRS Chapter 116. Foreclosure of liens under NRS Chapter 116 is also specifically excepted from the statutory scheme for judicial foreclosures under Chapter 40. NRS 40.433 states:

> **"Mortgage or other lien" defined**. As used in NRS 40.430 to 40.459, inclusive, unless the context otherwise requires, a "mortgage or other lien" includes a deed of trust, but **does not include a lien which arises pursuant to chapter 108 of NRS, pursuant to an assessment under chapter 116, 117, 119A or 278A of NRS or pursuant to a judgment or decree of any court of competent jurisdiction.** (emphasis added).

Also included in NRS Chapter 40 is the statute commonly referred to as the "one action rule, " NRS 40.430(1) which begins "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate...." The one action rule

permits only one action for the recovery of any debt or the enforcement of any right secured by a mortgage or other lien. The statute define a list of actions which a beneficiary may take which do not violate the one action rule, including non-judicial foreclosure. The non-judicial foreclosure is referred to as an "action" but it clearly is not a "civil action."

The Supreme Court has already rejected the argument that an "action" must be a civil action. In the case of Hamm v. Arrowcreek Homeowners Association 124 Nev. 290, 183 P.3d 895 (2008), the Supreme Court stated:

> NRS 116.3116(1) provides that liens exist when assessments are due, regardless of any classification. **Thus, an association is not required to commence a civil action to record or perfect the lien, which already exists once assessments are due, and, therefore, such association need not submit to mediation or arbitration before recording the lien**. We conclude that NRS 38.310 does not treat similarly situated individuals differently because it requires mediation or arbitration before civil actions are initiated by homeowners or homeowners' associations alike, without classification. Applying the rational basis test, we conclude that NRS 38.310's requirement of mediation or arbitration is rationally related to the legitimate governmental interest of assisting homeowners to achieve a quicker and less costly resolution of their disputes with homeowners' associations than if they had to initiate a civil action in the district court. Accordingly, we conclude that NRS 38.310 does not violate equal protection principles.

NRS Chapter 116 provides the requirements for a foreclosure sale of an HOA lien in NRS 116.31162 through 116.31168. The procedures are similar to foreclosure under power of sale on a trust as provided in NRS 107.080. There is no provision in these statutes for a judicial foreclosure process.

NRS 116.3116 is not the only statute providing a super priority. NRS 116.310312 allows an HOA to have a super priority lien that may be non-judicially foreclosed for maintenance or abatements costs. NRS 116.310312 provides in part:

> 4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. **The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.**
> 5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.
> 6. Except as otherwise provided in this subsection, **a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the**

> **liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116**. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien. (emphasis added).

The language in this statute makes it clear that the "super priority" lien status is to be achieved by the non-judicial foreclosure procedure outlined in NRS Chapter 116.

The Real Estate Division Advisory Opinion, attached as Exhibit 2 also addresses the meaning of the term "action" as used in the statute. The opinion begins by addressing 3 questions. The third one being:

> **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?

The opinion gives a short answer and a more detailed answer to the question. The short answer is:

> **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.

The detailed answer to the question in the opinion is:

> **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.

The argument that a judicial foreclosure must be instituted in order for the HOA lien to gain it's "super priority" status is contrary to Nevada law. The legislature set up a statutory scheme in which the liens are to be foreclosed upon in a non-judicial manner. There is no provision under chapter 116 for a judicial foreclosure similar to the statutory provisions providing for judicial foreclosure of trust deeds.

This was recognized in a recent decision issued by Judge Pro from the United States District Court for the District of Nevada regarding the super-priority lien created by NRS 116.3116. In the case of 7912 Limbwood Court Trust v. Wells Fargo Bank, __ F. Supp.2d ____, 2013 WL 5780793 (D.Nev.), the court stated:

> 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) (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. (emphasis added)
>
> . . . .
>
> The court went on to say:
>
> Moreover, the result in this case is neither novel nor unfair. Wells Fargo easily could have avoided this purportedly inequitable consequence by paying off the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of

its junior interest. Additionally, Wells Fargo could have required an escrow for HOA assessments so that in the event of default, Wells Fargo could have satisfied the super priority lien amount without having to expend any of its own funds. See Uniform Common Interest Ownership Act § 3–116, cmt. 1 (1982).

The legislature provided for a non-judicial procedure for foreclosure of a homeowners association lien. A judicial foreclosure is therefore not required for the super-priority lien to extinguish the respondent's mortgage lien.

**6. The statute takes priority over the provisions of the CC&R's.**

The statutes and case law are clear that the provisions of chapter 116 control over the CC&Rs. NRS 116.1104 provides:

> **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 116.1206 provides that any CC&R's which conflict with the statute will be deemed to conform with the chapter. The statute provides:

> **Provisions of governing documents in violation of chapter deemed to conform with chapter by operation of law; procedure for certain amendments to governing documents.**
>
> 1. 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 governing document became effective before the enactment of the provision of this chapter that is being violated.

This court affirmed that the statutes control over the wording of the CC& R's. In the case of Boulder Oaks Community Association v. B& J Andrews Enterprises, LLC 125 Nev. 397, 215 P.3d 27 (2009) this court stated:

> When NRS 116.003 is read in context with the UCIOA, **it is clear that when a term is defined in NRS Chapter 116, the statutory definition**

**controls and any definition that conflicts will not be enforced. To read NRS 116.003 otherwise would lead to the absurd result of rendering the definitions provided in NRS 116.005 to 116.095 mere surplusage. See Speer v. State, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000). Further, any other reading of the statute would be contrary to the express purpose of NRS Chapter 116, which is to "make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2)**. If this court were to enforce any definition provided by a declaration, then the goal of making the laws concerning common-interest communities uniform would never be reached. See Speer, 116 Nev. at 679, 5 P.3d at 1064 (stating that statutes should not be read in a manner that violates the " 'spirit of the act' " (quoting Anthony Lee R., A Minor v. State, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997))).

If the subject CC&R's conflict with the priority contained in NRS 116.3116, the statute controls.

Certainly, if any CC&R's on any development violated any statute, public policy or constitutional provision, no person could seriously claim that the CC&R's prevailed over the statute. There is no reason why the provisions of any CC&R's would take precedence over the statutes found in NRS Chapter 116

**7. The defendant is afforded with adequate notice**

To the extent that the defendants motion alleges that the defendant did not receive notice, this is an issue of fact, and the granting of the motion to dismiss is in appropriate.

The statutes outlining the procedures for the non-judicial foreclosure of the HOA lien give provide for adequate notice to subordinate lien holders, including first lien mortgage holders.

Defendant is statutorily entitled to notice of the foreclosure sale so that it may protect it's interests. NRS 116.31168 provides in part;

**Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.**

1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.

NRS 107.090 provides in part:

**Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.**

1. As used in this section, "person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described

> in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.
>
> . . . .
>
> 3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; and
>
> **(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**

The language of this statute makes it clear that all persons with an interest, whose interest are subordinate to the super priority lien, are entitled to notice.

The statutory scheme provided for in NRS 107.080 mirrors the foreclosure procedures for HOA liens found in NRS Chapter 116. In the case of Charmicor v. Deaner 572 F.2d 694 (9th Cir. 1978), the federal appeals court ruled that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

The statutory requirements for the foreclosure procedures under both NRS 107.080 and NRS Chapter 116 are detailed in the following graph:

| HOA Foreclosure | Statutory Requirement | Bank Foreclosure |
|---|---|---|
| NRS 116.31162(1)(a) | Delinquency by homeowner | NRS 107.080(1) |
| NRS 116.31162(1)(a) | Mail notice of delinquency to homeowner | No statutory requirement but required by terms of deed of trust |
| NRS 116.31162(1)(b) | Execute notice of default and election to sell (NOD) that describes the deficiency in payment | NRS 107.080(2)(b) |
| NRS 116.31162(1)(a) | Record NOD | NRS 107.080(3) |
| NRS 116.31162(2)(b) | Mail NOD by certified or registered mail, return receipt requested to homeowner | NRS 108.080(3) |
| NRS 116.31163 and NRS 16.31168 (incorporating requirements of NRS 107.090) | Mail NOD to interested parties who request notice | NRS 107.090(3)(a) |

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

The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. The notices provided to claimants to the real property are the same under both Chapters 107 and 116, and the notices are adequate.

Defendant had adequate notice to protect its interests in the subject real property and failed to do so. Defendant's mortgage lien has therefore been extinguished.

**8. Alleged inadequacy in price is not grounds to overturn a foreclosure sale**

The case of Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982) involved a lien foreclosure sale to recover assessments owed to an association. The Supreme Court held that the allegation that the price paid at the sale was inadequate was not sufficient to justify setting aside the sale where there was no showing of fraud, unfairness or oppression.

Moreover, we are before the court on a motion to dismiss. The adequacy of the purchase

price would be an issue of fact requiring discovery and presentation to the ultimate trier of fact. Dismissal on a motion to dismiss would be improper because the court is to look only to the pleadings, not extrinsic facts.

**9. Plaintiff is protected as a bona fide purchaser**

A bona fide purchaser for value at a foreclosure sale takes title free and clear from the claims of the extinguished former lien holders. In the case of Firato v. Tuttle, 48 Cal.2d 136, 308 P.2d 333 (1957), the California Supreme Court stated:

> Instruments which are wholly void cannot ordinarily provide the foundation for good title even in the hands of an innocent purchaser, as where a deed has been forged or has not been delivered. Trout v. Taylor, 220 Cal. 652, 656, 32 P.2d 968. It does not appear, however, that section 870 of the Civil Code should necessarily make the unauthorized reconveyance by a trustee void as to such a purchaser. Section 2243 of that code states: 'Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration.' (Emphasis added.) This section was also enacted in 1872 and has been treated as correlative to section 870. Chapman v. Hughes, 134 Cal. 641, 657, 58 P. 298, 60 P. 974, 66 P. 982.
>
> **The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose**, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civil Code, s 869. The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. **It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions.** Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.
>
> As section 2243 of the Civil Code must be read with section 870 of the same code and because of the obvious desirability of protecting innocent purchasers for value who rely in good faith upon recorded instruments under the circumstances presented here, we conclude that plaintiffs were required to plead that respondents were not such innocent purchasers for value in order to state a cause of action against them. In the absence of such allegations, the trial court properly sustained respondents' demurrers to plaintiffs' first amended complaint. (emphasis added)

The bona fide doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

As far back as 1880, this Court, in the case of Moresi v. Swift, 15 Nev. 215 (1880), stated:

> The rule that a man who advances money bona fide and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate.

California's Civil Code §2924 is similar to Nevada's NRS 107.080 governing the procedures for non-judicial foreclosures of trust deeds. However, Civil Code §2924 includes a codification of the common law presumptions regarding the protections provided to a bona fide purchaser at a trustee's sale. Section (6)(c) states:

> A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Nevada has not codified the protections of a bona fide purchaser at a trustee's sale, but the Nevada case law is consistent with the holdings in California based on it's statutory codification of the bona fide purchaser doctrine.

NRS 116.31166 has language similar to California Civil Code §2924 (6)(c) regarding the recitals in the foreclosure deed. The Nevada statute reads:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption.**
>
> 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.
>
> 3. 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.

In the case of Moore v. DeBernardi 47 Nev. 33, 220 P. 544 (1923), this court stated:

> The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, incumbrance, or otherwise, of which he has no notice, actual or constructive. Brophy M. Co. v. B. & D. G. & S. M. Co., 15 Nev. 108.
>
> . . . .
>
> To entitle a party to the character of a bona fide purchaser, without notice, he must have acquired the legal title, and have actually paid the purchase money before receiving notice of the equity of another party. Moresi v. Swift, 15 Nev. 215.

Consistent with these holdings, in the case of Baily v. Butner 64 Nev. 1, 176 P.2d 226 (1947) this court stated:

> The authorities are practically unanimous in holding that, in a suit by one asserting a prior equity, unless exceptional circumstances exist, the duty devolves upon the defendant, who seeks to establish a superior equity upon the basis that he is a bona fide purchaser, to both allege and prove all of the essential elements constituting him such bona fide purchaser, that is to say, a purchaser for a valuable consideration without notice of the prior agreement and the equity resulting therefrom.

Although the procedures for the non-judicial foreclosures are similar in Chapter 116 for foreclosure on a homeowners association lien and under Chapter 107 for foreclosure under a deed of trust, there is one striking difference between the two chapters. NRS 107.080(6) permits a party that does not receive proper notice of the sale to file an action to set the sale aside within 60 days of receiving actual notice of the sale. There is no similar provision in Chapter 116. This court may presume that the legislature intended for ALL sales under Chapter 116 to be final and not subject to attack.

It is respectfully submitted that because of the similarities between the Nevada statutory and case law and the California statutory and case law, this court should adopt the reasoning in the Firato v. Tuttle case and apply the bona fide purchaser doctrine and confirm the title of the plaintiff/ appellant in the subject real property free and clear of the defendants mortgage lien.

**10. The Supreme Court has enjoined banks from foreclosing in similar cases**

Counsel for the defendant has cited a number of non-binding opinions from other district court judges who have ruled in the defendants favor. Judge Tao issued a detailed, 20 page analysis of NRS Chapter 116 and found that the non-judicial foreclosure of an HOA lien extinguishes the lien of the mortgage holder. A copy of that decision is Exhibit 6. Counsel for plaintiff admits to quoting almost verbatim, portions of the judge's well thought out decision in this brief.

In the federal court, Judge Gordon recently issued a decision adopting the reasoning of Judge Tao's decision. A copy of Judge Gordon's decision is Exhibit 7. Judge Pro also issued a decision in a (soon to be reported) case which he found that the statutes provide that the foreclosure of an HOA lien extinguishes the mortgage loans. See 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A. ___ F.Supp 2. ___ , 2013 WL5780793 (D. Nev. 2013). A copy of the decision is Exhibit 8.

Counsel for the plaintiff has been involved in a number of cases, and has appealed the denial of an injunction to prohibit the bank from foreclosing on it's deed of trust after the plaintiff purchased the property at a foreclosure sale. The Supreme Court initially issued temporary injunctions staying the foreclosure sale. A copy of these temporary restraining orders are collectively attached as Exhibit 9.

In several of the cases and after full briefing, the Supreme Court has issued preliminary injunctions prohibiting the foreclosure pending the decision on appeal. A copy of these orders are collectively attached as Exhibit 10. In a few of the cases, the preliminary injunctions have not yet been issued. In none of the cases has the court refused to grant an injunction.

It should be noted, that NRAP 8(c) provides:

> (c) **Stays in Civil Cases Not Involving Child Custody.** In deciding whether to issue a stay or injunction, the Supreme Court will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) **whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.** (emphasis added)

The fact that the court has consistently issued injunctions, even though the orders are not final or binding, would indicate that the Supreme Court is inclined to rule in favor of the plaintiff's position in these cases. At the very least, this indicates the Supreme Court doesn't want the rights of any of the parties being affected while it makes it's decision.

**II. COUNTERMOTION TO STAY PROCEEDINGS**

This court has already heard a number of cases involving the HOA super priority lien issues. At present, there are almost 50 cases known to counsel, pending before the Supreme Court. Attached as Exhibit 11 is a list of the cases, as of the first week of August, pending before the Supreme Court regarding the super priority HOA lien issue.

The court has the inherent authority to regulate it's own cases. With the large number of cases being filed, and the large number of cases being appealed to the Nevada Supreme Court, a very large backlog of cases is building in the appellate level. It is respectfully submitted that this case should be stayed, the defendant should not be permitted to foreclose on the property, and the plaintiff should be required to maintain the property, pay all HOA dues and taxes and maintain insurance on the property, until such time as the Supreme Court makes a binding ruling on the issues.

## CONCLUSION

The language in NRS 116.3116 created a super priority lien that extinguished Defendant's deed of trust when Plaintiff purchased the real property at the HOA foreclosure sale. The legislative history for NRS 116.3116 supports plaintiff's position that foreclosure of the super priority lien has the normal effect of extinguishing all security interests that fall within the scope of NRS 116.3116(2)(b).

DATED this 6th day of December, 2013.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas, Nevada 89119
Attorney for plaintiff

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 6th day of December 2013, I served a photocopy of the foregoing OPPOSITION TO MOTION TO DISMISS by placing the same in a sealed envelope with first-class postage fully prepaid thereon and deposited in the United States mails addressed as follows:

Jason Peck, Esq.
Cooper Castle
5275 S. Durango Dr.
Las Vegas, NV 89113

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

# EXHIBIT 1

Inst #: 201309060000930
Fees: $18.00 N/C Fee: $25.00
RPTT: $640.05 Ex: #
09/06/2013 09:03:24 AM
Receipt #: 1761079
Requestor:
RESOURCES GROUP
Recorded By: LEX Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

**When recorded return to, and**
**Mail Tax Statements to:**

**Saticoy Bay LLC Series 4641 Viareggio Ct.**
**900 S. Las Vegas Blvd., Suite 810**
**Las Vegas, NV 89101**

**APN: 163-19-311-015**

**FORECLOSURE DEED**

**NAPLES COMMUNITY HOMEOWNERS ASSOCIATION ("Naples"), pursuant to NRS 116.31164(3), does hereby grant and convey, but without covenant or warranty, express or implied regarding title, possession or encumbrances, to SATICOY BAY LLC SERIES 4641 VIAREGGIO CT. (herein called Grantee), the real property in the County of Clark, State of Nevada, described as follows:**

> **Lot 70 in Block 1 of Conquistador/Tompkins – Unit 2, as shown by map thereof on file in Plat Book 93, Page 1, of the records of the County Recorder of Clark County, NV, more commonly known as: 4641 Viareggio Ct., Las Vegas, NV**

**This conveyance is made pursuant to the authority and powers vested to Naples by Chapter 116 of Nevada Revised Statutes and the provisions of the Declaration of Covenants, Conditions and Restrictions, recorded May 7, 2000 in Book 20000507 as Instrument No. 00911, in the Official Records of Clark County, Nevada, and any subsequent modifications, amendments or updates of the said Declaration of Covenants, Conditions and Restrictions, and Naples having complied with all applicable statutory requirements of the State of Nevada, and performed all duties required by such Declaration of Covenants, Conditions and Restrictions.**

**A Notice of Delinquent Assessment Lien was recorded on August 18, 2011 in Book 20110818, Instrument No. 02904 of the Official Records of the Clark County Recorder, Nevada, said Notice having been mailed by certified mail to the owners of record; a Notice of Default and Election to Sell Real Property to Satisfy Assessment Lien was recorded on January 24, 2012 in Book 20120124, Instrument No. 00764 in the Official Records, Clark County, Nevada, said document having been mailed by certified mail to the owner of record**

**and all parties of interest, and more than ninety (90) days having elapsed from the mailing of said Notice of Default, a Notice of Sale was published once a week for three consecutive weeks commencing on September 20, 2012, in the Nevada Legal News, a legal newspaper. Said Notice of Sale was recorded on July 30, 2012 in Book 20120730 as Instrument 01448 of the Official Records of the Clark County Recorder, Nevada, and at least twenty days before the date fixed therein for the sale, a true and correct copy of said Notice of Sale was posted in three of the most public places in Clark County, Nevada, and in a conspicuous place on the property located at 4641 Viareggio Ct., Las Vegas, NV**

**On August 22, 2013 at 10:00 a.m. of said day, at Nevada Legal News, a Nevada Corporation, Front Entrance Lobby, 930 South 4th Street, Las Vegas, Nevada, 89101, Naples, by and through its Agent, exercised its power of sale and did sell the above described property at public auction. Grantee, being the highest bidder at said sale, became the purchaser and owner of said property for the sum of FIVE THOUSAND FIVE HUNDRED SIXTY THREE ($5,563.00) Dollars, cash, lawful money of the United States, in full satisfaction of the indebtedness secured by the lien of Naples.**

**IN WITNESS WHEREOF, NAPLES COMMUNITY HOMEOWNERS ASSOCIATION caused its corporate name to be affixed hereto, and this instrument to be executed by its authorized agent.**

**Dated** 8/27/13

**NAPLES COMMUNITY HOMEOWNERS ASSOCIATION**

**By:** _____

**Kirby C. Gruchow, Jr., Esq., Authorized Agent**

HEATHER L. KELLEY
Notary Public State of Nevada
No. 02-73274-1
My appt. exp. Dec. 30, 2013

**STATE OF NEVADA )**
**COUNTY OF CLARK )**

**On** 8/27/13 **, before me, the undersigned, a Notary Public in and for said State, personally appeared KIRBY C. GRUCHOW, JR., known (or proven) to me to be the authorized agent of NAPLES COMMUNITY HOMEOWNERS ASSOCIATION, and executed the within Foreclosure Deed on behalf of the corporation therein named.**

Heather L. Kelley
**NOTARY PUBLIC**

**STATE OF NEVADA**
**DECLARATION OF VALUE**

1. Assessor Parcel Number(s)
   a. 163-19-311-015
   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 RECORDERS OPTIONAL USE ONLY |
|---|
| Book_____ Page:_____ |
| Date of Recording: _____ |
| Notes: |

3.a. Total Value/Sales Price of Property $ 125,052.00
   b. Deed in Lieu of Foreclosure Only (value of property) (_____)
   c. Transfer Tax Value: $ 125,052.00
   d. Real Property Transfer Tax Due $ 640.05

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section _____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

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 _____ 8/27/13 Capacity: Agent for Seller
Kirby K. Gruchow, Jr., Esq.

Signature _____ Capacity: Agent for Buyer

| **SELLER (GRANTOR) INFORMATION (REQUIRED)** | **BUYER (GRANTEE) INFORMATION (REQUIRED)** |
|---|---|
| Print Name: Naples Community HOA | Print Name: SATICOY BAY LLC |
| Address: c/o Leach Johnson Song & Gruchow | Address: Series 4641 Viareggio Ct. |
| City: 8945 W. Russel Rd., Suite 330 | City: 900 S. Las Vegas Blvd., #810 |
| State: Las Vegas, NV Zip: 89148 | State: Las Vegas, NV Zip: 89101 |

**COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)**

Print Name: SATICOY BAY LLC SERIES 4641 Escrow #
Address: 900 S LAS VEGAS BLVD #810 VIAREGGIO CT
City: L.V State: NV Zip: 89101

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

# 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

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[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

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[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

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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

---

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.

---

[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 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
J. Daniel Yu
Principal Deputy Legislative Counsel

Bradley A. Wilkinson
Chief Deputy Legislative Counsel

DY:dtm
Encl.
Ref No. 1212030823955
File No. OP_Hammond13E2051549B9

# EXHIBIT 5

# Chapter 2. Taxes and Assessments (07/01/99)

Part of a servicer's responsibility for protecting the priority of Fannie Mae's lien on a property securing a mortgage Fannie Mae has purchased or securitized is the maintenance of accurate records on the status of taxes, ground rents, or other assessments that could become a lien against the property—and paying the related bills if it maintains an escrow deposit account for that purpose.

## Section 201 Taxes and Ground Rents (08/24/03)

The servicer must maintain accurate records on the status of real estate taxes and ground rents. The servicer of a ***first-lien mortgage loan*** usually accomplishes this by paying the bills itself using funds in the borrower's escrow deposit account. When the servicer has waived the escrow deposit account for a specific borrower, it still remains responsible for the timely payment of taxes and ground rents. Therefore, if the borrower fails to pay the taxes or ground rents, the servicer must advance its own funds to pay them, revoke the waiver, and begin escrow deposit collections to pay future bills. (Also see *Section 103.01, Waiver of Escrow Deposits (01/01/05).*)

The servicer of a ***second*** mortgage does not have to pay the bills for taxes and ground rents, but it must satisfy itself that these items are paid when due—either by the borrower or the first-lien mortgage loan servicer. If the second-lien mortgage loan servicer wishes (and the mortgage loan documents permit), it may establish an escrow deposit account to ensure that these expenses are paid promptly.

When the property securing the mortgage loan is a manufactured home, servicers must take the appropriate steps to ensure that both the manufactured home and land are taxed as real property and that a single tax bill is issued. In most cases, manufactured homes that have been converted to real property also will be taxed as real property. If this is not possible under applicable law and the dwelling must be taxed separately as personal property, the servicer's escrow systems must be adjusted to escrow for both real and personal property taxes. Further, in this event, all of Fannie Mae's requirements relating to real estate taxes apply equally to personal property taxes applicable to the dwelling.

The servicer should use the funds in the borrower's escrow deposit account to pay taxes and other related charges before any penalty date. Whenever funds are available, the servicer must pay these expenses early enough to take advantage of the maximum discounts allowed. If the deposit account balance is not sufficient to pay these obligations, the servicer should notify the borrower and then advance its own funds. The borrower may be billed for the amount the servicer advanced if (and in the manner) permitted by the mortgage loan documents, applicable law, and government regulations. If a penalty is incurred for late payments of taxes—and the borrower was a factor in delaying the payment—the servicer may bill the borrower for the penalty. Otherwise, the servicer must pay the penalty from its own funds. In such cases, Fannie Mae will reimburse the servicer for any funds it has to advance (including those for late fees and tax penalties). (Also see *Part VIII, Section 108.01, Delinquent Tax Late Fees or Penalties (01/31/03).*)

## Section 202 Special Assessments (01/31/03)

Special assessments may be imposed by special tax, municipal utility, or community facilities districts in some states; by the HOA of a PUD or condo project; or by the co-op corporation of a co-op project. The servicer must maintain accurate records on the status of any special assessments that could become a lien against a property. Generally, the borrower will pay special assessments directly, but if he or she fails to do so, the servicer must advance its own funds to pay them if that is necessary to protect the priority of Fannie Mae's lien. In a few instances, deposits to pay special assessments will be collected as part of the mortgage loan payment.

When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days' delinquent in the payment of assessments or charges levied by the association, the servicer should advance the funds to pay the charges if necessary to protect the priority of Fannie Mae's mortgage lien. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute that provides for up to six months of delinquent regular condo assessments to have lien priority over the mortgage lien, Fannie Mae will reimburse the servicer for up to six months of such advances. However, Fannie Mae will not reimburse the servicer for any fees or costs related to attempts to collect the delinquent assessments.

# EXHIBIT 6

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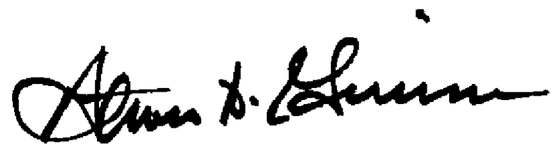

CLERK OF THE COURT

ORDD

DISTRICT COURT

CLARK COUNTY, NEVADA

FIRST 100, LLC,

Plaintiff,

v.

RONALD BURNS, et al.,

Defendants.

CASE NO.: A677693
DEPARTMENT NO. XX

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

This matter having come on for hearing on the 8th day of May, 2013; Luis A. Ayon, Esq., and Margaret E. Schmidt, Esq., appearing for and on behalf of Plaintiff; Chelsea A. Crowton, Esq., appearing for and on behalf of Defendant, U.S. Bank; Karl L. Nielson, Esq., appearing for and on behalf of Defendant, Ronald Burns; Gregory L. Wilde, Esq., appearing for and on behalf of Defendant, National Default Servicing Corporation; and the Court having hearing arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion by Defendant U.S. Bank NA to dismiss the Complaint pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure ("NRCP").

(2) This dispute arises from foreclosure proceedings conducted against a residential property located at 3055 Key Largo Drive, Unit #101, Las Vegas, Nevada 89120, identified by APN 162-25-614-153 ("the Subject Property"). The Subject

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

Property is located within a common-interest community governed by a homeowners' association as defined in NRS Chapter 116, known as the Canyon Willows Owners Association (HOA). The prior owners of the property (who are not parties to this action) failed to pay all monthly assessments due under the operating documents of the common-interest community. In response, the HOA asserted a lien against the Subject Property and initiated foreclosure proceedings pursuant to NRS 116.3116 et seq. which culminated in a foreclosure sale conducted on February 2, 2013.

(3) The Plaintiff is First 100 LLC, a Nevada limited-liability corporation, which alleges that it acquired the Subject Property at the February 2, 2013 public auction. According to the allegations of the Complaint, the Plaintiff properly recorded a Deed on February 4, 2013 reflecting its purchase of the Subject Property. However, two days later, on February 6, 2013, the Subject Property was re-sold by way of foreclosure and Trustee's Sale initiated by Defendant National Default Servicing Corporation, who asserted that it was the named trustee under Deed of Trust previously recorded against the Subject Property on October 30, 2006, as Instrument No. 200610300002548 (and referred to in the pleadings as the "BNC Mortgage Deed of Trust"). Defendant Robert Burns purchased the Subject Property at the February 6, 2013 Trustee's Sale.

(4) The Plaintiff's Complaint asserts three causes of action: (First) Wrongful Foreclosure against Defendant National Default Servicing Corporation; (Second) Declaratory Relief/Quiet Title against all Defendants; and (Third) Injunctive Relief against Defendant Burns.

(5) As framed by the parties' briefing and oral arguments, the issue before the Court is a straightforward question of law. The Plaintiff contends that the February 2 foreclosure sale conducted pursuant to NRS 116.3116 et seq. and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguished, by operation of law, any and all prior encumbrances upon the Subject Property. Thus, according to the Plaintiff, the subsequent Trustee's Sale conducted on

February 6 was unlawful because the October 30, 2006 Deed of Trust against the Subject Property had been extinguished in its entirety by the February 2 foreclosure sale. Therefore, the Plaintiff alleges that it is the rightful and legal owner of the Subject Property via its purchase of the Subject Property on February 2 free and clear of all prior encumbrances.

(6) In considering a Motion to Dismiss pursuant to NRCP 12(b)(5), the Court must accept all factual allegations of the pleadings to be true and view those allegations both liberally and in the light most favorable to the non-moving party. However, the Court need not accept the parties' assertions of law as true. The Court's analysis is limited to the factual allegations contained within the four corners of the Complaint and all inferences reasonably arising therefrom. A claim can only be dismissed if it is clear beyond any reasonable doubt that the plaintiff cannot prove any set of facts at trial that would entitle it to relief. Furthermore, a complaint can be dismissed even if all of the elements of a cause of action have been technically pled so long as the Court, relying on "judicial experience and common sense," finds that the allegations of the complaint are "conclusory" or "implausible." *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)[1].

(7) In this case, the parties do not appear to dispute that the February 2, 2013 foreclosure sale was properly conducted in accordance with all of the legal requirements of NRS Chapter 116. The parties also do not appear to dispute that the BNC Mortgage Deed of Trust was a perfected legal encumbrance upon the Subject Property properly recorded on October 30, 2006. The parties also do not appear to dispute that the lien asserted against the Subject Property by the HOA was proper and legal under the provisions of NRS Chapter 116. The parties also do not appear to dispute that, if the Plaintiff's interpretation of the legal consequences of NRS Chapter 116 is correct, the Plaintiff has properly pled the elements supporting its causes of

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[1] *Ashcroft* was decided pursuant to FRCP 12(b)(6). However, where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this Court in applying the Nevada Rules. *E.g., Executive Management Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53 (2002). NRCP 12(b)(5) is identical to FRCP 12(b)(6).

action.

(8) Therefore, the question before the Court is a straightforward question of statutory interpretation: whether a foreclosure sale properly initiated and conducted pursuant to NRS Chapter 116 automatically extinguishes all prior encumbrances on the property such that a bona fide purchaser at the foreclosure sale acquires the property free and clear of all prior encumbrances.

(9) In interpreting the scope and meaning of a statute, the Court looks first to the words of the statute. The words of a statute are assigned their ordinary meaning unless it is clear from the face of the statute that the Legislature intended otherwise. When "the language of a statute is plain and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. Adv. Op. 76 (November 23, 2011). If the Legislature has independently defined any word or phrase contained within a statute, the Court must apply the definition created by the Legislature. If, and only if, the Court determines that the words of the statute are ambiguous when given their ordinary and plain meaning, then reference may be made to other sources such as the legislative history of the statute in order to clarify the ambiguity. An "ambiguity" exists where a provision is susceptible to two reasonable interpretations.

(10) A threshold question in this case is whether the security interest represented by the BNC Mortgage Deed of Trust is senior or junior to the lien asserted by the HOA. NRS 116.3116 states in part as follows:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except...
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent....

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

(11) Thus, under NRS 116.3116, a previously perfected first security interest retains its seniority over a subsequent lien asserted by a homeowners' association *except* to the extent that the subsequent association lien is based upon unpaid regular periodic assessments for common expenses. In that event, notwithstanding that the association's lien was asserted subsequently in time, a portion of the homeowners' association lien (limited to what was unpaid during the nine months immediately preceding the lien) is given artificial priority over a previously perfected first security interest. The portion of the association lien equating to what was unpaid during those nine months is commonly said to have "super-priority" status over other prior encumbrances. If the association claims that more than nine months' assessments stand unpaid, then the amount unpaid during the nine months immediately preceding the lien is entitled to "super priority" status over other encumbrances, but any assessments remaining unpaid for more than nine months would be subordinate to other previously perfected encumbrances.

(12) The parties do not appear to dispute that the lien asserted by the HOA in this case was based upon regular periodic assessments that were unpaid during the nine

months immediately preceding the imposition of the lien. Therefore, as a matter of law, the lien asserted by the HOA is deemed to be senior to the security interest created by the BNC Mortgage Deed of Trust even though the HOA lien was asserted subsequently in time. The parties do not appear to dispute this legal conclusion.

(13) Thus, the parties appear to agree that the HOA lien was senior to the BNC Mortgage Deed of Trust at the instant in time immediately before the property was sold via foreclosure sale to the Plaintiff on February 2, 2013. However, what the parties vigorously dispute is whether the junior security interest (the BNC Mortgage Deed of Trust) was extinguished by operation of law as a result of the February 2 foreclosure sale.

(14) NRS 116.31162 states that, after a lien is asserted by a homeowner's association and certain procedures are followed, the association "may foreclose its lien by sale." If the association chooses to proceed with a non-judicial foreclosure sale, then NRS 116.31164 governs how the foreclosure sale is to occur. After the foreclosure sale is completed, NRS 116.31164 governs how the proceeds of the sale must be allocated. In particular, NRS 116.31164(3) states:

> 3. After the sale, the person conducting the sale shall....
> (c) Apply the proceeds of the sale for the following purposes in the following order:
> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
> (5) Remittance of any excess to the unit's owner.

(15) Thus, the plain language of NRS 116.31164 expressly contemplates that the proceeds must first used to pay the expenses of the sale, taxes and other governmental charges, legal expenses, and the association's lien, and then to satisfy

"subordinate claim[s] of record."

(16) In this case, the parties agree that the proceeds of the sale totaled only approximately $2,000.00, far less than what would have been required to pay off all of the liens and security interests that existed against the Subject Property prior to the foreclosure sale. Accordingly, the question before the Court can be phrased as follows: when the proceeds from a foreclosure sale conducted pursuant to NRS 116.31164 are inadequate to satisfy all of the various lienholders when distributed as required in NRS 116.31164(3), does the failure to satisfy the subordinate interests mean that those subordinate interests survive the foreclosure sale to the extent that they remain unsatisfied, or instead that those subordinate interests are extinguished by operation of law such that a bona fide third-party purchaser at the foreclosure sale takes the property free and clear of any unsatisfied subordinate encumbrances?

(17) The Plaintiff avers that the latter case is true. Consequently, the Plaintiff asserts that because all subordinate interests were extinguished on February 2 when it acquired the Subject Property, the subsequent foreclosure sale conducted on February 6 based upon an unpaid subordinate security interest was unlawful. On the other hand, the Defendant avers that the former must be true. Consequently, the Defendant avers that its subordinate security interest survived the February 2 sale because the interest remained unsatisfied from the proceeds of that sale, and accordingly it possessed the legal right to foreclose upon the Subject Property and trigger a second foreclosure sale in order to satisfy its subordinate interests. In effect, the Defendant argues that the Plaintiff, by purchasing the Subject Property for an amount insufficient to pay off all existing encumbrances, only acquired the property "subject to" those unsatisfied encumbrances.

(18) The Court has reviewed the entirety of NRS Chapter 116, and there appears to be no statutory provision that expressly states that an unsatisfied junior lien either is, or is not, extinguished by operation of law as a consequence of a foreclosure sale conducted pursuant to NRS 116.31164. In their briefs, the parties are also unable

to identify any particular provision expressly on point. Therefore, in analyzing the answer to this question, the Court must consider other sources, such as the legislative history of NRS 116.31164, and other similar statutes contained within the NRS.

(19) NRS Chapter 116 was originally introduced in 1991 as Assembly Bill 221, with the stated purpose of "adopt[ing] the Uniform Common-Interest Ownership Act," or UCIOA (Preamble of AB 221, introduced January 24, 1991; statement of introduction of AB 221, Minutes of the Assembly Committee on Judiciary, February 20, 1991). At the time, the UCIOA had already been adopted in several other states and was under consideration in at least 3 others. (Memorandum dated March 13, 1991 from Uniform Common Interest Ownership Act Subcommittee, in the legislative record as an exhibit to Minutes of the Assembly Committee on Judiciary, March 20, 1991). NRS 116.3116 originally corresponded to Section 100 of AB 221, and NRS 116.31164 originally corresponded to Section 102 of AB 221. The "super priority" lien verbiage included within Section 100 of AB 221 is identical to NRS 116.3116 as it exists today, except that the original "super priority" lien was limited to assessments unpaid during the six months (rather than 9 months) immediately preceding the lien. The time period was expanded to nine months in 2009 by Assembly Bill 204.

(20) NRS 116.3116 was subjected to various technical amendments in 1993 through AB 612 (which did not affect the "super priority" language at issue here). During testimony in support of the technical amendments, one of the drafters of the original bill testified that:

> "As a general proposition, it makes good sense to follow a uniform law as closely as possible, utilizing the optional suggestions in the uniform act to customize the law as necessary. The corresponding benefit -- especially important in a small state like Nevada -- is our own version of a uniform law with precedent in other uniform law jurisdictions. Maintaining the uniform law also makes available the very helpful explanatory comments, some of which contain illustrative examples, and all of which, like the act itself, represent not only very careful draftsmanship, but the input of all of the different groups involved in the homeowner association process; that is, developers, consumers, lenders, local governmental authorities, state regulators, managers and other

professionals, as well as homeowners associations themselves." (Testimony of Michael Buckley, Chairman of the Uniform Common-Interest Ownership Act Subcommittee, before the Assembly Judiciary Committee on May 20, 1993).

(21) Thus, one of the principal drafters of the bill expressly urged that the Nevada Legislature adhere as closely as practicable to the uniform version of the UCIOA, and the Nevada Legislature did so by enacting the "super priority" language originally included in the UCIOA into NRS 116.3116 without any amendment (and with virtually no debate). Consequently, the legislative history surrounding AB 221 contains virtually nothing useful to the Court's analysis in the case at hand. However, the Legislature apparently contemplated that adoption of the uniform language without amendment would enable Nevada courts to look to "precedent in other uniform law jurisdictions" as well as the background and explanatory comments accompanying the UCIOA in resolving questions relating to the scope and meaning of NRS 116.3116.

(22) Indeed, the Nevada Supreme Court regularly looks outside the confines of NRS Chapter 116 and to the Uniform Act (as well as other sources) in interpreting various provisions of NRS Chapter 116. *E.g., Holcomb Condominium HOA v. Stewart Venture LLC*, 129 Nev. Adv. Op. 18 (April 4, 2013) ("the term 'separate instrument' is not defined in NRS Chapter 116 or the Uniform Common-Interest Ownership Act (UCIOA)"); *Beazer Homes Holding Corp. v. District Court*, 128 Nev. Adv. Op. 66 (Dec. 27, 2012) (citing "the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3–102 of the Uniform Common Interest Ownership Act, upon which NRS 116.3102 is based"); *Boulder Oaks Community Association v. B&J Andrews*, 169 P.3d 1155 (2007) (unpublished) ("NRS Chapter 116 is Nevada's version of the Uniform Common-Interest Ownership Act and largely mirrors the uniform act [and citing to] the commentary to [the UCIOA]").

(23) NRS 116.3116 is modeled upon Section 3-116 of the 1982 version of the UCIOA, which was originally drafted by the National Conference of Commissioners on Uniform State Laws. NRS 116.3116 deviates from Section 3-116 in expanding the period of "super priority" to include unpaid assessments occurring during the preceding

9 months instead of merely 6 months, but otherwise NRS 116.3116 is identical to UCIOA Section 3-116.

(24) Official Comment 1 to Section 3-116 describes the purpose of the section as follows:

> "To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. ... A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity of protecting the priority of the security interests of lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provision of some state statutes which forbid some lending institutions from making loans not secured by first priority liens [state law should be consulted]."

(25) Thus, the drafters of the UCIOA expressly contemplated that, as a practical matter in most cases, the holder of the first security interest would seek to protect its interest from subordination to a "super priority" lien by simply paying the unpaid assessments. However, the Comment does not expressly specify whether, if a lender chooses not to do so and instead permits the property to proceed to foreclosure, the lender's first security interest is thereby extinguished. Furthermore, nothing else in either the plain text or comments of UCIOA appear to relate specifically to the question of whether a foreclosure sale initiated due to unpaid assessments extinguishes all other junior liens, including a first security interest rendered junior because of the "super priority" provision. Quite to the contrary, Comment 1 suggests that the drafters of the UCIOA intended to leave this question to state law rather than establishing uniform national standards.

(26) In Opposition to the Motion, the Plaintiff notes that, as a general principle of Nevada law, foreclosure of a superior security interest extinguishes all junior interests that did not participate in the foreclosure process. *E.g., Brunzell v.*

*Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). The Plaintiff also notes that the Nevada Department of Business and Industry has issued an administrative opinion, dated December 12, 2012, that interprets NRS Chapter 116.3116 such that a foreclosure based upon a "super priority" lien extinguished a first security interest made junior only due to the "super priority" statute. The Plaintiff also cites to an opinion by a Washington State appellate court (interpreting a statute identical to the UCIOA) finding that a foreclosure based upon a "super priority" lien extinguished a first security interest that was given notice of the pending foreclosure and yet chose not to participate. *Summerhill Village HOA v. Roughly*, 270 P.2d 639 (Wash.Ct.App. 2012). The Plaintiff also notes that some Judges of this Judicial District have resolved this question in favor of the Plaintiff's argument. The Court also notes that at least one scholarly commentator has opined that a non-judicial foreclosure sale under the UCIOA extinguishes all junior liens that did not participate in the foreclosure process as "necessary parties." *See*, Winokur, "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under The UCIOA," 27 Wake Forest Law Review 353, 378 n.106 (1992) ("foreclosure extinguish[es] the Less-Prioritized Lien").

(27) In support of its Motion, the Defendant cites to an opinion issued by Judge Dawson of the U.S. District Court, *Diakonos Holdings LLC v. Countrywide Home Loans*, 2013 WL 531092 (D.Nev. February 11, 2013), rejecting the reasoning of the Washington court in *Summerhill*. The Defendant also cites to various unpublished, non-precedential Orders issued by other Judges of this Judicial District that have found that a foreclosure sale based upon a "super priority" lien does not extinguish a first security interest upon the property. (*See*, Defendant's Motion, pages 11-14).

(28) In short, the situation before this Court appears to be as follows. By this Motion, this Court is asked to interpret the scope and meaning of a statute that was enacted by the Nevada Legislature after virtually no meaningful debate, that was modeled on a broad uniform act that specifically left unanswered the question raised by

this Motion, whose legislative sponsor urged the Legislature not to deviate from the text of the uniform act so that the courts of this State could rely upon precedent from other states, and upon which the courts of different states, and the Judges of this Judicial District, have taken different positions.

(29) In the absence of clear guidance from the text of the statute or its legislative history, this Court is left to examine other sources for guidance. One such source consists of other statutes that relate to matters similar to those addressed by NRS 116.3116.

(30) In Nevada, holders of security interests against real property may initiate foreclosure through multiple statutory avenues. For example, the holder of a mortgage may initiate a judicial foreclosure via NRS 40.430 et seq. The holder of a deed of trust may also initiate a non-judicial foreclosure (commonly known as a "Trustee's Sale") pursuant to NRS 107.080 et seq. A landlord (or other assignee of the right to receive rent from real property) may also seek the appointment of a receiver to initiate a foreclosure upon a security instrument pursuant to NRS 107A.260.

(31) It is well-settled that any foreclosure sale conducted pursuant to NRS 40.462, 107.080, or 107A.260 automatically extinguishes all junior security interests against the property. *E.g., Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Thus, the Defendant is essentially arguing that a foreclosure conducted pursuant to NRS 116.3116 is something wholly unique under Nevada law, because it would represent the only type of foreclosure permitted in Nevada under which junior liens would not be automatically extinguished.

(32) However, if the Defendant is correct that foreclosures conducted pursuant to NRS 116.3116 are unique under Nevada law, then there must exist something in the text or legislative history of NRS 116.3116 that says so. Under settled rules of statutory interpretation, the Court cannot read NRS 116.3116 as a unique, unprecedented, and *sui generis* departure from long-established norms relating to

foreclosure sales in Nevada unless there is some indication in the text or legislative history that the Legislature intended this to be the case. There is not. Quite to the contrary, the complete absence of anything within NRS Chapter 116 regarding the question of extinguishment suggests that the Legislature intended that Chapter 116 foreclosures would be handled as any other type of foreclosure.

(33) Notably, NRS 40.462 was enacted in 1989, and NRS 107.080 was originally enacted in 1927. In other words, both NRS 40.462 and 107.080 pre-date the enactment of NRS 116.3116, as does the opinion of the Nevada Supreme Court in *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). Thus, the Legislature must be presumed to have known when NRS 116.3116 was enacted that the normal consequence of a foreclosure sale in Nevada would be that all junior liens are automatically extinguished. Had the Legislature intended that NRS 116.3116 represent a singular departure from established legal norms, the Legislature certainly could have included language to that effect. The Court notes that the Legislature utilizes a variety of common phrases throughout the NRS when it intends to create exceptions to other statutes; *see, for example*, NRS 78.090(1) ("Notwithstanding the provisions of NRS 77.300..."); NRS 62B.390(1) ("Except as otherwise provided in NRS 62B.400..."); NRS 62E.010(2) ("Except as otherwise provided by specific statute...."); NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter..."); NRS 48.025 ("All relevant evidence is admissible, except as otherwise provided by this title..."); NRS 51.075(2) ("The provisions of NRS 51.085 to 51.305, inclusive, are...not restrictive of the exception provided by this section"). Yet none of these phrases are contained anywhere within NRS Chapter 116 in any context that suggests an intention to depart from the ordinary rule that, in Nevada, foreclosure sales extinguish junior liens. The absence of any language to this effect suggests that this was not the intention of the Legislature.

(34) Moreover, NRS 116.3116 et seq. contains a series of specific departures and deviations from the foreclosure proceedings established in NRS 40.462 and 107.080, but none that relate to the extinguishment or non-extinguishment of junior liens. For example, the idea of "super priority" exists nowhere in NRS Chapter 40 or 107. Similarly, neither NRS 40.462 nor 107.080 include the kinds of specific notice provisions required by NRS Chapter 116 before a foreclosure sale can be initiated. Yet the Legislature included no language in NRS 116.3116 that can be read as departing from the principle of extinguishment. It is well-settled that the inclusion of one thing must be read as the implying the omission of another (*"expressio unius est exclusio alterius"*). Thus, when the Legislature chose to include language designed to deviate in certain specific ways from established foreclosure practices, but not language that changes whether junior liens are extinguished, that choice must be deemed by this Court to have been intentional and deliberate.

(35) Furthermore, not only did the Legislature include no language departing from the principle of extinguishment under NRS Chapter 40 and 107, it included language in NRS Chapter 116 highly similar to language contained in NRS Chapter 107 that expressly recites that junior liens are extinguished. NRS 107.080(5) recites that a Trustee's Sale "vests in the purchaser the title of the grantor...without equity or right of redemption." NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption." This similarity suggests that the Legislature intended that a purchaser at a NRS Chapter 116 foreclosure sale acquires exactly the same title as he would have acquired had the foreclosure been a NRS Chapter 107 Trustee's Sale, i.e., title free and clear of junior encumbrances. Moreover, the words "without equity or right of redemption" were defined long ago by the Nevada Supreme Court, which held that a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all

equity of redemption as completely as a decree of court." *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003).

(36) Thus, the operation of NRS 116.3116 appears to be as follows. NRS 116.316 creates a series of specific and unique requirements when an HOA imposes a lien against a property and wishes to initiate a foreclosure sale to satisfy unpaid assessments. Where NRC Chapter 116 is silent, the Court must presume that the Legislature intended that the ordinary and established principles governing the conduct of foreclosure sales in Nevada apply to "fill in the gaps."

(37) Accordingly, when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages. NRS 116.3116(2). However, in order to perfect this "super priority" lien, the association must give proper notice to all parties including any holders of first security interests whose priority will have been adversely affected. NRS 116.31163(2). Furthermore, if the association wishes to foreclose upon the property in order to satisfy its lien, it may do so, but only after given specific notice to all subordinate lienholders of record. NRS 116.311635(1)(a)(2). As expressly contemplated by Comment 1 to UCIOA Section 3-116, most subordinate lienholders would likely protect their interest from extinguishment by simply paying off the unpaid assessments. Indeed, that appears to be the specific purpose of requiring that those lienholders be given notice under NRS 116.31163(2) and NRS 116.311635(1)(a)(2). But if those subordinate lienholders fail to stave off foreclosure by paying off the assessment, then their subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). After the sale is completed, any subordinate claims are automatically extinguished by operation of law. *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). If the lender's mortgage remains unsatisfied after the foreclosure sale, it may be

able to pursue a deficiency action against the mortgagor of record (the original defaulting party), but not any claim against the property itself or against new bona fide third-party who purchased the property at the foreclosure sale.

(38) In their briefs, both parties advance various policy and "fairness" arguments in support of their respective positions. For example, the Defendant argues that permitting a bona-fide third-party purchaser to procure a property for a mere $2,000 while extinguishing a mortgage worth many times that amount is "unfair". However, any junior lienholder has a simple remedy for this unfairness -- as expressly contemplated by Comment 1 to UCIOA Section 3-116, a lender can avoid foreclosure and protect its interest from extinguishment by simply intervening to pay off the assessments.

(39) Moreover, the Court notes that the Defendant's argument would lead to an equally "unfair" result. In this case, if the Defendant's argument were adopted, then the net result would be that the Plaintiff will have paid $2,000 to satisfy the association's lien, yet does not own the Subject Property. In effect, the Plaintiff paid off the lien asserted by the HOA and acquired nothing in return, because immediately after it acquired the Subject Property, the property was taken by the Defendant and sold to someone else for more money. This result appears fundamentally unfair to bona fide third-party purchasers who will have paid off the assessments that the lender failed to pay despite having been given specific notice of the existence of the unpaid assessments, and despite the obvious intent of the drafters of the UCIOA that, in most cases, the lender would protect its own interest by paying off the assessments. This result would achieve the perverse outcome of actually rewarding sloth and inaction on the part of the lender, who, as expressly recognized by Comment 1 to UCIOA Section 3-116, is the one party (other than the defaulting owner) in a position to stop the foreclosure, protect its own interests, and make the association whole by paying the assessments. Instead, the Defendant's interpretation of NRS 116.3116 would result in the association and the lender being made whole at the expense of bona fide third-party

purchasers, a result that is quite obviously absurd.

(40) The Defendant appears to suggest this outcome, however unfair, is the natural consequence of the fact that the Plaintiff attempted to purchase the Subject Property for less than the cumulative total of all existing encumbrances upon the Subject Property, and "buyer beware" because, had the Plaintiff properly done its homework, it should have known that it might stand to lose the Subject Property unless it purchased the Subject Property for an amount sufficient to pay off all existing liens.

(41) But, as noted, the party best-positioned to protect its interests (and incidentally to protect any innocent third parties) is the lender whose interests are directly at stake. It is a well-recognized principle of Nevada law that when both potential interpretations of a statute or rule are unfair to someone, the brunt of any unfairness should not fall on innocent third parties. *E.g., NC-DSH Inc. v. Garner*, 125 Nev. 647, 656 (2009) (in choosing who should suffer from the fraudulent actions of an agent, "ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt"); *Rothman v. Fillette*, 469 A.2d 543, 545 (Pa. 1983) (cited approvingly in *NC-DSH Inc. v. Garner*, 125 Nev. 647, 656 (2009)) ("a principal acting through an agent in dealing with an innocent third party must bear the consequences of the agent's fraud" because of "the long recognized principle that where one of two innocent persons must suffer because of the fraud of a third...the loss should be borne by him who put the wrongdoer in a position of trust and confidence and thus enabled him to perpetrate the wrong"). *See also, Tri-County Equipment & Leasing v. Klinke*, 128 Nev. Adv. Op. 33 (June 28, 2012) (Gibbons, J., concurring) (when one party is likely to receive a windfall, it should be the party who lacks any responsibility for the situation) (relevant citations omitted). In this case, it is true that the lender cannot be said to bear responsibility for the non-payment of assessments by the record owner. However, the lender is in a far better position to protect its interests, make the association whole, and eliminate the need for foreclosure than a third-party purchaser at the foreclosure sale with no connection to the lender, the

HOA, or the previous owner. Yet, accepting the Defendant's argument in this case would result in the Plaintiff being the only party who suffers any monetary loss from the non-payment of assessments, as both the HOA and the Defendant have been made whole. That result is fundamentally unfair and could not have been what the Legislature intended.

(42) In a sense, this outcome can be seen as unfair to the lender whose interest in this case was extinguished by the purchase of the Subject Property for a mere $2,000. However, Comment 1 to UCIOA Section 3-116 proposes two simple solutions. First, the lender (having been given specific notice of the association's "super priority" lien) can protect its interest by paying the unpaid assessments before foreclosure is initiated by the association, thereby removing the "super priority" lien and ensuring that its security interest is the most senior one remaining. Alternatively, and more proactively, as noted by Comment 1 the lender can ensure that there can never be a default or a "super priority" lien by simply impounding money in advance and paying the assessments itself, much as lenders now commonly impound money to pay tax bills in order to prevent tax liens and government tax foreclosures. In either case, the association will have been made whole, thus accomplishing the fundamental purpose of NRS 116.3116, and the lender can seek to satisfy its own security by initiating its own foreclosure at which its security interest would be the most senior encumbrance.

(43) In general, however, questions regarding the fairness of any public policy are for the Legislature to resolve, not for the Judiciary. The Legislature is entitled to enact legislation that may, in some instances, be unfair to some parties. But the Judiciary cannot substitute its own judgment for that of the Legislature and read a statute in a manner other than as it is drafted merely because the application of the statute might seem unwise. In this case, the disposition of this Motion is based upon the application of clear principles of statutory interpretation. In the complete absence of any language in NRS Chapter 116 reflecting a Legislative intent to depart from the

established principle that subordinate liens are extinguished by foreclosure sales, the Court must assume that the Legislature intended that Chapter 116 foreclosures operate precisely in the same manner.

(44) For the foregoing reasons, the Defendant's Motion to Dismiss is DENIED.

DATED: May 30, 2013

JEROME T. TAO
DISTRICT COURT JUDGE

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

Luis A. Ayon, Esq., and Margaret E. Schmidt, Esq. - Via Facsimile: 792-9002
Karl L. Nielson, Esq. - Via Facsimile: 692-8099
Gregory L. Wilde, Esq. - Via Facsimile: 258-8787
Chelsea A. Crowton, Esq. - Via Facsimile: 946-1345

Paula Walsh

Paula Walsh, Executive Assistant

# BROADCAST REPORT

TIME : 05/30/2013 16:09
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TEL : 7026714440
SER.# : 000C9N858027

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# EXHIBIT 7

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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

Plaintiff,

vs.

WELLS FARGO BANK, N.A., a national association; JOSEPH A. HOLMES, an individual; SONJA J. PALMER, an individual; and DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. 2:13-cv-01153-APG-PAL

**ORDER GRANTING PRELIMINARY INJUNCTION**

Plaintiff's motion for preliminary injunction was heard on July 23, 2013 at 2:00 p.m. Diana S. Cline, Esq. and Jacqueline A. Gilbert of Howard Kim & Associates appeared on behalf of Plaintiff SFR Investments Pool 1, LLC ("SFR"). Chelsea A. Crowton, Esq. of Wright Finlay & Zak LLP appeared on behalf of Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). The court has considered the motion, the pleadings and papers on file herein, and the arguments of counsel.

The court hereby finds that SFR has met its burden for injunctive relief. Plaintiff has a substantial likelihood of success on the merits and will suffer irreparable harm if Wells Fargo continues with the non-judicial foreclosure proceedings before the conclusion of this litigation.

Before Wells Fargo filed its notice of removal, Plaintiff filed an application for temporary restraining order and motion for preliminary injunction, seeking to enjoin Defendant Wells Fargo, its successors, assigns and agents from continuing foreclosure proceedings, selling, transferring, or otherwise conveying the real property commonly known as **2650 Upland Bluff Drive, Las Vegas, NV 89142 Parcel No. 161-11-112-032** (the "Property"). On July 10, 2013,

this Court issued a temporary restraining order enjoining the trustee's sale scheduled for Friday, July 12, 2013 and required Plaintiff to post a $5,000 bond.

Plaintiff acquired title to the Property through a quit claim deed dated March 6, 2013 from Sunrise Highlands Community Association (the "Association"). According to a foreclosure deed recorded on February 14, 2013, the Association acquired title to the Property on June 27, 2012 at a publicly-held foreclosure auction pursuant to the powers conferred by the Nevada Revised Statutes 116 *et seq.* and a Notice of Delinquent Assessment (Lien), recorded on November 24, 2010.

Defendants Joseph A. Holmes and Sonja J. Palmer obtained title to the Property in August of 2007 through a Grant, Bargain, Sale Deed. On August 10, 2007, Wells Fargo recorded a deed of trust against the Property to secure a loan to Holmes and Palmer ("Deed of Trust"). A Notice of Default and Election to Sell pursuant to the terms of Deed of Trust was recorded on December 10, 2012. A Notice of Sale pursuant to the terms of the Deed of Trust was recorded on June 11, 2013.

Plaintiff argues that Wells Fargo's foreclosure of its Deed of Trust is improper because the July 27, 2013 foreclosure of the Association's lien containing super priority amounts extinguished the Deed of Trust. Wells Fargo argues that NRS 116.3116(2) establishes a "payment priority" that requires payment to the Association if a first security interest forecloses, but does not give the Association the ability to extinguish a first security interest through foreclosure of an Association's lien.

The court finds that NRS 116.3116 is clear, not ambiguous; therefore, the court need not look to the legislative history to interpret the statute.[1] Under NRS 116.3116(1), the Association has a lien on the Property for amounts including delinquent assessments. Pursuant to NRS 116.3116(4), the recording of the Association's declaration of covenants, conditions and

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[1] Even if the court were to consider legislative history and other sources, the result would be the same. The court has considered the May 30, 2013 order issued by the Honorable Judge Jerome Tao in *First 100, LLC v. Burns, et al*, (Eighth Judicial District Court Case No. A-13-677693-C), which contains a detailed analysis of NRS 116.3116. The Court finds Judge Tao's analysis in that order persuasive.

restrictions on August 1, 2006 constituted perfection and record notice of the Association's lien.

NRS 116.3116(2) provides that the entire Association Lien

> is prior to all other liens and encumbrances of 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.
>
> NRS 116.3116(2) further provides that a portion of the Association Lien has priority over

a first security interest in the Property:

> [the Association 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[.]

The Association may foreclose on its lien, including the portion of its lien that has priority over a first security interest, through the procedures outlined in NRS 116.31162 through NRS 116.31168.

In this case, the Deed of Trust held by Wells Fargo is inferior to any super priority portion of the Association's lien. Therefore, the proper foreclosure of the Association's lien containing super priority amounts would have extinguished the Deed of Trust. Accordingly, Plaintiff has demonstrated a likelihood of success on the merits.

It is up to the Nevada Legislature, not this court, to decide whether the statutory scheme that allows a homeowners association lien to have priority over a first security interest is sound public policy. This court's obligation is to enforce the law as written, absent some statutory or constitutional infirmity.

IT IS HEREBY ORDERED that Defendant Wells Fargo Bank, N.A. and its agents are restrained and enjoined from continuing with foreclosure proceedings regarding (and from selling, transferring, or otherwise conveying) the real property commonly known as **2650**

**Upland Bluff Drive, Las Vegas, NV 89142 Parcel No. 161-11-112-032** (the "Property") until the conclusion of this litigation or further order of this court.

IT IS FURTHER ORDERED that the $5,000.00 bond posted by Plaintiff on July 11, 2013 as security for the temporary restraining order issued by this court on July 10, 2013 shall remain in place as security for this preliminary injunction. Plaintiff also shall post an additional security bond in the amount of $500.00 per month for each month that this injunction remains in place. The parties may stipulate to have the bond amounts deposited into an interest-bearing escrow or similar account, rather than into the court.

IT IS FURTHER ORDERED that Plaintiff shall maintain the Property including, but not limited to, paying all homeowners association assessments and taxes, and carrying hazard insurance in an appropriate amount. Plaintiff shall disclose to Wells Fargo the amount and coverage of that insurance. If, during the litigation, Wells Fargo believes the Property is not being properly maintained or protected, or that an additional bond amount is needed, it may seek appropriate relief from this court.

Dated this 25th day of July, 2013 at 8:15 a.m.

UNITED STATES DISTRICT JUDGE

# EXHIBIT 8

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

| | |
|---|---|
| 7912 LIMBWOOD COURT TRUST,<br><br>Plaintiff,<br><br>v.<br><br>WELLS FARGO BANK, N.A.; MTC FINANCIAL INC.; and FEDERAL HOME LOAN MORTGAGE CORPORATION,<br><br>Defendants. | 2:13-CV-00506-PMP-GWF<br><br>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 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 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 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 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 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 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 required, 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). 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 (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 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, 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 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). 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., 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 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).

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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 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).

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[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 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 holder "has notified the association, before the mailing of the notice of sale, of the existence of the security interest." Id. §116.311635(b)(2); see also id. § 116.61162(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; 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 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) (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, 563 P.2d 82, 86 (Nev. 1977); Erickson Constr. Co. v. Nev. Nat'l Bank, 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., 734 P.2d 724, 725 (Nev. 1987); Keever v. Nicholas Beers Co., 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 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 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, 191 P.3d 1159, 1165 (Nev. 2008); Folio v. Briggs, 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.

In a December 2012 advisory opinion, the Real Estate Division addressed three questions: (1) whether, 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

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[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.)

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 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 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 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 116.31161." (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 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, 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 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. Petersen & Sons Constr. Co., 929 P.2d 937, 939 (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 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 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.

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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 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 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 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

PHILIP M. PRO
United States District Judge

# EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF NEVADA

9320 POKEWOOD CT TRUST,
Appellant,
vs.
WELLS FARGO BANK OF NEVADA, N.A.; AND QUALITY LOAN SERVICE CORPORATION,
Respondents.

No. 63009

FILED

APR 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

ORDER GRANTING TEMPORARY INJUNCTION

This is an appeal from a district court order denying a preliminary injunction. Appellant has filed an emergency motion seeking a preliminary injunction from this court to prevent respondents from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending receipt and consideration of a response to appellant's motion. Respondents shall have 11 days from the date of this order to file and serve a response to appellant's motion for an injunction.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Law Offices of Michael F. Bohn, Ltd.
McCarthy & Holthus, LLP/Las Vegas
Wright, Finlay & Zak, LLP/Las Vegas

IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICO BAY LLC, SERIES 6629 TUMBLEWEED RIDGE 103 TRUST,
Appellant,
vs.
BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-23CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-23B,
Respondent.

No. 63011

FILED

APR 19 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Moore
DEPUTY CLERK

ORDER GRANTING TEMPORARY INJUNCTION

This is an appeal from a district court order denying a preliminary injunction. Appellant has filed an emergency motion seeking a preliminary injunction from this court to prevent respondent from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending receipt and consideration of a response to appellant's motion. Respondent shall have 11 days from the date of this order to file and serve a response to appellant's motion for an injunction.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Allan R. Earl, District Judge
Law Offices of Michael F. Bohn, Ltd.
McCarthy & Holthus, LLP/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

RIVER GLIDER AVE TRUST,
Appellant,
vs.
BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE OF THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-24CB, MORTGAGE PASS-THROUGH CERTIFICATES,
Respondent.

No. 63077

FILED

APR 29 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

*ORDER GRANTING MOTION TEMPORARY INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction. Appellant has filed an emergency motion seeking a preliminary injunction from this court to prevent respondent from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending receipt and consideration of a response to appellant's motion. Respondent shall have 11 days from the date of this order to file and serve a response to appellant's motion for an injunction.

It is so ORDERED.

_____, J.
Gibbons

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Allan R. Earl, District Judge
Law Offices of Michael F. Bohn, Ltd.
Miles, Bauer, Bergstrom & Winters, LLP
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST,
Appellant,
vs.
WELLS FARGO BANK, N.A.; AND MTC FINANCIAL INC., D/B/A TRUSTEE CORPS,
Respondents.

No. 63611

FILED

JUL 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

*ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction and granting a motion to dismiss in a quiet title action. Appellant has filed an emergency motion seeking a temporary injunction from this court to prevent respondents from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending receipt and consideration of a response to appellant's motion. Respondents shall have 11 days from the date of this order to file and serve a response to appellant's motion for an injunction. In their response, respondents shall clarify whether there is, in fact, a pending foreclosure sale.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Saitta

cc: Hon. Stefany Miley, District Judge
Law Offices of Michael F. Bohn, Ltd.
Robison Belaustegui Sharp & Low
Snell & Wilmer LLP/Salt Lake City
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

8025 VILLA ROSARITO STREET TRUST,
Appellant,
vs.
QUALITY LOAN SERVICE CORPORATION,
Respondent.

No. 63909

FILED

SEP 12 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Mallow
DEPUTY CLERK

*ORDER GRANTING TEMPORARY INJUNCTION*

This is an appeal from a district court order granting a motion to dismiss in a quiet title action. Appellant has filed an emergency motion seeking a preliminary injunction from this court to prevent respondent from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending further order of this court. Respondent shall have until Monday, September 23, 2013, to file and serve any opposition to appellant's motion for an injunction. Thereafter, appellant shall have until Wednesday, October 2, 2013, to file and serve any reply to respondent's opposition.

It is so ORDERED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Mark R. Denton, District Judge
Law Offices of Michael F. Bohn, Ltd.
McCarthy & Holthus, LLP/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARADISE HARBOR PLACE TRUST,
Appellant,
vs.
NATIONSTAR MORTGAGE, LLC.; AND COOPER CASTLE LAW FIRM, LLP,
Respondents.

No. 63823

FILED

AUG 21 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING TEMPORARY INJUNCTION*

This is an appeal from a district court order granting a motion to dismiss in a quiet title action. Appellant has filed an emergency motion seeking a preliminary injunction from this court to prevent respondents from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending further order of this court. Respondents shall have until 4 p.m., on Tuesday, September 3, 2013, to file and serve any opposition to appellant's motion for an injunction. Thereafter, appellant shall have until 4 p.m., on Thursday, September 12, 2013, to file and serve any reply to respondents' opposition.

It is so ORDERED.

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Saitta

cc: Hon. Stefany Miley, District Judge
Law Offices of Michael F. Bohn, Ltd.
The Cooper Castle Law Firm, LLC
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARADISE HARBOR PLACE TRUST,
Appellant,
vs.
SELENE FINANCE, LP,
Respondent.

No. 64183

FILED

OCT 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING TEMPORARY INJUNCTION*

This is an appeal from a district court summary judgment in a quiet title action. Appellant has filed an emergency motion seeking an injunction from this court to prevent respondent from conducting a foreclosure sale on the subject property.

Having reviewed appellant's motion and the supporting documents, we conclude that a temporary injunction is warranted. NRAP 8(c). Accordingly, we temporarily enjoin any foreclosure sale concerning the subject property, pending further order of this court. Respondent shall have until October 29, 2013, to file and serve any opposition to appellant's motion for an injunction. Thereafter, appellant shall have until November 7, 2013, to file and serve any reply to respondent's opposition.

In the opposition and reply, we direct the parties, in addition to their contentions, to clarify whether respondent received notice of the previous foreclosure sale pursuant to NRS 116.31163 and NRS 107.090(3),

and if not, how the lack of notice affects appellant's current claim to title on the subject property.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Stefany Miley, District Judge
Hon. Elissa F. Cadish, District Judge
Law Offices of Michael F. Bohn, Ltd.
Wright, Finlay & Zak, LLP/Las Vegas
Eighth District Court Clerk

# EXHIBIT 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICO BAY LLC, SERIES 6629 TUMBLEWEED RIDGE 103 TRUST,
Appellant,
vs.
BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-23CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-23B,
Respondent.

No. 63011

FILED

JUN 10 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction in a real property action. Appellant filed a motion in this court seeking a preliminary injunction to prevent respondent from conducting a foreclosure sale on the subject property pending our resolution of this appeal. On April 19, 2013, we entered a temporary injunction, pending our consideration of any response to the motion. Respondent has since opposed the motion.

Having considered appellant's motion and the opposition in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we

enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Allan R. Earl, District Judge
Law Offices of Michael F. Bohn, Ltd.
McCarthy & Holthus, LLP/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

9320 POKEWOOD CT TRUST,
Appellant,
vs.
WELLS FARGO BANK OF NEVADA, N.A.; AND QUALITY LOAN SERVICE CORPORATION,
Respondents.

No. 63009

FILED

JUN 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction in a real property action. Appellant filed a motion in this court seeking a preliminary injunction from this court to prevent respondents from conducting a foreclosure sale on the subject property pending our resolution of this appeal. On April 18, 2013, we entered a temporary injunction pending our consideration of any response to the motion. Respondents have since opposed the motion.

Having considered appellant's motion and oppositions thereto in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Law Offices of Michael F. Bohn, Ltd.
McCarthy & Holthus, LLP/Las Vegas
Wright, Finlay & Zak, LLP/Las Vegas

IN THE SUPREME COURT OF THE STATE OF NEVADA

RIVER GLIDER AVE TRUST,
Appellant,
vs.
BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE OF THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-24CB, MORTGAGE PASS-THROUGH CERTIFICATES,
Respondent.

No. 63077

FILED

JUN 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction in a real property action. Appellant filed a motion in this court seeking a preliminary injunction to prevent respondent from conducting a foreclosure sale on the subject property pending our resolution of this appeal. On April 29, 2013, we entered a temporary injunction, pending our consideration of any response to the motion. Respondent has since opposed the motion.

Having considered appellant's motion and the opposition thereto in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

_____, J.
Gibbons

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Allan R. Earl, District Judge
Law Offices of Michael F. Bohn, Ltd.
Akerman Senterfitt/Las Vegas
Miles, Bauer, Bergstrom & Winters, LLP
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST,
Appellant,
vs.
WELLS FARGO BANK, N.A.; AND MTC FINANCIAL INC., D/B/A TRUSTEE CORPS,
Respondents.

No. 63611

FILED

AUG 23 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court order denying a preliminary injunction and granting a motion to dismiss in a quiet title action. Appellant filed a motion in this court seeking a preliminary injunction to prevent respondents from conducting a foreclosure sale on the subject property pending our resolution of this appeal. On July 25, 2013, we entered a temporary injunction, pending our consideration of any response to the motion. Respondent Wells Fargo Bank, N.A., has since opposed the motion.

Having considered appellant's motion and the opposition in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

Hardesty, J.

Parraguirre, J.

Cherry, J.

cc: Hon. Stefany Miley, District Judge
Law Offices of Michael F. Bohn, Ltd.
Robison Belaustegui Sharp & Low
Burke, Williams & Sorensen, LLP
Snell & Wilmer LLP/Salt Lake City
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARADISE HARBOR PLACE TRUST,
Appellant,
vs.
NATIONSTAR MORTGAGE, LLC; AND COOPER CASTLE LAW FIRM, LLP
Respondents.

No. 63823

FILED

OCT 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Mallare
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court order granting a motion to dismiss in a quiet title action. Appellant filed a motion in this court seeking a preliminary injunction to prevent respondents from conducting a foreclosure sale of the subject property pending our resolution of this appeal. On August 21, 2013, we entered a temporary injunction, pending our consideration of any response to the motion. Respondent has since opposed the motion.

Having considered the parties' filings in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

Douglas, J.

Hardesty, J.

Saitta, J.

cc: Hon. Stefany Miley, District Judge
Law Offices of Michael F. Bohn, Ltd.
The Cooper Castle Law Firm, LLC
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARADISE HARBOR PLACE TRUST,
Appellant,
vs.
SELENE FINANCE, LP,
Respondent.

No. 64183

FILED

NOV 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

*ORDER GRANTING INJUNCTION*

This is an appeal from a district court summary judgment in a quiet title action. Appellant filed in this court a motion seeking a preliminary injunction to prevent respondent from conducting a foreclosure sale of the subject property pending our resolution of this appeal. On October 17, 2013, we entered a temporary injunction, pending our consideration of any response to the motion. Respondent has since opposed the motion, and appellant has filed a reply.

Having considered the parties' filings in light of the NRAP 8 factors, we conclude that an injunction is warranted pending our consideration of the appeal. NRAP 8(c). Accordingly, we enjoin any foreclosure sale concerning the subject property pending further order of this court.

It is so ORDERED.

/ Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Cherry, J.
Cherry

cc: Hon. Stefany Miley, District Judge
Hon. Elissa F. Cadish, District Judge
Law Offices of Michael F. Bohn, Ltd.
Wright, Finlay & Zak, LLP/Las Vegas
Eighth District Court Clerk

# EXHIBIT 11

| DC Judge | DC# | NSC # | Short Caption | Investor's Counsel | Bank's Law Firm |
|---|---|---|---|---|---|
| Williams | A682283 | 64099 | SFR INVESTMENTS POOL 1 VS. WELLS FARGO BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | David J. Merrill, P.C. |
| Adair/ Smith | A678715 | 64046 | SFR INVESTMENTS POOL 1 VS. PHH MORTGAGE | Jacqueline Gilbert, Diana Cline, Howard Kim | Malcolm Cisneros |
| Delaney | A683666 | 63966 | SFR INVESTMENTS POOL 1 VS. WELLS FARGO BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Villani | A674458 | 63929 | SFR INVESTMENTS POOL 1 VS. BANK OF NEW YORK MELLON | Jacqueline Gilbert, Diana Cline, Howard Kim | Akerman Senterfitt |
| Johnson | A683133 | 63915 | SFR INVESTMENTS POOL 1 VS. GREEN TREE SERVICING | Jacqueline Gilbert, Diana Cline, Howard Kim | Brooks Bauer |
| Kishner | A685896 | 63914 | SFR INVESTMENTS POOL 1 VS. FIRST HORIZON | Jacqueline Gilbert, Diana Cline, Howard Kim | Ballard Spahr, LLP |
| Earl/ Loeher | A685826 | 63905 | SFR INVESTMENTS POOL 1 VS. FIRST HORIZON | Jacqueline Gilbert, Diana Cline, Howard Kim | Ballard Spahr, LLP |
| Williams | A680573 | 63892 | SFR INVESTMENTS POOL 1 VS. WELLS FARGO BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | David J. Merrill, P.C. |
| Wiese | A686474 | 63817 | SFR INVESTMENTS POOL 1 VS. DEUTSCHE BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Barker | A680565 | 63814 | SFR INVESTMENTS POOL 1 VS. WELLS FARGO BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Kishner | A684596 | 63796 | SFR INVESTMENTS POOL 1 VS. NATIONSTAR MORT. | Jacqueline Gilbert, Diana Cline, Howard Kim | Akerman Senterfitt |
| Kishner | A684630 | 63795 | SFR INVESTMENTS POOL 1 VS. NATIONSTAR MORT. | Jacqueline Gilbert, Diana Cline, Howard Kim | Akerman Senterfitt |
| Escobar | A679714 | 63768 | WELLS FARGO BANK VS. SFR INVESTMENTS POOL 1 | Jacqueline Gilbert, Diana Cline, Howard Kim | David J. Merrill, P.C. |
| Bixler | A680704 | 63695 | SFR INVESTMENTS POOL 1 VS. GREEN TREE SERVICING | Jacqueline Gilbert, Diana Cline, Howard Kim | Brooks Bauer |
| Barker | A678814 | 63614 | SFR INVESTMENTS POOL 1 VS. US BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Bare | A678094 | 63613 | SFR INVESTMENT POOL 1 VS. FED. NATIONAL MORTGAGE ASSOC. | Jacqueline Gilbert, Diana Cline, Howard Kim | Brooks Bauer |
| Herndon | A681847 | 63612 | SFR INVESTMENT POOL 1 VS. FED. NATIONAL MORTGAGE ASSOC. | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Delaney | A679361 | 63579 | SFR INVESTMENTS POOL 1 VS. WELLS FARGO BANK | Jacqueline Gilbert, Diana Cline, Howard Kim | Wright Finlay & Zak |
| Walsh/ Gates | A674958 | 63451 | SFR INVESTMENTS POOL 1 VS. FIRST HORIZON | Jacqueline Gilbert, Diana Cline, Howard Kim | Ballard Spahr, LLP |
| Herndon | A667931 | 63313 | SFR INVESTMENTS POOL 1 VS. BANK OF AMERICA | Jacqueline Gilbert, Diana Cline, Howard Kim | Routh Crabtree Olsen, P.S.; Akerman Senterfitt |
| Allf | A673671 | 63078 | SFR INVESTMENTS POOL 1 VS. US BANK, N.A. | Jacqueline Gilbert, Diana Cline, Howard Kim | Akerman Senterfitt |
| Barker | A675778 | 64206 | 80 HUNTFIELD DRIVE TRUST VS. WELLS FARGO BANK | Michael Infuso, Zachary Takos | Wright Finlay & Zak |
| Barker | A675778 | 63965 | 80 HUNTFIELD DRIVE TRUST VS. WELLS FARGO BANK | Michael Infuso, Zachary Takos | Wright Finlay & Zak |

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|---|---|---|---|---|---|
| Kishner | A687798 | 63958 | WOODRUFF VS. PITSICALIS | Michael Infuso, Zachary Takos | Pite Duncan |
| Earley | A671168 | 63824 | SHINING SAND AVE TRUST VS. FLAGSTAR BANK | Michael Infuso, Zachary Takos | Snell & Wilmer |
| Vega | A667342 | 63542 | DRYSDALE COURT TRUST VS. BANK OF AMERICA | Michael Infuso, Zachary Takos | Akerman Senterfitt |
| Earley | A676718 | 63409 | 3182 TARPON 103 TRUST VS. WELLS FARGO BANK | Michael Infuso, Zachary Takos | Wright Finlay & Zak |
| Wiese | A670423 | 63067 (c/w) | SANUCCI CT TRUST VS. ELEVADO C/W 63067 | Michael Infuso, Zachary Takos | Kravitz, Schnitzer, Sloane & Johnson and Akerman Senterfitt |
| Herndon | A669301 | 63066 | MANN STREET TRUST VS. NEWMAN | Michael Infuso, Zachary Takos | Lewis Roca Rothgerber LLp |
| Williams | A674595 | 62528 | VILLA PALMS COURT 102 TRUST VS. RILEY | Michael Infuso, Zachary Takos | McCarthy & Holthus |
| Miley | A675032 | 64183 | PARADISE HARBOR PLACE TRUST VS. SELENE FINANCE | Michael F. Bohn | Wright Finlay & Zak |
| Denton | A674872 | 64014 | OLIVER SAGE DRIVE TRUST VS. BAC HOME LOAN | Michael F. Bohn | Ballard Spahr, LLP |
| Wiese | A679804 | 64006 | AMERICAN RIVER LANE TRUST VS. CITIMORTGAGE | Michael F. Bohn | Akerman Senterfitt |
| Denton | A680190 | 63909 | 8025 VILLA ROSARITO ST. TRUST VS. QUALITY LOAN SERVICE | Michael F. Bohn | McCarthy & Holthus |
| Earl | A680362 | 63903 | WELLS FARGO BANK VS. PARADISE HARBOR PLACE TRUST | Michael F. Bohn | David J. Merrill, P.C. |
| Williams | A677062 | 63882 | DELTA WATER STREET TRUST VS. U.S. BANK NATIONAL | Michael F. Bohn | McCarthy & Holthus |
| Miley | A675227 | 63823 | PARADISE HARBOR VS. NATIONSTAR MORTGAGE | Michael F. Bohn | Cooper Castle Law Firm |
| Williams | A679812 | 63615 | RIVER GLIDER AVE TRUST VS. US BANK | Michael F. Bohn | McCarthy & Holthus |
| Miley | A679095 | 63611 | TRUST VS. WELLS FARGO BANK | Michael F. Bohn | Snell & Wilmer |
| Miley | A678650 | 63550 | RIVER GLIDER AVE TRUST VS. BANK OF AMERICA | Michael F. Bohn | Akerman Senterfitt |
| Delaney | A675228 | 63481 | OLIVER SAGEBRUSH DRIVE TRUST VS. BAC HOME LOANS | Michael F. Bohn | Akerman Senterfitt |
| Delaney | A675505 | 63282 | BOURNE VALLEY COURT TRUST VS. CITIBANK, N.A. | Michael F. Bohn | Smith Larsen & Wixom and McCarthy Holthus |
| Villani | A673750 | 63185 | VILLA VECCHIO CT TRUST VS. DEUTSCHE BANK | Michael F. Bohn | Kravitz, Schnitzer, Sloane & Johnson and Akerman Senterfitt |
| Villani | A674883 | 63184 | BOURNE VALLEY COURT TRUST VS. WELLS FARGO BANK | Michael F. Bohn | Kravitz, Schnitzer, Sloane & Johnson |
| Earl | A675507 | 63077 | RIVER GLIDER AVE TRUST VS. BANK OF NEW YORK MELLON | Michael F. Bohn | Miles Bauer, Bergstrom & Winters and Akerman Senterfitt |
| Earl | A677973 | 63011 | SATICO BAY VS. BANK OF NEW YORK MELLON | Michael F. Bohn | McCarthy & Holthus |
| Earl | A677406 | 63009 | 9320 POKEWOOD CT TRUST VS. WELLS FARGO BANK C/W 63384 | Michael F. Bohn | Wright Finlay & Zak |
| Bare | A667397 | 62506 | CENTENO VS. MONTESA LLC | Martin Centeno | Snell & Wilmer |

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|---|---|---|---|---|---|
| Smith | A677349 | 64031 | FIRST 100 VS. FIRST HORIZON | Luis Ayon, Margaret Schmidt | Ballard Spahr, LLP |
| Williams | A677353 | 63593 | KAL-MOR-USA VS. SUNTRUST MORTGAGE | Luis Ayon, Margaret Schmidt | Akerman Senterfitt |
| Smith | A664235 | 63651 | LV MOTOR COACH OWNERS ASSOC. VS. AMERICAN UNDERWRITERS LIFE INS. | Shana S. Gullickson, Brent A. Larsen | Ellis & Gordon |
| Wiese | A678626 | 63764 | LN MANAGEMENT VS. WELLS FARGO BANK | Kerry P. Faughnan | Wright Finlay & Zak |
| Williams | A678628 | 64233 | LN MANAGEMENT LLC SERIES VS. PHH MORTGAGE CORP. | Kerry P. Faughnan | Cooper Castle Law Firm |
| Johnson | A685578 | 63836 | LAS VEGAS DEV. GROUP VS. THE COOPER CASTLE LAW FIRM | Marilyn Fine, Rachel Donn | The Cooper Castle Law Firm |
| Vega | A682482 | 64185 | KK REAL ESTATE INV. FUND VS. CAPITAL ONE | Bradley Bace, Huong X. Lam | Ballard Spahr, LLP |
| Johnson | A680743 | 63861 | TRASHED HOME CORP. VS. MORTGAGE ELEC. REGISTRATION | Patrik W. Kang; Erica D. Loyd | Akerman Senterfitt |
| Williams | A653747 | 61416 | CENTENO VS. NATIONAL DEFAULT SERVICING CORP. | Martin Centeno | Houser & Allison and Tiffany & Bosco |
| Bixler | A654878 | 60984 | CENTENO VS. MAVERICK VALLEY PROPERTIES LLC | Martin Centeno | Snell & Wilmer |

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP and MONIQUE GUILLORY<br><br>Defendants. | Case No: A-13-689240-C<br><br>Dept. No. V |

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendants NATIONSTAR MORTGAGE, LLC and THE COOPER CASTLE LAW FIRM, LLP, by and through their attorney The Cooper Castle Law Firm, LLP, submit this Reply in support of their Motion to Dismiss.

**1. Dismissal pursuant to NRCP 12(b)(5) is appropriate based upon the allegations of the Complaint and the recorded documents.**

Plaintiff has not disputed the authenticity of the recorded documents reflecting the existence of the liens in question. Accordingly, this matter is proper for determination

pursuant to NRCP 12(b)(5) as the Deed of Trust was recorded prior to the date the HOA assessments became due, and the HOA lien was foreclosed non-judicially. Pursuant to NRS 116.3116, Nationstar's interest pursuant to the Deed of Trust has priority over the HOA lien. Furthermore, the HOA did not file an action to foreclose its lien, and instead pursued a non-judicial foreclosure proceeding. Accordingly, Nationstar's interest is not extinguished pursuant to NRS 116.3116(2).

2. **Fannie Mae policies are not indicative of what Nevada law is**.

Each state has its own laws concerning priority of liens. FNMA conducts business in all states. The fact that FNMA may have a "servicing Guide Announcement" addressing how HOA foreclosures affect first security interests has no bearing on what the Nevada law is. Conspicuously, Plaintiff has not cited language by FNMA stating that an HOA foreclosure in Nevada extinguishes the first security interest. This court determines the law in Nevada.

3. **NRED statement concerning priority it its advisory opinion is dicta and not thoroughly analyzed.**

Plaintiff cites the Nevada Real Estate Division ("NRED") advisory opinion in support of its interpretation of NRS 116.3116. NRED is the entity charged with adopting appropriate regulations concerning NRS Chapter 116. State Dep't of Bus. & Indus. v. Nev. Ass'n Servs., 294 P.3d 1223, 1227 (2012). This Court is not bound by the NRED's opinions, and in this case, the opinion is not persuasive.

The 20-page opinion is mainly devoted to the types of fees and costs that can be included in an HOA lien and the "super-priority" portion of the lien. The opinion does not analyze a single authority as to whether or not an HOA extinguishes a first security interest. Instead, the opinion simply makes a passing reference to the effect of foreclosure on the HOA

and the first security interest. The passing reference is nothing more than dicta and should not be a basis for this case.

Furthermore, in the advisory opinion cited by Plaintiff, the NRED devotes just 3 paragraphs to the issue of whether a civil lawsuit is meant by "an action" in NRS 116.3116(2). The fact that the NRED does not cite any caselaw from other states, or address the lack of a notice requirement if the HOA chooses to foreclose non-judicially, shows that the "action" issue was not the focus of the NRED's attention and purpose for issuing its opinion. Thus, this Court should disregard the NRED's opinion as it relates to the issue of priority.

**4. The Washington State case cited by Plaintiff is inapplicable because that case involved a judicial foreclosure action.**

In the *Sumerhill Village* case cited by Plaintiff, the HOA foreclosure was conducted judicially, with the lender having been properly served with the complaint. 289 P.3d 645, 646 (Wash.App. 2012). This is precisely what was not done in this case. Here, the HOA conducted a non-judicial foreclosure, without giving the lender an opportunity to protect its interest.

**5. An HOA can foreclosure pursuant to a civil action if it chooses.**

The statutory scheme for HOA foreclosures provides for judicial or non-judicial proceedings. If an HOA wants to enforce its super-priority rights, it must foreclose by filing a lawsuit so that all junior lienholders have an opportunity to appear in the action and assert their position. The statutory authority for the judicial foreclosure is stated in NRS 116.4117, wherein the statute states an association may bring a lawsuit against a unit's owner for "damages or other appropriate relief", and such a remedy is "in addition to, and not exclusive or, any other available remedy or penalty." NRS 116.4117(2) and (7).

**6. Conclusion.**

To use NRS 116.3116 as a means for an HOA or a purchaser at an HOA foreclosure to eliminate a lender's senior deed of trust by paying off a *de minimus* assessment lien at a non-judicial foreclosure is an inappropriate interpretation of the statute leading to an unreasonable and absurd result. The statute is intended to allow the HOA to recover, at least a portion of its lien, while also to allow the lender to retain its security interest. Accordingly, Plaintiff's claims against Defendants Nationstar Mortgage and The Cooper Castle Law Firm, LLP should be dismissed.

DATED this 16th day of January, 2014.

THE COOPER CASTLE LAW FIRM, LLP

*/s/ Jason Peck, Esq.*
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*Attorneys for Defendants Nationstar Mortgage, LLC and The Cooper Castle Law Firm, LLP*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of January, 2014, I served a true and correct copy of the REPLY IN SUPPORT OF MOTION TO DISMISS, via First Class U.S. Mail, postage pre-paid, to the parties listed below.

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Attorneys for Plaintiff

*/s/ Jennifer Shumway*
An employee of
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Attorneys for plaintiff

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

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|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A689240-C<br>DEPT NO.: V<br><br>Date of hearing: January 24, 2014<br>Time of hearing: 9:00 a.m. |

**ORDER**

The motion of defendants, Nationstar Mortgage and the Cooper Castle Law Firm, to dismiss and the plaintiff's countermotion to stay proceedings having come before the court on the 24th day of January, 2014, Michael F. Bohn, Esq. and Kelly M. Perri, Esq., appearing on behalf of the plaintiff and Jason M. Peck, Esq. appearing on behalf of Nationstar Mortgage and the Cooper Castle Law Firm, and the court, having reviewed the motion and countermotion and having heard the arguments of counsel and for good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to dismiss is denied.

IT IS FURTHER ORDERED that the countermotion to stay the proceedings in this case is

granted. Any further proceedings in this case is stayed until further order of the court.

IT IS FURTHER ORDERED that the plaintiff shall be required to keep current on all property taxes and assessments, HOA dues, to maintain the property and to maintain insurance on the property.

IT IS FURTHER ORDERED that the plaintiff shall be prohibited from selling or encumbering the property unless otherwise ordered by the court.

IT IS FURTHER ORDERED that defendant Nationstar Mortgage is prohibited from conducting a foreclosure sale on the property unless otherwise ordered by the court.

DATED this 11th day of April, 2014.

DISTRICT COURT JUDGE

VK

Respectfully submitted by:

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

By: _____
Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, NV 89119
Attorney for plaintiff

Reviewed by:

THE COOPER CASTLE LAW FIRM, LLP

By: _____
Jason Peck, Esq.
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Attorney for defendants, Nationstar Mortgage and the Cooper Castle Law Firm

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| SATICOY BAY LLC SERIES 4641 VIAREGGIO CT<br><br>Plaintiff,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY<br><br>Defendants. | CASE NO.: A689240-C<br>DEPT NO.: V |

**NOTICE OF ENTRY OF ORDER**

TO: NATIONSTAR MORTGAGE, LLC and COOPER CASTLE LAW FIRM, LLP; and

TO: Jason M. Peck, Esq., of THE COOPER CASTLE LAW FIRM, LLP;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an **ORDER** has been entered on the 15th day of March, 2014, in the above captioned matter, a copy of which is attached hereto.

Dated this 18th day of April, 2014.

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

By: /s/ /*Michael F. Bohn, Esq.*/
MICHAEL F. BOHN, ESQ.
376 E. Warm Springs Rd., Ste. 140
Las Vegas, NV 89119
Attorney for plaintiff

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 18th day of April 2014, I served a photocopy of the foregoing **NOTICE OF ENTRY OF ORDER** by placing the same in a sealed envelope with first-class postage fully prepaid thereon and deposited in the United States mails addressed as follows:

Jason Peck, Esq.
THE COOPER CASTLE LAW FIRM, LLP
5275 South Durango Drive
Las Vegas, Nevada 89113
Attorney for defendants, Nationstar Mortgage
and the Cooper Castle Law Firm

By: /s/ /Esther Maciel-Thompson/
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.