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SUPREME COURT

STATE OF NEVADA

5316 CLOVER BLOSSOM CT TRUST, Appellant, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Respondents.	CASE NO.: 82426

APPELLANT'S APPENDIX VOLUME 6

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SUPREME COURT

STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE, Appellant, vs. 5316 CLOVER BLOSSOM CT TRUST, and COUNTRY GARDEN OWNERS ASSOCIATION, Respondents.	No. 75861

RESPONDENT 5316 CLOVER BLOSSOM CT TRUST'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/respondent certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. 5316 Clover Blossom Ct Trust is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 5316 Clover Blossom Ct Trust.

3. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/respondent therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished the deed of trust assigned to U.S. Bank, National Association (hereinafter "defendant Bank").

2. Whether the superpriority lien held by Country Gardens Owners' Association (hereinafter "HOA") was extinguished when Alessi & Koenig, LLC (hereinafter "foreclosure agent") rejected the conditional tender of $1,494.50 made by Miles, Bauer, Bergstrom & Winters, LLP (hereinafter "Miles Bauer") on December 6, 2012.

3. Whether 5316 Clover Blossom Ct Trust (hereinafter "plaintiff") is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the HOA's rejection of the tender by Miles Bauer discharged the HOA's superpriority lien.

4. Whether the stipulated discovery deadline prevented the district court from granting plaintiff's motion.

5. Whether the district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment.

6. Whether judicial estoppel prevents plaintiff from claiming that the deed of trust was extinguished by the HOA foreclosure sale.

7. Whether defendant Bank is entitled to equitable relief against plaintiff from the extinguishment of the deed of trust.

8. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On April 23, 2015, plaintiff filed an amended complaint asserting three claims for relief: 1) entry of an injunction prohibiting defendant Bank and Clear Recon Corps (hereinafter "Clear Recon") from foreclosing the deed of trust recorded on June 30, 2004 against the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada (hereinafter "Property"); 2) for entry of a determination pursuant to NRS 40.010 that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) for entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (Appellant's Appendix (hereinafter "AA") Vol. I - 1, pgs. 1-4)

The amended complaint amended the allegations in plaintiff's verified complaint, filed on July 25, 2014. (AA Vol I-1, pgs. 5-9)

On September 25, 2014, defendant Bank filed an answer to complaint. (AA Vol. I-1, pgs. 10-15)

On May 18, 2015, plaintiff filed a motion for summary judgment. (AA Vol. I-1, pgs. 16-74)

On July 22, 2015, defendant Bank filed an opposition to plaintiff's motion and a countermotion for summary judgment. (AAI-1, pg. 75 to AAI-2, pg. 162)

On July 29, 2015, plaintiff filed a reply in support of plaintiff's motion for summary judgment and opposition to countermotion for summary judgment. (AAI-2, pgs. 163-183)

On August 13, 2015, defendant Bank filed a supplemental briefing in support of its countermotion and in opposition to plaintiff's motion. (AAI-2, pg. 184 to AAI-3, pg. 197)

On September 9, 2015, the court entered findings of fact, conclusions of law, and judgment granting quiet title to plaintiff. (AAI-3, pgs. 198-204)

On August 3, 2017, the court entered an order vacating judgment and setting further proceedings re: the court of appeals court order vacating judgment and remanding. (AAI-3, pg. 205)

On August 16, 2017, the parties filed a stipulation and order extending discovery that included a discovery cut-off date of January 24, 2018. (AAI-3, pgs. 206-209)

On October 10, 2017, defendant Bank filed an amended answer to plaintiff's amended complaint, counterclaims, and cross-claims. (AAII-1, pgs. 241 to AAII-3, pg. 323)

On October 23, 2017, plaintiff filed a motion to dismiss counterclaim. (AAII-3, pgs. 324 to AAII-4, pg. 379)

On November 9, 2017, defendant Bank filed an opposition to plaintiff's motion to dismiss counterclaim. (AAII-4, pgs. 380-484)

On November 21, 2017, plaintiff filed a reply in support of motion to dismiss counterclaim. (AAIII-1, pgs. 496-507)

On November 29, 2017, plaintiff filed supplemental authority in support of motion to dismiss counterclaim. (AAIII-2, pgs. 616-642)

On February 7, 2018, the court entered findings of fact, conclusions of law, and judgment in favor of plaintiff quieting title to the Property in plaintiff free of defendant Bank's deed of trust. (AAIII-2, pgs. 661-674)

Notice of entry of findings of fact, conclusions of law was served and filed on February 8, 2018. (AAIII-2, pgs. 680-695)

On February 26, 2018, defendant Bank filed a motion for reconsideration under NRCP 59. (AAIV-1, pg. 696 to AAIV-2, pg. 897)

On March 14, 2018, plaintiff filed an opposition to the motion for reconsideration under NRCP 59. (AAIV-2, pgs. 898-907)

On May 1, 2018, the court entered an order denying defendant Bank's motion for reconsideration under NRCP 59. (AAIV-2, pgs. 936-939)

Notice of entry of the order denying defendant Bank's motion for reconsideration under NRCP 59 was served and filed on May 1, 2018. (AAIV-2, pgs. 940-945)

Defendant Bank filed its notice of appeal on May 10, 2018. (AAV, pgs. 946-948)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $8,200.00 at a public auction held on January 16, 2013. See copy of foreclosure deed recorded on January 24, 2013. (AAII-3, pgs. 322-323)

The foreclosure deed arises from a delinquency in assessments due from Dennis L. Johnson and Geraldine J. Johnson (hereinafter "former owners") to the HOA pursuant to NRS Chapter 116.

The former owners were identified as the "Borrowers," Countrywide Home Loans, Inc. was identified as the "Lender," and MERS was identified as the

beneficiary in a deed of trust recorded against the Property on June 30, 2004. See copy of deed of trust at AAII-1, pgs. 261-292.

MERS assigned the deed of trust and the underlying note to plaintiff on June 20, 2011. See copy of assignment of deed of trust at AAII-1, pgs. 294-295.

On February 22, 2012, the foreclosure agent recorded a notice of delinquent assessment (lien) for $1,095.50 against the Property. (AAII-1, pg. 297)

On April 20, 2012, the foreclosure agent recorded a notice of default and election to sell for $3,396.00 against the Property. (AAII-1, pg. 301)

On October 31, 2012, the foreclosure agent recorded a notice of trustee's sale for $4,039.00 against the Property. (AAII-1, pg. 303)

On November 21, 2012, Miles Bauer sent a letter to the HOA c/o the foreclosure agent on behalf of BAC Home Loans Servicing, LP stating its position that "nine months' of common assessments pre-dating the NOD" was "the amount BANA should be required to rightfully pay to full discharge its obligations to the HOA per NRS 116.3102." (AAII-2, pgs. 309-310)

On November 27, 2012, the foreclosure agent faxed an amended demand for $4,186.00 to A. Bhame that included an account history report for the Property, dated August 6, 2012. (AAII-2, pgs. 312-314)

On December 6, 2012, Miles Bauer sent a letter to the foreclosure agent and enclosed a check for $1,494.50 drawn payable to the foreclosure agent from Miles Bauer's trust account. (AAII-2, pg. 316 to AAII-3, pg. 318)

The foreclosure agent returned this check to Miles Bauer. (AAII-2, pg. 307, ¶9)

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant Bank's first deed of trust when plaintiff purchased the real property at the public auction held on January 16, 2013.

The HOA's superpriority lien was not extinguished when the HOA or its foreclosure agent rejected the conditional tender made by Miles Bauer.

Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the superpriority portion of the lien was extinguished by Miles Bauer's conditional tender.

The stipulated discovery deadline did not prevent the district court from granting plaintiff's motion.

The district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment because defendant Bank presented "matters

outside the pleadings" to the district court.

The bankruptcy petition and other bankruptcy pleadings filed by River Glider Avenue Trust do not affect the rights obtained by plaintiff by paying the high bid made at the HOA foreclosure sale.

Defendant Bank is not entitled to equitable relief against plaintiff because it had an adequate remedy at law against the HOA and its foreclosure agent.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. The trust deed was extinguished by the HOA foreclosure sale.

NRS 116.3116(2) provides in part that the HOA's assessment lien is "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 statute does not state that the superpriority amount is measured by the assessments which "are" past due or unpaid on the date that the action to enforce the lien is instituted. The superpriority amount is instead measured by the assessments "which would have become due" during the nine months prior to the enforcement of the lien. The amount of each of the assessments is measured by the HOA's "periodic budget."

The deed of trust, recorded on June 30, 2004, falls squarely within the language in NRS 116.3116(2)(b).

In the present case, the notice of delinquent assessment (lien) stated that the lien was recorded "[i]n accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) . . ." (AAII-1, pg. 297)

When the deed of trust was recorded on June 30, 2004, NRS 116.3116(5) stated:

> Recording of the declaration constitutes record notice and perfection of the lien. No recordation of any claim of lien for assessment under this section is required.

As recognized by this Court in SFR Investments Pool 1, LLC v. U.S. Bank,

N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014), and in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5, 388 P.3d 970, 975 (2017), both the CC&Rs and the statute enacted in 1991 provided defendant Bank with notice that the deed of trust was subordinate to the HOA's superpriority lien rights.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this Court stated that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." 334 P.3d at 419.

Each notice recorded and served by the HOA and its foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 418.

Because the high bid of $8,200.00 made by plaintiff to purchase the Property exceeded the full amount of the $4,039.00 stated in the notice of trustee's sale (IIAA-1, pg. 303), the HOA necessarily foreclosed its entire lien, including the unpaid superpriority portion, and extinguished the deed of trust assigned to defendant Bank.

2. The HOA's superpriority lien was not extinguished when the HOA or its foreclosure agent rejected the conditional tender made by Miles Bauer.

At page 14 of Appellant's Opening Brief, defendant Bank states that "BANA's offer and check for the superpriority portion of the lien were a sufficient tender that extinguished that part of the lien."

On the other hand, as discussed at pages 18 to 20 of plaintiff's motion to dismiss counterclaim (IIAA-3, pgs. 341-343) and at page 6 of plaintiff's reply in support of motion to dismiss counterclaim (IIIAA-1, pg. 501), the rules regarding payment and discharge when a payment is tendered by a person who is "not primarily responsible for performance" of a debt or obligation are stated in subsections e, f and g of Restatement (Third) of Prop.: Mortgages, § 6.4 (1997), as follows:

> **§ 6.4 Redemption from Mortgage by Performance or Tender**
>
> . . .
>
> (e) A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, **by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance, does not extinguish the mortgage**, but redeems the interest of the person performing from the mortgage and entitles the person performing to subrogation to the mortgage under the principles of §7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.
>
> (f) Upon receipt of performance as provided in Subsection (e), the

> mortgagee has **a duty to provide to the person performing, within a reasonable time, an appropriate assignment of the mortgage in recordable form.** If the mortgagee fails to do so upon reasonable request, the person performing may obtain judicial relief ordering the mortgage assigned and, unless the mortgagee acted in good faith in rejecting the request, awarding against the mortgagee any damages resulting from the delay.
>
> (g) An **unconditional tender of performance in full by a person described in Subsection (e),** even if rejected by the mortgagee**, if kept good** has the effect of performance under Subsections (e) and (f) above. (emphasis added)

At the threat of foreclosure by a senior lien, a junior lienor is entitled, even without express contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay off the senior lien and become subrogated to the rights of the senior lienholder as against the owner of the property. See Restatement (Third) of Prop.: Mortgages §7.6; American Sterling Bank v. Johnny Management LV, Inc., 126 Nev. 423, 245 P.3d 535 (2010); Houston v. Bank of America 119 Nev. 485, 78 P.3d 71 (2003).

Comment a to Section 6.4 of the Restatement (Third) of Prop.: Mortgages explains the distinction between payment or tender by someone primarily liable for the debt, and payment or tender by a party seeking to protect its interest in the property. It states in part:

> Equitable redemption is ultimately accomplished by performance in full of the obligation secured by the mortgage. **However, redemption has**

> **two quite distinct results, depending on whether the performance is made by a person who is primarily responsible for payment of the mortgage obligation, or by someone else who holds an interest in the land subordinate to the mortgage**. In the first of these situations, the mortgage is simply extinguished, as provided in Subsection (a) of this section. **In the second, the mortgage is not extinguished, but by virtue of Subsection (e) is assigned by operation of law to the payor under the doctrine of subrogation;** see §7.6. Subrogation does not occur in the first situation, since one who is primarily responsible for payment of a debt cannot have subrogation by performing that duty; see §7.6, Comment b. (emphasis added)

Subrogation is a device adopted by equity which applies in a great variety of cases and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915).

Comment g to Section 6.4 of the Restatement further explains the distinction when redemption is made by a subordinate lienholder:

> The second distinction, mentioned above, is that redemption by a person who is not primarily responsible for payment of the debt **does not extinguish the mortgage, but rather assigns both the mortgage and the debt to the payor by operation of law under the doctrine of subrogation**; See §7.6 (emphasis added)

Paragraph F on page 3 of 4 of the Planned Unit Development Rider to the deed of trust (AAII-1, pg. 291) states:

> If Borrower does not pay PUD dues and assessments when due, then

> Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

This language is consistent with Restatement (Third) of Prop.: Mortgages §6.4(e) and (f) that treat any payment offered by Miles Bauer as creating an assignment.

At the bottom of page 14 and top of page 15 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 117 (2018), that "[a] valid tender of payment operates to discharge a lien." As amended by this Court on November 13, 2018, this line now reads: "A valid tender of payment operates to discharge a lien or cure a default."

On the other hand, the law of real property in Restatement (Third) of Prop.: Mortgages, §§ 6.4 (a) and 6.4(b) provides that a lien is discharged only if the payment is made "by one who is primarily responsible for performance of the obligation." In the present case, defendant Bank was not primarily responsible for payment of the HOA's common assessments – the former owners were. Likewise, the law of real property does not provide that a conditional offer of payment made

by one who is "not primarily responsible for performance" could "cure a default."

Even if the HOA had accepted the conditional tender made by Miles Bauer on December 6, 2012 (AAII-2, pg. 316 to AAII-3, pg. 318), the conditional payment could not "discharge" or "cure" the former owners' default in payment. It could only "assign" the HOA's superpriority lien rights to the subordinate lienholder making the payment.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court quoted from Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13, 16 (Wis. 1972), that "[a] lien may be lost by . . . payment or tender of the proper amount of the debt secured by the lien." In that case, however, Power Transmission was the person "primarily responsible" for payment of the lien asserted by Beloit, so the Supreme Court of Wisconsin did not discuss in any way the effect of a payment offered by a subordinate lienholder like defendant Bank.

The Wisconsin Supreme Court also stated that "an excessive demand does not waive the lien" if the demand is "made in good faith and in belief that the person making the demand is entitled to such sum and that he has a general lien upon the specific goods." Id. at 544-545.

At the bottom of page 15 and top of page 16 of Appellant's Opening Brief, defendant Banks states that the tender for $1,494.50 made by Miles Bauer included

"$495.00 for delinquent assessments and $999.50 in 'reasonable collection costs' to satisfy the superpriority lien." On the other hand, instead of including the full amount of the fees and costs of $2,850.00 identified by the foreclosure agent in its facsimile cover letter, dated November 27, 2012 (AAII-2, pgs. 312-313), Miles Bauer arbitrarily divided that amount by three and included only $950.00 for collection costs in the check for $1,494.50. (AAII-2, pg. 314)

Page two of the cover letter by Rock K. Jung, Esq. stated that the check for $1,494.50 was a "non-negotiable amount" that the HOA must agree "paid in full" both "9 months worth of common assessments **as well as reasonable collection costs** to satisfy its obligations to the HOA as a holder of the first deed of trust against the property." (AAII-3, pg. 317) (emphasis added) The cover letter also included a specific reference to "the Nevada Real Estate Division's Advisory Opinion of December 2010, which was recently ratified in the Nevada Supreme Court's *non-published* opinion on May 23, 2012." (AAII-3, pg. 317)

The check for $1,494.50 was not a "cashier's check" as represented by Mr. Jung, but only a check drawn on Miles Bauer's "Trust Account" at Bank of America. (AAII-3, pg. 317)

As acknowledged in the cover letter by Rock K. Jung, Esq., on December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels

(hereinafter "CCICCH") issued Advisory Opinion 2010-01 that stated:

> 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.
>
> Id. at 1.
>
> In the conclusion to Advisory Opinion 2010-01, the CCICCH stated:
>
> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien**. (emphasis added)
>
> Id. at 12.

Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) included "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

In addition, this Court stated on August 2, 2012 in State Dep't of Business & Industry, Financial Institutions Div'n v. Nevada Ass'n Services, Inc., 128 Nev. Adv. Op. 54, 294 P.3d 1223, 1227-1228 (2012): "We therefore determine that the plain language of the statute requires that the CCICCH and the Real Estate Division, and

no other commission or division, interpret NRS Chapter 116."

At page 16 of Appellant's Opening Brief, defendant Bank states that in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court "considered a nearly identical tender." The record on appeal, however, does not include any evidence proving that the terms, conditions, timing or amount of the tender made in Bank of America, N.A. v. SFR Investments Pool 1, LLC are "nearly identical" to the conditional tender made by Miles Bauer in the present case.

Furthermore, in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court did not address the "good-faith rejection argument" because "SFR did not present its good-faith rejection argument to the district court." 427 P.3d at 118. In footnote 1 of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 427 P.3d at 117, n. 1, this Court stated that "SFR argues for the first time in its petition for review that Bank of America's tender was insufficient because it did not include collection costs and attorney fees." This Court also stated that "SFR waived this argument, both by failing to raise it timely in district court and by failing to cogently distinguish the statutory and regulatory analysis in *Horizons at Seven Hills*."

In footnote 3 at page 15 Appellant's Opening Brief, defendant Bank cites

BAC Home Loans Servicing LP v. Aspinwall Court Trust, No. 69885, 2018 WL 3544962 (Nev. July 20, 2018)(unpublished disposition), but in footnote 2, this Court stated that "[w]e decline to consider Aspinwall's arguments, raised for the first time on appeal, that BAC's tender imposed improper conditions and that BAC was required to keep the tender good."

I In footnote 3 at page 15 Appellant's Opening Brief, defendant Bank also cites 2713 Rue Toulouse Trust v. Bank of America, N.A., No. 68206, 2018 WL 3545359 (Table) (Nev. July 20, 2018)(unpublished disposition), but this Court declined to consider "appellant's argument that Bank of America imposed improper conditions on its tender" because "that argument was not coherently made in district court." Id. at *1.

In the present case, on the other hand, plaintiff timely raised this argument at pages 6 to 8 of plaintiff's reply in support of motion to dismiss counterclaim. (IIIAA-1, pgs. 501-503)

At page 17 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC that "[a] plain reading of NRS 116.3116 indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that

portion of the lien." 427 P.3d at 118.

The law of real property provides, however, that the issue is not whether Miles Bauer tendered an amount that was later determined to be correct, but whether the foreclosure agent "wrongfully rejected" the offer based on the state of the law at the time the tender was made.

In Bank of America, N.A. v. Rugged Oaks Investments, LLC, No. 68504, 383 P.3d 749 (Table), 2016 WL 5219841 (Nev. Sept. 16, 2016) (unpublished disposition), this Court quoted from 59 C.J.S. Mortgages § 582 that "[i]t has been held . . . that a good and sufficient tender on the day when payment is due will relieve the property from the lien on the mortgage, except where the refusal [of payment] was . . . grounded on an honest belief that the tender was insufficient."

At page 18 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), where this Court cited Hohn v. Morrison, 870 P.2d 513 (Colo. App. 1993), as authority that "[w]hen rejection of a valid tender is unjustified, the tender effectively discharges the lien."

In Hohn v. Morrison, 870 P.2d 513, 517-518 (Colo. App. 1993), the court stated:

> Although this is an issue of first impression in Colorado, other jurisdictions which have adopted the lien theory of real estate mortgages have also adopted the rule that an unconditional tender of the amount due by the debtor releases the lien of the mortgage **unless the creditor establishes a justifiable and good faith reason for the rejection** of the tender. Moore v. Norman, 43 Minn. 428, 45 N.W. 857 (1890); Renard v. Clink, 91 Mich. 1, 51 N.W. 692 (1892); Easton v. Littooy, 91 Wash. 648, 158 P.531 (1916) (tender of the full amount due operates to discharge the lien of the mortgage **if the tender is refused without adequate excuse**.) (emphasis added)

In First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court stated:

> "To constitute a sufficient tender, it must be unconditional. *Where a larger sum than that tendered is in good faith claimed to be due*, the tender is ineffectual as such if its acceptance involves the admission that no more is due." (Emphasis ours.)

In Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913), the Kansas Supreme Court stated:

> A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. Moore v. Norman, 52 Minn. 83, 53 N.W. 809, 18 L.R.A. 359, 38 Am. St. Rep. 526, and not page 529; 38 Cyc. 152, and cases cited in note 152, 153.

Because the Nevada Real Estate Division did not issue its Advisory Opinion No. 13-01 until December 12, 2012, the only authority that existed to guide the HOA on December 6, 2012 was Advisory Opinion No.2010-01 and NAC 116.470.

Furthermore, even though Advisory Opinion No. 13-01 adopted a different method of calculating the HOA's superpriority lien than Advisory Opinion No.2010-01, the conflict between the two methods of calculating the amount of the superpriority lien was not resolved by this Court until the opinion in Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016), was issued on April 28, 2016. This is a date more than three years after Miles Bauer made its "non-negotiable" offer of only $1,494.50 on December 6, 2012 and after the public auction held on January 16, 2013.

Furthermore, the interpretation of the statute in Horizons at Seven Hills v. Ikon Holdings, LLC, did not involve a tender made by a subordinate lienholder prior to an HOA foreclosure sale. This Court instead determined how to calculate the amount of the HOA's assessment lien that survived a lender's foreclosure of its deed of trust.

Again, the issue in the present case is whether the HOA and its foreclosure agent had a "good faith" reason to believe that collection costs and reasonable attorneys' fees were part of the HOA's superpriority lien and not whether that belief turned out to be correct.

In this regard, the Oklahoma Supreme Court stated in First Nat. Bank of Davis

v. Britton that:

> **The lien is not released** as a result of a tender **if the creditor in good faith, even though erroneously, claims a greater amount due than is later found to be actually due and owing**, where the acceptance of the lesser amount involves an admission that the amount tendered is sufficient.
>
> 94 P.2d at 898.

When the authorities that existed on December 6, 2012 are considered, defendant Bank did not prove that the HOA and its foreclosure agent wrongfully rejected the non-negotiable amount of $1,494.50 offered by Miles Bauer as payment "in full."

At page 18 of Appellant's Opening Brief, defendant Bank states that "[t]he district court's reasoning would put obligors completely at the mercy of lienholders" who "would be able to wipe out other property interests **for any reason whatsoever**." (emphasis added) This is not plaintiff's argument, and this is not what the "good faith" standard discussed above provides.

Defendant Bank also objects to having to pay "the entire HOA lien" or "seeking to enjoin the HOA's sale" as suggested by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014). However, because defendant Bank cannot and did not prove that the HOA wrongfully rejected the conditional tender of only $1,494.50 made by Miles Bauer,

the HOA necessarily foreclosed the superpriority portion of its lien that remained unpaid on January 16, 2013. By permitting the HOA to foreclose the superpriority portion of its lien without objection, defendant Bank allowed the subordinate deed of trust to be extinguished.

3. Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the superpriority portion of the lien was extinguished by Miles Bauer's conditional tender.

At page 19 of Appellant's Opening Brief, defendant Bank cites Bank of America, N.A. v. SFR Investments Pool 1, LLC, as authority that "when the superpriority portion of the lien has been discharged, 'a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.'" 427 P.3d at 121.

As noted above, however, the law of real property provides that a tender made by "one who holds an interest in the real estate subordinate to the mortgage [superpriority lien] but is not primarily responsible for performance, does not extinguish the mortgage [superpriority lien]," but instead entitles the person making payment to receive an assignment of the superpriority lien rights. Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court quoted from NRS 111.315 and italicized the words "in the manner prescribed in this

chapter." 427 P.3d at 119. The words "in the manner prescribed in this chapter" in NRS 111.315 refer to how the conveyance or instrument in writing is "proved, acknowledged and certified." In this regard, Section 6.4(f) of the Restatement requires that the person accepting payment from a subordinate lienholder provide "the person performing, within a reasonable time, an appropriate assignment of the mortgage [super priority lien] in recordable form." The "assignment" required by the law of real property falls squarely within the language used in NRS 111.315.

This Court also quoted the definition of the word "instrument" from Black's Law Dictionary (10th ed. 2014), but the "appropriate assignment in recordable form" provided by Section 6.4(f) of the Restatement falls within the definition of the word "instrument."

The definition of the word "conveyance" in NRS 111.010(1) includes "every instrument in writing" by which an "interest in lands" is "assigned." Because a tender made by a subordinate lienholder creates an "assignment," such a tender also falls squarely within the definition of the word "conveyance" in NRS 111.010(1).

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court also cited NRS 116.3116 as support for the statement that "Bank of America's tender cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law." 427 P.3d at 120. On the other hand, the words

"cured the default" do not appear anywhere in NRS 116.3116. As provided by Section 6.4 of the Restatement, a proper tender could at most "assign" the superpriority portion of the HOA's assessment lien.

This Court also cited NRS 116.3116(1)-(3) as support for the statement that "NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder." 427 P.3d at 120. No such language appears anywhere in NRS 116.3116. NRS 116.3116(3) instead provides for the creation of an escrow account or impound account to pay all of the assessments for common expenses.

This Court also quoted from the official comments to § 3-116 of the Uniform Common Interest Ownership Act, but the official comments do not state that a tender made by a lender "cures" the default or "prevents foreclosure" of the lien "by operation of law." The law of real property instead provides that such a payment, if accepted, "assigns" the superpriority lien rights to the subordinate lienholder. Comments a and g to Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

This Court also stated that "[b]ecause the lien is not discharged using an instrument, NRS Chapter 106 does not apply." 427 P.3d at 120. Again, however, the law of real property states that the tender by the subordinate lienholder does not "discharge" the mortgage [superpriority lien], but "entitles the person performing to

subrogation." Restatement (Third) of Prop.: Mortgages, § 6.4(e)(1997). Section 6.4(f) of the Restatement in turn requires that the assignment be proved by "an appropriate assignment of the mortgage in recordable form" or that the person performing "obtain judicial relief ordering the mortgage assigned."

The law of real property does not allow the HOA's superpriority lien to be discharged or satisfied by an unrecorded tender made by the holder of a subordinate deed of trust. No language in NRS 116.3116 contradicts the established principles of real property law in Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

At pages 27 and 28 of its motion to dismiss (AAII-3, pgs. 350-351), plaintiff also discussed defendant Bank's failure to allege or prove that Miles Bauer kept the rejected tender "good." In Bank of America, N.A. v. SFR Investments Pool, this Court quotes the following language from comment d to Restatement (Third) of Prop.: Mortgages, § 6.4, pg. 427 (1997): "The tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment." 427 P.3d at 120.

In the present case, defendant Bank did not allege or prove that BAC Home Loans Servicing, LP was ready, willing or able to pay the superpriority portion of the assessment lien after the HOA rejected the conditional tender of only $1,494.50 made by Miles Bauer on December 6, 2012.

In Section E of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court stated that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." 427 P.3d at 121. This Court cited Henke v. First Southern Properties, Inc., 586 S.W.2d 617 (Tex. App. 1979), where the foreclosing lender holding the first deed of trust agreed with the property owner to reinstate the loan if $2,156 was paid by September 30, 1974, and "the money was paid by the specified time (September 30, 1974) and accepted with the advice that Henke's loan had been reinstated." Id. at 618. The lender then assigned the note and deed of trust to Continental Bank, and Continental Bank assigned the note and deed of trust to Harold E. Bro who sold the property at a trustee's sale on October 1, 1974 even though the loan was not in default. Id.

Under these facts, the court found:

> Substitute trustee Hedblom in the case at bar had no power to convey because the note was not in default; the substitute trustee's deed was void; First Southern acquired no title to the property, and the trial court correctly rendered judgment for plaintiffs for the property.

Id. at 620.

In the present case, on the other hand, defendant Bank did not allege or prove that the HOA agreed to reinstate the former owner's account in return for the payment of $1,494.50 offered by Miles Bauer on December 6, 2012.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court also

quoted from Section 7:21 in 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law (6th ed. 2014), that "[t]he most common defect that renders a sale void is that the mortgagee had no right to foreclose . . . ." None of the examples discussed in Section 7:21, however, involved a conditional tender made by a subordinate lienholder that had been rejected in good faith.

Section 7:21 instead discusses the distinction between defects in the exercise of a power of sale that render a sale void, voidable, or inconsequential. Section 7:21 also states: "Most defects render the foreclosure *voidable* and not void" and that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at pgs. 956-957.

This Court also stated that "[b]ecause Bank of America's valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion." 427 P.3d at 121.

Again, however, because the law of real property provides that a tender made by a subordinate lienholder acts as an "assignment" and not as a "discharge" or "satisfaction," the superpriority portion of the assessment lien remained unpaid on the date of the HOA foreclosure sale. Because the "assignment" was not recorded,

NRS 111.325 expressly provides that the "assignment" created by such a tender is void against plaintiff because the foreclosure deed was first recorded.

Nevada law requires that interests in real property be recorded. An unrecorded interest in property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tai-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

NRS 111.315 states:

> **Every conveyance** of real property, and every instrument of writing setting forth an agreement to convey any real property, or **whereby any real property may be affected**, proved, acknowledged and certified in the manner prescribed in this chapter, **to operate as notice to third persons, shall be recorded** in the office of the recorder of the county in which the real property is situated or to the extent permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record. (emphasis added)

Because defendant Bank did not record any claim that the superpriority lien was paid, NRS 111.325 provides that defendant Bank's unrecorded claim of tender is void against the innocent purchaser–plaintiff. NRS 111.325 states:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, **shall be void as against any subsequent purchaser**, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded. (emphasis added)

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016), this Court stated that the purchaser at an HOA sale is entitled to rely on the recorded notices as proof that the HOA foreclosed a superpriority lien:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.,* 334 P.3d at 412–13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, **as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary,** the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser**.** (emphasis added)

In the present case, each of the notices recorded by the foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014), and none of the notices indicated that the superpriority lien had been paid.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> 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. Marks, 204 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.

The bona fide purchaser 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).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, and because defendant Bank did not record any document stating that the HOA's lien did not include a superpriority amount, plaintiff is protected as a bona fide purchaser from that unrecorded claim.

Public policy is not served by allowing a lender to wait until after a

foreclosure sale to assert an unrecorded claim or objection that alters the rights acquired by the high bidder. The statute must instead be interpreted to protect the foreclosure sale purchaser's expectations based on the documents recorded prior to the sale. If this court permits the expectations of a high bidder like plaintiff to be frustrated by information that did not appear in the public record prior to the sale, bidding at HOA foreclosure sales will be chilled, and the nonjudicial foreclosure process created by the Nevada Legislature will become useless.

In Melendrez v. D&I Investment, Inc.,127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (2005), the court discussed the benefits of encouraging experienced buyers to bid at foreclosure sales:

> A holding that an experienced foreclosure buyer perforce cannot receive the benefits of the law as a BFP if he or she buys property for substantially less than its value would chill participation at trustee's sales by this entire class of buyers, and, **ultimately, could have the undesired effect of reducing sales prices at foreclosure**. (emphasis added)

26 Cal. Rptr. at 426.

In Homestead Savings v. Darmiento, 230 Cal. App. 3d 424, 434, 281 Cal. Rptr. 367, 372 (1991), the court stated that "[t]he statute was clearly designed to provide incentives to the public at large to attend the sales in order to obtain a better price at the sale."

Because defendant Bank did not record any document disclosing the assignment allegedly created by Miles Bauer's conditional tender before the foreclosure deed was recorded, the unrecorded claim the HOA wrongfully rejected the conditional tender is void as to plaintiff.

4. The stipulated discovery deadline did not prevent the district court from granting plaintiff's motion.

At pages 20 and 21 of Appellant's Opening Brief, defendant Bank states that "the district court granted summary judgment to Clover Blossom only a few months after the Court of Appeals' decision" and that "[s]ignificantly, the stipulated discovery period was still open."

On the other hand, neither NRCP 12 nor NRCP 56 contains any language that requires that the discovery be closed before the district court can grant a motion to dismiss or a motion for summary judgment.

NRCP 56(f) permits a party to state by affidavit the reasons why a party cannot "present by affidavit facts essential to justify the party's opposition," but defendant Bank did not provide the district court with such an affidavit or make such request until defendant Bank filed its motion for reconsideration under NRCP 59.

5. The district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment because defendant Bank presented "matters outside the pleadings" to the district court.

At page 22 of Appellant's Opening Brief, defendant Bank stated that the district court violated NRCP 12(b) by treating plaintiff's motion to dismiss counterclaim as a motion for summary judgment and not giving defendant Bank a "reasonable opportunity to present all material pertinent to such a motion by Rule 56."

In the present case, however, it was defendant Bank that supported its opposition to plaintiff's motion to dismiss with "matters outside the pleadings." *See* Exhibits A to defendant Bank's opposition, filed on November 9, 2017, at AAII-4, pgs. 402-460, and *see* Exhibits A to F to defendant Bank's motion for reconsideration at AAIV-1, pg. 714 to AAIV-2, pg. 897.

If defendant Bank did not want the district court to treat plaintiff's motion as a motion for summary judgment, defendant Bank should have relied only on matters in the pleadings, which would include the exhibits to defendant Bank's counterclaim.

In Baxter v. Dignity Health, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015), this Court stated:

> But "the court is not limited to the four corners of the complaint." 5B Charles Alan Wright & Arthur Miller, Federal Practice & Procedure: Civil § 1357, at 376 (3d ed.2004). Under NRCP 10(c), "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." A court "may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." United States v.

> Corinthian Colleges, 655 F.3d 984, 999 (9th Cir.2011) (internal quotation omitted); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (in evaluating a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on [Fed.R.Civ.P.] 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference") (citing 5B Charles Alan Wright & Arthur Miller, supra, § 1357).

In the present case, Exhibits A to H to defendant Bank's amended answer to plaintiff's amended complaint, counterclaims, and cross-claims (AAII-1, pgs. 260 to AAII-3, pg. 323) prove that the HOA and its foreclosure agent timely recorded every notice required to properly foreclose the HOA's assessment lien and that the HOA properly rejected the conditional tender made by Miles Bauer.

Defendant Bank cannot object to an action taken by the district court that was created solely by defendant Bank's decision to introduce matters outside the pleadings in support of its opposition.

6. The bankruptcy petition and other bankruptcy pleadings filed by River Glider Avenue Trust do not affect the rights obtained by plaintiff by paying the high bid made at the HOA foreclosure sale.

At page 23 of Appellant's Opening Brief, defendant Bank states that bankruptcy pleadings filed by an entity that is separate and independent from plaintiff (i.e. River Glider Trust) prove that plaintiff could not be a bona fide purchaser in the present case. The Chapter 11 petition was filed by River Glider

Trust on July 3, 2012. See voluntary petition at AAIV-1, pgs. 744-782.

Defendant Bank misstates the meaning attributed to River Glider Trust listing certain creditors in Schedule D of the bankruptcy schedules. Listing a creditor is not an admission by the debtor that the creditor's claim is valid. 11 U.S.C. § 101(10)(A) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," and 11 U.S.C. § 101(5)(A) defines a "claim" to be a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, **disputed**, undisputed, legal, equitable, **secured, or unsecured** . . . ." (emphasis added) 11 U.S.C. § 521(a)(1) requires that the debtor file "a list of creditors" and "a schedule of assets and liabilities."

By complying with the requirements of the Bankruptcy Code, River Glider Trust did not admit that any of the deeds of trust were not affected by the foreclosure of the HOA's superpriority lien. Because no court had yet resolved the issue, the debtor was required to list each lender as a creditor even though River Glider Trust believed that each deed of trust had been extinguished.

Similarly, the motions filed with the bankruptcy court on July 5, 2012 (AAIV-1, pgs. 784-794) and November 8, 2012 (AAIV-1, pgs. 796-801) were necessary because on that date, this Court had not yet entered its decision in SFR Investments

Pool 1, LLC v. U.S. Bank, N.A., which adopted River Glider Trust's understanding that the HOA's foreclosure of its superpriority lien extinguished the prior recorded deeds of trust.

The same is true of the omnibus response to orders to show cause filed on November 5, 2012 by four trusts other than plaintiff. (AAIV-1, pg. 803 to AAIV-2, pg. 897)

This Court discussed the doctrine of judicial estoppel in NOLM, LLC v. County of Clark, 120 Nev. 736, 100 P.3d 658 (2004), and this Court stated:

> However, judicial estoppel should be applied only when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." Judicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process.
>
> > [T]he doctrine generally applies "when "`(1) **the same party has taken two positions**; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) **the party was successful in asserting the first position** (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."'" (emphasis added)

100 P.3d at 663.

Defendant Bank did not prove the elements of judicial estoppel because none of the bankruptcy pleadings were filed by plaintiff or involved the Property. There is also no "risk of inconsistent court determinations" because the Bankruptcy Court

did not make a final determination regarding whether or not each deed of trust was not extinguished by an HOA foreclosure sale.

7. Defendant Bank is not entitled to equitable relief against plaintiff because defendant Bank has an adequate remedy at law against the HOA and the foreclosure agent.

As stated at pages 7 to 10 of plaintiff's motion to dismiss counterclaim (AAII-3, pgs. 330-333), even if the HOA and its foreclosure agent wrongfully rejected the conditional offer made by Miles Bauer, defendant Bank had legal remedies available to it that prevent defendant Bank from obtaining equitable relief against plaintiff.

According to the United States Supreme Court, equitable relief is not available when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992).

This same limitation on the availability of equitable relief has consistently been applied by this Court. Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982); County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961); State v. Second Judicial District Court, 49 Nev. 145, 241 P. 317, 321-322 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568, 574 (1909); Conley v. Chedic, 6 Nev. 222, 224 (1870); Sherman v.

Clark, 4 Nev. 138 (1868).

In County of Washoe v. City of Reno, this Court stated that "our concern is with the existence of a remedy and not whether it will be unproductive in this particular case [citation omitted], or inconvenient [citation omitted], or ineffectual [citation omitted]." 360 P.2d at 604.

In Shadow Wood, this Court stated:

> Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property.

366 P.3d at 1115, n. 7.

In Shadow Wood, this Court also stated that Gogo Way's "putative status as a bona fide purchaser" had a bearing on the bank's request for equitable relief and that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." 366 P.3d at 1115 (quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)).

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court stated:

> The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser **even where the trustee wrongfully rejected a proper tender of reinstatement by the**

> **trustor**. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].) (emphasis added)

Although the district court held that defendant Bank's legal remedy against the HOA is barred by the statute of limitations, plaintiff is not responsible for defendant Bank 's failure to timely assert the legal remedies available to defendant Bank if it could prove that the HOA wrongfully rejected the conditional tender made by Miles Bauer. In addition, these legal remedies may still exist if this Court adopts any of the arguments made by defendant Bank at pages 26 to 43 of Appellant's Opening Brief.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court affirm the findings of fact, conclusions of law and judgment that quieted title to the Property in favor of plaintiff.

DATED this 26th day of November, 2018.

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

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074

Attorney for plaintiff/respondent
5316 Clover Blossom Ct Trust

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 9,821 words.

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

DATED this 26th day of November, 2018.

LAW OFFICES OF

MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for plaintiff/respondent

CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 26th day of November, 2018, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

Ariel E. Stern, Esq. Jared M. Sechrist, Esq. AKERMAN LLP 1635 Village Center Circle, Suite 200 Las Vegas, NV 89134
James W. Pengilly, Esq. Elizabeth B. Lowell, Esq. PENGILLY LAW FIRM 1995 Village Center Circle, Suite 190 Las Vegas, NV 89134

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

EXHIBIT K

EXHIBIT K

Inst #: 201301240002549
Fees: $17.00 N/C Fee: $0.00
RPTT: $43.35 Ex: #
01/24/2013 02:33:00 PM
Receipt #: 1470974
Requestor:
ALESSI & KOENIG LLC
Recorded By: ANI Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

(2)-1

When recorded mail to and
Mail Tax Statements to:
5316 Clover Blossom Ct Trust
PO Box 36208
LAS VEGAS, NV 89133

A.P.N. No.**124-31-220-092** TS No. **30488-5316**

TRUSTEE'S DEED UPON SALE

The Grantee (Buyer) herein was: **5316 Clover Blossom Ct Trust**
The Foreclosing Beneficiary herein was: **Country Gardens Owners' Assocation**
The amount of unpaid debt together with costs: $5,021.00
The amount paid by the Grantee (Buyer) at the Trustee's Sale: **$8,200.00**
The Documentary Transfer Tax: $43.35
Property address: **5316 CLOVER BLOSSOM CT, North Las Vegas, NV 89031**
Said property is in [ ] unincorporated area: City of **North Las Vegas**
Trustor (Former Owner that was foreclosed on): **DENNIS L & GERALDINE J JOHNSON**

Alessi & Koenig, LLC (herein called Trustee), as the duly appointed Trustee under that certain Notice of Delinquent Assessment Lien, recorded **February 22, 2012** as instrument number **0001651**, in **Clark** County, does hereby grant, without warranty expressed or implied to: **5316 Clover Blossom Ct Trust** (Grantee), all its right, title and interest in the property legally described as: **LOT 92**, as per map recorded in Book **91**, Pages **71** as shown in the Office of the County Recorder of **Clark** County Nevada.

TRUSTEE STATES THAT:
This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on **January 16, 2013** at the place indicated on the Notice of Trustee's Sale.

Ryan Kerbow, Esq.
Signature of AUTHORIZED AGENT for Alessi & Koenig, LLC

State of Nevada)
County of **Clark**)

SUBSCRIBED and SWORN to before me 1/24/13

WITNESS my hand and official seal.
(Seal) (Signature)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
LANI MAE U. DIAZ
Appt. No. 10-2800-1
My Appt. Expires Aug. 24, 2014

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 124-31-220-092
   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 $ 8,200.00
b. Deed in Lieu of Foreclosure Only (value of property) ( )
c. Transfer Tax Value: $ 8,200.00
d. Real Property Transfer Tax Due $ 43.35

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 _____ Capacity: Grantor

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Alessi & Koenig, LLC	Print Name: 5316 Clover Blossom Ct Trust
Address: 9500 W Flamingo Rd. Suite 205	Address: PO Box 36208
City: Las Vegas	City: Las Vegas
State: NV Zip: 89147	State: NV Zip: 89133

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

Print Name: Alessi & Koenig, LLC	Escrow # N/A Foreclosure
Address: 9500 W Flamingo Rd. Suite 205	
City: Las Vegas	State: NV Zip: 89147

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

EXHIBIT L

EXHIBIT L

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bar
*** Admitted to the California and Nevada Bar

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RENO NV
PHONE: 775-626-2323
&
DIAMOND BAR CA
PHONE: 909-843-6590
Nevada Licensed Qualified Collection Manager
AMANDA LOWER

March 23, 2010

Miles, Bauer, Bergrstom & Winters
2200 Paseo Verde Parkway, Suite 250
Henderson, NV 89052

Re: Rejection of Partial Payments

Gentlepersons,

This letter will serve to inform you that we are unable to accept the partial payments offered by your clients as payment in full. While we understand how you read NRS 116.3116 as providing a super priority lien only with respect to 9 months of assessments, case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments. (see *Korbel Family Trust v. Spring Mountain Ranch Master Asociation*, Case No. 06-A-523959-C.)

If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. The association could end up having *lost* money in attempting to collect assessments from the delinquent homeowner.

If you would like to discuss these matters further, please do not hesitate to call.

Sincerely,

Ryan Kerbow

Ryan Kerbow, Esq.

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bar
*** Admitted to the California and Nevada Bar

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If you would like to discuss these matters further, please do not hesitate to call.

Sincerely,

Ryan Kerbow

Ryan Kerbow, Esq.

DAVID ALESSI *
THOMAS BAYARD *
ROBERT KOENIG **
RYAN KERBOW ***
HUONG LAM ****
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bar
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DIAMOND BAR CA
PHONE: 909-843-6590

7-26-2012 *Via Email*

MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTN: Rock K. Jung
2200 Paseo Verde Parkway, Suite 250
Henderson, NV 89052
Fax: (702) 369-4955

Re: 9050 W WARM SPRINGS RD 2180/The Falls at Rhodes Ranch Condominium Owners Association, Inc

Mr. Jung,

The Commission for Common Interest Communities and Condominium Hotels (the "Commission") released Advisory Opinion No. 2010-01 which specifically addresses the issue of whether or not collection costs are included in the super-priority amount. In the opinion, the Commission concluded that associations may collect, as part of the super priority lien, the costs of collecting as authorized by NRS 116.310313. The Commission also amended NAC 116 establishing provisions concerning fees charged by an association or a person acting on behalf of an association to cover the costs of collecting a past due obligation of a unit's owner.

Furthermore, the nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses. As such, please be advised that Alessi & Koenig, LLC, on behalf of the HOA, will continue the foreclosure process unless $3,966.14 is paid pursuant to the attached demand letter. This amount includes all past due obligations, plus collection costs and fees.

Regards,

Ryan Kerbow, Esq.

Licensed in Nevada.

A&K0168

DAVID ALESSI *
THOMAS BAYARD *
ROBERT KOENIG **
RYAN KERBOW ***
HUONG LAM ****
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bar
*** Admitted to the Nevada and California Bar
**** Admitted to the Nevada Bar

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DIAMOND BAR CA
PHONE: 909-843-6590

2-27-12 *Via Fax*

MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTN: Rock K. Jung
2200 Paseo Verde Parkway, Suite 250
Henderson, NV 89052
Fax: (702) 369-4955

Re: 3254 Gold Run St / Sutter Creek Homeowners Association

Mr. Jung,

The Commission for Common Interest Communities and Condominium Hotels (the "Commission") released Advisory Opinion No. 2010-01 which specifically addresses the issue of whether or not collection costs are included in the super-priority amount. In the opinion, the Commission concluded that associations may collect, as part of the super priority lien, the costs of collecting as authorized by NRS 116.310313. The Commission also amended NAC 116 establishing provisions concerning fees charged by an association or a person acting on behalf of an association to cover the costs of collecting a past due obligation of a unit's owner.

Furthermore, the nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses. As such, please be advised that Alessi & Koenig, LLC, on behalf of the HOA, will continue the foreclosure process unless $3,280.00 is paid pursuant to the attached demand letter. This amount includes all past due obligations, plus collection costs and fees.

Regards,

Ryan Kerbow, Esq.

Licensed in Nevada.

EXHIBIT M

EXHIBIT M

ARIEL E. STERN
Nevada Bar No. 8276
DIANA S. ERB
Nevada Bar No. 10580
AKERMAN SENTERFITT LLP
400 South Fourth Street, Suite 450
Las Vegas, Nevada 89101
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: ariel.stern@akerman.com
Email: diana.erb@akerman.com

Attorneys for Plaintiff
BAC Home Loans Servicing, LP

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400 SOUTH FOURTH STREET, SUITE 450
LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiff,

v.

STONEFIELD II HOMEOWNERS ASSOCIATION; ANTHEM HIGHLANDS COMMUNITY ASSOCIATION; MONTECITO AT MOUNTAIN'S EDGE HOMEOWNERS ASSOCIATION; HERITAGE SQUARE SOUTH HOMEOWNERS' ASSOCIATION, INC.; SIERRA RANCH HOMEOWNERS ASSOCIATION; CORTEZ HEIGHTS HOMEOWNERS ASSOCIATION; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; ELKHORN – CIMARRON ESTATES HOMEOWNERS ASSOCIATION; ELKHORN COMMUNITY ASSOCIATION, a Nevada non-profit corporation; CANYON CREST ASSOCIATION; LAS BRISAS HOMEOWNERS ASSOCIATION; ALIANTE MASTER ASSOCIATION; MOUNTAIN'S EDGE MASTER ASSOCIATION; ALESSI & KOENIG, LLC; ALLIED TRUSTEE SERVICES, INC.; ANGIUS & TERRY COLLECTIONS, LLC; ASSESSMENT MANAGEMENT GROUP INC.; ASSET RECOVERY SERVICES, INC.; LJS&G, LTD., d/b/a Leach Johnson Song & Gruchow; HOMEOWNER ASSOCIATION SERVICES,

CASE NO.: 2:11-cv- 00167

COMPLAINT

INC.; NEVADA ASSOCIATION SERVICES, INC.; PHIL FRINK & ASSOCIATES, INC.; G.J.L., INCORPORATED, d/b/a Pro Forma Lien & Foreclosure; K.G.D.O. HOLDING COMPANY, INC., d/b/a Terra West Property Management; RMI MANAGEMENT LLC, d/b/a/ Red Rock Financial Services; SILVER STATE TRUSTEE SERVICES, LLC,

Defendants.

AKERMAN SENTERFITT LLP
400 SOUTH FOURTH STREET, SUITE 450
LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

INTRODUCTION

Nevada law gives homeowners' associations the power to impose and foreclose a lien for unpaid assessments. Nevada Revised Statute section 116.3116 makes this lien superior to a first security interest, but only in an amount equal to common assessments for the nine months preceding the action to enforce the lien. (The portion of a homeowners' association lien senior to a first deed of trust is referred-to as a "super-priority lien.") BAC Home Loans Servicing, LP ("BAC") services hundreds of residential loans secured by properties that are subject to these homeowners' association liens. To maintain clear and marketable title to these properties, BAC has tendered payments to the trustees of many homeowners' associations that, if accepted, would fully satisfy their super-priority liens. But the trustees of many homeowners associations – including Defendants – are rejecting these payments based on erroneous interpretations of Nev. Rev. Stat. § 116.3116 and other law. The trustees are also demanding BAC pay fees and costs excluded from the super-priority lien as a condition to accepting payment of the super-priority amount. BAC therefore seeks a declaration confirming (a) its right to tender payment of super-priority liens and (b) the amount entitled to super-priority status.

PARTIES

Plaintiff

1. BAC is a Texas limited partnership, but is a citizen of North Carolina.

Defendant Homeowners' Associations (HOAs)

2. Stonefield II Homeowners Association ("Stonefield") is a Nevada non-profit corporation with its principal place of business in Nevada.

3. Anthem Highlands Community Association ("Anthem") is a Nevada non-profit

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LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

corporation with its principal place of business in Nevada.

4. Montecito at Mountain's Edge Homeowners Association ("Montecito") is a Nevada non-profit corporation with its principal place of business in Nevada.

5. Heritage Square South Homeowners' Association, Inc. ("Heritage"), is a Nevada non-profit corporation with its principal place of business in Nevada.

6. Sierra Ranch Homeowners Association ("Sierra Ranch") is a Nevada non-profit corporation with its principal place of business in Nevada.

7. Cortez Heights Homeowners Association ("Cortez Heights") is a Nevada non-profit corporation with its principal place of business in Nevada.

8. Southern Highlands Community Association ("Southern Highlands") is a Nevada non-profit corporation with its principal place of business in Nevada.

9. Elkhorn – Cimarron Estates Homeowners Association ("Elkhorn-Cimarron") is a Nevada non-profit corporation with its principal place of business in Nevada.

10. Elkhorn Community Association, ("Elkhorn") is a Nevada non-profit corporation with its principal place of business in Nevada.

11. Canyon Crest Association ("Canyon Crest") is a Nevada non-profit corporation with its principal place of business in Nevada.

12. Las Brisas Homeowners Association ("Las Brisas") is a Nevada non-profit corporation with its principal place of business in Nevada.

13. Aliante Master Association ("Aliante") is a Nevada non-profit corporation with its principal place of business in Nevada.

14. Mountain's Edge Master Association ("Mountain's Edge") is a Nevada non-profit corporation with its principal place of business in Nevada.

Defendant Trustees

15. Alessi & Koenig, LLC ("Alessi"), is a Nevada limited liability company with its principal place of business in Nevada.

16. Upon information and belief, Alessi acts as trustee for Defendant Southern Highlands, as well as other homeowners' associations in Nevada.

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LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

17. Allied Trustee Services, Inc. ("Allied"), is a Nevada foreign corporation with a qualifying state of California, with its principal place of business unknown.

18. Upon information and belief, Allied acts as trustee for Defendant Cortez Heights, as well as other homeowners' associations in Nevada.

19. Angius & Terry Collections, LLC ("Angius"), is a Nevada limited liability company with its principal place of business in Nevada.

20. Upon information and belief, Angius acts as trustee for Defendant Elkhorn, as well as other homeowners' associations in Nevada.

21. Assessment Management Group Inc. ("AMGI") is a Nevada corporation with its principal place of business in Nevada.

22. Upon information and belief, AMGI acts as trustee for Defendant ElkHorn-Cimarron, as well as other homeowners' associations in Nevada.

23. Asset Recovery Services, Inc. ("ARSI"), is a Nevada corporation with its principal place of business in Nevada.

24. Upon information and belief, ARSI acts as trustee for Defendant Canyon Crest, as well as other homeowners' associations in Nevada.

25. LJS&G, Ltd., d/b/a Leach Johnson Song & Gruchow ("Gruchow"), is a Nevada corporation with its principal place of business in Nevada.

26. Upon information and belief, Gruchow acts as trustee for Defendant Sierra Ranch, as well as other homeowners' associations in Nevada.

27. Homeowner Association Services, Inc. ("HOASI"), is a collection agency licensed in Clark County with its with its principal place of business in Nevada.

28. Upon information and belief, HOASI acts as trustee for Defendant Las Brisas, as well as other homeowners' associations in Nevada.

29. Nevada Association Services, Inc. ("NASI"), is a Nevada corporation with its principal place of business in Nevada.

30. Upon information and belief, NASI acts as trustee for Defendant Aliante, as well as other homeowners' associations in Nevada.

AKERMAN SENTERFITT LLP
400 SOUTH FOURTH STREET, SUITE 450
LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

31. Phil Frink & Associates, Inc. ("Frink"), is a Nevada corporation with its principal place of business in Nevada.

32. Upon information and belief, Frink acts or has acted as trustee for Defendant Stonefield, as well as other homeowners' associations in Nevada.

33. G.J.L., Incorporated, d/b/a Pro Forma Lien & Foreclosure ("Pro Forma"), is a collection agency licensed in Clark County and is a Nevada corporation with its with its principal place of business in Nevada.

34. Upon information and belief, Pro Forma acts as trustee for Defendant Heritage, as well as other homeowners' associations in Nevada.

35. K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management ("Terra West"), is a Nevada corporation with its principal place of business in Nevada.

36. Upon information and belief, Terra West acts as trustee for Defendant Montecito, as well as other homeowners' associations in Nevada.

37. RMI Management LLC, d/b/a Red Rock Financial Services ("RRFS"), is a Nevada corporation with its with its principal place of business in Nevada.

38. Upon information and belief, RRFS acts or has acted as trustee for Defendant Anthem, as well as other homeowners' associations in Nevada.

39. Silver State Trustee Services, LLC ("SSTS"), is a Nevada limited liability company with its principal place of business in Nevada.

40. Upon information and belief, SSTS acts or has acted as trustee for Defendant Mountain's Edge, as well as other homeowners' associations in Nevada.

41. Upon information and belief, homeowners' associations currently unknown to BAC are directing Defendant Trustees to refuse to communicate with BAC and to reject tender of lien amounts from BAC and other loan servicers. BAC reserves the right to amend its Complaint to insert the names of these homeowners associations when they are identified.

JURISDICTION AND VENUE

42. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity of citizenship and the amount in controversy exceeds $75,000.

AKERMAN SENTERFITT LLP
400 SOUTH FOURTH STREET, SUITE 450
LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

43. BAC is a citizen of North Carolina. None of the Defendants are North Carolina citizens. There is complete diversity between BAC and Defendants.

44. The amount in controversy exceeds $75,000 because, as shown below, the value of the object of this litigation – clear, marketable title for real property securing hundreds of mortgage loans – exceeds $75,000.

45. The court may exercise personal jurisdiction over each Defendant because each Defendant is a Nevada citizen or is actively doing business in Nevada.

46. Venue is proper under 28 U.S.C. § 1391(b) because the acts or transactions complained of occurred in this District and the real property at issue is in this District.

FACTS

Background

47. BAC services thousands of mortgage loans in Nevada on behalf of many holders of first deeds of trust, or "first security interests" for purposes of Nev. Rev. Stat. § 116.3116.

48. Many of these deeds of trust are subject to the liens of homeowners' associations.

49. Under Nevada law, homeowners' associations have the right to charge property owners residing within the community an assessment to cover the association's expenses for maintaining or improving the community, among other things.

50. When these assessments go unpaid, the association may impose and then foreclose on a lien if the assessments remain unpaid.

51. Under Nev. Rev. Stat. § 116.3116, an association may impose a lien for "any penalties, fees, charges, late charges, fines and interest charged" under Nev. Rev. Stat. § 116.3102(1)(j)–(n).

52. Nev. Rev. Stat. § 116.3116 makes an association's lien for assessments junior to a first deed of trust, such as the deeds of trust securing BAC's loans, with one exception: an association's lien is senior to a first security interest "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[.]"

53. As generally applied and interpreted by homeowners' associations and their trustees

(including, without limitation, Defendants), the "super-priority" lien created by Nev. Rev. Stat. § 116.3116 attaches only after a first-priority deed of trust is foreclosed. If the amount secured by the super-priority lien is not paid at or prior to foreclosure of the first deed of trust, the super-priority lien continues to cloud title to the property. BAC must clear this cloud in order to deliver marketable title to its foreclosure purchaser.

54. To fulfill its obligation to protect the deeds of trust securing the loans it services, BAC tenders payment of the super-priority amount. On occasion, BAC makes this tender prior to foreclosing on the deed of trust.

55. Several trustees of homeowners' associations, including the trustee Defendants, have wrongfully rejected BAC's tender.

56. In some instances, Defendant Trustees have refused to communicate with BAC when BAC sought a pay-off amount for the association's super-priority lien.

57. By refusing BAC's tender of the super-priority amount, the HOA Defendants prevent BAC from clearing the super-priority lien from the title of the properties securing its loans.

Illustrative Examples

58. For example, on January 29, 2010, BAC tendered a check for $180.00 to Defendant Trustee Frink in full satisfaction of Defendant Homeowners' Association Stonefield's lien against a property located at 9050 Alsandair Court.

59. On February 18, 2010, Stonefield, through its trustee Frink, returned BAC's check. Frink rejected the check, claiming (1) "the Association has no relationship, and therefore no obligation to communicate with or negotiate with, [BAC] under any circumstance unless and until [BAC] is the owner of the property," and (2) "the Association has no obligation or intention to accept a partial payment from [BAC] . . . ." Apparently, Frink regarded BAC's payment as a "partial payment" because it did not include the attorney's fees Stonefield allegedly incurred while attempting to enforce its lien or the full amount of assessments Stonefield asserted were due. A true and correct copy of the returned check with the accompanying letter, as well as BAC's original letter to Stonefield, are attached as **Exhibit 1**.

60. BAC also tendered payments to Southern Highlands, through its trustee Alessi, only to

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LAS VEGAS, NEVADA 89101
TEL.: (702) 634-5000 – FAX: (702) 380-8572

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400 SOUTH FOURTH STREET, SUITE 450
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have Alessi reject the payments and proceed with its foreclosure action.

61. On December 17, 2009, January 13, 2010, January 26, 2010, January 29, 2010 and February 12, 2010, BAC tendered five (5) separate checks to SHCA for full payment of five (5) liens on five (5) properties: 10865 Calcedonian Street, 11117 Deluna Street, 10792 Vineyard Pass Street, 10930 Fintry Hills Street, and 6017 Lamotte Avenue.

62. Alessi rejected these five (5) payments based on its contention that the payments were not for the full lien amount because none of the five (5) payments included Southern Highlands' attorney's fees or "the reasonable costs of collection." A true and correct copy of the returned checks with the accompanying letter from Alessi are collectively attached as **Exhibit 2**.

63. Anthem, through Red Rock, also received and rejected payment in full from BAC.

64. As with Southern Highlands, BAC tendered five (5) checks to Red Rock for full payment of five (5) liens on five (5) properties: 2724 Mintlaw Avenue, 2855 Strathallan Avenue, 2784 Drummossie Drive, 2859 Strathallan Avenue, 2734 Craigmillar Street.

65. Red Rock returned each check, based on its contention that BAC had failed to tender the full amount due, meaning the full amount of Anthem's attorney's fees.

66. Similar to the illustrative examples above, each named Defendant Trustee has wrongfully rejected tender of payments by BAC that would have satisfied the full lien amount for the corresponding Defendant Homeowners' Association.

67. Defendant Trustees and Defendant Homeowners' Associations are intransigent in their position. They will continue to refuse BAC's payments and to release their liens because they believe – erroneously – that the law requires BAC to pay them more than the amount being tendered: nine (9) months' worth of common general assessments.

68. BAC therefore seeks declaratory relief to clarify and settle legal relations between it and Defendants, and to obtain relief from the uncertainty and controversy surrounding Defendants' refusal of BAC's payments.

ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

69. Based on the facts alleged above, BAC seeks declaratory relief under 28 U.S.C. § 2201 and Nev. Rev. Stat. Ch. 30.

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LAS VEGAS, NEVADA 89101
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70. Because the issues outlined above are principally questions of law and because the associations, including Defendants, will continue clouding the title of properties securing the loans BAC services under erroneous interpretations of the law, BAC requests "a speedy hearing" as provided by Federal Rule of Civil Procedure 57.

71. An actual controversy exists between BAC and Defendants because Defendants have, among other things, (a) refused to accept BAC's tender to pay the amounts secured by the super-priority lien and (b) improperly demanded payment of attorneys' fees and collection costs even though these expenses are not afforded super-priority status by Nev. Rev. Stat. § 116.3116.

72. BAC's interests are adverse to Defendants' because BAC cannot clear the title to the properties securing the loans it services unless it pays Defendants the amount secured by the super-priority lien, but Defendants refuse to accept payment unless BAC also pays funds not entitled to super-priority status.

73. BAC seeks two judicial declarations. These judicial declarations are necessary (a) to settle an actual and ripe dispute between BAC and Defendants concerning the parties' rights and obligations under Nev. Rev. Stat. § 116.3116 and (b) to prevent the Defendants from unlawfully clouding title to real property with excessive and unlawful liens.

74. First, a judicial declaration is needed establishing BAC's right to pay off or "redeem" the associations' super-priority liens.

75. Many homeowners associations, including Defendants, refuse to provide BAC payoff information and reject BAC's tender in part because they wrongfully contend BAC "has no relationship [with it], and therefore no obligation to communicate with or negotiate with [BAC] under any circumstance unless and until [BAC] is the owner of the property[.]" **Exhibit 1**.

76. BAC has both a common-law and a statutory right to pay off or redeem any lien that is senior to the deeds of trust securing the loans it services. This Court should judicially declare that BAC is entitled to pay off that portion of an association's lien that is senior to BAC's first deed of trust, even if payment is tendered before BAC forecloses on the deed of trust. This right necessarily includes the right to obtain information related to the exercise of those rights, including the amount due under Nev. Rev. Stat. § 116.3116.

77. Second, the Court should issue a judicial declaration establishing an association's super-priority lien does not include attorneys' fees or collection costs. Under the plain language of Nev. Rev. Stat. § 116.3116, only nine (9) months of regular, budgeted common assessments are included in the super-priority amount.

78. Without these declarations, associations and trustees – including, without limitation, Defendants – will continue refusing tender from BAC unless BAC also pays amounts to which they are not entitled. Allowing Defendants to continue this practice would deprive BAC of the ability to protect its deeds of trust without paying excessive and unlawful fees to Defendants.

79. In addition to these judicial declarations, the Court should issue an injunction (a) prohibiting Defendants from wrongfully rejecting BAC's tender of the super-priority amount and (b) requiring Defendants to disclose and account for the super-priority amounts upon request by BAC. This injunction is required to give effect to the Court's declaratory judgments.

PRAYER FOR RELIEF

BAC respectfully prays that the Court grant the following:

a. A declaration that (1) BAC has a right to pay off or redeem an association's super-priority lien, and (2) only budgeted common assessments, but not attorneys' fees or collection costs, are included within the super-priority amount under Nev. Rev. Stat. § 116.3116;

b. Attorney's fees and costs of suit, as provided for in 28 U.S.C. § 2201 and Nev. Rev. Stat. Ch. 30.;

c. An injunction as set forth in paragraph 79 of this Complaint; and

d. For such other and further relief the Court deems proper.

DATED this 31st day of January, 2011.

AKERMAN SENTERFITT LLP

/s/ Ariel Stern
ARIEL E STERN, ESQ.
Nevada Bar No. 8276
DIANA S. ERB, ESQ.
Nevada Bar No. 10580
400 South Fourth Street, Suite 450
Las Vegas, Nevada 89101
Attorneys for Plaintiff

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EXHIBIT "1"

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COSTA MESA, CA 92626
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

Of Counsel
JOHN W. LIBBY
Admitted in Utah

January 29, 2010

Phil Frink & Associates
1895 Plumas Street, Suite 5
Reno, NV 89509

Re: *Property Address:* 9050 Alsandair Court
ACCT #: 12086
LOAN #: 135318504
MBBW File No. 09-L0454

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $4,371.38. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
>
> ...
>
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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...

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assesament. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $180.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to PHIL FRINK & ASSOCIATES, INC. in the sum of $180.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 9050 Alsandair Court have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct

09-L0454

Initials: TLC

Payee: Phil Frink & Associates

Check #: 2576

Date: 1/29/2010

Amount: 180.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/29/2010	#12086	To Cure HOA Delinquency	180.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-68/1220
1020

2576

Date: 1/29/2010

Amount $***** 180.00

09-L0454

Loan # 135318504

Check Void After 90 Days

Pay $*****One Hundred Eighty & No/100 Dollars

to the order of Phil Frink & Associates

Security Features Included. Details on Back.

⑈2576⑈ ⑆122400724⑆ 501006876973⑈

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ATTORNEYS AT LAW

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RENO, NEVADA 89511

TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

February 18, 2010

Rock K. Jung, Esq.
Miles, Bauer, Bergstrom & Winters, LLP
2200 Paseo Verde Pkwy, Suite 250
Henderson, NV 89052

Re: *Stonefield II Homeowners Association*
9050 Alsandair Drive, Unit ID: 1-119-02

Dear Mr. Jung:

I represent the Stonefield II Homeowners Association. I am in receipt of your letter of January 29, 2010 to Phil Frink and Associates enclosing a cashier's check in the amount of $180.00, with the statement that "any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 9050 Alsandair Drive have now been "paid in full"". This, as well as the other statements contained in your letter, are unenforceable, unlawful and without merit. Accordingly, I return your "tender" of payment. As noted below, we will deal solely with the record owner of the property.

The 9-month super priority is only triggered by a foreclosure by the first deed of trust holder. The Washoe County Recorder's website reflects that your client has not even recorded a Notice of Default at this time, so most certainly has not completed a foreclosure and therefore cannot claim the benefit of the super-priority write off. Second, the Association has no relationship, and therefore no obligation to communicate with or negotiate with, a first deed of trust holder under any circumstance unless and until that lender is the owner of the property. Having a deed of trust gives BAC no right to information regarding the account. Third, $180.00 is a fraction of what is due the Association and is not sufficient, without a written payment plan *from the record owner*, to stop the pending foreclosure.

As noted, your check is being returned to you as the Association has no obligation or intention to accept a partial payment from a lien-holder, and most certainly will not accept a payment with conditions on the "expressed or implied" endorsement thereof. If BAC wishes to pay this account in full, please provide written authorization from the owner of record of the property that we may release account information to your firm, and we will provide a written breakdown of all amounts due.

We are collecting a debt for the above-referenced Association. Any information obtained will be used for this purpose.

Very truly yours,

GAYLE A. KERN, LTD.

Gayle A. Kern

Enclosure
c: Client
Phil Frink and Associates, Inc.

EXHIBIT "2"

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
* Admitted to the California Bar
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*** Admitted to the California and Nevada Bar

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Nevada Licensed Qualified Collection Manager
AMANDA LOWER

February 4, 2010

Miles, Bauer, Bergrstom & Winters
2200 Paseo Verde Parkway, Suite 250
Henderson, NV 89052

Re: Rejection of Partial Payments

Gentlepersons,

This letter will serve to inform you that we are unable to accept the partial payments offered by your clients as payment in full. While we understand how you read NRS 116.3116 as providing a super priority lien only with respect to 9 months of assessments, case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments. (see *Korbel Family Trust v. Spring Mountain Ranch Master Association*, Case No. 06-A-523959-C.)

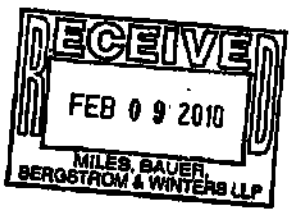
If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. The association could end up having *lost* money in attempting to collect assessments from the delinquent homeowner.

It has come to my attention that our office inadvertently posted some of the checks sent from Miles Bauer that contained only partial payments. We are therefore refunding that money, as our clients have not authorized us to take payments that amount to a small fraction of their total liens. We apologize for an inconvenience this may cause you.

If you would like to discuss these matters further, please do not hesitate to call.

Sincerely,

Ryan Kerbow, Esq.



09-L1013

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bars
*** Admitted to the Nevada Bar
**** Admitted to the Nevada and California Bar

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&
DIAMOND BAR CA

Nevada Licensed Qualified Collection Manager
AMANDA LOWER

FACSIMILE COVER LETTER

To:	Teri Cole	Re:	10865 Calcedonian SUHO #16971
From:	Aileen Ruiz		
Fax No.:	702-492-8556	Pages:	1, including cover
		HOA:	16971

Dear Teri Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced escrow; property located at 10865 Calcedonian St, Las Vegas, NV. The total amount due through December, 15, 2009 is $1,455.95. The breakdown of fees, interest and costs is as follows:

11/9/2009	Notice of Delinquent Assessment Lien – Nevada	$295.00
11/9/2009	Demand Fee	$150.00
Total		$445.00

1.	**Attorney and/or Trustees fees:**	$445.00
2.	**Costs (Notary, Recording, Copies, Mailings, Publication and Posting)**	$50.00
3.	**Interest Through November, 9, 2009**	$11.10
4.	**Title Research (10-Day Mailings per NRS 116.31163)**	$0.00
5.	**Management Document Processing & Transfer Fee**	$0.00
6.	**Late Fees Through November, 9, 2009**	$10.00
7.	**Fines Through November, 9, 2009**	$200.00
8.	**Assessments Through December, 15, 2009 @ $55.00 per month**	$739.85
9.	**Progress Payments:**	$0.00
12.	**RPIR-GI Report**	$0.00
Sub-Total:		$1,455.95
Less Payments Received:		$0.00
Total Amount Due:		$1,455.95

Please have a check in the amount of $1,455.95 made payable to the Alessi & Koenig, LLC and mailed to the below listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

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Also Admitted in Nevada and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
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MATTHEW D. TOKARZ *
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Of Counsel
JOHN W. LISH
Admitted in Utah

January 29, 2010

Alessi & Koenig
9500 W. Flamingo Road, Suite 100
Las Vegas, NV 89147

Re: *Property Address:* 10865 Calcedonian St. #18971
HOA #: 18971
LOAN #: 60315529
MBBW File No. 09-L1013

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $1,455.95. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
>
> ...
>
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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...

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $495.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to ALESSI & KOENIG, LLC in the sum of $495.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 10865 Calcedonian St. #18971 have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0412.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L1013 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2565 Date: 1/26/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/26/2010	#18971	To Cure HOA Delinquency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
18-86/1220
1020

2565

Date: 1/26/2010

09-L1013

Amount $***** 495.00

Loan # 60316529

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

Check Void After 90 Days

to the order of Alessi & Koenig, LLC

Security Features Included. Details on Back.

⑈2565⑈ ⑆122400724⑆ 501008878973⑈

09-L0936

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KERBOW***
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** Admitted to the California, Nevada and Colorado Bars
*** Admitted to the Nevada Bar
**** Admitted to the Nevada and California Bar

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&
DIAMOND BAR CA
PHONE: 909-843-6500

Nevada Licensed Qualified Collection Manager
AMANDA LOWER

FACSIMILE COVER LETTER

To:	Teri Cole	Re:	11117 Deluna St/HO #11882
From:	Alissa Ruiz		
Fax No.:	702-492-6558	Pages:	1, including cover
		HO #:	11882

Dear Teri Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced escrow; property located at 11117 Deluna St, Las Vegas, NV. The total amount due through December, 15, 2009 is $16,150.77. The breakdown of fees, interest and costs is as follows:

	Notice of Delinquent Assessment Lien – Nevada		$345.00
	Notice of Default		$395.00
	Notice of Violation Lien		$500.00
	Notice of Trustee's Sale		$395.00
	Payment Plan Letter	(6)	$150.00
	Pre NOD		$150.00
	Payment Plan Breach Letter		$125.00
	Pre-Notice of Trustee's Sale		$150.00
	Trustees Fees		$420.00
	Demand Fee		$150.00
11/4/2009	Update Demand Fee		$95.00
Total			$2,875.00

1.	**Attorney and/or Trustees fees:**	$2,875.00
2.	**Costs (Notary, Recording, Copies, Mailings, Publication and Posting)**	$510.00
3.	**Interest Through November, 4, 2009**	$22.40
4.	**Title Research (10-Day Mailings per NRS 116.31163)**	$240.00
5.	**Management Document Processing & Transfer Fee**	$0.00
6.	**Late Fees Through November, 4, 2009**	$10.00
7.	**Fines Through June, 30, 2009**	$11,000.00
8.	**Assessments Through December, 15, 2009 @ $55.00 per month**	$1,493.37
9.	**Progress Payments:**	$0.00
12.	**RPIR-GI Report**	$0.00

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

DOUGLAS E. MILES *
Also Admitted in Nevada and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
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FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
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* CALIFORNIA OFFICE
1665 SCENIC AVENUE
SUITE 200
COSTA MESA, CA 92626
PHONE (714) 481-9100
FACSIMILE (714) 481-9143

Of Counsel
JOHN W. LISH
Admitted in Utah

January 20, 2010

ALESSI & KOENIG, LLC
9500 W. FLAMINGO ROAD, SUITE 100
LAS VEGAS, NV 89147

Re: *Property Address:* 11117 Deluna St.
HO #: 11882
LOAN #: 5710428
MBBW File No. 09-L0936

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $16,150.77. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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...

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $495.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $495.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 11117 Deluna St. have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L0936 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2203 Date: 12/17/2009 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
12/16/2009	HOA#11882	To Cure HOA Delinquency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-68/1220
1020
09-L0936
Loan # 5710428

2203
Date: 12/17/2009
Amount $**** 495.00
Check Void After 90 Days

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

to the order of Alessi & Koenig, LLC

⑈2203⑈ ⑆122400724⑆ 501006876973⑈

10-H0012

DAVID ALESSI*
THOMAS BAYARD *
ROBERT KOENIG**
RYAN KIMBROW***
* Admitted to the California Bar
** Admitted to the California, Nevada and Colorado Bars
*** Admitted to the Nevada Bar
**** Admitted to the Nevada and California Bar

ALESSI KOENIG
A Multi-Jurisdictional Law Firm
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Facsimile: 702-222-4043
www.alessikoenig.com

ADDITIONAL OFFICES IN
AGOURA HILLS, CA
PHONE: 818- 735-0600
RENO NV
PHONE: 775-826-7000
&
DIAMOND BAR CA
PHONE: 909-843-6500

Nevada Licensed Qualified Collection Manager
AMANDA LOWER

FACSIMILE COVER LETTER

To:	Tari Cole	Re:	10792 Vineyard Pass St/HO #11849
From:	Alison Ruiz	Date:	Monday, December 14, 2009
Fax No.:	702-499-8656	Pages:	1, including cover
		HO #:	11349

Dear Tari Cole:

This cover will serve as an amended demand on behalf of Southern Highlands Community Association for the above referenced escrow; property located at 10792 Vineyard Pass St, Las Vegas, NV. The total amount due through January, 15, 2010 is $4,369.43. The breakdown of fees, interest and costs is as follows:

Notice of Delinquent Assessment Lien -- Nevada	$345.00
Notice of Default	$395.00
Notice of Trustee's Sale	$395.00
Trustees Fees	$420.00
12/14/2009 Demand Fee	$150.00
Total	$1,705.00

1. Attorney and/or Trustees fees:	$1,705.00
2. Costs (Notary, Recording, Copies, Mailings, Publication and Posting)	$510.00
3. Interest Through December, 14, 2009	$23.71
4. Title Research (10-Day Mailings per NRS 116.31163)	$240.00
5. Management Document Processing & Transfer Fee	$0.00
6. Late Fees Through December, 14, 2009	$10.00
7. Fines Through December, 14, 2009	$300.00
8. Assessments Through January, 15, 2010 @ $55.00 per month	$1,580.72
9. Progress Payments:	$0.00
12. RPIR-GI Report	$0.00
Sub-Total:	$4,369.43
Less Payments Received:	$0.00
Total Amount Due:	$4,369.43

Please have a check in the amount of $4,369.43 made payable to the Alessi & Koenig, LLC and mailed to the below listed NEVADA address. Upon receipt of payment a release of lien will be drafted and recorded. Please contact our office with any questions.

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

DOUGLAS E. MILES *
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* CALIFORNIA OFFICE
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SUITE 200
COSTA MESA, CA 92626
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

Of Counsel
JOHN W. LISH
Admitted in Utah

January 29, 2010

ALESSI & KOENIG, LLC
9500 W. FLAMINGO ROAD, SUITE 100
LAS VEGAS, NV 89147

Re: *Property Address:* 10792 Vineyard Pass St. **#11343**
HOA #: 11343
LOAN #: 93334722
MBBW File No. 10-H0012

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $4,369.43. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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,..

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $495.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $495.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 10792 Vineyard Pass St. #11343 have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 10-H0012 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2577 Date: 1/29/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/29/2010	#11343	To Cure HOA Delinquency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1020
10-H0012
Loan # 93334722

2577

Date: 1/29/2010

Amount $**** 495.00

Check Void After 90 Days

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

to the order of Alessi & Koenig, LLC

Security Features Included. Details on Back.

⑈2577⑈ ⑆122400724⑆ 501006876973⑈

US BANK (JOHNSON) 0863

DOUGLAS E. MILES *
Also Admitted in Nevada and Illinois
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SUITE 200
COSTA MESA, CA 92626
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

Of Counsel
JOHN W. LISH
Admitted in Utah

January 15, 2010

ALESSI & KOENIG, LLC
9500 W. FLAMINGO ROAD, SUITE 100
LAS VEGAS, NV 89147

Re: *Property Address:* 10930 Fintry Hills St. **#18160**
HOA #: 18160
LOAN #: 87667844
MBBW File No. 09-L1545

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $2,254.50. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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...

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $495.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $495.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 10930 Fintry Hills St. **#18160** have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L1545 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2462 Date: 1/13/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/13/2010	#18160	To Cure HOA Deficiency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1029
09-L1545
Loan # 87667844

2462

Date: 1/13/2010

Amount $***** 495.00

Check Void After 90 Days

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

to the order of Alessi & Koenig, LLC

Details on back. Security Features Included.

⑈2462⑈ ⑆122400724⑆ 501006876973⑈

DOUGLAS E. MILES *
Also Admitted in Nevada and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
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COSTA MESA, CA 92626
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

Of Counsel
JOHN W. LISH
Admitted in Utah

January 21, 2010

ALESSI & KOENIG, LLC
9500 W. FLAMINGO ROAD, SUITE 100
LAS VEGAS, NV 89147

Re: *Property Address:* 6017 Lamotte Avenue
HOA #: 4805
LOAN #: 189375753
MBBW File No. 09-L0666

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by in regards to the above-referenced address shows a full payoff amount of $10,538.23. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *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*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 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...

The lien is also prior to all security interests described in paragraph (b) 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.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $495.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $495.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 6017 Lamotte Avenue have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0442.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 09-L0666 Initials: TLC

Payee: Alessi & Koenig, LLC Check #: 2488 Date: 1/14/2010 Amount: 495.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
1/14/2010	#4805	To Cure HOA Deficiency	495.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1665 Scenic Avenue - Suite 200
Costa Mesa, CA 92626
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1020
09-L0666
Loan # 189375753

2488

Date: 1/14/2010

Amount $**** 495.00

Check Void After 90 Days

Pay $*****Four Hundred Ninety-Five & No/100 Dollars

to the order of Alessi & Koenig, LLC

Security Features Included. Details on back.

⑈2488⑈ ⑆122400724⑆ 501006876973⑈

US BANK (JOHNSON) 0869

EXHIBIT N

EXHIBIT N

Huong X. Lam, Esq.
Nevada Bar No. 10916
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9500 W. Flamingo, Suite 100
Las Vegas, Nevada 89147
Phone: (702) 222-4033
Fax: (702) 254-9044
Attorney for Defendants
Southern Highlands Community Association
Alessi & Koenig, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiff,

v.

STONEFIELD II HOMEOWNERS ASSOCIATION; ANTHEM HIGHLANDS COMMUNITY ASSOCIATION; MONTECITO AT MOUNTAIN'S EDGE HOMEOWNERS ASSOCIATION; HERITAGE SQUARE SOUTH HOMEOWNERS' ASSOCIATION, INC.; SIERRA RANCH HOMEOWNERS ASSOCIATION; CORTEZ HEIGHTS HOMEOWNERS ASSOCIATION; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; ELKHORN – CIMARRON ESTATES HOMEOWNERS ASSOCIATION; ELKHORN COMMUNITY ASSOCIATION, a Nevada non-profit corporation; CANYON CREST ASSOCIATION; LAS BRISAS HOMEOWNERS ASSOCIATION; ALIANTE MASTER ASSOCIATION; MOUNTAIN'S EDGE MASTER ASSOCIATION; ALESSI & KOENIG, LLC; ALLIED TRUSTEE SERVICES, INC.; ANGUS & TERRY COLLECTIONS, LLC; ASSESSMENT MANAGEMENT GROUP, INC.; ASSET RECOVERY SERVICES, INC.; LJS&G, LTD., d/b/a Leach Johnson Song & Gruchow; HOMEOWNER ASSOCIATION SERVICES, INC.; NEVADA ASSOCIATION SERVICES,

Case No. 2:11-cv-00167

DEFENDANTS SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION AND ALESSI & KOENIG, LLC's MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) UNDER NRS 38.310, OR IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

INC.;PHIL FRINK & ASSOCIATES, INC.; G.J.L., INCORPORATED, d/b/a Pro Forma Lien & Foreclosure; K.G.D.O. HOLDING COMPANY, INC., d/b/a Terra West Property Management; RMI MANAGEMENT, LLC, d/b/a Red Rock Financial Services; SILVER STATE TRUSTEE SERVICES, LLC,

Defendants.

DEFENDANTS SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION AND ALESSI & KOENIG, LLC's MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) UNDER NRS 38.310, OR IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

COMES NOW, Defendants SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION ("Southern Highlands") and ALESSI & KOENIG, LLC ("A&K") (collectively "Defendants"), and files this MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) UNDER NRS 38.310, OR IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION.

This Motion to Dismiss is made and based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument of counsel the court may consider at the hearing on this Motion.

POINTS AND AUTHORITIES

I. Brief Summary

Defendants Southern Highlands and A&K are among the many defendants in the above-entitled action commenced in this Court. On January 31, 2011, Plaintiff commenced this action by filing their Complaint requesting declaratory relief and an injunction. Plaintiff's request for relief asks this Court to declare that (1) Plaintiff has a right to pay off or redeem an association's super-priority lien, and (2) only budgeted common assessments, but not attorneys' fees or

collection costs, are included within the super-priority amount under Nevada Revised Statute ("NRS") 116.3116. In connection with Plaintiff's prayer for declaratory relief, Plaintiff asks this Court to issue an injunction forcing Defendants to accept payment for only the super-priority amount, exclusive of attorneys' fees and collection costs. Plaintiff's Complaint conveniently ignores the rest of NRS Chapter 116 and NRS 38.310 which (1) requires the parties to participate in mediation or arbitration prior to the commencement of a civil action and (2) permits an association to collect, as part of the super-priority lien, the "costs of collecting" authorized by NRS 116.310313.

II. Legal Argument

A. *NRS 38.310 Requires the Dismissal of this Action.*

Plaintiff's Complaint should be dismissed pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(1) for lack of subject matter jurisdiction. Pursuant to NRS 38.320, this action should be submitted to arbitration. NRS 38.320 provides that "[a]ny civil action described in NRS 38.310 must be submitted for mediation or arbitration by filing a written claim with the Division. [...]"

NRS 38.310(1) further puts limitations on the commencement of civil action. It provides:

> No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
>
> (b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,
>
> may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of

> chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

Furthermore, NRS 38.310(2) states: [a] court ***shall dismiss*** any civil action which is commenced in violation of the provisions of subsection 1. (Emphasis added).

B. *Plaintiff's Complaint Should Be Dismissed Pursuant to NRS 38.300 et seq.*

NRS 38.300 et seq. unequivocally grants the Real Estate Division original jurisdiction over all claims related to the application, enforcement or interpretation of a home owners association's governing documents, as well as claims that pertain to the imposition of association assessments upon residential property. NRS 38.330 requires the parties to submit the matter to mediation or arbitration. NRS 38.330(1) gives the parties the option to participate in mediation. However, if the parties do not agree to mediate the matter, NRS 38.330(2) requires the parties to arbitrate the matter. NRS 38.330(2) provides, in pertinent part, "[i]f all the parties named in the claim do not agree to mediation, the parties ***shall*** select an arbitrator..." *Emphasis added.* Furthermore, a civil action may only be commenced ***after*** the parties have participated in arbitration.

In this case, Plaintiff has not reached out to these Defendants in order to submit the matter to mediation or arbitration. Plaintiff's Complaint should be dismissed pursuant to Nevada law because this civil action was commenced without first arbitrating the matter.

C. *According to Nevada's Commission on Common Interest Communities and Condominium Hotels, An Association May Collect as a Part of the Super Priority Lien the "Costs of Collecting" as Authorized by NRS 116.310313.*

Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation. A lien under NRS 116.3116 is prior to a first security interest for up to nine

months' worth of assessments. NRS 116.3116(2). Among a few other exceptions, Nevada law states that a homeowners' association lien is prior to all other liens and encumbrances except for a first security interest recorded before the date on which any assessment collections were initiated. NRS 116.3116(2)(b). However, the statute further provides:

> 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..."

An association may also charge a homeowner reasonable fees to collect any past due obligation. NRS 116.310313(1). Costs of collection 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."

NRS 116.310313(3)(a). "'Obligation' means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents." NRS 116.31313(3)(b). Furthermore, "[a]ny assessment for common expenses or installment thereof that is 60 days or more past due bears interest at a rate equal to the prime rate at the largest bank in Nevada." NRS 116.3115(3).

Pursuant to the plain language of the statute, associations should be able to include specified costs of collecting as part of the association's super priority lien. Furthermore, the Commission for Common Interest Communities and Condominium Hotels (the "Commission") released Advisory Opinion No. 2010-01 which specifically speaks to this issue. In the opinion,

the Commission concluded that associations may collect as part of the super priority lien the costs of collecting as authorized by NRS 116.310313. See attached Exhibit A.

Additionally, in a relatively similar case in the District Court of Clark County Nevada, the court in that case dismissed the action due to lack of subject matter jurisdiction and pursuant to NRS 38.310. *See, e.g., Higher Ground, LLC, et al., v. Nevada Association Services, Inc., et al.*, Case no. A-10-609031-C (May 18, 2010) (dismissing action due to lack of subject matter jurisdiction under NRCP 38.310 and NRCP 12(b)(1)). A copy of the Order is attached hereto as Exhibit B. Moreover, associations and their collection agencies, have been routinely awarded their collection costs, late fees, and interest as part of the super-priority lien amount under NRS Chapter 116. *See, e.g. Korbel Family Trust v. Spring Mountain Ranch Master Ass'n*, Case No. A523959 (Nov. 20, 2006) (awarding to association the super-priority amount, including late fees, interest, costs of collection, and transfer fees). A copy of the Order is attached hereto as Exhibit C.

In this case, Plaintiff seeks a declaration that an association's super-priority lien only includes the "budgeted common assessments, but not attorneys' fees or collection costs." Such a finding would impose a burden on those homeowners who pay their assessments by forcing them to pick up the tab for delinquent homeowners, and is contrary to the plain language of NRS Chapter 116 and goes against the findings in past cases in Nevada.

D. *An Injunction is Not Appropriate in this Case Because Even if Payment is Tendered, Plaintiff Refuses to Include Attorneys' Fees and Collection Costs in the Tender of Payment.*

An injunction is not appropriate in this case because Defendants have every right to refuse Plaintiff's tender of the super-priority amount. Even if Defendants were to accept Plaintiff's tender of payment, Plaintiff's tender does not include attorneys' fees or collection

costs, which Nevada law specifically authorizes. As stated, *supra*, Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation.

III. Conclusion

Based on the foregoing, Defendants Southern Highlands Community Association and Alessi & Koenig, LLC respectfully requests this Court to dismiss Plaintiff's Complaint in its entirety, or alternatively, compel arbitration and stay proceedings pending the outcome of arbitration. It is further requested that Defendants be awarded attorneys' fees and costs for having to defend this action and to submit this motion.

Dated: February 22, 2010

ALESSI & KOENIG, LLC

By: */s/ Huong Lam*

Huong X. Lam, Esq.
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Attorney for Defendants
Southern Highlands Community Association
Alessi & Koenig, LLC

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an associate of ALESSI & KOENIG, LLP, and that on the 22nd day of February, 2011, I served a true and correct copy of DEFENDANTS SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION AND ALESSI & KOENIG, LLC's MOTION TO DISMISS PURSUANT TO NRS 38.310, OR IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION via US mail on the parties shown below.

BAC HOME LOANS SERVICING, LP
c/o Ariel E. Stern, Esq.
AKERMAN SENTERFITT, LLP
400 South Fourth Street, Suite 450
Las Vegas, NV 89101

/s/ Huong Lam
Huong X. Lam , Esq.

Exhibit A

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "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 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

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

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . 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[1] 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. . .

NRS 116.3116 further provides that "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."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116. (1994)	**NRS 116.3116 Liens against units for assessments.**(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . 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.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to,	(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;
(ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(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

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(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.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments***.[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	**NRS 116.3116 Liens against units for assessments**. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any . . . **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. . . .

ADOPTED DECEMBER 8, 2010

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except: * * * (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of: (I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	2. A lien under this section is prior to all other liens and encumbrances on a unit except: * * * 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** [redacted] 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.]

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> 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 . . .. 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**.. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. 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).[5] 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. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although the assessment portion of the super priority lien is limited to a finite number of months, because the assessment lien itself includes "fees, charges, late charges, attorney fees, fines, and interest," these charges may be included as part of the super priority lien amount. This language is the same as NRS 116.3116, which states that "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." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above..

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (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.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders"[6] have all concluded otherwise.

Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

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

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

Exhibit B

ORDG
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Attorneys for Defendants Nevada Association Services, Inc., RMI Management, LLC, and Angius & Terry Collections, LLC

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Holland & Hart LLP
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Las Vegas, Nevada 89169
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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGHER GROUND, LLC, a Nevada limited liability company; RRR HOMES, LLC, a Nevada limited liability company, TRIPLE BRAIDED CORD, LLC, a Nevada limited liability company; EQUISOURCE, LLC, a Nevada limited liability company; EQUISOURCE HOLDINGS, LLC, a Nevada limited liability company; APPLETON PROPERTIES, LLC, a Nevada limited liability company; CBRIS, LLC, a Nevada limited liability company; MEGA, LLC, a Nevada limited liability company; SOUTHERN NEVADA ACQUISITIONS, LLC, a Nevada limited liability company; VESTEDSPEC, INC., a Nevada corporation; CUSTOM ESTATES, LLC, a Nevada limited liability company; KINGFUTT'S PFM LLC, a Nevada limited liability company; THORNTON & ASSOCIATES, LLC, a Nevada limited liability company; WINGBROOK CAPITAL LLC, a Nevada limited liability company; on behalf of themselves and as representatives of the class defined herein,

Plaintiffs,

vs.

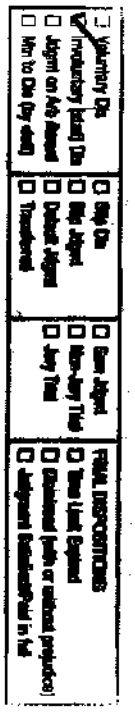
NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; RMI MANAGEMENT, INC., dba RED ROCK FINANCIAL SERVICES, a Nevada corporation; HOMEOWNER ASSOCIATION SERVICES, INC., a Nevada corporation; ALESSI & KOENIG, a Nevada limited liability company;

Case No. : A-10-609031-C
Dept. No.: IX

ORDER GRANTING MOTIONS TO DISMISS

Hearing Date: April 6, 2010

Hearing Time: 9:00 a.m.



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HAMPTON & HAMPTON, a professional corporation; ANGIUS & TERRY COLLECTIONS, LLC; SILVER STATE TRUSTEE SERVICES, LLC, a Nevada limited liability company, and DOES I through X and ROE ENTITIES I through X, inclusive,

Defendants.

/

AND ALL RELATED CLAIMS

On April 6, 2010, this Court heard oral argument on Motions to Dismiss filed by the following parties: (1) Defendant Hampton & Hampton ("Hampton"); (2) Defendants Nevada Association Services, Inc. ("NAS"), RMI Management, LLC ("RMI"), and Angius & Terry Collections, LLC ("Angius & Terry"); and (3) Defendant Alessi & Koenig, LLC. Homeowner Association Services, Inc. filed a Joinder to Hampton & Hampton's Motion to Dismiss. Among the various counsel present, James R. Adams, Esq. of Adams Law Group, Ltd. appeared on behalf of Plaintiffs. Patrick J. Reilly, Esq. of Holland & Hart LLP appeared on behalf of NAS, RMI, and Angius & Terry. Ryan M. Kerbow, Esq. of Alessi & Koenig, LLC appeared on behalf of Alessi & Koenig, LLC. Robert A. Massi, Esq. of Robert A. Massi, Ltd. appeared on behalf of Hampton and Hampton. Aaron D. Shipley, Esq. of McDonald Carano Wilson LLP appeared on behalf of Homeowner Association Services Inc. After carefully considering the briefs and arguments of counsel, this Court concludes that it lacks subject matter jurisdiction to hear this matter, and thereby GRANTS the Motions to Dismiss.

This action was brought by a group of real estate investors who purchased certain parcels of foreclosed residential real estate in Clark County, Nevada. Plaintiffs' Complaint rests on the notion that they were compelled to pay to remove outstanding homeowners association ("HOA") liens that they claim were excessive and/or unwarranted. In the Motions to Dismiss, Defendants all contend that NRS 38.310 compels the dismissal of this action. In the alternative, RMI, NAS, and Angius & Terry contend that Plaintiffs' various claims are not substantively viable as a matter of law.

///

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Section 38.310 of the Nevada Revised Statutes states as follows:

> 1. No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
>
> (b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,
>
> may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.
>
> 2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

NRS 38.310. "NRS 38.310 expresses Nevada's public policy favoring arbitration of disputes involving the interpretation and enforcement of CC&Rs." ***Hamm v. Arrowcreek Homeowners' Ass'n***, 124 Nev. 28, 183 P.3d 895, 902 (2008).

Plaintiffs concede that their claims never were submitted to arbitration or mediation prior to the commencement of this action. Instead, however, they contend that (1) their claims are governed by NRS Chapter 116; (2) they have not brought forth claims involving the application, interpretation, or enforcement of CC&Rs; and (3) claims for injunctive relief are pleaded and, therefore, this action is not subject to the mandatory dismissal provisions of NRS 38.310.

This action results from a dispute over the application and enforcement of CC&Rs, specifically the alleged lien enforcement and collection procedures of the various HOAs. Even assuming Plaintiffs' allegations are true, i.e., that Defendants improperly attempted to collect extinguished amounts under NRS Chapter 116, such claims are still claims associated with the HOA's application and enforcement of the CC&Rs. Like the claims in ***Hamm***, which is binding authority on this Court, Plaintiffs' claims all require the Court to interpret, apply, or enforce the CC&Rs. As such, each of Plaintiffs' claims—whether they are couched in contract, in tort, or under NRS Chapter 116—fall squarely within the scope of NRS 38.310.

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This Court rejects Plaintiffs' remaining arguments concerning the exceptions to NRS 38.310 and the ***Hamm*** doctrine.

Accordingly, this Court lacks subject matter jurisdiction over this action and is compelled to dismiss this action pursuant to NRCP 38.310 and NRCP 12(b)(1).

IT IS SO ORDERED.

DATED this 11th day of May, 2010.

DISTRICT COURT JUDGE

Submitted by:

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Exhibit C

ORD
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Attorneys for Spring Mountain Ranch Master Association

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Shirley A. Rupiper
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DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 20, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John E. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issues, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

02658-08/127734_2

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,963.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

. . .

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall issue a check payable to the Spring Mountain Ranch Master Association in the amount of $[illegible] which represents interest from the funds previously deposited with the Court on October 4, 2006, by Miles, Bauer, Bergstrom & Winters, LLP, on behalf of the Intervenor, Reconstrust Company, N.A.

Dated this 20 day of December, 2006

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH,
KEARNEY, JOHNSON & THOMPSON

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TRACY A. GALLEGOS, ESQ.
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Attorneys for Defendant Spring Mountain Ranch Master Association

Approved as to Form and Content:

THE COOPER CASTLE LAW FIRM

Anita KH McFarland, Esq.
Marty G. Baker, Esq.
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Las Vegas, NV 89107

Attorneys for Korbel Family Trust

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TRUE AND CORRECT COPY
OF THE DOCUMENT ON FILE
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CLERK OF THE COURT

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EXHIBIT O

EXHIBIT O

Ryan Kerbow, Esq., (State Bar #261512)
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(702) 222-4033 fax: (702) 222-4043
Attorneys for Respondents Alessi & Koenig, LLC, Southern Highlands Community Association, Canyon Crest Community Association and Caparola at Southern Highlands Homeowners Association

STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

	NRED No. 12-58 ALESSI & KOENIG, LLC'S ARBITRATION BRIEF

I. INTRODUCTION

Alessi & Koenig, LLC ("A&K") is a law firm that represents several homeowners associations ("HOA"s). A&K's HOA clients retain A&K to collect delinquent assessments and enforce HOA liens, including HOA super priority liens ("SPL"s). For many years A&K and others in the HOA industry have relied on the interpretation of NRS §116.3116 set forth in Korbel Family Living Trust v. Spring Mountain Ranch Master Ass'n, Eighth Judicial District Court Case No. A-06-523959-C.

In Korbel, the Honorable Judge Jackie Glass concluded the HOA was entitled to recover, as its SPL, assessments for common expenses; late fees imposed for non-payment of assessments for common expenses; interest on the principal amount of unpaid assessments for common expenses; the HOA's costs of collection, which may include legal fees and costs; and the transfer

fee for conveyance and change of ownership of the property. Id. A copy of the Order issued by this Court in Korbel is attached hereto as Exhibit 1. Claimant disagrees with the interpretation of NRS §116.3116 set forth in Korbel. Claimant argues that, contrary to Korbel, there is a pre-determined numerical cap on the amount of the SPL.

There is substantial authority in Nevada that fees and costs of collection are a component of the SPL. In addition to the District Court opinion issued in Korbel, the Commission for Common Interest Communities and Condominium Hotels (the "CCIC") has issued an advisory opinion on the subject pursuant to its authority to issue advisory opinions on the interpretation of NRS chapter 116, authority found in NRS §116.623 (the "CCIC Advisory Opinion"). The CCIC Advisory Opinion, a copy of which is attached hereto as Exhibit 2, squarely rejected the notion that Section §116.3116 places a numerical cap on collection fees and costs, and held that "Nevada law authorizes the collection of 'charges for late payment of assessments' as a portion of the super[priority] lien amount." See Exhibit 2 at p. 12-13. Significantly, under Nevada law, this Court is required to give "great deference" to the CCIC's interpretation of NRS 116.3116. Imperial Palace v. State, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); see also Dep't of Taxation v. Daimler Chrysler Services N.A., LLC, 121 Nev. 541, 119 P.3d 135 (2005).
In addition to Korbel (a case which has set the industry standard for years) and the CCIC Advisory Opinion (issued by the agency tasked with interpreting and enforcing NRS Chapter 116), there is substantial case law holding that fees and costs of collection are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. Recently, in Elkhorn Community Association v. Mortgage Electronic Systems, Inc., Case No. A607051, the Honorable Judge Valerie Vega, held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. See Order attached hereto as Exhibit 3. Also, in JPMorgan Chase Bank vs Countrywide Home Loans Inc, Countrywide Warehouse Lending, et al., Case No. A562678, the Honorable Judge Timothy Williams, held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to

enforce the lien. See Order attached hereto as Exhibit 4. As a result, A&K agrees with the longstanding view of District Court Judges and the view of the CCIC as to the proper interpretation of NRS §116.3116.

Claimant further argues that a mortgage lender, such as itself, has the right to satisfy an HOA lien by paying the HOA the super-priority amount prior to conducting a foreclosure of the first security interest. However, under NRS 116.3116, an HOA has a lien against a unit for all delinquent assessments and related charges up until the first security interest on the unit is foreclosed. The HOA assessment lien is only eliminated, save for the super priority amount, when the mortgage lender forecloses on the unit. Therefore, where, as in most cases, the full HOA lien amount exceeds the super priority amount, the mortgage lender's payment of the super priority amount would constitute only a partial payment. Further, there exists no statutory or other authority that would compel an HOA to accept payment of any amount from a mortgage lender.

A. The Plain Language of NRS §116.3116 / Nevada Law Does Not Permit Illogical Interpretation of NRS §116.3116.

The goal of statutory interpretation is to ascertain the legislature's intent. Karcher Firestopping v. Meadow Valley Contractors, Inc., ____ Nev. ____, 204 P.3d. 1262, 1263 (2009). The Court must give a clear and unambiguous statute its plain meaning, unless doing so violates the spirit of the act. D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 123 Nev. 468, 476, 168 P.3d. 731, 737 (2007). It is well established in Nevada that the words in a statute, "should be giveu their plain meaning unless this violates the spirit of the act." State Dep't of Ins. v. Humana Health, Ins., 112 Nev. 356, 360 (1999) (quoting McKay v. Bd. Of Supervisors, 102 Nev. 644, 648 (1986)). When interpreting the plain language of a statute, Nevada courts "presume that the Legislature intended to use words in their usual and natural meaning." McGrath v. Dep't of Public Safety, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). In doing so, the Court must consider a statute's provisions as a whole, reading them "in a way that would not render words or phrases superfluous or make a provision nugatory." S. Nev.

Homebuilders Ass'n v. Clark County, 121 Nev. 446, 339, 117 P.3d 171, 173 (2005) (quotation omitted). Meaningless or unreasonable results should be avoided by courts when interpreting statutes. Matter of Petition of Phillip A.C., 122 Nev. 1284, 1293 (2006). As such, "where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended." County of Clark, ex rel. Univ. Med. Ctr. V. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (quotation omitted). Moreover, "when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

Here, in light of the language of NRS Chapter 116 and the important policy considerations behind these statutes, Claimant's proposed interpretation of NRS 116.3116 is without merit. While the SPL authorized by NRS 116.3116 has one material temporal limitation of nine months, there is simply no other specific numerical limit capping the lien. Moreover, fees and costs of collection are clearly intended to be considered as part of the SPL. Accordingly, Respondents are entitled to collect fees and costs of collection as a portion of the SPL.

1. Assessments Enforceable Under NRS §116.3116 and Given Super Priority Status Include All Reasonable Collection Costs and Fees Relating to the Relevant Nine Month Period.

Pursuant to NRS §116.3116, HOAs have a lien on real property to recover assessments owed by delinquent homeowners. A portion of this lien has a senior position over a first deed of trust, even if the deed of trust was recorded before the delinquency. Nevada law is clear that the component portions of the SPL include both common expenses and multiple other charges and fees that are also deemed to be "enforceable as assessments under this section [NRS §116.3116]" unless said charges are restricted by a community HOA's governing documents.

NRS §116.3116 is titled "Liens against units for assessments" and states that:

> 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 assessments 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 provides otherwise, 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 also prior to all security interests described in paragraph (b) ["a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . ."""] 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)

Thus, the plain language describing a lien for assessments under the statute clearly incorporates each of the following component assessments into the lien amount "unless the declaration provides otherwise:" (1) any assessment levied against the unit from the time the assessment comes due, (2) penalties, (3) fees, (4) charges, (5) late charges, (6) fines, and (7) interest. All charges itemized in NRS 116.3116(1) are meant to be a part of an HOA's lien for assessments, as the statute clearly denotes that said charges are "enforceable as assessments under this section" – a section aptly titled "Liens against units for assessments" by the Nevada Legislature in the Nevada Revised Statutes. (NRS 116.3116 (see statute section title)). NRS 116.3116(7) goes on to state that collection costs and attorney's fees are recoverable as part of the lien. Thus, not only does NRS 116.3116 grant an association an enforceable lien for assessments, which includes assessments for common expenses, penalties, fees, charges, interest, attorney's fees, and costs of suit, but Nevada law additionally deems the super priority portion of the lien to be "prior to all security interests."

Subsection (2) of NRS 116.3116 does not set a numeric cap on the SPL based upon any particular HOA's assessments charged to homeowners. The only material proviso placed on the amount of the Association's SPL is that any assessment for common expenses "based on the periodic budget adopted by the Association pursuant to NRS 1116.3115" be limited to a period of "9 months preceding institution of an action to enforce the lien."[1] The portion of the HOA lien given super priority status is defined with regard to a particular time period only. There is no mention in the statute of any numerical limitation or simple mathematical calculation. Indeed, if the Legislature wanted to define the SPL by some simple mathematical calculation it could have done so simply by setting forth that mathematical calculation in the statute.

In addition, NRS §116.3115 defines assessments for common expenses as those "made at least annually." NRS §116.3115 sets forth several different categories of common expenses that are to be included in the assessments, many of which do not apply equally to all owners. These categories include:

1. Common expenses for repair of limited common elements, Subsection 4(a);
2. Common expenses benefitting fewer than all of the units, Subsection 4(b);
3. Common expenses to pay the cost of insurance, Subsection 4(c);
4. Common expenses to pay a judgment, Subsection 5; and, most importantly,
5. Common expenses caused by the misconduct of any unit's owner, Subsection 6.

If an owner fails to pay his or her assessments, that failure constitutes misconduct. If the HOA incurs expenses in an effort to collect those unpaid assessments, under NRS §116.3115(6), those expenses are chargeable to the unit's owner as part of the association's periodic budget under NRS §116.3115. Because they are part of the HOA's periodic budget under NRS §116.3115, they are included in the super priority portion of the HOA's lien under NRS §116.3116(2).

2. NRS §116.3116 is Broader than the UCIOA.

[1] There is one other limiting proviso found outside of NRS 116.3116. NRS 116.31162(4) states that "[t]he association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the Association . . . ." Thus, any portion of assessments for violation fines cannot, by definition (with some limiting exceptions), be incorporated into a super priority lien for assessments that could be the impetus for foreclosure.

"It is a well-known rule of statutory construction that words shall be given their plain meaning, unless to do so would clearly violate the evident spirit of the statute . . . unless from a consideration of the entire act it appears that some other intendment should be given to it. We cannot arbitrarily ignore plain language, but must be controlled by it, except in the instance mentioned." Ex parte Zwissig, 178 P. 20, 21 (Nev. 1919) (emphasis added). Thus, where the intent of the Legislature or the evident spirit of the statute would be violated under a plain language interpretation of the statute, effect must be given to the intent of the Legislature and the spirit of the statute. In order to fully understand the intent of the Legislature and the spirit of NRS Chapter 116, it is important to look first at the UCIOA. The UCIOA was originally promulgated in 1982 by the National Conference on Commissioners on Uniform State Laws ("Uniform Law Commissioners" or "ULC"). The UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities. In 1991, Nevada adopted the UCIOA, with some changes, by enacting NRS Chapter 116.

Notably, the SPL as provided for in the UCIOA is much more limited than the actual language adopted by Nevada. The SPL in all three (3) versions of the UCIOA (1982, 1994 and 2008) is limited to the extent of "common expenses based on the periodic budget adopted by the Association pursuant to section 3-115(a)." Nevada, however, specifically removed the limitation to subsection (a) (which is Subsection 1 of NRS 116.3115 in Nevada's statutory format). Thus, common expenses for purposes of the SPL under the UCIOA are limited to 3-115(a), while common expenses for purposes of the SPL in Nevada includes all of NRS 116.3115. In other words, "common expenses" is much broader under the Nevada statute than it is under the UCIOA and includes amounts assessed against a specific unit. Such common expenses, including those costs and fees caused from a unit owner's misconduct, must be included in Nevada's SPL amount. Thus, by broadening the SPL to include common expenses under all subsections of NRS §116.3116, the Nevada Legislature clearly intended to allow Nevada HOA's and their attorneys or collection agencies to assess and recover as assessments the fees and costs of collection while enforcing the SPL.

B. Public Policy Supports the Widely Accepted Interpretation of NRS §116.3116.

This common sense statutory interpretation is consistent with the obvious purpose of the statutory scheme, which is to compensate HOAs for past due assessments even after foreclosure by the lender/deed of trust holder. It also makes good public policy sense. If collection fees and costs are not included as part of the assessments that survive foreclosure, it would be cost prohibitive for Nevada HOAs to enforce their own liens, as HOA's would no doubt spend more money on collections of amounts due than they would actually recover. The burden of this substantial lost revenue would then fall upon the homeowners who do pay their mortgages and HOA fees on time. The result would be an increase in monthly association fees for the rule-abiding homeowners who pay their bills. Further, if HOAs have no effective means of lien enforcement, this will incentivize additional home owners to stop paying their HOAs.

Claimant's interpretation also provides for an inherently inequitable result for HOAs with low monthly assessments. For example, where one HOA has monthly assessments of $15.00 ($135 over nine months), the HOA would never be able to afford the cost of collecting from a delinquent homeowner. Indeed, no HOA could possibly hope to recover its collection fees and out of pocket costs for a mere $135.00, as no rational HOA would spend more money on collection efforts than the amount of money owed. Clearly, Claimant's interpretation violates the spirit of the statute.

C. Nevada Authority Supports Respondents' Interpretation of NRS §116.3116.

1. The CCIC Advisory Opinion.

On December 8, 2010, the CCIC issued the Advisory Opinion that concludes that the SPL includes reasonable costs of collection. The Advisory Opinion explicitly rejects a numerical maximum for the super-priority lien:

> The argument has been advanced that limiting the super priority to a finite amount . . . is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The State of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders" have all concluded otherwise.
>
> Accordingly, both a plain reading of the applicable provisions of NRS §116.3116 and the policy determinations of commentators, the state of Connecticut, and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien."

Exhibit 2. The Nevada Supreme Court has made it clear that courts are to give "great deference" to administrative interpretation. Imperial Palace, 108 Nev. at 1067, 843 P.2d at 818 DaimlerChrysler Services, 121 Nev. 541, 119 P.3d 135; Thomas v. City of N. Las Vegas, 122 Nev. 82, 101 127 P.3d 1057 (1070) (2006) (citing Chevron U.S.A. v. Not. Res. Def. Council, 467 U.S. 837 (1984). Indeed, particularly for pure questions of statutory interpretation, courts should defer to agency interpretations. See, e.g., Human Soc'y of U.S. v. Locke, ___ F.3d ___, 2010 WL 4723195, at 9 (9th Cir. 2010) ("'If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.'" (quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

Because there is a reasonable opinion as to the statutory interpretation of NRS §116.3116(2) that was issued by the agency tasked with enforcing NRS Chapter 116, the Nevada Real Estate Division, this opinion should be considered highly persuasive authority. Indeed, the Nevada Supreme Court has explicitly stated deference must be given to agency interpretations.

Finally, the Nevada Real Estate Division's Winter 2010 Publication referenced AB 204 which became effective 2009 and increased the time period of the SPL from six months to nine months. See Nevada Real Estate Division Winter 2010 Publication attached hereto as Exhibit 5.

In that publication, the division specifically characterized AB 204 as allowing for the collection of "related costs" in addition to assessments. Id. at 2. While not binding, it is instructive that the agency's own characterization of NRS §116.3116 indicates that collection costs are part of the SPL.

2. The Korbel decision.

In Korbel, the District Court specifically ruled that the SPL includes, and an HOA is entitled to recover, the following:

- Assessments for common expenses;
- Late fees imposed for non-payment of assessments for common expenses;
- Interest on principal amount of unpaid assessments for common expenses;
- The HOA's "costs of collection, which may include legal fees and costs incurred during the nine months preceding an action to enforce the lien; and
- The transfer fee for conveyance and change of ownership of the property foreclosed upon pursuant to the first deed of trust.

Exhibit 1. While the Order itself does not go into detail regarding the Court's analysis, the legal issues were briefed in great detail by the parties and necessarily decided in that case. (See Korbel Minutes of Proceedings attached hereto as Exhibit 6; see also Korbel parties' briefs attached hereto as Exhibit 7 and Exhibit 8.) The issues presented in Korbel were identical to the issues presented here. The Defendant in Korbel apparently did not appeal the Korbel decision.

3. Elkhorn Community Association v. Mortgage Electronic Registration Systems, Inc. ("MERS")

In Elkhorn, the Honorable Judge Valerie Vega granted Elkhorn Community Association's Motion for Declaratory Relief and held that collection fees and costs are included in the SPL in addition to other assessments that came due in the nine month period immediately preceding the first action to enforce the lien. Specifically, the Court found:

> [N]on-attorney fees and costs of collection accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are a component part of the Association's SPL. Moreover, the Court concludes that attorney's fees accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are also considered to be a component part of the Association's SPL. Any attorney's fees considered to be part of the Association's SPL must be "reasonable" . . .

Exhibit 3. Although the Court in Elkhorn notes that attorney's fees are limited to a "reasonable" amount, the Court makes no mention of a numeric cap placed upon the attorney's fees or a numerical cap on "[n]on attorneys fees and costs of collection" that are a "component part" of the SPL.

4. JPMorgan Chase Bank vs Countrywide Home Loans Inc, Countrywide Warehouse Lending, et al

Similar to the Court's decision in Elkhorn, in JPMorgan Chase Bank, the honorable Judge Timothy Williams stated as follows:

> 4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

> 5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).
>
> 6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

Exhibit 4. Notably, in both Elkhorn and JPMorgan Chase Bank, the Court specifically mentioned the limitation that collection costs must be reasonable – but neither decision imposed a specific predetermined numeric cap of any kind whatsoever.

D. Case Authority from Sister Jurisdictions Supports A&K's Interpretation of NRS 116.3116.

Similarly, the Supreme Court of Connecticut analyzed Connecticut's own super priority lien statute, which at the time was substantially identical to the Nevada statute, specifically holding the super priority statute includes all collection costs. Hudson House Condo. v. Brooks 611 A.2d 862 (Conn. 1992). In Hudson House, the super priority lien statute reads as follows:

> This lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of the common expense assessments based on the periodic budget adopted by the Association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the

> six months immediately preceding institution of an action to enforce either the Association's lien or a security interest described in subdivision (2) of this subsection.

Id. at 863, n. 1 (quoting Conn. Gen. Stat. § 47-258 (1989)). There, the court relied specifically upon language in the statute that stated a "judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." Id. at 866 (internal quotation omitted). The court held this language "specifically authorizes the inclusion of the costs of collection as part of the [super-priority] lien." Id. This language mirrors the language contained in the Nevada statute, which states, "A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(7).

Moreover, the court in Hudson House held the legislature logically must have meant to include collection costs in the lien:

> Since the amount of monthly assessments are, in most instances, small and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows.

Hudson House, 611 A.2d at 866 (emphases added). Although the court noted that the Connecticut Legislature later amended the statute to specifically include "the Association's costs and attorney's fees in enforcing its lien," the Court specifically noted that this merely "clarified that attorney's fees and costs are included in the priority debt." Id. at 866 n.4.

The court did not limit the recovery to only the amount of regular monthly assessment payments over the super-priority period. To the contrary, as the court noted, the legislature must have permitted all collection costs accrued over the super priority period to be recoverable. Indeed, to read the statute otherwise would make no practical sense at all, as it would fashion a proverbial "bow" with no "arrow." Likewise, as the Connecticut statute is substantively identical to Nevada's statute, Nevada courts must "consider the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result." Fierle v. Perez, ____ Nev. ____, 219 P.3d 906, 911 (2009) (quotation omitted).

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully request an arbitration award in their favor.

DATED this 7th day of September, 2012.

ALESSI & KOENIG, LLC

By: _____

RYAN KERBOW, ESQ.

Exhibit "1"

ORD
JOHN R. LEACH, ESQ.
Nevada Bar No. 1225
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[signature]

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Attorneys for Spring Mountain Ranch Master Association

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST Plaintiff, v. SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP., Defendants.	Case No.: 06-A-523959-C Dept. No.: V ORDER Hearing Date: November 20, 2006 Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John R. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issues, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

09416-07/3771H_1

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,965.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall [illegible] Bequeathed Company, N.A.

Dated this 30 day of December, 2006

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

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Attorneys for Korbel Family Trust

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE DOCUMENT ON FILE

ATTEST: [illegible]
CLERK OF THE COURT

Exhibit 2

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS
ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "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 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

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

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> NRS 116.3116 Liens against units for assessments.
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . 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[1] 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. . .

NRS 116.3116 further provides that "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."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116, (1994)	NRS 116.3116 Liens against units for assessments.(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . 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.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to,	(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;
(ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(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

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(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.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First All. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments.***[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	NRS 116.3116 Liens against units for assessments. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, attorney fees, fines, and interest charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. . The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any . . . 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. . . .

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except:	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
* * *	* * *
(b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of:	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.]
(I) An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> 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 . . .. 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. . . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. 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).[6] 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. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although the assessment portion of the super priority lien is limited to a finite number of months, because the assessment lien itself includes "fees, charges, late charges, attorney fees, fines, and interest," these charges may be included as part of the super priority lien amount. This language is the same as NRS 116.3116, which states that "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." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[6] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (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.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (i)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3116(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders"[6] have all concluded otherwise.

Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

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

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

Exhibit 3

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CLERK OF THE COURT

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ELKHORN COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation,

Plaintiff,

v.

DANIEL VALENZUELA, an Individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), AS NOMINEE FOR MYLOR FINANCIAL, a Mississippi Corporation; MYLOR FINANCIAL, a Mississippi Corporation; SONEPCO FEDERAL CREDIT UNION, a Corporation; CATARINO GUTIERREZ, an Individual; MARIA GUTIERREZ, an Individual; JUANITA GUTIERREZ, an Individual; and DOES I through X, inclusive,

Defendants.

CASE NO.: A-10-607051-C

DEPT NO.: II

NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that an ORDER GRANTING MOTION FOR DECLARATORY RELIEF was entered in the above-referenced matter on June 1, 2011, a copy which is attached hereto with its accompanying Stipulation.

DATED this 6th day of June, 2011.

ANGIUS & TERRY LLP

By: _____
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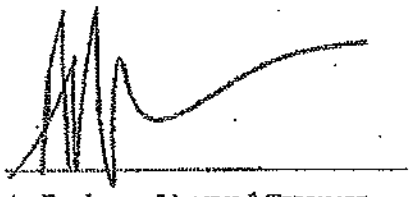
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June 2011, I served a true and correct copy of the foregoing a **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR DECLARATORY RELIEF** by placing the same in the U.S. Mail, addressed as follows:

Mortgage Electronic Systems ("MERS")
c/o Christina S. Bhirud, Esq.
Akerman Senterfitt LLP
400 South Fourth Street, Suite 450
Las Vegas, NV 89101



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DISTRICT COURT

CLARK COUNTY, NEVADA

ELKHORN COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation,

Plaintiff,

v.

DANIEL VALENZUELA, an Individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), AS NOMINEE FOR MYLOR FINANCIAL, a Mississippi Corporation; MYLOR FINANCIAL, a Mississippi Corporation; SCHEPCO FEDERAL CREDIT UNION, a Corporation; CATARINO GUTIERREZ, an Individual; MARIA GUTIERREZ, an Individual; JUANITA GUTIERREZ, an Individual; and DOES 1 through X, inclusive,

Defendants.

CASE NO.: A-10-607051-C

DEPT NO.: II

ORDER GRANTING MOTION FOR DECLARATORY RELIEF

Plaintiff Elkhorn Community Association's ("Plaintiff" or "Association") Motion for Declaratory Relief came on for hearing on February 16, 2011, in Department 2 before the

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Honorable Valorie J. Vega, Judge, presiding. The motion was heard on the Court's chambers calendar.

The matter was originally calendared for hearing on the Court's chambers calendar on January 5, 2011. On December 30, 2010, the Court received a motion from counsel for Defendant Mortgage Electronic Registration Systems, Inc. ("Defendant"), requesting permission to file a Sur-Reply to Plaintiff's original Reply on the grounds that Plaintiff's Reply raised new issues. The Court granted Defendant's motion, continued the hearing on this matter until January 26, 2011, and ordered Defendant's Sur-Reply to be filed by January 19, 2011. No Sur-Reply was filed by the January 19, 2011 deadline. The Court then received a Motion to Extend Time to File Sur-Reply from Defendant's counsel, claiming that he had never received the Court's Order granting Defendant permission to file a Sur-Reply, and requesting an extension to file. The Court granted the relief requested and continued the hearing to February 16, 2011 on the Court's chambers calendar.[1]

The Court now issues the following ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY RELIEF:

Question No. 1: Does the Association have the right to bring a judicial foreclosure action before a court of proper jurisdiction in Nevada to satisfy the Association's special priority portion of a lien for assessments authorized by NRS 116.3116 ("SPL")?

Answer to Question No. 1: Yes. The Court finds that the Association has the right to bring a judicial foreclosure action before a court of proper jurisdiction in Nevada to satisfy the SPL pursuant to NRS Chapters 40 and 116 and as authorized by the Association's governing

[1] Subsequent moving papers were filed by both parties after the Court granted relief on Defendant's Motion to Extend Time to File Sur-Reply. Plaintiff filed a Short Opposition to Defendant's Sur-Reply, which Defendant moved to Strike. Defendant's Motion to Strike was denied by the Court's minute order dated March 22, 2011.

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documents ("CC&Rs"), so long as the assessments at issue were for common expenses based on the periodic budget adopted by the Association pursuant to NRS 116.3116(2)(c).

Question No. 2: If the Association has the right to bring a judicial foreclosure action to satisfy its SPL in Nevada, are the non-attorney fees and costs of collection accrued by the Association to bring the judicial foreclosure action considered a component part of the Association's SPL?

Answer to Question No. 2: Yes. The Court finds that the non-attorney fees and costs of collection accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are a component part of the Association's SPL. Moreover, the Court concludes that attorney's fees accrued by the Association to bring a judicial foreclosure action in Nevada to satisfy its SPL are also considered to be a component part of the Association's SPL. Any attorney's fees considered to be part of the Association's SPL must be "reasonable" pursuant to the Association's governing documents, specifically Article 6, Section 6.1.

IT IS SO ORDERED that Plaintiff's Motion for Declaratory Relief is GRANTED.

DATED this 21st day of May, 2011.

By: _____
JUDGE VALORIE J. VEGA
DISTRICT COURT JUDGE

Respectfully Submitted by:

By: _____
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William Paul Wright (NBN 7564)
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Exhibit 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

JP MORGAN CHASE BANK, N.A. a National Association, Plaintiff, vs. COUNTRYWIDE HOME LOANS, INC., a New York corporation; COUNTRYWIDE WAREHOUSE LENDING, INC., a California corporation; CITIMORTGAGE, INC., a New York corporation; NV MORTGAGE, INC., a Nevada corporation d/b/a SOMA FINANCIAL; SOMA FINANCIAL, INC., a Nevada corporation; NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; JOHNATHAN D. AMOS, an individual; MELISSA SMILEY a/k/a MELISSA AMOS, an individual, DOES 1 through 10, ROE CORPORATIONS 1 through 10, inclusive, Defendants. ALL RELATED CLAIMS.	CASE NO.: 08-A562678 DEPT.: XVI ORDER AND JUDGMENT Date: April 7, 2011 Time: 9:00 a.m.

Defendant Nevada Association Service, Inc.'s Motion for Determination of Priority Amount Including Attorney's Fees and Costs ("Motion") came on for rehearing on April 7, 2011. Debra L. Pieruschka, Esq. of Martin & Allison Ltd. appeared on behalf of Nevada Association Services, Inc. ("NAS"), Jason D. Smith, Esq. of Santoro, Driggs, Walch, Kearney, Holley & Thompson appeared on behalf of JP Morgan Chase Bank ("Chase"), and no other party or counsel having appeared at the

05-10-11

rehearing of this matter. The Court having reviewed the moving papers, opposition papers and reply papers submitted by counsel and hearing oral argument, good cause appearing, the Court issued a decision on April 8, 2011, and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On August 27, 2010, this Court issued an order denying Chase's Motion for Summary Judgment and granting NAS's Countermotion for Summary Judgment in part, determining that NAS has a "super priority" position for no more than nine (9) months of assessments senior to Chase's equitable lien finding that:

a. The Property at issue in this matter is part of a common-interest ownership community. As such, NRS 116 governs the priority of NAS's lien over Chase's equitable lien.

b. NRS 116.3116(1) establishes NAS's statutory right to a lien for any assessments from the time they become due.

c. Pursuant to NRS 116.3116, recording of the Declaration by the Association constitutes record notice and perfection of the lien – no further recordation of any claim of lien is required.

d. NRS 116.3116(2) establishes the priority of NAS's liens against the Property. Specifically, NRS 116.3116(2) provides that NAS's lien is prior to all other liens and encumbrances except:

(1) a lien or encumbrance recorded prior to the recording of the Declaration of the association;

(2) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

(3) liens for real estate taxes and other governmental assessments.

e. NRS 116.3116(2) further provides NAS with a limited priority even over a first security interest recorded against the property for nine (9) months of assessments that would have become due immediately preceding institution of an action to enforce the lien.

f. Chase's equitable lien attached to the property on August 9, 2007 when its Deed of Trust was recorded against the property.

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2. The Court further directed NAS to submit further briefing to the Court to determine the extent and amount of NAS' "super priority" lien that it has against the subject property, including the issue of attorney's fees and costs.

3. After briefing by both parties, on September 16, 2010 this Court held oral arguments regarding the amount of NAS' "super priority" lien amount and granted NAS' Motion in part and denied it in part.

4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).

6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

7. As such, the Court granted NAS' Motion, in part, and awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $5,909.91 out of the $23,480.16 requested in delinquent assessments. The Court further awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $6,000.00 out of the $49,035.28 for reasonable attorney's fees and costs as part of its collection costs.

8. The Court, however, denied NAS the following requested portions of its "super priority" lien amount because it failed to provide adequate documentation to support the claim:

(a) $135.00 out of the total amount of $525.00 in late fees relating to the nine (9) months of delinquent assessments as permitted by NRS 116.3116;

(b) $1,352.00 for collection costs related to the nine (9) months of delinquent assessments as permitted by NRS 116.310313 and NRS 116.3116; and

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(c) $43,035.28 in legal fees as part of its collection costs related to the collection of the "super priority" amount as permitted by NRS 116.310313 and NRS 116.3116.

9. On October 28, 2010, NAS filed a Motion for Partial Reconsideration of the Court's October 4, 2010 Order denying NAS its full collection costs including attorney's fees and costs pursuant to NRS 116.3116.

10. After supplemental briefing by the parties, on February 17, 2011, the Court granted NAS' Motion for Partial Reconsideration.

11. On April 7, 2011, after further supplemental briefing by the parties, the Court entertained oral arguments by Counsel.

12. The Court concluded that NAS can recover as part of its "super priority" its costs associated with enforcement of the Association's assessment lien including late fees and collection costs pursuant to NRS 116.3116(1) and (2).

13. The Court found that NAS properly supported its claim for $135.00 in late fees relating to the nine (9) months of delinquent assessments, pursuant to NRS 116.3116(1).

14. The Court further found that NAS properly supported its claim for $1,352.00 in collection costs relating to the nine (9) months of delinquent assessments but disallowed $743.00 of the requested $1,352.00 because $743.00 related to costs incurred by NAS after the lawsuit was filed to enforce any past due obligation and are, thus, precluded by statute.

153. The Court further found that NAS properly supported its claim for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien, pursuant to NRS 116.3116(7).

16. NAS's documented attorney's fees in the amount of $47,400.00 meet the Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349 (1969) factors. That based on the qualities of the advocate, the character of the work to be done, the work actually performed by the lawyer, and the result obtained, the amount of attorney's fees and costs to be included as part of NAS' collection costs relating to its "super priority" lien amount are reasonable and necessary.

///

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ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NAS' Motion for Determination of NAS' Priority Amount Including Attorney's Fees and Cost is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that NAS's "super priority" lien amount totals $55,689.19 comprised as follows:

(1) An award of $5,909.91 for nine (9) months of delinquent assessments, pursuant to NRS 116.3116;

(2) An award of $135.00 in late fees relating to the nine (9) of delinquent assessments, pursuant to NRS 116.3116;

(3) An award of $609.00 in collection costs, pursuant to NRS 116.310313 and NRS 116.3116;

(4) An award of for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien as collection costs, pursuant to NRS 116.3116(7), NRS 116.310313, and NRS 116.3116.

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IT IS FURTHER ORDERED ADJUDGED AND DECREED that NAS shall recover $55,689.19 plus statutory interest from Plaintiff JP Morgan Chase Bank, N.A., a National Association the judgment amount as follows:

1. $6,653.91 for delinquent assessments and partial collection costs; and

2. $49,035.28 for reasonable attorney's fees and costs comprised of $1,635.28 in costs and $47,400.00 in attorney's fees as part of NAS' collection costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the judgment will accrue interest in the manner permitted by Nevada law until the judgment has been satisfied.

IT IS SO ORDERED.

Dated this 11th day of May, 2011.

DISTRICT COURT JUDGE

MARTIN & ALLISON LTD.
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Submitted by:

MARTIN & ALLISON LTD.

By
Debra L. Pieruschka (Bar No. 10185)
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Approved/Disapproved as to form and content:

SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON

By
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Jason D. Smith, Esq. (Bar. No. 9691)
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Attorneys for JP Morgan Chase Bank, N.A.

Exhibit 5

A newsletter from the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels

COMMUNITY INSIGHTS Special Edition

VOLUME VI, ISSUE I | Department of Business and Industry, Real Estate Division | Winter 2010

Nevada Real Estate Division

OUR MISSION

The mission of the Nevada Real Estate Division is to safeguard and promote interest in real estate transactions by developing an informed public and a professional real estate industry.

Office of the Ombudsman

OUR MISSION

To provide a neutral and fair venue to assist homeowners in handling issues that may arise while living in a common-interest community.

Inside ...

2009 Legislative Summary

NRS 116, the law governing HOAs in Nevada, was modified by 15 bills, most of which are now in effect. This special edition of the Community Insights newsletter offers a brief overview of the changes affecting homeowners associations from the 2009 Nevada Legislative Session and related information.

Changes to NRS 116 are reflected in the new law, copies of which may be purchased from the Office of the Ombudsman for $15. This publication emphasizes key changes that affect the vast majority of associations statewide. It is distributed with the intent of bringing attention to new provisions that require action by most associations. For details on the implementation or adoption of new policies, associations are advised to consult an attorney, accountant, reserve study specialist or other appropriate professional.

Bill Digest

EDITOR'S NOTE: The following summaries reflect the Real Estate Division's understanding of the changes to NRS 116 as it pertains to enforcement and administration. Some matters may be clarified further through regulations adopted by the Commission on Common-Interest Communities and Condominium Hotels, through hearings on specific complaints, or other means.

There are nearly 3,000 homeowner associations throughout the state, and the application of the law to any given association will vary depending upon its circumstances. Boards must exercise sound business judgment to determine the policies to ensure their associations are in compliance. They are advised to consult with their attorneys, CPAs or other appropriate expert on any matters in which they are in doubt.

ASSOCIATION POWERS/ DUTIES/ RESTRICTIONS

AB 129 prohibits HOAs from restricting the parking of utility vehicles 20,000 lbs. or less, law enforcement vehicles and emergency service vehicles. Regarding utility vehicles, parking must be allowed

See Digest on Page 2

Focus shifts to regulatory changes

Following numerous changes to NRS 116, several new sections of regulations are under consideration that potentially will affect the way homeowners associations and community managers conduct business.

The Real Estate Division recently presented the text of several proposed regulations at public workshops held in Las Vegas and teleconferenced to Carson City.

See Regulations on Page 5

COMMUNITY INSIGHTS

VOLUME VI, ISSUE 1

Is an official publication of the

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
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Director

REAL ESTATE DIVISION
Gail J. Anderson
Administrator

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Lindsay Walte
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Randolph Watkins, Commissioner
Developer Representative

Donna Toussaint, Commissioner
Homeowner Representative

M. Favil West, Commissioner
Homeowner Representative

Bill Digest

Continued from Page 1

where visitors can park, on common parking areas or in the driveways of the consumer while utility services are being provided to that unit. Also, these vehicles can also be parked in these same locations by owners and tenants if they are required by their employers to have these vehicles at home in order to respond to emergencies. For law enforcement and emergency vehicles, these same parking rules apply if they are engaged in their official duties or are required by their employers to have the vehicles at their homes. Associations can require written proof of the requirement of the employer. (NRS 116.350) (Eff. 10/1/09)

AB 204 requires the HOA Board to make available to unit owners – at the time it makes the budget available – the policies for collecting fees, fines, assessments, and costs from owners and include information on the rights and responsibilities regarding these collections. (NRS 116.31151) It also allows HOAs to have a super-priority lien for 9 months of unpaid assessments and related costs (increased from 6 months), (NRS 116.3116) (Eff. 10/1/09)

AB 360 (1.7) creates a new section of law authorizing associations to charge "reasonable fees" for collecting any past due obligations. (NRS 116.3102) (Eff. 6/9/09 for regulations, 1/1/10 for all other purposes)

AB 361 authorizes associations to improve the appearance of vacant and foreclosed properties. It allows, without liability for violating trespass laws, entry on the grounds of these kinds of properties to maintain the exteriors, or abate nuisances (visible, threaten health or safety, result in blight, adversely affect the use and enjoyment of neighbors' properties). This maintenance work can begin if -- after notice and a hearing -- the owner refuses to do so. Further, the costs for the maintenance can become a priority lien if the owner doesn't pay the costs. In addition, people who acquire foreclosed properties, including banks, must give the association contact information within 30 days after filing an action to recover the debt (such as the first mortgage) or recording a notice of a breach of the obligation and the election to sell the unit. (NRS 116.3102, .310312 and .3116) (Eff. 10/1/09)

SB 65 relates to security walls and provides that associations must maintain them unless the governing documents provide otherwise. However, for associations created before Oct. 1, 2009, the requirements of this bill do not apply until January 2013. (Eff. 1/1/13, or earlier)

See Bill Digest on Page 3

Bill Digest

Continued from Page 2

SB 182 (28) and SB 183 (91) prohibit the association from interrupting utility services except for nonpayment of utility charges. Before any interruption, the owner or tenant must get at least a 10-day notice. (NRS 116.345) (Eff.10/1/09)

SB 183 (28) An association's official publications (newsletters, Web sites, bulletin boards, magazines) now must provide "equal space" to opposing points of view upon request and at no cost. This equal space requirement is with respect to certain specific subject areas, including but not limited to: mentions of candidates or ballot questions, views or opinions on matters of official interest such as adoption of rules, issues on which there will be a vote, and so forth. In addition, there is protection from civil or criminal liability for the association, officers, employees and agents for any act or omission that arises out of the publication of information pursuant to this provision. (NRS 116.31175) (Eff.10/1/09)

BOARD MEMBERS

AB 350 (3.5, 5.5, and 16.5) adds to the duties of executive board members to clarify that not only must they act as fiduciaries but they must act: 1) on an informed basis, 2) and in the honest belief that their actions are in the best interest of the association. (NRS 116.3103) On the other hand, board members and officers are protected from punitive damages for acts and omissions that occur in their capacity as board members and officers. (NRS 116.31036) There is an exception to the protection from punitive damages where acts are willful and establish a material failure to comply with the law (NRS 116.4117); these damages can be sought not only against the association but against unit owners and the declarant as well. (Eff. 7/1/09)

SB 182 (14) also addresses executive board and officer liability. It provides that punitive damages cannot be recovered from the association, the board members or officers for acts or omissions that occur in their official capacities as board members of officers. (NRS 116.31036) (Eff. 10/1/09)

SB 182 (13) When a declarant has fully terminated control of the HOA, the owners shall elect an executive board of at least 3 members, all of whom must be owners (previously a "majority" had to be owners). Then the executive board shall elect officers, but unless the governing documents provide otherwise, officers of the association are not required to be unit owners. (NRS 116.31034) (Eff.10/1/09)

SB 182 (26) and SB 183 (29) prohibit executive board members and officers from contracting with the association to provide financing (this was added to provisions which already disallowed the providing of goods and services to the association). (NRS 116.31183 and NRS 116.31187) (Eff.10/1/09)

SB 183 (3) and SB 263 (2) provide that an executive board member who will gain personal profit or compensation from a matter before the board must:

1) disclose that matter to the board and

2) abstain from voting on that matter.

If a board member is an employee or affiliate of the declarant, those factors do not by themselves violate this provision, nor does the fact that a board member is also a unit owner constitute a violation of this provision. SB 263 also provides that executive board members must disclose if members of households or certain relatives will profit from matters before the board. (NRS 116.31084) (Eff.10/1/09)

SB 183 (14) Terms for executive board members may be increased from 2 to 9 years but there is no limitation on the number of terms -- unless the governing documents provide otherwise. (NRS 116.31034) (Eff.10/1/09)

SB 351 (9) Unless the governing documents provide that executive board vacancies must be filled by a vote of the membership, vacancies can be filled by appointment by the remaining board members. (NRS 116.3103) (Eff.10/1/09)

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New NRS 116 on sale

Copies of NRS 116 are available for sale through the Office of the Ombudsman, as well as the Legislative Counsel Bureau. The latest copies contain all of the changes from last year's Legislative session. The price is $15 per copy.

In Southern Nevada, interested parties may purchase copies at the Ombudsman's Office at 2501 E. Sahara Ave, Suite 202, or at the LCB on the fourth floor of the Sawyer Building, 555 E. Washington Ave.

In Carson City, copies are available at the Real Estate Division, 788 Fairview Drive, Suite 102, or the LCB at 401 S. Carson St.

Questions? Contact Compliance

The laws are in place and hopefully, by now, most homeowner associations have implemented the necessary changes to their elections, meetings and policies. For associations uncertain of their obligations under the new laws, the Real Estate Division offers a valuable resource.

Compliance, the office within the Division charged with enforcement of NRS 116, offers regular hours to call or visit and seek answers to HOA-related questions.

Any party within an association may call statewide toll-free 877-829-9907 from 8 a.m. to 5 p.m. weekdays and ask to speak with an investigator. For more in-depth issues, investigators are available by appointment Tuesdays through Thursdays from 9-11 a.m. and 1:30-3:30 p.m. in Las Vegas, and weekdays from 8 a.m. to 1 p.m. and 2 p.m. to 5 p.m. in Carson City.

Bruce Allit, chief investigator, encourages associations to contact his office, stating his office has helped many associations get into compliance with as little as a phone call or a letter of instruction.

"We're in the resolution business more than the punishment business," Allit said. "While we have the tools to deal with serious matters, some things can be handled through simpler means."

Ultimately, Allit said, associations must determine policies that are proper for their particular circumstances, using the appropriate expert's advice as needed.

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UNIT OWNERS – RIGHTS/RESPONSIBILITIES

AB 350 (12.5) allows an owner who is retaliated against by the executive board, board members, officers, employees or agents for complaining in good faith about violations of laws or governing documents – or requesting to review association records – to bring a separate action in court to recover compensatory damages and attorney's fees. (NOTE: The definition of retaliatory action means "taking actions that affect the unit owner's rights as a unit owner," according to the Commission on Common-Interest Communities at its July 31, 2007 meeting.) (NRS 116.31183) (Eff. 7/1/09)

AB 350 (13.7) (15.5) These provisions clarify that the public offering or resale package contains a statement listing all current and expected fees per unit – association fees, fines, assessments, late charges and penalties, interest rates for assessments, additional costs for collecting past due fines, and charges for opening and closing files (NRS 116.4103 and NRS 116.4109) (Eff. 7/1/09)

SB 114 prohibits CC&Rs from prohibiting or unreasonably restricting the use of solar or wind energy systems, and specifically allows the use of black solar glazing (NRS 111.239 and NRS 278.0208) (Eff.6/0/09)

SB 182 (19) provides that when the executive board receives a written complaint from an owner alleging that the board has violated NRS 116 or the governing documents, the board shall acknowledge receipt of the complaint within 10 days. The board shall also notify the owner that he or she may make a written request to place the subject of the complaint on the agenda of the next board meeting. (NRS 116.31087) (Eff.10/1/09)

SB 182 (26) increases the number of political signs allowed on property, though the size limit remains the same (24 x 36 inches). There can now be one sign for each candidate, political party or ballot question, and an owner cannot place signs on property where there is a tenant without the tenant's consent. All other laws governing political signs still apply. (NRS 116.325) (Eff.10/1/09)

SB 182 (27) clarifies that owners cannot be prohibited from installing drought-tolerant landscaping in their own front and back yards, but still must submit plans for architectural review, and the plans must still be compatible with the community's style. However, executive boards shall not unreasonably deny approval. Also, "drought-tolerant landscaping" specifically is now defined to include decorative rock and artificial turf along with other landscaping that conserves water. (NRS 116.330) (Eff.10/1/09)

SB 216 Associations may not unreasonably restrict, prohibit or withhold approval for owners to add shutters to improve security or conserve energy, even if they will be attached to certain common elements or limited common elements. The owner is responsible for their maintenance. A CC&R that does not unreasonably restrict shutters and that is in the governing documents or policies is enforceable if it existed as of July 1, 2009 or was in the governing documents in effect on the close of escrow of the first sale of a unit. (NRS 116.2111) (Eff. 7/1/09)

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SB 253 (6) Unless at the time of purchase there is a rental prohibition, the association may not prohibit an owner from renting a unit. Further, unless at the time of purchase the declaration requires the owner to receive approval from the association to rent the unit, this approval cannot be required. If the declaration has a limit on the number of units that can be rented, it cannot be amended to decrease the number of units which can be rented. Even if there is a limitation on the number of rentals, an owner can seek a waiver based upon a showing of "economic hardship." Where there is a limit on the number of rental units, the units owned by the declarant cannot be counted or considered when determining the maximum number of rental units allowed. (NRS 116.335) (Eff. 10/1/09)

SB 255 (3) It is the responsibility of the owner to pay for the resale package when the property is being sold. Further, this resale package must include information on transfer fees, transaction fees, and other fees involved in unit resales. (NRS 116.4109) (Eff. 6/6/09 pursuant to AB 360)

ELECTIONS AND VOTING

AB 251 changes procedures for elections where the number of candidates running is the same or less than the number of vacancies. In such cases, the executive board must send out a notice informing owners that those nominated will be deemed to be elected to the

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Regulations

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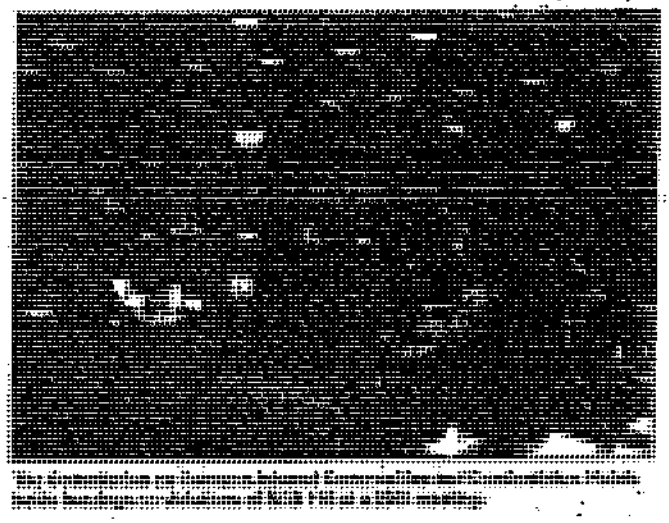
The first workshop of the year was for R-204-09, which would affect conditions under which an association could deposit funds with an out-of-state bank. The workshop was conducted by the Division with two members of the Commission on Common-Interest Communities and Condominium Hotels in attendance.



Workshops provide the opportunity for the public to view regulations and submit comment in person before adoption. Both the Division and the Commission hold scheduled workshops.

Future workshops will affect standards for receiving credentials to serve as a community manager or reserve study specialist, the way reserve studies are conducted, among several other matters. For a list of upcoming workshops and adoption hearings, visit www.red.state.nv.us, click on Common-Interest Communities and then Workshops and Adoptions (on the left side of the page). Visitors may also find the copies of proposed text on adjoining links.

Workshops conducted by the Commission are usually held in conjunction with regular meetings, the schedule of which may also be found online, under the heading Commission Meetings and Agendas on the Division's Web site.

Regulations add specifics to laws passed by the Legislature and have the full effect of law. In time, those regulations pertaining to NRS 116, the section of law governing common-interest communities, are codified into NAC 116.

Those who wish to write to the Division or Commission regarding a proposed regulation may do so through Administrative Legal Officer Joanne Glover at Nevada Real Estate Division, 2501 E. Sahara Ave., Las Vegas, NV, 89104.

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board unless an owner submits a nomination form within 30 days after receiving the board's notice (the nomination period). In that case, a regular election will be held with the normal balloting procedure. If no one else is nominated, then no ballots will be mailed out and the previously nominated candidates will be considered elected to the board 30 days after the date of the closing of the nomination period. (116.31034) (Eff. 7/1/09)

SB 182 (3) states that persons who knowingly, willfully and with fraudulent intent alter the outcome of executive board elections can be found guilty of a category D felony (1 to 4 year sentence, possible fine up to $5,000). (NRS 116.31034) (Eff. 10/1/09)

SB 182 (4) provides that community managers or executive board members who ask for or receive compensation to influence a vote, opinion or action are guilty of a category D felony, along with those who offer or give such compensation. (NRS 116.31183) (Eff. 10/1/09)

SB 182 (13) prohibits an association from adopting rules or regulations that effectively prohibit or unreasonably interfere with election campaigns for the executive board. However, campaigning can be limited to 90 days before the date ballots are required to be returned. Also, candidates may request (to the secretary or officer specified in the bylaws) that the association send - 30 days before the election date - a "candidate informational statement." This statement may be limited to a single typed page and may be sent either with the ballot, or in a separate mailing, at the association's expense. This campaign material cannot contain defamatory, libelous or profane information. Further, the association, directors, officers, employees and agents are immune from criminal and civil liability for any act or omission resulting from the publication or disclosure of information regarding any individuals that occurs during this election process. (NRS 116.31034) (Eff. 10/1/09)

SB 182 (14) Removal elections: It is now easier to remove members of the executive board. If at least 35% of the voting members vote -- and a majority of those voting vote in favor of removal - then the board member is removed. In a practical sense, this means that in a community of 100 voting members, if 35 vote, and 18 vote in favor of removal, then the board member is removed. (NRS 116.31036) Also, pursuant to SB 182 (10), the association cannot adopt any rule or regulation that prevents or unreasonably interferes with the collection of signatures for a petition for a special meeting for a removal election. (NRS 116.3108) (Eff. 10/1/09)

SB 183 (8) (14) (16) (18) (20) (21) provides that there cannot be delegate voting in the election or removal of executive board members. (NRS 116.31106(1)) (Eff. 10/1/09)

SB 183 (22) provides an exception to the prohibition on delegates during the period of declarant control and 2 years after declarant control is terminated. (NRS 116.1201) (Eff. 10/1/11)

SB 183 (14) requires that the association distribute the candidate disclosure statements with the ballots but the association is not obligated to distribute any disclosure if it contains information that is believed to be defamatory, libelous or profane. (NRS 116.31034) (Eff. 10/1/09)

RECORDS

AB 350 (6.5, 7.5) provides that owners may receive a copy or summary of unit owner or executive board meeting minutes cost-free in an electronic format or, if not in electronic format, at the following costs: 25 cents per page for the first 10 pages, 10 cents per page thereafter. (NRS 116.3108, 116.31083) (Eff. 7/1/09)

AB 350 (10.5, 12.2) provides that association books and records, including the budget, must be made available at a location not to exceed 60 miles from the CIC. (NRS 116.31151, NRS 116.31175) (Eff. 7/1/09)

SB 182 (23.5) now includes attorney's contracts as records that are available for review by owners. (NOTE: It is the opinion of the Division that this applies to current contracts that were in place on the day the statute went into effect, not to past ones.) (NRS 116.31175) (Eff. 10/1/09)

SB 183 (28) provides that although books, records and other papers of the association are generally available to owners – if that document (including minutes, a reserve study, and budget) is in a draft stage and has not been placed on the agenda for final approval by the board – it does not have to be provided to the owner. (NRS 116.31175) (Eff. 10/1/09)

SB 351 (12) Regarding records which are to be made available to owners upon written request, this new law protects the privacy of an owner's architectural plans or specifications submitted for approval to the association's

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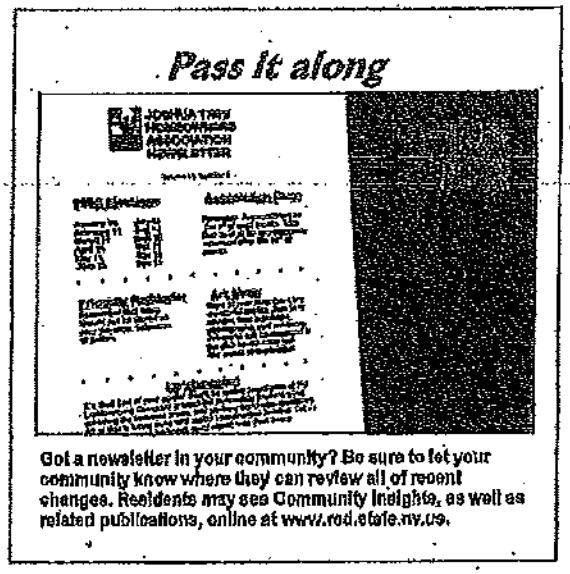
architectural review committee. (NRS 116.31176) (Eff. 10/1/09)

MEETINGS

AB 350 (7.5) Regarding executive board meetings, on an annual basis, two of the meetings must be held outside "standard business hours." (NRS 116.31083) (Eff. 7/1/09) NOTE: NAC 116.300 defines standard business hours as follows: "As used in this section, 'regular business hours' means Monday through Friday, 9 a.m. to 5 p.m., excluding state and federal holidays."

SB 182 (17) requires audio recordings of executive board meetings (but not of the executive sessions). Within 30 days of that meeting, the audio recordings, the minutes and/or a summary of the minutes must be made available to owners, including copies. (NRS 116.31083) (Eff. 10/1/09)



Got a newsletter in your community? Be sure to let your community know where they can review all of recent changes. Residents may see Community Insights, as well as related publications, online at www.red.state.nv.us.

SB 182 (17) also provides that there are 2 comment periods for owners. At the beginning of the meeting, comments are limited to agenda items. At the end of the meeting, comments can be on any subject. (NRS 116.31083) (Eff. 10/1/09)

SB 182 (18) now requires that if the association is taking any action on contracts with the association's attorney, it must be done during the open portion of the executive board meeting (in the past attorney's contracts were only allowed to be discussed in executive session). Further, these contracts can be reviewed by owners. (NRS 116.31085) (Eff. 10/1/09)

SB 182 (19) provides that executive board meetings must be held at least once every quarter, and not less than once every 100 days (previously the reference was to every 90 days). (NRS 116.31083) (Eff. 10/1/09)

SB 259 (3) provides that if the association solicits bids for an "association project", the bids must be opened during executive board meetings. Such project is defined as including maintenance, replacement and restoration of common elements or the provision of services to the association. (NRS 116.31144) (Eff. 10/1/09)

BUDGETS/ACCOUNTS

AB 311 (1) changes audit requirements. If the HOA budget is under $75,000, financial statements only have to be reviewed by a CPA during the year immediately preceding the year of the reserve study (Audits are no longer required). If budgets are $75,000 to $150,000, there just needs to be an annual review (again, no audit). For both of these types of associations, however, 15% of the voting members can submit a written request for an audit. Further, if budgets are above $150,000 there must be an annual audit by a CPA. (NRS 116.31144) (Eff. 10/1/09)

SB 182 (21) provides that even if the governing documents state otherwise, the executive board has authority to impose assessments to establish adequate reserves - without seeking or obtaining the approval of owners. These assessments, however, must be based on the reserve study. (NRS 116.3115) (Eff. 10/1/09)

SB 182 (20) Money in operating accounts may not be withdrawn without 2 signatures: one must be of an executive board member or an officer and the second must be of another member of an executive board, an officer or the community manager. However, there can be a withdrawal with just 1 signature for 2 limited purposes: transferring money to the reserve account at regular intervals, or making auto-

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matic payments for utilities. This does NOT apply to limited-purpose associations. (NRS 116.31153) (Eff. 10/1/09)

SB 351 (3) This section provides that associations, executive boards and community managers must deposit association funds in financial institutions that are 1) in Nevada, 2) qualified to conduct business in Nevada, or 3) have consented to jurisdiction of Nevada courts and the Division, if out-of-state. In addition, except as otherwise provided by the governing documents, an association shall deposit, maintain and invest funds in:

1) properly insured accounts (FDIC, National Credit Union Share Insurance Fund, or Securities Investor Protection Corp.);
2) with a private insurer (approved under NRS 678.755); or
3) In United States government backed securities. (NRS 116.311395) (Eff. 10/1/09)

SB 351 (12) (12.3) and (12.7) require that the association establish reserves not only for major components of the common elements but also for "any other portion of the CIC that the association is obligated to maintain, repair, replace or restore." (NRS 116.31151) (Eff. 10/1/09)

VIOLATIONS, ENFORCEMENT OF CC&RS

AB 350 (4.5) Past due fines can no longer accrue interest. (NRS 116.31031) However, interest can be accrued for past due assessments under AB 350 (9). (NRS 116.3115) (Eff. 7/1/09)

AB 350 (9) Past due assessments that are 60 days or more past due bear interest at a rate equal to the prime rate at the largest bank in Nevada, plus 2 percent. The official rate is posted at www.fid.state.nv.us. (NRS 116.3115) (Eff. 7/1/09)

SB 182 (12) Where there are fines against an owner for violations which have been committed by tenants or invitees, the board cannot impose a fine against the owner unless the unit owner 1) participated in or authorized the violation, 2) had prior notice of the violation, or 3) had an opportunity to stop the violation and failed to do so. (NRS 116.3101) (Eff. 10/1/09)

SB 182 (18) creates additional due process protections during violation hearings. Owners must be informed that they have the right to counsel, the right to present

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Glossary

Assembly Bill (AB) -- One of two potential prefixes for legislation in Nevada, the other being Senate Bill (SB). Nevada has a bicameral Legislature, similar to the U.S. Congress. Legislation may originate in either the state Senate or the state Assembly. Even though it must eventually pass both houses, a bill retains its original name, which also includes a number based upon the order it was drafted (e.g., SB 183 followed right after SB 182). There is no practical difference between the two.

Assessments (or dues) -- Each unit owner is obligated pay a share of the common expenses of the association, such as the cost of landscape maintenance, insurance, utilities and administrative costs. The amount the unit owner is obligated to pay is the assessment. This may be paid monthly, annually, or anywhere in between depending upon the HOA's governing documents.

Common-Interest Community (CIC)/ Homeowners Association (HOA or association) -- means real estate described in a declaration with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for a share of the real estate taxes, insurance premiums, maintenance or other improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration (NRS 116.021). The more familiar term "homeowners association" is used interchangeably with CIC.

Commission on Common-Interest Communities and Condominium Hotels (Commission) -- A seven-member (as of Oct. 1, 2009) panel, appointed by the governor, charged with adopting regulations and holding hearings regarding violations of NRS 116. The commission comprises an attorney, a CPA, a community manager, a development company executive, and three homeowner association members.

Executive Board/ Board of Directors/ Board -- These terms are used interchangeably. As the governing body of an association, it may create policy, hold hearings on violations of governing documents, and perform administrative roles. After an association transitions from developer to homeowner control, directors are

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witnesses, and the right to present information regarding any conflict of interest of anyone on the hearing panel. The Commission may be adopting regulations on these rights in the future. Also, these rights are minimum due process rights, and do not preempt any governing document provisions that provide greater protections. (NRS 116.31085) (Eff. 10/1/09)

SB 183 (12) With respect to not only owners and tenants but also invitees, there are some changes regarding fines. There can be no fines imposed against an owner, tenant or invitee regarding the delivery of goods or services by vehicle. In addition, "notice" requirements have been expanded so that fines cannot be imposed unless the owner AND, if different, the person against whom the fine will be imposed, has written notice of the violation. An owner will not be deemed to have received written notice unless it was mailed to the address of the unit AND, if different, to a mailing address specified by the owner. At the hearings, an executive board member who has not paid all assessments cannot participate in the hearing or vote. Such actions will render the board's actions void. The party who receives the fine can request, within 60 days after paying any payment on the fine, a statement of any remaining balance owed. (NRS 116.31031) (Eff. 10/1/09)

SB 183 (13) Associations shall establish a compliance account to account for fines, which must be separate from any account established for assessments. (NRS 116.310315) (Eff. 10/1/11)

CREDENTIALED PROFESSIONALS

SB 182 (24) Community managers are prohibited from taking retaliatory action against an owner who complained in good faith about violations of the law or governing documents, or recommended the selection or replacement of an attorney, community manager or vendor. These prohibitions also apply to executive board members and officers, employees and agents of the HOAs. (NRS 116.31183) (Eff. 10/1/09)

SB 182 (29) A civil suit can now be filed against a manager for failing to comply with NRS 116 or the governing documents. These suits can be filed by the association -- or by a class of owners (at least 10% of the voting members). Further, managers are subject to punitive

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Glossary

elected by the membership, although vacancies of unexpired terms may be appointed by the board (if the governing documents allow). Directors typically select officers (president, etc.) from amongst themselves, although officers are not required by law to be directors.

Nevada Administrative Code (NAC) -- Many Nevada Revised Statutes (see below) include provisions for regulations that "fill in the details." These details become part of the Nevada Administrative Code. Regulations have the power of law, but are subordinate to the statutes that authorize them and may be adopted only for the purposes specified by the statute. After regulations are adopted, they are later "codified" into the Nevada Administrative Code. The Commission on Common-Interest Communities and Condominium Hotels holds hearings and adopts regulations authorized by NRS 116. These become part of NAC 116.

Nevada Revised Statutes (NRS) -- The laws passed by the Nevada Legislature, which are organized by subject into chapters. For instance, Chapter 116 of the Nevada Revised Statutes (NRS 116) is called "Common-Interest Ownership" and directly pertains to homeowners associations. Other chapters of state law also apply to HOAs, such as the chapters affecting the towing of vehicles, pools and spas, energy efficiency and fair housing.

Ombudsman for Owners in Common-Interest Communities and Condominium Hotels (Ombudsman) -- The office, part of the Real Estate Division, that produces this newsletter. It also educates HOA residents on their rights and responsibilities, assists in resolving HOA-related disputes, and maintains a registry of all HOAs in Nevada. Its duties are supplemented by other sections of the Division, which licenses and regulates community managers and investigates issues relating to NRS 116.

Senate Bill (SB) -- See Assembly Bill.

Unit Owner/ Homeowner/ Member -- These terms are used interchangeably. The members of a homeowners association are the owners; not the tenants. A more detailed definition may be found in NRS 116.093.

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damages under certain conditions. (NRS 116A.117) (Eff. 10/1/09)

SB 182 (39) provides for the issuance of temporary certificates for community management for a period of one year under certain circumstances. (NRS 116A.410) (Eff. 1/1/10)

SB 183 (39) Reserve study specialists must be registered with the Division (changed from being required to have a permit). (NRS 116A.260) (Eff. 10/1/09)

ARBITRATORS

SB 182 (40) This provision establishes that arbitrators must provide specific information to parties, in plain English, that explains the procedures and law, including information on confirmation of awards, judgments on awards, and applicable laws and court rules regarding attorney's fees and costs. It also clarifies that in nonbinding arbitration, parties have 30 days to commence an action in court, and a year to apply to court for confirmation of the award. In binding arbitration, if a party seeks to have that award vacated, or commences an action in court, that person will be responsible for the opposing party's attorney fees and costs if a more favorable award or judgment is not received. (NRS 38.330) (Eff. 10/1/09)

DECLARANT ISSUES

SB183 (16) provides that the declarant must provide to the association an accounting for money of the association and audited financial statements for each fiscal year and any ancillary period from the date of the last audit. Forthwith, the declarant must pay for this ancillary audit and must deliver it within 210 days after the date the declarant's control ends. (NRS 116.31038) (Eff. 10/1/09)

SB 183 (17) provides that, with respect to the converted building reserve deficit which the declarant must deliver to the association, it is defined as the amount necessary to replace major components within 10 years after the date of the first close of escrow of a unit, (previously had been the date of the first sale). (NRS 116.310395) (Eff. 10/1/09)

OMBUDSMAN/REAL ESTATE DIVISION

SB 182 (5) allows petitions to the Division for advisory opinions and rulings. (NRS 116.623) (Eff. 10/1/09)

SB 182 (30) adds 2 members who are unit owners to the CICCH Commission. (NRS 116.600) (Eff. 10/1/09)

SB 263 (9) The CICCH Commission now can impose administrative fines of up to $10,000 per violation (previously the limit was $5,000). (NRS 116A.900) (Eff. 10/1/09)

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NOTE: This bill digest is not a legal document or legal advice. It is a summary of select laws from the 2009 Nevada Legislative session relating to common-interest communities. It is not a complete listing of all Legislative changes.

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HOAs: Forms have changed — Get yours up to date

When the law changes, so does everything else. This is true especially of all the myriad paperwork associated with a homeowner association.

Some of these changes are internal: Do your agendas list both homeowner comment periods? Do your candidate disclosures forms ask all the relevant questions? Do your resale packages contain a statement listing all current and expected fees, fines, assessments and other costs?

Just as important: Is your association using the most updated form to do business with the Office of the Ombudsman? To ensure compliance with the law, associations should check the Real Estate Division's Web site, www.red.state.nv.us, each time they have business with the state. From the main page, select the gray button marked Forms on the home page, then look for the form by Type (click on the word "Type" to sort). Scroll down to the set of forms marked as Common-Interest Community.

Some of the documents affected by the 2009 Legislative Session include: Annual Association Registration, Reserve Study Summary and the Candidacy Disclosure Statement.

In addition, associations submitting payment for annual registration must remember that all HOA operating expenses now require two signatures (except limited-purpose ones), one from a director or officer AND another from a director, officer or community manager.

Educational Opportunities expand in 2010

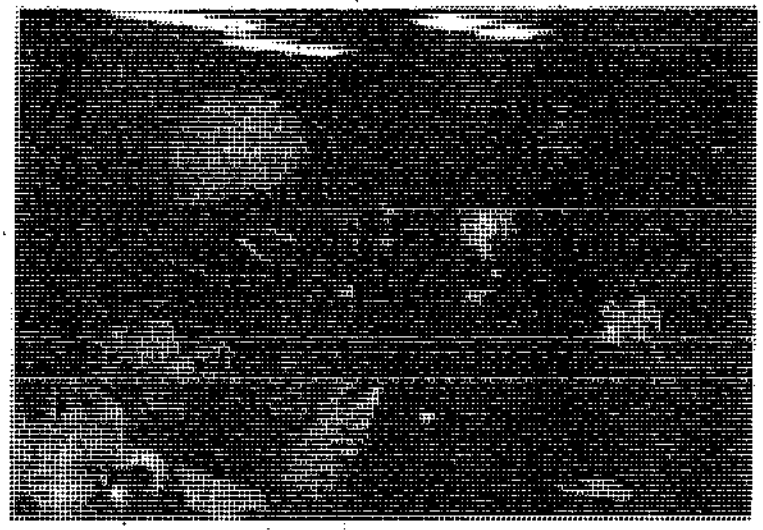
Outreach classes cover fundamentals of managing an association

It is a duty and legal responsibility of all HOA board members to keep informed of changes to the law. While there is much to learn, the Office of the Ombudsman hopes to make this task a little easier. Our staff has created publications and classes to make learning the new material as simple and convenient as possible.

The first class dates are already under way. Basics for Board Members is presented monthly at locations throughout the state. This 3-hour presentation addresses HOA basics, such as meetings, elections, recordkeeping, and fiduciary duty. It also offers a forum for asking questions, and presents information on addressing common association challenges.

Additional classes on various HOA topics will be scheduled throughout the year. In addition, seminars taught by contracted subject matter experts are planned throughout the year. Visit http://www.red.state.nv.us/CIC/Seminars/omb_seminars for an updated listing of class opportunities.

Registration is required as seating is limited. Contact Nicholas Haley at 486-4480 or email to nhaley@red.state.nv.us to register.



HOA residents attend the first "Basics for Board Members" class, held at the Bradley Building and teleconferenced to Carson City. The three-hour presentation covers the fundamentals of serving as a board member and incorporates changes to the law from the 2009 session. Additional dates are scheduled monthly throughout 2010, as well as classes on specific subjects.

Publications synthesize old, new law on meetings, elections

Adding new law to old, the Office of the Ombudsman recently issued updated brochures on meetings, elections, and general information for Spanish speakers.

The brochures are available online at http://www.red.state.nv.us/CIC/cic.htm and in print form at select state offices, including the Real Estate Division at 2501 E. Sahara Ave. in Las Vegas and 788 Fairview Drive in Carson City.

Association Meetings explains the different kinds of meetings, the general purpose of each, and scheduling and agenda requirements. It lists the varying timelines for all types of meetings—reason alone to keep it handy.

Association Elections gives a start-to-finish overview of how to comply with HOA election law, including a depiction of a three-envelope system.

The Ombudsman's Spanish brochure covers the very basics of how an association works, as well as information on our office. It is useful for bridging the communication gap with residents not well versed in English.

"The brochures bring together all of the details of a particular subject within NRS 116," said Nick Haley, education and information officer for the Office of the Ombudsman. "While some of our products speak to changes in the law, the brochures take a particular topic – say elections – and present the topic as a whole. This is ultimately how all of us will come to understand these changes: within the context of the existing law."

Additional subjects are coming online. Check the Web site for updates, or ask the Ombudsman staff what's new.

Frequently used links to government agencies

Following are links to public agencies used by HOAs:

List of registered Reserve Study Specialists — http://www.red.state.nv.us/CIC/rss.htm

Nevada Secretary of State (used for HOA's corporate filing) - http://www.nvsos.gov/online/

Upcoming classes — http://www.red.state.nv.us/CIC/Seminars/omb_seminars.pdf

Prime rate (basis for which associations may charge interest on assessments) — http://www.fid.state.nv.us/Prime/PrimeInterestRate.pdf

Mortgage Lending Division — http://mld.nv.gov/

Neighborhood Services, Henderson — http://www.cityofhenderson.com/neighborhood_services/index.php

Neighborhood Services, Las Vegas — http://www.lasvegasnevada.gov/Government/neighborhoodservices.htm

Neighborhood Services, North Las Vegas — http://cityofnorthlasvegas.com/Departments/CityManager/NeighborhoodServices.shtm

Real Estate Division Forms and links

Real Estate Division — http://www.red.state.nv.us/

Annual Associations Registration — http://www.red.state.nv.us/forms/662.pdf

Reserve Study Summary — http://www.red.state.nv.us/forms/660.pdf

Declaration of Certification (signed by new board members) — http://www.red.state.nv.us/forms/669.pdf

Before You Purchase in a Common-Interest Community Did you Know? — http://www.red.state.nv.us/forms/684.pdf

Intervention Affidavit — http://www.red.state.nv.us/forms/530.pdf

PRSRT STD
U.S. POSTAGE
PAID
Carson City, NV 89701
PERMIT #12

8820
State of Nevada
Department of Business & Industry
Real Estate Division
2501 E. Sahara Avenue, Suite 202
Las Vegas, NV 89104-4137

Exhibit 6

REGISTER OF ACTIONS
CASE No. 06A523959

Korbel Family Living Trust vs Spring Mountain Ranch Master Assn, Bay Capital Corp

Case Type: Title to Property
Subtype: Liens
Date Filed: 08/27/2006
Location: Department 16
Conversion Case Number: A523959

PARTY INFORMATION

		Lead Attorneys
Conversion Extended Connection Type	No Convert Value @ 06A523959 Removed: 04/24/2009 Converted From Blackstone	
Defendant	Bay Capital Corp	
Defendant	Spring Mountain Ranch Master Assn	John Eric Leach *Retained* ** Confidential Phone Number **
Intervenor	Reconstrust Company	Jeremy T. Bergstrom *Retained* ** Confidential Phone Number **
Plaintiff	Korbel Family Living Trust	Anita K. Holden-DeFarland *Retained* ** Confidential Phone Number **

EVENTS & ORDERS OF THE COURT

11/20/2006 Hearing (9:30 AM) (Judicial Officer Glass, Jackie)
ARGUMENT/ PLTF'S MTN FOR PRELIMINARY INJUNCTION /8 Court Clerk: Sandra Jeter Reporter/Recorder: Francesca Haak Heard By: Jackie Glass

Minutes
11/20/2006 9:00 AM
- Arguments by counsel regarding who is going to pay what and what are common expenses as outlined in NRS.116. COURT ORDERED, the Association can collect the superpriority lien including up to six months of late fees, collection fees and attorney's fees; however anything after foreclosure is not included - only what was before - and counsel is to make sure everyone has notice. COURT FURTHER ORDERED, the previously interpled funds are to be RELEASED. Mr. Leach to prepare the Order and submit to Mr. Baker for approval as to form and content.

Parties Present
Return to Register of Actions

Exhibit 7

ORIGINAL

FILED

Oct 30 3 57 PM '06

CLERK

BREF
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Marty G. Baker, Esq.
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KORBEL FAMILY LIVING TRUST

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

KORBEL FAMILY LIVING TRUST Plaintiff(s), v. SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP., Defendant(s).	Case No.: A523959 Dept. No.: V PLAINTIFF'S BRIEF Hearing Date: November 6, 2006. Hearing Time: 9:00 a.m.

Plaintiff KORBEL FAMILY LIVING TRUST (hereinafter "Plaintiff"), by and through its attorneys of record, Anita KH McFarland, Esq. and Marty G. Baker, Esq. of The Cooper Christensen Law Firm, LLP, hereby respectfully submits this brief pursuant to the Court's minute order of September 18, 2006 and in support of its position regarding the judicial interpretation of NRS 116.3116.

I. STATEMENT OF THE CASE

This case concerns the determination of what homeowners assessment amounts are owed

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by a new property owner who purchases real property a foreclosure sale conducted by the beneficiary of a first deed of trust.

II. LEGAL ISSUE PRESENTED

What is the correct application of NRS 116.3116(2), which states:

> "The lien [for assessments] 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 6 months immediately preceding institution of an action to enforce the lien."

III. ARGUMENT

A. GENERAL STATEMENT OF ISSUES AND PROBLEMS

Although NRS 116.3116 establishes lien priorities with respect to the rights and obligations as to a homeowners association such as Defendant Spring Mountain Ranch Master Association (hereinafter "Spring Mountain"), there has been a great deal of confusion with respect to what payment may be demanded from persons who purchase property at foreclosure sales conducted by the beneficiaries of first deeds of trust held against the property. As a general rule, the first mortgage security interest is of the highest priority, and any junior lien or mortgage is extinguished when there is a foreclosure by the first deed of trust.

Nevada, however, has adopted what is known as a "superpriority" lien statute with respect to planned community/homeowner's associations. According to NRS 116.3116(2), a lien assessment for delinquent "common expenses" (ie. association dues, common area maintenance dues, etc., as set forth in NRS 116.3115) incurred up to six (6) months prior to institution of an action to enforce said lien, does have a priority over a first security interest regardless of the prior recording. Landscape violations, fines, and collection costs are clearly *not* "common expenses

based on the periodic budget adopted by the association."

Unfortunately, since there has been no judicial interpretation of this statute by the Supreme Court of Nevada, homeowners associations, as well as the collection agencies who work for them, very frequently and improperly demand payment of thousands of dollars from new purchasers for items that are not properly included in this superpriority portion of the lien. Sometimes lien release fees and other items are demanded from both the new owner (as a superpriority claim) and from available excess proceeds (as a non-superpriority claim). Frequently, a lien which was only a few hundred dollars balloons into a demand for thousands of dollars for attorney fees and costs for simply recording a standard lien and notice of default. The legal and collection fees are often many times the amount of the lien.

Like Plaintiff in this case, most parties who purchase homes at foreclosure sales are banks or investors who intend to refurbish and resell the property as quickly as possible. Frequently, the amounts demanded remain unknown until the property is to be sold to a subsequent bona fide purchaser. At this point an Escrow Demand is generally requested from the pertinent association in order to clear the lien and provide clear title to the subsequent purchaser. Typically, at this point an escrow has already been opened and the transaction with the buyer must close within a short period of time. When the owner/investor is faced with an excessive and incorrect demand, they are forced to make the decision as to whether or not it is financially feasible to file suit against the association and their agents to have the lien reduced, which may result in the loss of a sale to a subsequent purchaser because clear title cannot be provided until the association releases the lien. The owner/investor's other and often more feasible option is to simply pay the amount demanded by the association in order to preserve the sale to the subsequent purchaser.

B. NRS 116.3116 AS APPLIED TO THE FACTS OF THIS CASE

In the case at hand, the beneficiary of the second deed of trust conducted a non-judicial foreclosure sale and sold the property locally known as 9021 Little Horse Avenue, Las Vegas, Nevada, APN #125-08-221-016 (hereinafter "the Property") to Defendant Bay Capital Corp. (hereinafter "Bay Capital"), who became the vested owner of the Property. Upon taking ownership of the Property, Bay Capital did not correct landscape issues which were causing violations to be assessed against the Property, and did not cure amounts owing to Spring Mountain.

Then, on or about May 1, 2006 and after the sale to Bay Capital, the beneficiary of the first deed of trust conducted a non-judicial foreclosure sale, at which time the Property was sold to Plaintiff. A Trustee's Deed Upon Sale was recorded in favor of Plaintiff on May 9, 2006. Plaintiff promptly refurbished the Property and arranged to sell it to a subsequent purchaser. Even though the monthly assessments on the Property are approximately $40.00 per month, Spring Mountain initially presented Plaintiff with a superpriority demand for $7,528.07. Spring Mountain also initially presented a non-superpriority demand for payment from excess proceeds in the amount of $2,151.67.

Plaintiff telephoned the collection agent who was handling this account for Spring Mountain and requested that said demand be re-apportioned to the correct amounts between the super-priority portion owed by Plaintiff, and the non-superpriority portion to be paid from excess proceeds, but Spring Mountain refused to amend its demand to comply with NRS Chapter 116. Rather than assent to Spring Mountain's demand, Plaintiff elected to file suit under NRS 108.2275 for *Frivolous or Excessive Notice of Lien*. In order to provide their subsequent

purchaser with clear title, Plaintiff was forced to deposit $10,000.00 with the title company pending the outcome of this case.

Because of the dispute between the parties, Counsel for the trustee who conducted the foreclosure sale on the first deed of trust elected to intervene in this case, interplead the excess proceeds, and request attorneys' fees for doing so pursuant to NRS 40.462. The excess proceeds have now been depleted by thousands of dollars because of Spring Mountain's refusal to reapportion its demand.

Under the clear and precise application of NRS 116.3116(2), the only amounts that survived the foreclosure sale and constitute the superpriority portion of the lien are "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 6 months immediately preceding institution of an action to enforce the lien." Based on this language, Plaintiff's position is that it should have to pay only six months of monthly assessments with interest thereon, any assessments which accrued during Plaintiff's ownership of the Property, and any charges incident to the transfer of the Property (Assessments of $219.00 plus interest; Escrow Demand of $150.00; and Transfer Fee of $300.00, for a total owing of $669.00 plus interest on the assessments).

In discussing statutory interpretation generally, the Supreme Court of Nevada stated in Irving v. Irving, 122 Nev. Adv. Rep. 44, 134 P.3d. 718, 720 (2006), as follows:

> "This court follows the plain meaning of a statute absent an ambiguity. Whether a statute is deemed ambiguous depends upon whether the statute's language is susceptible to two or more reasonable interpretations. When a statute is

ambiguous, we look to the Legislature's intent in interpreting the statute."

In this case, the language of the statute regarding "assessments for common expenses based on the periodic budget adopted by the association" is unambiguous. This language clearly includes delinquent assessments within the statutory six month period, and clearly does not include fines, late fees, collection costs, or attorneys' fees. Following the plain meaning of NRS 116.3116, Plaintiff should not have to pay Spring Mountain for these other items. Spring Mountain may still collect these non-superpriority expenses from the excess proceeds on deposit with the Court.

C. SPRING MOUNTAIN SEEKS AN EXPANSIVE INTERPRETATION OF NRS 116.3116

The Supreme Court of Nevada has yet to interpret NRS 116.3116. The State of Connecticut has adopted a superpriority statute similar to Nevada's, and Spring Mountain relies on the Connecticut case of Hudson House Condominium Association, Inc. v. Brooks, 223 Conn. 610, 611 A.2nd 862 (1992) in support of its revised demand of $1,963.00. However, the Connecticut statute and the Connecticut court's interpretation thereof are inapposite. Nevada and Connecticut are as far apart legally and they are geographically. As set forth above, the better interpretation for the Court in this case is to look at the plain meaning of the Nevada statute.

Based upon the Connecticut court's decision, in addition to six months of delinquent assessments, Spring Mountain contends that it is entitled to recover collection costs and attorneys' fees from Plaintiff as part of its superpriority lien. These costs and fees are associated with the former owners' delinquency, and pursuant to the plain meaning of NRS 116.3116 are properly recoverable from the excess proceeds as part of the non-superpriority portion of the lien.

* * *

D. THE EQUITIES OF THE INSTANT CASE ALSO DEMAND A STRICT INTERPRETATION OF NRS 116.3116

In the instant case, the beneficiary of the second deed of trust foreclosed and Bay Capital became the vested owner of the Property. Thus, after satisfaction of junior liens and mortgages under NRS 40.462(2)(c), Bay Capital is entitled to recover any excess proceeds remaining pursuant to NRS 40.462(2)(d). After Bay Capital became the owner of the Property it paid *none* of the amounts that were owing to Spring Mountain and did not correct the landscaping condition, causing additional fines and violations to continually accrue while Bay Capital was the owner.

Spring Mountain originally insisted that the superpriority portion of the lien was $7,528.07, and stated that non-superpriority demand was an additional $2,151.67. Since there was $7,495.65 in excess proceeds, Spring Mountain's interpretation of the statute would have resulted in Bay Capital being awarded approximately $5,000.00 from the excess proceeds even though it failed and refused to pay Spring Mountain or correct violations.

If this Court were to honor Spring Mountain's request for the adoption of the Connecticut court's interpretation of our Nevada statute, the result would be that Plaintiff would be forced to pay an additional $1,234.00 to Spring Mountain. Since these funds would be paid by Plaintiff under the superpriority portion of the lien, this amount would not need to come from the remaining excess proceeds and Bay Capital would therefore benefit by this amount. Spring Mountain's interpretation of the statute would thus reward Bay Capital's bad behavior by allowing Bay Capital to profit from not paying amounts it should have paid to Spring Mountain.

Additionally, inclusion of these additional fees and costs in the superpriority portion of

the lien would give association collection agencies free reign to continue charging thousands of dollars in collection costs and attorneys' fees for filing a couple of simple, standard documents. Purchasers at foreclosure sales would thereby be forced to either pay the exorbitant amounts demanded or seek court review of the lien amounts pursuant to NRS 108.2275. Both of these options result in improper and excessive expenditures for foreclosure sale purchasers.

IV. CONCLUSION

At the outset of this matter, Spring Mountain had the choice of collecting $669.00 from Plaintiff and collecting the bulk of the remaining monies it was owed from excess proceeds that were held by the sale trustee. Spring Mountain's refusal to amend it's demand resulted in a depletion of available excess proceeds, and caused Plaintiff to seek relief from the Court.

Additionally, Spring Mountain's interpretation of NRS 116.3116 would reward persons collecting excess proceeds under NRS 40.462(2)(d), such as Bay Capital in this case, for not paying homeowners assessments, while saddling the foreclosure sale purchaser with thousands of dollars in additional costs. Finally, Spring Mountain's suggested interpretation of NRS 116.3116 would allow the associations' collection agencies to continue demanding thousands of dollars for fines, late fees, attorneys' fees and collection costs from foreclosure sale purchasers.

Both the clear language of the statute and the equities of this case demand a strict interpretation of the statute. Pursuant to NRS 116.3116, Plaintiff is entitled to a ruling that Plaintiff only owes $669.00 (plus interest on six months of assessments) to Spring Mountain. Plaintiff is also entitled to an order pursuant to NRS 108.2275 releasing Spring Mountain's lien.

* * *

* * *

and a ruling that Plaintiff recover its attorneys' fees pursuant to NRS 108.2275(6)(b).

DATED this 30th day of October, 2006

THE COOPER CHRISTENSEN LAW FIRM, LLP

By: _____
Anita K. McFarland, Esq.
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Marty G. Baker, Esq.
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820 South Valley View Blvd.
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Attorneys for Plaintiff
KORBEL FAMILY LIVING TRUST

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of THE COOPER CHRISTENSEN LAW FIRM, LLP, and that on the 30th day of October, 2006, I served a true and correct copy of the foregoing PLAINTIFF'S BRIEF, via First Class United States mail, postage prepaid, on the parties indicated below.

John E. Leach, Esq.
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant
Spring Mountain Ranch Master Association

_____
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THE COOPER CHRISTENSEN LAW FIRM, LLP

Exhibit 8

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Attorneys for Spring Mountain Ranch Master Association

FILED
Nov 16 4 36 PM '06
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

DEFENDANT SPRING MOUNTAIN RANCH ASSOCIATION'S BRIEF

Hearing Date: November 20, 2006
Time: 9:00 A.M.

Defendant Spring Mountain Ranch Master Association (hereinafter the "Association"), by and through its attorneys of record, John E. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson respectfully submits this Brief pursuant to the Court's Minute Order of September 18, 2006, and in support of its position regarding the judicial interpretation of Nevada Revised Statutes ("NRS") 116.3116.

STATEMENT OF THE FACTS

On or about August 26, 2004, Jose Olivera ("Olivera") purchased the real property located at 9021 Little Horse Avenue, Las Vegas, Nevada (the "Property"). The Property is located within the community known as Spring Mountain Ranch (the "Community") and, therefore, is subject to the terms and conditions of the Amended and Restated Master Declaration of Covenants, Conditions and Restrictions and Grant of Easements for Spring Mountain Ranch (the "Declaration"), which was recorded with the Clark County Recorder's Office on November

25, 1998, in Book No. 981125, as Instrument No. 03642. A true and correct copy of relevant portions of the Declaration are attached hereto as Exhibit "1" and incorporated herein by this reference.

Concurrent with the purchase of the Property, Olivera executed and consented to the recordation of a first deed of trust against the Property. Also concurrent with the purchase of the Property, Olivera executed and consented to the recordation of a second deed of trust against the Property.

According to the Declaration, Olivera was required to pay assessments for common expenses, among other things, to the Association. See Declaration, Article V, Section 5.1(a). The Declaration further provides that if an owner fails or refuses to pay assessments due and owing to the Association, then the Association may place a lien upon the Property and ultimately foreclose upon the same. See Exhibit "1", Article V, Section 5.10.

On or about February 16, 2005, the Association caused a Notice of Delinquent Assessment Lien (the "Lien") to be recorded against the Property. A true and correct copy of the Lien is attached hereto as Exhibit "2" and incorporated herein by this reference. When Olivera continued to fail or refuse to pay his assessments, the Association caused a Notice of Default and Election To Sell Under Homeowners Association Lien (the "Notice of Default") to be recorded against the Property on March 25, 2005. A true and correct copy of the Notice of Default is attached hereto as Exhibit "3" and herein incorporated by this reference.

On or about March 14, 2006, the beneficiary of the second deed of trust conducted a non-judicial foreclosure sale and sold the Property to Defendant Bay Capital Corp. ("Capital") who recorded its Trustee's Deed Upon Sale on March 22, 2006. A true and correct copy of the Trustee's Deed Upon Sale is attached hereto as Exhibit "4" and incorporated herein by this reference.

On or about April 28, 2006, the beneficiary of the first deed of trust conducted a non-judicial foreclosure sale and sold the Property to Plaintiff Korbel Family Living Trust ("Plaintiff"), who recorded its Trustee's Deed Upon Sale on May 9, 2006. A copy of the Trustee's Deed Upon Sale is attached hereto as Exhibit "5" and incorporated herein by this

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reference.

Based on the information provided by the Plaintiff, the Plaintiff paid the sum of Three Hundred Thousand Forty-Seven Three Hundred Dollars ($347,300.00) for the Property. The foreclosing beneficiary of the first deed of trust was only owed Three Hundred Thousand Thirty-Nine Eight Hundred Four Dollars and Thirty-Nine Cents ($339,804.35). As a result, surplus funds in the amount of Seven Thousand Four Hundred Ninety-Five Dollars and Sixty-Five Cents ($7,495.65) remained to be distributed in accordance with NRS 40.462.

After the foreclosure sale, Plaintiff requested that the Association provide it with a payoff on the Association's lien so that it could clear title to the Property. The Association initially presented Plaintiff with a demand for Seven Thousand Five Hundred Twenty-Eight Dollars and Seven Cents ($7,528.07). A true and correct copy of the Association's initial payoff is attached hereto as Exhibit "6" and incorporated herein by this reference. The Association subsequently provided a payoff demand in the amount of Two Thousand One Hundred Fifty-One Dollars and Sixty-Seven Cents ($2,151.67). A true and correct copy of the subsequent payoff demand is attached hereto as Exhibit "7" and incorporated herein by this reference.

When the Plaintiff and the Association could not agree on the apportionment of the Association's claim, Plaintiff initiated this instant action against the Association. The issue currently before the court is the value of the superpriority portion of the Association's lien, which is the responsibility of Plaintiff, and the amount of the surplus funds that should be distributed to the Association.

STATEMENT OF THE LAW

In 1991, the Nevada Legislature adopted the Uniform Common-Interest Ownership Act (the "Act"). The Act, which was originally created by the Uniform Law Commissioners, was codified at NRS 116 and became effective January 1, 1992. Included in the Act is a section that governs the association assessment liens and the priority of those liens. Specifically, NRS 116.3116(2) reads, as follows:

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

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> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in paragraph (b) to the extent of 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 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.

This statute provides for the "superpriority" of a portion of an association's lien over even a first deed of trust or mortgage recorded against the property. In the comments to the Uniform Common-Interest Ownership Act, it states 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. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.

The Nevada Supreme Court has never ruled on the scope and extent of the six (6) month "superpriority" portion of the Association's lien. Plaintiff requests that the court limit it to no more than the six (6) months assessments. However, the Association asserts that the Association's priority should be greater.

A. The Association's Lien Has Priority Over the Second Deed of Trust.

As set forth in NRS 116.3116(2), the Association's Lien has priority over all other liens or encumbrances recorded against the Property, except: (1) those recorded prior to the recordation of the Declaration, (2) those imposed for real estate taxes or other governmental assessments or charges against the Property, and (3) first security interests recorded before the assessments became due.

The Declaration was recorded on November 25, 1998. See Exhibit "1". The second deed of trust was recorded on August 26, 2004. The second deed of trust was not imposed for real estate taxes or other governmental assessments. A second deed of trust is not a first security interest. Accordingly, the Association's lien has priority over the second deed of trust.

When the second deed of trust holder foreclosed on the Property, the purchaser, Capital, acquired title to the Property subject to the Association's lien. The Association's lien claim survived the second deed of trust foreclosure and has priority over any claim made by Capital. See NRS 116.3116(2).

B. Association Lien Has Priority Over the First Deed of Trust.

As set forth in NRS 116.3116(2) a portion of the Association's lien has priority over even the first deed of trust. Plaintiff acknowledges the Association's position of priority but challenges the calculation of the Association's claim.

C. The Superpriority Portion of the Association's Claim Should Include Interest, Collection Costs, Late Fees and Interest.

The Plaintiff contends that the Association's "superpriority" claim should be in the amount of Six Hundred Ninety Nine Dollars ($699.00), plus interest. The Association contends that its "superpriority" claim should be valued at One Thousand Nine Hundred Sixty-Three Dollars ($1,963.00), plus interest. As noted above, the Nevada Supreme Court has not ruled on this issue.

The State of Connecticut has also adopted and codified the Uniform Common-Interest Ownership Act, including the assessment lien and priority of lien provisions. The Connecticut statute is identical to the one adopted by the Nevada legislature and codified at NRS

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116.3116(2).[1] Unlike Nevada, the Connecticut Supreme Court has had an opportunity to interpret this provision. In Hudson House Condominium Association, Inc. v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992), the Connecticut Supreme Court held that the superpriority portion of an association's lien for assessments should include attorneys' fees (collection costs) and other expenses incurred.

On January 8, 1991, the plaintiff association began an action to foreclose a statutory lien for delinquent common expense assessments due on a condominium unit owned by the defendant Brooks. Hudson House, supra, 223 Conn. at 613, 611 A.2d at 864. The Connecticut Housing Finance Authority ("CHFA") was named as an additional defendant as a result of its interest as the assignee of the first mortgage on the unit. Id. The trial court agreed with the plaintiff association's calculation of the amounts due, but concluded that only six months of common expense assessments, i.e. $570, together with interest, were entitled to the statutory priority over CFHA's the first mortgage. Id. The trial court refused to include attorneys' fees (collection costs) and other costs in the amount entitled to priority. Id. Thereafter, the trial court rendered a judgment of strict foreclosure unless the first mortgage holder paid the plaintiff association the $570, plus interest, in order to redeem the premises. Id. The plaintiff association appealed to the appellate court and the matter was ultimately transferred to the Connecticut Supreme Court. Id.

The Connecticut Supreme Court noted that the statute in question was contrary to the

[1] Connecticut General Statutes (Rev. to 1989) § 47-258 provides: "(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes delinquent. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to subdivisions (10), (11) and (12) of subsection (a) of the section 47-244 are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due. (b) A lien under this section is prior to all other liens and encumbrances on a unit except (1) 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, (2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (3) liens for real property taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection. 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."

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tenet that the priority of liens is governed by the common law rule that first in time is first in right. Id. at 614, 611 A.2d at 865. The Connecticut Supreme court further noted that the statute "carves out an exception and grants a priority to the lien for common expense assessments. The priority, however, is temporally limited by Section 47-258(b) to the amount 'of the common expense assessments . . . which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce . . . the association's lien . . .'" Id. The Connecticut Supreme Court held:

> In construing this statute, we assume that 'the legislature intended to accomplish a reasonable and rational result.' . . . Section 47-258(a) creates a statutory lien for delinquent common expense assessments . . . Section 47-258(i) authorizes the foreclosure of the lien thus created. Section 47-258(b) provides for a limited priority over other secured interests for a portion of the assessment accruing during the six month period preceding the institution of the action. Section 47-258(g) specifically authorizes the inclusion of the costs of collection as part of the lien. Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection and the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows. We conclude that [Section] 47-258 authorizes the inclusion of attorneys' fees and costs and the sums entitled to a priority.
>
> Id. at 616-17, 611 A.2d 866 (citations omitted and emphasis added).

Applying the Hudson House decision to the case at hand, Nevada law creates a statutory lien for delinquent common expense assessments. See NRS 116.3116(1). Furthermore, NRS 116.31162(1) authorizes the foreclosure of the common expense assessment lien. NRS 116.3116(2) provides for a limited priority over other secured interests for the superpriority portion of the association's assessment accruing during the six (6) month period preceding the institution of the action. NRS 116.3116(1) also specifically authorizes the inclusion of costs of collection, late fees and interest as part of the lien.

If this court adopts the holding and rationale of the Hudson House court, then, in the case at hand, the Association's superpriority claim would be in the amount of One Thousand Nine

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Hundred Sixty-Three Dollars ($1,963.00), plus interest. This figure is calculated as follows:

Item	Total due	Superpriority Portion	Other Portion
Assessments	$926.30	$ 219.00	$ 707.30
Late Fees	$210.00	60.00	150.00
Interest	$433.97	- 0 -	433.97
Demand Letter	$95.00	95.00	- 0 -
Lien	$295.00	295.00	- 0 -
Pre NOD Letter	$75.00	75.00	- 0 -
Release Lien	$30.00	30.00	- 0 -
Trustee's Fees	$400.00	400.00	- 0 -
Trustee's Sale Guaranty	$360.00	360.00	- 0 -
Recording Fee	$57.00	57.00	- 0 -
Postage	$72.00	72.00	- 0 -
Escrow Demand	$150.00	- 0 -	150.00
Management Company Fee Costs	$45.00	45.00	- 0 -
Management Company Transfer Fee	$100.00	- 0 -	100.00
Violations	$300.00	300.00	- 0 -
TOTALS	$4,025.00	- 0 -	4,025.00
		$ 1,963.00	$ 5,611.27

The Nevada Supreme Court has established the rule of statutory interpretation that the words in a statute "should be given their plain meaning unless this violates the spirit of the act." State, Dep't of Ins. v. Humana Health Ins., 112 Nev. 356,360 (1999) (quoting McKay v. Bd. Of Supervisors, 102 Nev. 644, 648 (1986)).

In the case at hand, the Association contends that the Nevada Legislature, while attempting to balance the interests of the respective parties, intended to provide a modest protection to the interests of associations by granting the right to recover the fees, costs, interest,

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late fees and assessments that accrued as a result of the association exercising its enforcement remedy. To interpret the statute otherwise would create an impediment to association enforcement of unpaid assessments. It would truly create the bow, without strings or arrows, as referenced in Hudson House case. If these costs are not recoverable as part of the superpriority portion of an association's claim, then they must be borne by the individual owners in the community. This is particularly punitive since the same owners are already required to share the burden of the uncollected assessments.

Based on the foregoing, the Association contends that the superpriority portion of its claim is in the amount of $1,963, plus interest and that payment of this amount must be made by the Plaintiff in order to have clear title to the Property.

D. The Association is Entitled to Recover the Balance of Its Claim From the Excess Proceeds.

The superpriority portion of the Association's claim is only a part of the balance due and owing to the Association. The remaining balance is Five Thousand Five Hundred Sixty-Five Dollars and Seven Cents ($5,565.07)[2]. The Association claims it has priority over all other claims to the surplus or excess funds in this foreclosure and that any surplus funds remaining, after payment of legal fees to the stake holder, must first be distributed to the Association. On September 22, 2006, this court awarded the law firm of Miles, Bauer, Bergstrom & Winters, LLP One Thousand Five Hundred Dollars ($1,500.00) in legal fees and One Hundred Sixty Three Dollars ($163.00) in costs for interpleading these funds. After payment of this amount, the balance of the excess funds should be Five Thousand Eight Hundred Thirty-Two Dollars and Sixty-Five Cents ($5,832.65).

...

...

...

[2] A payment in the amount of $46.20 was applied to the non-priority portion of the past due balance leaving a balance due, prior to the calculation of interest, of $5,565.07.

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SUMMARY

In conclusion, the Association contends that pursuant to NRS 116.3116(2) and the Hudson House case, the Association's superpriority claim should be established in the amount of One Thousand Nine Hundred Sixty-Three Dollars ($1,963.00), plus interest. The Plaintiff should be responsible for tendering this payment to the Association. Upon receipt thereof, the Association's superpriority claim would be extinguished against the Property and the Property would be free and clear of any claims from the Association. In addition, the Association contends that the balance of its claim in the amount of Five Thousand Five Hundred Sixty-Five Dollars and Seven Cents ($5,565.07) has priority over any other mortgage or lien recorded against the Property. See NRS 40.462(c). Thus, any remaining surplus funds should first be applied to the Association's claim.

Dated this 16th day of November, 2006.

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RECEIPT OF COPY

RECEIPT OF COPY of the foregoing DEFENDANT SPRING MOUNTAIN RANCH ASSOCIATION'S BRIEF is hereby acknowledged:

DATED this 16th day of November, 2006.

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EXHIBIT P

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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY NEVADA

5316 CLOVER BLOSSOM CT TRUST Plaintiff, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS Defendants.	CASE NO.: A-14-704412-C DEPT NO.: XXIV

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW

TO: Parties above-named; and

TO: Their Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an **FINDINGS OF FACT,**

/ / /

/ / /

/ / /

CONCLUSIONS OF LAW has been entered on the 7th day of February, 2018, in the above captioned matter, a copy of which is attached hereto.

Dated this 8th day of February, 2018.

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 SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of LAW OFFICES OF MICHAEL F. BOHN., ESQ., and on the 8th day of February, 2018, an electronic copy of the **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Darren T. Brenner, Esq.
Rebekkah B. Bodoff, Esq.
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1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

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