Docket No. 59139

IN THE SUPREME COURT OF THE STATE OF NEVADA

VILLA PALMS COURT 102 TRUST,

Appellant,

v.

WILLIAM L. RILEY, an individual; DEUTSCHE BANK NATIONAL TRUST COMPANY, an expired Nevada Corporation, in its capacity as indenture trustee for the Noteholders of AAMES MORTGAGE INVESTMENT TRUST 2005-3, a Delaware Statutory Trust; and any and all other persons unknown claiming any right, title, estate, lien or interest in the Property adverse to the Plaintiff's ownership, or any cloud upon Plaintiff's title thereto (DOES 1 through 10, inclusive),

Respondents.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DOCKET NO. A-13-674595-C

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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VILLA PALMS COURT 102 TRUST, Appellant, v. WILLIAM L. RILEY, an individual; DEUTSCHE BANK NATIONAL TRUST COMPANY, an expired Nevada Corporation, in its capacity as indenture trustee for the Noteholders of AAMES MORTGAGE INVESTMENT TRUST 2005-3, a Delaware Statutory Trust; and any and all other persons unknown claiming any right, title, estate, lien or interest in the Property adverse to the Plaintiff's ownership, or any cloud upon Plaintiff's title thereto (DOES 1 through 10, inclusive), Respondents.	}	**CASE NO. 59139**

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NRAP 26.1 DISCLOSURE

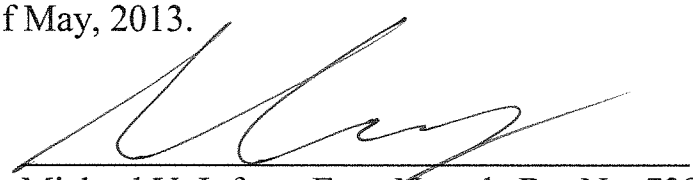
The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Ryan Welch – trustee

Iyad Haddad – trustee

Greene Infuso, LLP

DATED this 24 day of May, 2013.



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JURISDICTIONAL STATEMENT

The Supreme Court of Nevada has jurisdiction over this matter pursuant to NRAP 3A(b)(3) as this appeal is taken from an order refusing to grant an injunction.

The order denying the application for preliminary injunction was filed on January 24, 2013. Notice of the district court's order denying the application was filed and mailed on January 25, 2013. The notice of appeal was filed on January 28, 2013.

STATEMENT OF THE ISSUES

Did the district court err as a matter of law in refusing to grant a preliminary injunction on the grounds that Appellant Villa Palms Court 102 Trust ("Villa Palms") failed to demonstrate a reasonable likelihood of success on the merits of its quiet title claims when the district court held, as a matter of law, that the foreclosure of the homeowners' association's super priority lien did not impact or extinguish Respondent Deutsche Bank National Trust Company's (the "Bank") first security interest?

STATEMENT OF THE CASE

This is a quiet title action relating to real property located in Clark County, Nevada. On January 8, 2013, Villa Palms filed its Verified Complaint for Quiet Title and Declaratory Relief ("Complaint") in the Eighth Judicial District Court, Clark County, Nevada. Through its Complaint, Villa Palms seeks to quiet title to real property solely in its name after acquiring the property at a homeowners' association foreclosure sale.

Concurrently with its Complaint, on January 8, 2013, Villa Palms filed an Ex Parte Application for Temporary Restraining Order and Application for Preliminary Injunction ("Application"), seeking an injunction preventing Respondent Deutsche Bank National Trust Company (the "Bank") from foreclosing on its deed of trust, which the Bank alleges still encumbers the subject property. The District Court denied Villa Palms' Application on January 24, 2013 and this appeal followed.

STATEMENT OF FACTS

In March 1999, William L. Riley executed a deed of trust encumbering real property commonly known as 1908 Villa Palms, Unit 102, Las Vegas, Nevada 89128 (the "Property"). (JA000123 – JA000132.) This deed of trust was recorded on March 26, 1999 in the official records of Clark County, Nevada as document/instrument number 990326-03105 ("Deed of Trust"). (*Id.*) The original beneficiary under the Deed of Trust was One Stop Mortgage, a Wyoming corporation. (*Id.*)

On July 7, 1999, an Assignment of Deed of Trust was recorded in the official records of Clark County, Nevada as document/instrument number 990707-01488, assigning the Deed of Trust to Aames Capital Corporation. (JA000133 – JA000136.) On April 30, 2012, another Assignment of Deed of Trust was recorded in the official records of Clark County, Nevada as document/instrument number 201204300003264, assigning the Deed of Trust to the Bank. (JA000151 – JA000152.)

On November 16, 2012, Nevada Association Services, Inc., agent for the La Posada Condominium Association (the "HOA"), foreclosed on the Property pursuant to a Notice of Delinquent Assessment Lien (the "Lien") and NRS Chapter 116. (JA000008 – JA000010.) Villa Palms purchased the Property at the foreclosure sale for $5,800.00. (*Id.*) The Foreclosure Deed conveying the

Property to Villa Palms was recorded on November 27, 2012 in the official records of Clark County, Nevada as document/instrument number 201211270001933. (*Id.*)

On January 8, 2013, Villa Palms filed its Complaint, contending that by purchasing the Property at the foreclosure sale, Villa Palms acquired title to the Property free and clear of all liens and encumbrances. (JA000001 – JA000010.) Through its Complaint, Villa Palms seeks a declaration that it is the rightful owner of the Property and that no other party, including the Bank, has any right, title, estate, or interest in the Property adverse to Villa Palms. (*Id.*)

The Bank, however, scheduled a foreclosure sale on the Property to take place on January 11, 2013. (*See* JA000013.) Therefore, Villa Palms sought a preliminary injunction to enjoin the Bank from foreclosing on the Property before the completion of this action. (JA000011 – JA000099.) Although the district court granted Villa Palms' request for a temporary restraining order, the district court denied Villa Palms' Application for a preliminary injunction. (JA000100 – JA000101, JA000192 – JA000193.) The district court denied Villa Palms' Application solely on the basis that the district court found that Villa Palms failed to demonstrate a reasonable likelihood of success on the merits because the district court found, as a matter of law, that the HOA's foreclosure of its super priority Lien did not extinguish the Bank's Deed of Trust. (JA000175 – JA000176.) It is

from the district court's denial of the Application that Villa Palms now appeals. (JA000198 – JA000199.)

SUMMARY OF THE ARGUMENT

The district court's denial of Villa Palms' Application for failure to demonstrate a reasonable likelihood of success on the merits is based on a fundamental misinterpretation of Nevada law. While the district court recognized that the HOA's Lien enjoyed "super priority" under NRS 116.3116, it erroneously concluded that the super priority Lien does not have priority over the Bank's first security interest. This interpretation, however, ignores the plain language of NRS 116.3116, the comments to the uniform act upon which NRS 116.3116 is based, legislative history, and the Real Estate Division of the Department of Business and Industry for the state of Nevada's ("Real Estate Division") interpretation of this statute.

When the plain and unambiguous language of NRS 116.3116 is given effect, the only reasonable interpretation that can be reached is that the HOA's super priority Lien is superior to the Bank's Deed of Trust. And when the Bank failed to pay off the super priority portion of the HOA's Lien and the HOA foreclosed, well-settled common law rules of lien priority dictate that all subordinate interests, including the Bank's Deed of Trust, were extinguished. Thus, the district court erred when it concluded, as a matter of law, that Villa Palms failed to demonstrate a reasonable likelihood of success on the merits because the HOA's foreclosure of its super priority Lien did not impact or extinguish the Bank's Deed of Trust.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

In Nevada, "[a] preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." *Finkel v.Cashman Prof'l, Inc.*, 128 Nev. Adv. Op. 6, ---, 270 P.3d 1259, 1262 (2012) (*citing Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009)). "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

This Court reviews a district court's decision to deny a preliminary injunction for an abuse of discretion "and will reverse only when the district court's decision was based 'on an erroneous legal standard or on clearly erroneous findings of fact.'" *Dep't of Bus. & Indus. v. Nev. Ass'n Servs., Inc.*, 128 Nev. Adv. Op. 34, ---, 294 P.3d 1223, 1226 (2012); *see also Univ. and Cmty. Coll. Sys.*, 120 Nev. at 721, 100 P.3d at 187. "However, when the underlying issues in the motion for preliminary injunction 'involve questions of statutory construction, including the meaning and scope of a statute, [this Court] review[s] those questions of law de

novo.'" *Dep't of Bus. & Indus.*, 128 Nev. Adv. Op. at ---, 294 P.3d at 1226 (original modifications omitted). Indeed, all questions of law "are reviewed de novo, even in the context of an appeal from a preliminary injunction." *Boulder Oaks Cmty. Ass'n*, 125 Nev. at 403, 215 P.3d at 31.

Here, the district court made no findings with respect to irreparable harm, potential hardship, or the public interest. (JA000192 – JA000193.) Instead, the district court denied Villa Palms' Application on the basis of a failure to demonstrate a reasonable likelihood of success on the merits. This finding, however, was based on the district court's erroneous interpretation of NRS Chapter 116—that is, that the HOA's foreclosure of its super priority Lien did not impact or extinguish the Bank's Deed of Trust. Therefore, the district court's legal determination and interpretation of NRS Chapter 116 should be reviewed de novo.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN INTERPRETING NRS CHAPTER 116 AND FINDING THAT THE HOA'S FORECLOSURE OF ITS SUPER PRIORITY LIEN DID NOT IMPACT OR EXTINGUISH THE BANK'S DEED OF TRUST.

A. Applicable Rules of Statutory Interpretation.

"This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228, 209 P.3d 766, 769 (2009). "Thus, when a statute is facially clear, [this Court] will generally not go beyond its language in determining the Legislature's intent." *Pub. Employees' Benefits*

Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). Additionally, "[s]tatutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous." *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. Adv. Op. 21, ---, 234 P.3d 920, 922 (2010) (*citing Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

B. Under the Plain Language of NRS 116.3116, the HOA Lien Was Superior to the Bank's Deed of Trust.

NRS Chapter 116 gives homeowners' associations the ability to collect unpaid association assessment dues, fines and other charges by giving the associations liens on units in the association. *See* NRS 116.3116(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. . . ."). This statute also dictates the priority of the association's lien vis-à-vis other encumbrances. Specifically,

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration . . . ;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ; and

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

NRS 116.3116(2) (emphasis added).

In other words, a homeowners' association lien is comprised of two parts, one of which is superior to (*i.e.*, deemed *prior to*) first security interests. That superior portion is made up of charges pursuant to NRS 116.310312[1] and nine months worth of assessments for common expenses. This portion of the association's lien is commonly referred to as the "super priority lien."

In this case, the HOA recorded its Lien on December 22, 2011. (JA000008, JA000116.) The Lien was comprised of assessments for common expenses which had become due and were delinquent during the nine months immediately prior to the date on which the HOA recorded its Lien, among other things. (JA000008, JA000116.)[2] Because the Lien was comprised of assessments, under the plain

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[1] These charges are for "maintenance and abatement"—charges incurred by the association relating to maintaining the exterior of the property or removing or abating a public nuisance on the exterior of the property. *See* NRS 116.310312(2).

[2] The exact composition of the remainder of the Lien is unknown at this time. As this case is in the early stages, discovery has not commenced. It is possible that the

language of NRS 116.3116(2), a portion of the Lien was superior to the Bank's Deed of Trust.[3] In fact, the district court found that the HOA Lien was a "super-priority lien." (JA000193.)

C. The Comments to the Uniform Act and the Real Estate Division's Interpretation of NRS 116.3116 Confirm that NRS 116.3116 Means What It Says—Homeowners' Association Liens for Assessments Are Superior to First Security Interests.

NRS Chapter 116 was adopted in 1991 and is modeled after the Uniform Common Interest Ownership Act ("Uniform Act"). (JA000065.) When the Nevada Legislature considered adopting the Uniform Act, it specifically contemplated the guidance provided by the comments to the Act. (JA000076.) Comment 1 to the Uniform Act states:

> 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 [9] months' assessments based on the periodic budget.***

Lien is also comprised of charges for maintenance and abatement under NRS 116.310312.

[3] For purposes of this appeal, the Bank's Deed of Trust is considered a "first security interest" as described in subsection (b) of NRS 116.3116(2). (JA000018, JA000029.)

(JA000062.) The Uniform Act could not be clearer—association liens have super priority over first security interests in the amount of nine months worth of assessments.

Additionally, on December 12, 2012, the Real Estate Division issued its Advisory Opinion No. 13-01 ("Advisory Opinion"). (JA000080.) The Advisory Opinion discusses homeowners' association liens and examines subsection (2) of NRS 116.3116 "to determine the lien's priority in relation to other liens recorded against the unit." (JA000087.)

In making this priority determination, the Real Estate Division also recognizes the plain meaning of the statute. Specifically, the Real Estate Division acknowledges that homeowners association liens are prior to all other liens recorded against the unit. (*See id.*) There are, however, three exceptions: "liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments." (*Id.*) With respect to first deeds of trust, however, the Real Estate Division notes:

> [t]here is one exception to the exceptions, so to speak . . . . ***This exception makes a portion of an association's lien prior to the first security interest.*** The portion of the association's lien given priority status to a first security interest is what is referred to as the ***"super priority lien"*** to distinguish it from the other portion of the association's lien that is subordinate to a first security interest.

(JA000087 – JA000088.)

The Advisory Opinion is entitled to substantial weight and great deference. Earlier last year, this Court held that the Real Estate Division and the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") "are responsible for regulating and administering [NRS Chapter 116]." *Dep't of Bus. & Indus.*, 128 Nev. Adv. Op. at ---, 294 P.3d at 1227. This Court also noted that:

> NRS Chapter 116 also addresses the issuance of advisory opinions, stating that "[t]he [Real Estate] Division shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability ***or interpretation of***: (a) [a]ny provision of [NRS 116] or chapter 116A or 116B of NRS.

Id. (emphasis added); *see also* NRS 116.623(1)(a).[4] Importantly, this Court went on to hold that "the responsibility of determining which fees may be charged, the maximum amount of such fees, ***and whether they maintain a priority***, rests with the Real Estate Division and the CCICCH." *Dep't of Bus. & Indus.*, 128 Nev. Adv. Op. at ---, 294 P.3d at 1227 (emphasis added). Furthermore, this Court has repeatedly held that substantial weight should be given to an administrative body's

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[4] 1. The Division shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability or interpretation of:

(a) Any provision of this chapter or chapter 116A or 116B of NRS;

(b) Any regulation adopted by the Commission, the Administrator or the Division; or

(c) Any decision of the Commission, the Administrator or the Division or any of its sections.

NRS 116.623(1).

interpretation of statutes it is charged to enforce. *See Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983) citing *Clark Co. Sch. Dist. v. Local Gov't*, 90 Nev. 442, 530 P.2d 114 (1974) and *Sierra Pac. Power v. Dep't of Taxation*, 96 Nev. 295, 607 P.2d 1147 (1980). Indeed, agency interpretations should not be declared invalid unless they "violate[] the constitution, conflict[] with existing statutory provisions or exceed[] the statutory authority of the agency or [are] otherwise arbitrary and capricious." *Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 292, 995 P.2d 482, 485 (2000).

Perhaps more importantly, "[g]reat deference should be afforded to an administrative body's interpretation when it is within the language of the statute." *Sierra Pac. Power Co.*, 96 Nev. at 297, 607 P.2d at 1148. Until the Nevada Legislature has the opportunity to address the Real Estate Division's Advisory Opinion, "it would be improper for this court to legislate the change." *Id.* at 298, 1149.

In sum, the plain language of NRS 116.3116 grants a portion of the HOA Lien super priority over the Bank's Deed of Trust. While clear on its face, this conclusion is also supported by the Uniform Act and the Real Estate Division. Although the district court seemed to agree that the HOA Lien had "super-priority," the district court erred as a matter of law when it held that a foreclosure

of the HOA's super priority Lien did not impact or extinguish the Bank's Deed of Trust.

D. The Common Law Rules of Lien Priority Dictate That When the HOA Foreclosed Its Super Priority Lien, the Bank's Deed of Trust Was Extinguished.

It is an axiomatic principle of law that when a senior interest is foreclosed, that foreclosure extinguishes all junior interests. *See* Restatement (Third) of Property (Mortgages) § 7.1 (1997) ("[a] valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed . . . ."); *see also McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 818, 123 P.3d 748, 752 (2005) ("when a senior lienholder forecloses and sells property to a person other than the junior lienholder, the junior lienholder is 'sold out' . . . ."); *see also Carson Meadows Inc. v. Pease*, 91 Nev. 187, 193, 533 P.2d 458, 462 (1975) ("[t]he first trust deeds were foreclosed at a trustee's sale, and the second deeds of trust held by the plaintiffs were thereby rendered valueless.").

On November 16, 2012, the HOA foreclosed on the Property pursuant to its super priority Lien and NRS Chapter 116. (JA000008.) Villa Palms purchased the Property at the foreclosure sale for $5,800.00. (*Id.*) Because a portion of the HOA Lien was superior to the Bank's Deed of Trust, the foreclosure sale extinguished the Bank's junior interest.

Again, both the Uniform Act and the Advisory Opinion countenance this result. Comment 1 to the Uniform Act states,

> [a]s a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association ***rather than having the association foreclose on the unit***. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans ***not secured by first priority liens***, the law of each state should be reviewed and amended when necessary.

(JA000062.)

The last sentence of the quotation above is conclusive—the Uniform Act gives homeowner's association liens priority over first security interests and warns that first security interest holders are in danger of losing their security. This sentence is a warning to states contemplating adopting the Uniform Act that lending institutions may become unsecured by virtue of the super priority lien, and that the states should deal with those situations accordingly.

Similarly, the Real Estate Division analyzed the effect of a foreclosure sale of a super priority lien. It concluded,

> [t]he ramifications of the super priority lien are significant in light of the fact that ***superior liens, when foreclosed, remove all junior liens***. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount ***or lose its security***.

(JA000088.)

In short, the Uniform Act and the Real Estate Division confirm that common law priority rules apply to the foreclosure of a super priority homeowners' association lien. In this case, when the HOA foreclosed its super priority Lien, the well-settled consequences naturally followed and all junior interests were at least affected, if not extinguished, including the Bank's Deed of Trust. Accordingly, Villa Palms enjoys a reasonable likelihood of success on the merits of its quiet title claims against the Bank and its Application for preliminary injunction should have been granted.

III. THE PERCEIVED INEQUITY OF THE CONSEQUENCES STEMMING FROM THE FORECLOSURE OF A HOMEOWNERS' ASSOCIATION'S LIEN IS ILLUSORY

The Bank will undoubtedly argue that allowing the foreclosure of the HOA's Lien to extinguish its Deed of Trust is inequitable. The truth, however, is that the Bank had every opportunity to protect its security interest, and failed to do so. As discussed below, if the Bank's failure to act yields no consequences, it is the homeowner's associations that will be inequitably harmed, frustrating the purpose of NRS Chapter 116.

The entire purpose of granting homeowners' associations super priority liens is to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments . . . ." (JA000062.) Indeed, the Nevada Legislature acknowledged that assessment collection is one of the principal reasons for adopting the Uniform

Act. (JA000066 – JA000067) ("there is some need to have some uniformity in how that association deals with all its members, how it assesses, ***how it collects those assessments*** so it can operate and actually function as a government." (Emphasis added.)).

Of course, the need to promptly and efficiently enforce an association's lien must be balanced with the need to protect a lender's security interest. (JA000062) ("the [9] 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."). In order to balance the needs of the homeowners' association and the interests of the lenders, the Nevada Legislature codified the Uniform Act, a comprehensive statutory framework under which homeowners' associations are given powerful superior liens, but lenders were given the opportunity to pay off a limited portion of those liens in order to maintain their interests.

The super priority aspects of a homeowners' association lien are discussed at length above. Again, a portion of an association's lien is superior to first deeds of trust, and when the lien is foreclosed, if any portion of that lien which is superior to the first security interests is not already paid, the first deed of trust is extinguished. This is the great power given to associations. If the foreclosure of an association's super priority lien does not extinguish first deeds of trust, then holders of those

interests have no incentive to ever pay homeowners' associations their overdue assessments. And the inability of associations to receive payment for outstanding assessments is the precise problem NRS 116.3116 was enacted to remedy. (JA000062.)

On the other hand, due process and equity to the lender is achieved in three ways: (1) the lender is given notice of the association's lien in order to pay the amounts owing, (2) the amounts which are superior to the lender's interest are limited monetarily, and (3) the lender can require the borrower to pay assessments into escrow.

With respect to notice, "[a] person who holds a security interest in a unit ***must provide*** the association with the person's contact information ***as soon as reasonably practicable*** . . . ." NRS 116.310312(1). Also, "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1). Chapter 107, in turn, requires that notice of a foreclosure sale be given to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust." NRS 107.090(3)(b). In other words, the HOA is statutorily required to provide first security interest holders with notice of the foreclosure sale.

Regarding the monetary limits, the super priority lien is limited to charges for maintenance and abatement incurred pursuant to NRS 116.310312, and nine

months worth of assessments. *See* NRS 116.3116(2). Because the super priority portion of an association's lien is limited to the association's out-of-pocket costs for maintenance of a unit and only nine months worth of association dues, lenders are assured that the amount the lender has to pay to protect its interests will not be disproportionate to the association's need.

Finally, the Uniform Act states that, "[i]f the lender wishes, an escrow for assessments can be required." (JA000062.) Thus, not only is the super priority portion of the association's lien small, the lenders can ensure that money will be in escrow to cover these expenses.

The Uniform Act summarizes the balance achieved between the association and the lender as follows: "As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit." (*Id.*) In other words, if the association commences foreclosure of its lien, a secured lender can protect its interest by paying the monetarily-limited super priority amounts to the association. This way the association gets the funds it needs to operate the community (which ultimately benefits the lender), and the lender keeps its security interest on the property.

The problem here, however, is that the Bank failed to protect its interest. There is no evidence that the Bank did not receive proper notice of the foreclosure sale. There is, however, evidence that the Bank knew and understood that it could

lose its security interest if the HOA foreclosed on its super priority Lien. Indeed, in its Deed of Trust the Bank included a provision requiring its borrower to pay the assessments into escrow. (JA000123) ("Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments ***which may attain priority over this Security Instrument*** as a lien on the Property . . . . These items are called "Escrow Items.") (emphasis added). Furthermore, the Bank required its borrower to execute a Condominium Rider, wherein the Bank obtained the contractual right to pay the HOA assessments if the borrower failed to do so. (JA000129) ("If Borrower does not pay condominium dues and assessments when due, then Lender may pay them."). Although the Bank contends that the HOA's foreclosure of its super priority Lien had no impact on the Deed of Trust, the Bank's conduct and loan documents tell a different story.

The foregoing demonstrates that the Bank was not only protected by statute, but also negotiated contractual safeguards to protect its security interest. However, despite taking these steps, the Bank failed in the most fundamental and important regard—it failed to pay the assessments prior to the HOA Lien being foreclosed. Therefore, as argued above, the Bank's Deed of Trust was extinguished.

Again, the Bank will claim it is inequitable to allow Villa Palms to pay $5,800.00 for the Property and take it free and clear of the Bank's Deed of Trust.[5] The real inequity, however, would be if the Bank's Deed of Trust survived despite the Bank's inaction. Such a determination would create an untenable situation in which lenders would not have to pay off super priority lien amounts, potentially bankrupting homeowners' associations, yet still keep their interests. It would create a disincentive for lenders to ever pay associations any amounts on their liens. This would be the inequitable result, not the Bank losing its interest.

IV. THIS COURT SHOULD NOT DISREGARD THE PLAIN LANGUAGE OF NRS 116.3116 IN THE NAME OF EQUITY

As set forth above, inequity only arises if the Bank is allowed to keep its security interest without paying the HOA's super priority Lien. Nevertheless, if the Bank argues that equity requires a different result, the Court should not disregard the plain language of NRS 116.3116. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. Adv. Op. 53, ---, 289 P.3d 1199, 1212 (2012) ("[w]e have recognized that . . . equitable principles will not justify a court's disregard of statutory requirements."). "When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole

[5] It must not be forgotten that as a sold-out junior lienholder the Bank can collect the debt by suing the borrower on the underlying note. *McDonald*, 121 Nev. at 818, 123 P.3d at 752.

purview of the legislative branch." *Id.* (citing *Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004)).

The HOA Lien at issue here is not unlike the mechanic's lien considered in *In re Fontainebleau*. Both are created by statute, both are given priority over mortgages, and both are typically small in value when compared to the subordinate mortgages. There is no question that a mechanic's lien, if properly foreclosed, extinguishes mortgages. There is also no question that if this result is somehow found to be inequitable it cannot be set aside. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. Adv. Op. at ---, 289 P.3d at 1212. Similarly, the proper foreclosure of the HOA Lien impacted, if not extinguished, the Bank's Deed of Trust, and such a result cannot be avoided on grounds of equity.

CONCLUSION

Based upon the foregoing, Villa Palms respectfully requests that the Court reverse the district court's order denying the Application for preliminary injunction and find that Villa Palms has demonstrated a reasonable likelihood of success on the merits because the HOA's foreclosure of its super priority Lien extinguished the Bank's Deed of Trust.

DATED this 24 day of May, 2013.

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ATTORNEY'S CERTIFICATE PURSUANT TO RULE 28.2

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DATED this 24 day of May, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 24 day of May, 2013, I served a copy of this OPENING BRIEF AND CORRESPONDING JOINT APPENDIX (CD included) upon all counsel of record:

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