Docket No. 62528

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

RESPONDENT'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, vs. 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.: 62528**

DEUTSCHE BANK NTC AS TRUSTEE'S OPENING BRIEF

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STATEMENT OF THE CASE

This matter centers on a quiet title action concerning real property located in Clark County, Nevada. On January 8, 2013, Villa Palms Trust filed a Verified Complaint for Quiet Title and Declaratory Relief in the Eighth Judicial District Court, Clark County, Nevada. Villa Palms Trust seeks to quiet title to the real property based on it acquiring an interest in the real property at a homeowner association's foreclosure sale.

Villa Palms Trust filed an application for a Temporary Restraining Order and an Application for a Preliminary Injunction, seeking to prevent Deutsche Bank NTC as Trustee from proceeding with its trustee's sale pursuant to its rights under its Deed of Trust. On January 24, 2013 the District Court denied Villa Palms Trust's request for a preliminary injunction and Villa Palms Trust filed this appeal.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to Nev. R. App. P. 3A(b)(3), as the appeal is taken from an order denying VILLA PALMS COURT 102 TRUST's (Villa Palms Trust) request for a preliminary injunction.

Villa Palms Trust filed the Notice of Appeal on January 28, 2013; three days after the District Court entered its order on January 25, 2013, denying Villa Palms' application for Preliminary Injunction. Accordingly, the appeal is timely. *See* Nev. R. App. P. 4(a)(1) (notice of appeal timely if filed within thirty days after notice of entry of order).

ISSUE PRESENTED FOR REVIEW

Whether the District Court's decision was an error as a matter of law as to it denying Villa Palms' request for a Preliminary Injunction and finding that Villa Palms failed to demonstrate a reasonable likelihood of success on the merits of its quiet title claims because the foreclosure of the homeowner association's super priority lien did not impact or extinguish DEUTSCHE BANK NATIONAL TRUST COMPANY, in its capacity as indenture trustee for the Noteholders of AAMES MORTGAGE INVESTMENT TRUST 2005-3, a Delaware Statutory Trust's first security interest (Deutsche Bank NTC as Trustee).

STATEMENT OF FACTS

William L. Riley obtained a $64,000.00 loan on or about March 19, 1999, and executed a Deed of Trust as security for the loan in favor of One Stop Mortgage, a Wyoming Corporation. (Joint Appendix ("JA") 000123-000132.) Said Deed of Trust was recorded on March 26, 1999 as Instrument Number 990326-03105, in the official records of Clark County, Nevada. ("Deed of Trust"). (Id.)

On July 7, 1999, an Assignment of Deed of Trust was recorded as Instrument Number 990707-01488, in the official records of Clark County, Nevada. (JA000133-JA000136.) The Assignment of Deed of Trust assigned the beneficial interest under the Deed of Trust to Aames Capital Corporation. (Id.)

On April 23, 2012, Residential Credit Solutions, Inc., as attorney in fact for Aames Capital Corporation, dba Aames Home Loan, executed an Assignment of Deed of Trust, assigning the beneficial interest under the Deed of Trust to Deutsche Bank National Trust Company in its capacity as indenture trustee for the Noteholders of Aames Mortgage Investment Trust 2005-3, a Delaware statutory trust ("Deutsche Bank NTC as Trustee"). (JA000151-JA000152.) The Assignment of Deed of Trust was recorded as Instrument Number 201204300003264, in the official records of Clark County, Nevada. (Id.)

On September 7, 2012, Quality Loan Service Corporation, as Trustee, recorded a Notice of Breach and Default and of Election to Cause Sale of Real Property under Deed of Trust ("Notice of Default"). (JA000034-JA000041.) The Notice of Default was recorded as Instrument Number 201290970002553, in the official records of Clark County, Nevada. (Id.) The Notice of Default indicated that as of September 6, 2012, the default amount was no less than $7,377.56 and that the unpaid principal amount of the obligation secured by the Deed of Trust was $52,088.56. (Id.)

On November 27, 2012, Villa Palms Trust recorded a Foreclosure Deed as Instrument Number 201211270001933, in the official records of Clark County, Nevada. (JA000008-JA000010.) The Foreclosure Deed states that on November 16, 2012, the Nevada Association Services, Inc., agent for the La Posada Condominium Association (the "Homeowners Association"), foreclosed on the real property and sold it at a public action. The Foreclosure Deed also states that the real property was sold to the highest bidder for the amount of $5,800.00. (Id.)

On December 21, 2012, Quality Loan Service Corporation recorded a Notice of Trustee's Sale. (JA000031-JA000032.) The Notice of Trustee's Sale was recorded as Instrument Number 201212210003840, in the official records of Clark County, Nevada. (Id.) The Notice of Trustee's Sale indicated that the amount of

unpaid principal was $59,204.94 and that the sale was set for January 11, 2013. (Id.)

On January 8, 2013, Villa Palms Trust filed a Complaint for quiet title and declaratory relief. (JA000001-JA000010.) The Complaint sought a Court declaration that the real property is vested in Villa Palms Trust free and clear of all other encumbrances, a declaration that Deutsche Bank NTC as Trustee have no title or interest in the property and a judgment forever enjoining Deutsche Bank NTC as Trustee from asserting a right to title in the real property. (Id.)

On January 8, 2013, Villa Palms Trust filed an Ex Parte Application for Temporary Restraining Order and Application for Preliminary Injunction. (JA000011-JA000099.) On January 9, 2013, the Court granted Villa Palms Trust's Ex Parte Application for Temporary Restraining Order and entered an order temporarily enjoining Deutsche Bank NTC as Trustee from conducting the foreclosure sale of the real property. (JA000100-JA000101.)

On January 17, 2013, Villa Palms Trust's Application for Preliminary Injunction came before the district court for oral argument. (JA000153-JA000191.) At the hearing after reviewing the parties moving papers and hearing oral argument, the district court denied Villa Palms Trust's Application for Preliminary Injunction. (JA000192-JA000193.) The Court found that Villa Palms Trust failed to demonstrate a reasonable likelihood of success on the merits because the Court

held that the homeowner's association's foreclosure of its super-priority lien under N.R.S § Chapter 116 did not impact or extinguish Deutsche Bank NTC as Trustee's first security interest on the subject property. (Id.)

On January 28, 2013, Villa Palms Trust filed its Notice of Appeal from the district court's denial of the Application for Preliminary Injunction. (JA000198-JA000199.)

STANDARD OF REVIEW

A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief is inadequate. N.R.S. § 33.010; *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Whether to grant or deny a preliminary injunction is within the district court's discretion. *Id* at 721, 100 P.3d at 187. In the context of an appeal from a preliminary injunction, questions of law are reviewed de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support. Id. *City of Sparks v. Sparks Mun. Court,* 2013 Nev. Lexis 42. The Court must decide whether the party seeking the injunction has shown a reasonable probability of success on the merits, and also whether the party defending against the injunction's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages represent an inadequate remedy. *Number One Rent-A-Car v. Ramada Inns,* 94 Nev. 779, 587 P.2d 1329 (1978).

A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be

comparatively small and insignificant if it is granted. *Dangberg Holdings Nev., LLC v. Douglas County* 115 Nev. 129 (1999).

In the instant case, Villa Palms Trust is an investor who, seeking a windfall, purchased an investment property at a foreclosure sale conducted by a Homeowners Association, for the sum of $5,800.00. At the time the Homeowners Association conducted the sale Deutsche Bank NTC as Trustee had recorded a notice of default and was seeking to foreclose on the subject real property; as such investor Villa Palms Trust had record notice that another auction was pending and that the risk of losing the investment property was inherent at the time of purchase. Accordingly the Court did not err in refusing to grant the preliminary injunction. There was no novel question of law to decide as since the inception of N.R.S. § 116.3116 all parties have understood and relied on the understanding that a foreclosure by a Homeowners Association does not wipe out a first deed of trust.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR AS A MATTER OF LAW IN INTERPRETING N.R.S § CHAPTER 116 AND FINDING THAT THE HOMEOWNERS ASSOCIATION'S FORECLOSURE OF A LIEN DID NOT IMPACT OR EXTINGUISH DEUTSCHE BANK NTC AS TRUSTEE'S DEED OF TRUST AS SUCH THE DENIAL OF THE INJUNCTION WAS NOT AN ABUSE OF DISCRETION.

A. It is Well-Established That Secured Creditor's First Mortgage has Priority over the Homeowners Association Lien

The Nevada Supreme Court has espoused that when a statute "is clear on its face, a Court may not go beyond the language of the statute in determining the legislature's intent." *Diaz v. Eighth Judicial District Court ex rel. County of Clark*, 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000). The language in N.R.S §116.3116(2)(b) is clear as to the priority of title regarding deeds of trust and Homeowners Association liens. N.R.S §116.3116(2)(b) unambiguously states that the Homeowners Association lien is junior to Secured Creditor's lien. N.R.S §116.3116(2)(b) provides:

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

The specific language of N.R.S §116.3116(2) states that the Homeowners Association lien is prior to all other liens and encumbrances secured by the Property, ***except*** a first security interest on the Property recorded before the date on which the assessment became delinquent. Any other reading of the statute renders this section moot. In the case of *Centeno v. MERS, Inc., et al.*, the Federal District Court dismissed the Homeowners Association Plaintiff's quiet title complaint, ruling that the Homeowners Association's trustee sale did not wipe out the first position deed of trust holder's lien because the Homeowners Association lien did not precede the recordation of the first position deed of trust. *Centeno v. MERS, Inc., et al.*, 2012 WL 3730528 *3 (D. Nev. Aug. 28, 2012), See also *Bayview Loan Servicing v. Alessi & Koenig, LLC.* (D. Nev. Jun. 6, 2013) 2:13-CV-00164-RCJ-NJK; *Weeping Hollow*, 2013 WL 2296313, at *6 (quoting *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, no. 2:13-cv-00949-KJD- RJJ, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013)); *First 100, LLC v. Wells Fargo Bank,N.A. et al, 2:13-cv-00431-JCM-PAL*, order, document number 29. Thus, the statutory scheme and the Courts recognize that first mortgages have priority over Homeowners Association liens. It is therefore unequivocal that pursuant to N.R.S. § 116.3116(2)(b), Secured Creditor's Deed of Trust was senior to the Homeowners Association's lien.

Further, as N.R.S. § 116.3116(2)(c) limits the super-priority portion of the lien to "charges" and "assessments" the financial priority portion of the lien cannot wipe out a title lien (such as a first deed of trust). As such the sale by the attorney for the Homeowners Association could not extinguish the first deed of trust, and as the investors purchasing the property had recorded knowledge of both the timing of the recording of the first deed of trust compared to the timing of the recording of the Homeowners Association lien and recorded knowledge of the impending foreclosure by the first deed of trust, it was not an abuse of the court's discretion to deny the preliminary injunction.

a. The Super-Priority Lien Exception Does Not Create a Superior Lien Over a First Mortgage, But Rather an Entitlement to Payment Over a First Mortgage Accordingly it was Not an Abuse of Discretion to Deny the Requested Injunction.

While Secured Creditor's lien is superior to that of the Homeowners Association, N.R.S. § 116.3116(2)(c) has carved out a narrow and limited exception to the priority of a first mortgage or security interest over an Homeowners Association lien. Specifically, N.R.S. § 116.3116(2)(c) provides:

> The [Homeowners Association] lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to N.R.S § 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to N.R.S § 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 [remaining portions omitted].

(emphasis added).

This is a narrow exception, for N.R.S §116.3116(2)(c) merely states that an Homeowners Association's unpaid charges and assessments for a maximum period of nine (9) months continue to encumber the Property after the foreclosure by the first position Deed of Trust. The operation of this super-priority lien exception is not intended to wipe out a first position Deed of Trust, nor does the language in N.R.S § 116.3116(2)(c) state that a first position Deed of Trust is extinguished by a foreclosure on an assessment lien. Rather the exception creates a limited priority in payment over a first mortgage for up to nine months of common assessments. In fact, N.R.S. § 116.31164(3)(a) provides that rather than conveying *title* to the purchaser at sale, the title conveyed to the new owner is limited to the "title of the unit's owner to the unit." As the prior owner's title is encumbered by the first deed of trust, the title passing onto the purchaser at the Homeowners Association sale is encumbered by the first deed of trust.

Again, one cannot lose sight of the general rule that a first position deed of trust has priority over an Homeowners Association assessment lien pursuant to N.R.S. § 116.3116(2)(b). In interpreting the Uniform Common Interest Community Act super-priority exception, which Nevada has adopted, Professor Andrea Boyack explains:

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

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

This interpretation and construction makes sense under N.R.S. § 116.3116(2)(c), as the super-priority interest is expressly limited, in part, "to the extent of" nine months of common assessments and nothing within the provision states that the interest can eliminate a first mortgage.

Further, there is no specific guidance or requirement under N.R.S. § 116 et seq. directing the Homeowners Association to record a separate notice of a super-priority lien interest or to provide notice to a first mortgage holder prior to

foreclosure. It is unfathomable that the drafters of the UCIOA and the Nevada legislature would allow an Homeowners Association to extinguish a first position deed of trust while not requiring that the Homeowners Association first disclose the amount of that super-priority lien or even require the provision of notice to the first position trust deed holder. In fact the common practice of the agencies collecting for Homeowners Associations is, and has been, to (1) refuse to set forth the super-priority portion of the lien until such time as the first deed of trust forecloses and only provide the entire lien balance pending such foreclosure; or (2) refuse to disclose *any* information relative to the lien without a release from the record title holder, citing privacy concerns. See N.R.S. § 116.3116(8)

> The association, upon written request, shall furnish to a *unit's owner* a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under N.R.S § 116.31162 to 116.31168, inclusive, the statement must be in recordable form.

Indeed the practical effect of a true super-priority lien within an assessment lien would result in the Homeowners Association wiping out a large portion of its own lien. Proof that such an application is illogical is demonstrated by a local Homeowners Association's admission that the super-priority interest is trigged only by a foreclosure by the first deed of trust holder. This is precisely why the

Homeowners Associations refuse to provide the nine (9) month super-priority demand to first position Deed of Trust holders: Nowhere in N.R.S § 116 et. seq. is there any authority allowing an Homeowners Association to communicate the owner of the property's account information to an unauthorized third party (the first trust deed holder), nor is there any mechanism detailed to enable a first trust deed holder to obtain the amount of the nine (9) month super-priority. Homeowners Association's are not required to provide any information under the statute and thus have 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.

As the super-priority portion of the lien is limited to a payment priority it was not an abuse of discretion for the court to deny the requested injunction to the investors seeking a windfall when purchasing at a Homeowners Association sale.

B. The HOMEOWNERS ASSOCIATION Failed to Initiate a Judicial Action to Foreclose on the Property, Which is Required to Give an Homeowners Association a Super-Priority Under N.R.S § 116.3116(2)(C)

The language of the statute creating the super-priority interest in nine months of common assessments is clear, namely that the interest is created upon the "institution of **action** to enforce the lien." *See* N.R.S. § 116.3116(2)(c). Statutory terms are generally interpreted according to their ordinary meaning unless otherwise defined in the statute. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The term "action" in the ordinary sense means to file or bring a lawsuit.

See NRCP 2 and 3; see also *Seaborn v. First Judicial Dist. Court*, 29 P.2d 500, 505 (Nev. 1934) ("An 'action' is a judicial proceeding, either in law or equity, to obtain certain relief at hands of court"); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) ("The key terms in this provision-'action' and 'complaint'-are ordinarily used in connection with judicial, not administrative, proceedings"); Black's Law Dictionary (8th ed. 2004) (the phrase "bring an action" is defined as "to sue; institute legal proceedings").

The use of the word "action" in NRS 116.3116 was not accidental and is consistently reinforced when analyzing the structure and language of Nevada law. Action is used consistently to refer to a lawsuit.

- NRCP 2 provides: "There shall be one form of *action* to be known as 'civil action.'"
- NRCP 3 states: "A civil action is commenced by filing a complaint with the court."
- NRS 38.300 "'Civil action' includes an action for money damages or equitable relief. . . ."

NRS 38.300 specifically deals with rights and remedies after mediations and arbitrations associated with homeowners association disputes. With this in mind, when we read the super-priority states of NRS 116.3116 we see that the super-priority only arises with the filing of ". . . an action to enforce the lien .... " (Emphasis added).

In addition, other portions of N.R.S. § 116.3116 refer to the term "action" as a judicial proceeding. Specifically, N.R.S. § 116.3116(7) states "[a] judgment or

decree in any *action* under this section must include costs and reasonable attorney's fees for the prevailing party." (emphasis added). Additionally, N.R.S. § 116.3116(10) provides that a Homeowners Association may institute an *action* to collect delinquent assessments and to foreclose a lien and the court may appoint a receiver to collect rents during the pendency of the action. Noticeably absent from the non-judicial foreclosure provisions of N.R.S. § 116.31162 – 31168, is any mention or reference to the term "action." The plain meaning and the context of the term "action" under N.R.S. § 116.3116 therefore means to commence or institute a lawsuit or judicial action. Furthermore, not only is each reference to an action coupled with the potential for court activity, but when the statute refers to the non-judicial foreclosure procedure, it specifically references it as a "foreclosure of lien by sale." *See*, N.R.S. § **116.31162.** Furthermore, in all of the sections of N.R.S. § 116 dealing with a lien by sale, they never once reference the commencement of an action. *See* N.R.S. §§ 116.31162 – 116.31168. As a result, the Nevada legislature was careful not to confuse a judicial action provided for in N.R.S. § 116.3116 and N.R.S. § 38.310 with a non-judicial foreclosure of lien by sale provided for in N.R.S. § 116.31162 through N.R.S. § 116.31168. In the end, the only conclusion is that a judicial action must be filed to give rise to the super-priority lien.

There are other areas where the word "action" is defined by the Nevada legislature. In the mechanic's lien law under N.R.S § Chapter 108, the Nevada legislature provided another statutory lien right with distinct enforcement tools. A review of that framework confirms that the commencement of an action as synonymous with a judicial action.

- N.R.S § 108.2275(5): If, at the time the application is filed, **an action to foreclose the notice of lien** has not been filed, the clerk of the court shall assign a number to the application and obtain from the applicant a filing fee of $85. If an action has been filed to foreclose the notice of lien before the application was filed pursuant to this section, the application must be made a part of the action to foreclose the notice of lien.

- N.R.S § 108.239(1): A notice of lien may be enforced by **an action in any court** of competent jurisdiction that is located within the county where the property upon which the work of improvement is located, on setting out in the complaint the particulars of the demand, with a description of the property to be charged with the lien.

- N.R.S § 108.229(1): At any time before or during **the trial of any action to foreclose a lien**, a lien claimant may record an amended notice of lien to correct or clarify the lien claimant's notice of lien.

- N.R.S § 108.229(5): A notice of lien may be enforced **by an action in any court** of competent jurisdiction.

See, N.R.S § 108.221, *et seq*.

It should also be noted that the word "action" is not defined in N.R.S § chapter 108 either. Just in case there is any doubt about the use of judicial proceeding in terms of establishing lien priority between competing parties, the

Nevada Supreme Court provided this excerpt: "However, the statute suggests that the validity and priority of all statutory liens should be decided in the enforcement action." *A.F. Const. Co. v. Virgin River Casino Corp.* 118 Nev. 699, 704 (2002).

Furthermore, the reasoning set forth above is consistent with the recent Nevada Supreme Court decision that made it clear that there is a material difference between a judicial foreclosure action and a non-judicial foreclosure of a Deed of Trust under N.R.S § 107. In *Holt v. Regional Trustee Services Corp.* __ Nev. ___, 266 P.3d 602, 605-606, 127 Nev.Adv.Op. 80 (2011), the Nevada Supreme Court stated: "But as the name implies, non-judicial foreclosure is not a judicial 'action' giving rise to a claim or defense of foreclosure . . ."

While Nevada has no case law interpreting the meaning of this portion of the statute, Massachusetts does. Specifically, in *Trustees of MacIntosh Condominium Association v. FDIC.*, et.al. 908 F.Supp. 58 at 63 (1995), the Court held:

> The condominium lien achieves "super priority" status over the first mortgage when a condominium association institutes "an action to enforce the lien." Thus, Section 6(c) provides that: [t]his lien is also prior to the mortgages described in clause (ii) above to the extent of the common expense assessments based on the budget adopted pursuant to subsection (a) above which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien ...
>
> Accordingly, the institution of an action by a condominium association is a condition precedent to

> achieving "super-priority" status for the condominium lien. However, even when the association files such an action, the condominium lien is given a "super-priority" status only to the extent of unpaid condominium fees for the preceding six months. It is uncontested by the parties that a lawsuit is required before a lien for unpaid condominium fees achieves a "super-priority" status. See also *In re Stem*, 44 B.R. 15, 19 (Bankr.D.Mass.1984). ("the establishment of the lien is not dependent on the commencement of a lawsuit, which is only a step necessary to elevate the status of the lien to a position superior to other encumbrances, other than municipal liens and first mortgages. ") ...In this regard, M.G.L. ch. 183A,6(c) specifically provides that, without the commencement of an enforcement action by a condominium association, a lien for unpaid condominium fees is "prior" to all other liens and encumbrances "except ... (ii) a first mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent ... " (emphasis added). That exception makes the lien junior at least until an action is commenced. Indeed, if the lien was anything but junior to the first mortgage, there would be no reason to require that an action be filed in order to grant that lien super-priority status.

Massachusetts law closely mirrors Nevada law, stating:

> This lien is also prior to the mortgages described in clause (m above to the extent of the common expense assessments based on the budget adopted pursuant to subsection (a) above which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien .... MA ST 183A s 6.

The same conclusion was reached in Connecticut where the court held:

> Most importantly, our review of our statutes and appellate case law reveals that "the institution of an action" has never been held to mean anything other than the filing of a civil action in court. See generally General Statutes 47-258(b) (employing phrase "institution of an action to enforce" in context of condominium association lien, which requires civil action to enforce) . . . Accordingly, we are not inclined to extend the meaning of the phrase "the institution of an action to enforce" to include other formal proceedings unless the legislature has made its intent clear that other proceedings will suffice. It has not done so. *Benson v. Zoning Bd. Of Appeal of Town of Westport* 89 Conn. App. 324, 332, 873 A.2d 1017, 1022 (Conn. App. 2005)

Thus, a homeowners' association must file an action for the super priority lien over a first position deed of trust to exist. The State of Washington also requires "an action for judicial foreclosure" by the Homeowners Association before an Homeowners Association lien attains super-priority status. *See Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645, 649 (Wash. Ct. App. 2012); see also RCW 64.34.364.

Finally, the requirement that the Homeowners Association commence judicial foreclosure prior to attaining super-priority status on its lien makes logical sense from a due process standpoint under the statutory scheme. A judicial foreclosure action requires the service of a summons and complaint on all interested parties in the case, including junior lien holders. *See Arabia v. BAC Home Loans Servicing, LP*, 208 Cal. App. 4th 462, 474, 145 Cal. Rptr. 3d 678, 687

("When a junior lienholder has been omitted from a senior judicial foreclosure action and sale, "[t]he foreclosure and sale are not void but are ineffective in foreclosing as far as the junior lien is concerned")(citing *Carpentier v. Brenham*, 40 Cal. 221, 225–226 (1870)); *Fox v. California Title Ins. Co.*, 7 P.2d 722 (1932). This undoubtedly affords the first mortgage an opportunity to appear and protect its lien interest in the property.

However, under a non-judicial foreclosure of a Homeowners Association lien, the Homeowners Association is not expressly required to send notice of the super-priority lien amounts to the first mortgage lien holder and is not otherwise expressly required to make such amounts known in the foreclosure notices. *See* N.R.S. §§ 116.31162 – 31168. In Nevada, the associations refuse to disclose super-priority portions of the lien thereby eliminating the ability of the first trust deed holder to protect its interest, contrary to the statutory scheme of all other liens. (CF. N.R.S. § 107.080(a)(1) and (2) and N.R.S. §107.080(b):

> "[t]he grantor, the person who holds the title of record, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property has, . . . failed to make good the deficiency in performance or payment."
>
> "[t]he grantor, the person who holds the title of record, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property has, for a period that commences in the manner and subject to the requirements described

> in subsection 3 and expires 5 days before the date of sale, failed to make good the deficiency in performance or payment."

The statutory framework of N.R.S. § 107.080 et. seq. expressly empowers subordinate lienholders to eliminate a lien that could extinguish its interest, similar provisions are not found N.R.S. 116.3116. Indeed, the foreclosure notices in this case do not make the super-priority amounts known and/or mention that the Homeowners Association is foreclosing a super-priority lien interest that would affect a first mortgage. This is at odds with due process considerations relative to notice and opportunity to be heard or respond to protect a property interest. As such, even if the Homeowners Association could extinguish a first mortgage through a foreclosure on a super-priority lien interest, it must do so through a civil complaint or judicial foreclosure to afford adequate due process considerations to mortgage holders.

In this matter, as the Homeowners Association failed to file the requisite action to enforce its lien, it was not an abuse of discretion for the Court to deny the requested injunction.

C. Villa Palms Trust's Reliance on the Nevada Real Estate Division's Advisory Opinion Does Not Change the Conclusion that an "Action" is Required

Villa Palms Trust cites to the Nevada Real Estate Division recent statement on whether a lawsuit is filed to create the super-priority lien right. *The Super Priority Lien* NV Real Estate Div. Advisory Op. 13-01, pp. 8-9 (Dec. 12, 2012). The Nevada Real Estate Division points to the language of N.R.S § 116.3116(2) to define an "action." However, it is the language of N.R.S § 116.3116(2) that leads to further support for the argument that a lawsuit is required. Specifically, the last sentence of N.R.S § 116.3116(2) incorporate the mechanics' liens and materialman's lien law by stating: "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." Thus, N.R.S § chapter 116 should be read in harmony with the Mediation and Arbitration statutes (N.R.S § Chap. 38) and the mechanics' lien and materialman's lien laws. *Orion Portfolio Servs. 2 LLC v. Cnty. of Clark*, 126 Nev. ___, ___, 245 P.3d 527, 531 (2010). ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *Id.* (citations omitted). In addition, the court must not render any part of the statute meaningless, and must

not read the statute's language so as to produce absurd or unreasonable results. *Id.* (citations omitted).")

D. The Court Should Follow the Majority of the Recent Nevada State and Federal Courts Holding that a Court Action is Required to Enforce the Super-Priority Lien.

Villa Palms Trust cites to the Nevada Real Estate Division's recent statement on whether a lawsuit is filed to create the super-priority lien right. *The Super Priority Lien* NV Real Estate Div. Advisory Op. 13-01, pp. 8-9 (Dec. 12, 2012). While the advisory opinion is one of the few statements on the subject, the analysis is lacking in rigor or consistent statutory construction and is not binding on this court. Deutsche Bank NTC as Trustee directs the Court to the orders in both State and Federal Court that have ruled, with substantial analysis, on this issue. In *Sanucci Ct Trust v. Elevado, et al.*, Judge Weiss dismissed a quiet title complaint, holding that a super-priority lien does not extinguish a first mortgage or security interest. Rather, it establishes payment priority over a first security interest and "is not a standalone lien that a Homeowners Association can foreclose upon constituting a senior position to all prior first security interests." See Order in *Sanucci Ct Trust v. Elevado, et al.*, Case No. A-12-670423-C. Judge Herndon has also agreed with Judge Weiss that a super-priority lien interest does not extinguish a first mortgage. *See* Order in *Mann Street Trust v. Heather Newman, et al.,* Case No. A-12-669301-C. *See also* Order in *U.S. Bank National Association v. Linda Perry, et al.*, Case No. A-12-666569-C. Judge Earl has also ruled that the general rule is that a super-priority lien interest does not extinguish a first mortgage unless the Homeowners Association gives notice to the holder of the first deed of trust specifically informing the creditor that the foreclosure could have the effect of

completely eliminating the first mortgage lien if the super priority is not paid off. In the absence of such notice, any purchaser at the homeowner's association's foreclosure sale will take title subject to the lien of the first deed of Trust. *See* Order in *Saticoy Bay, LLC., Series 6629 Tumbleweed Ridge 103 Trust v. Bank of New York Mellon*, Case No. A-13-677973-C. Judge Johnson recently ruled that "the institution of an action or suit brought in a court is a condition precedent to elevating the status of the association's junior lien to 'super priority.'" *See* Order in *Deutsche Bank National Trust Company v. The Foothills at McDonald Ranch, et al.*, Case No. A-13-680505-C. Judge Bixler's ruling further established that "in order for a homeowners' association to trigger and/or enforce a 'super priority' lien claim, a judicial foreclosure civil lawsuit must first commence." See Order in *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC, et al.*, Case No. A-13-680704-C. See also *Bayview Loan Servicing v. Alessi & Koenig, LLC.* (D. Nev. Jun. 6, 2013) 2:13-CV-00164-RCJ-NJK; *Weeping Hollow*, 2013 WL 2296313, at *6 (quoting *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, no. 2:13-cv-00949-KJD- RJJ, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013)); *First 100, LLC v. Wells Fargo Bank,N.A. et al, 2:13-cv-00431-JCM-PAL*, order, document number 29.

Thus, because the application and effect of the super-priority lien is to create a priority in payment, and not a priority in lien, and is only enforced after a judicial foreclosure civil lawsuit is commenced; a Secured Creditor's Deed of Trust and senior lienholder status is not affected by a Homeowners Association lien sale. Therefore, the Villa Palms Trust did not obtain the property free and clear of Deutsche Bank NTC as Trustee's interest and the denial of the preliminary injunction was within the Court's discretion.

These opinions support a sound public policy that ensures that lienholders in danger of being divested of their property rights are afforded an opportunity to protect and preserve those rights. As it stands now, Homeowners Associations are relying on the law in N.R.S. § 116.3116(8) (which only allows the owner of the property to request account information) to refuse provide information necessary to permit a first trust deed holder to obtain the super-priority, at the same time investor's are snapping up the properties at low cost while asserting the first deed of trust is wiped out by failing to pay an amount that cannot be obtained. Homeowners Associations have no incentive to provide the super-priority portion of the lien as they reap a substantial windfall by collecting any charges they assert in the lien, without any affected party (other than the non-paying owner) being able to challenge those fees and costs. Investor's obtain real property at amounts significantly below market value reaping a substantial windfall at the expense of the first deed of trust holder whose efforts to foreclose on its collateral are delayed by legislation, understaffing at state agencies, and public policy dictating that a trust deed holder must make every effort to prevent foreclosure while allowing homeowners associations to foreclose unimpeded by any such public policy concerns.

CONCLUSION

Based on the forgoing, Deutsche Bank NTC as Trustee respectfully requests that the Court find that district court did not error in denying the Application for Preliminary Injunction and find that Villa Palms Trust failed to demonstrate a reasonable likelihood of success on the merits because the Homeowners Association's foreclosure of its lien did not extinguish the Secured Creditor's First Deed of Trust.

Dated: July 29, 2013

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Certificate Of Compliance with Nev. R. App. P. 28.2

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 Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. The type face of this brief is Times New Roman, Size 14, and is less than 30 pages in compliance with the requirements of Nev. R. App. P. 32(a)(4)-(6). I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 29, 2013

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on July 29, 2013, and pursuant to Nev. R. App. P. 25, I served via the Nevada Supreme Court's electronic filing system and/or deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a seal envelope, a true and correct copy of the foregoing **RESPONDENTS' BRIEF**, postage paid and addressed as follows:

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