

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

2  
3   VILLA PALMS COURT 102 TRUST,

4   Appellant,

5   vs.

Case No.: 62528

Electronically Filed  
Aug 09 2013 09:04 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

6  
7   WILLIAM L. RILEY, an individual;  
8   DEUTSCHE BANK NATIONAL  
9   TRUST COMPANY, an expired  
10   Nevada Corporation, in its capacity as  
11   indenture trustee for the Noteholders of  
12   AAMES MORTGAGE INVESTMENT  
13   TRUST 2005-3, a Delaware Statutory  
14   Trust; and any and all other persons  
15   unknown claiming any right, title,  
16   estate, lien or interest in the Property  
17   adverse to the Plaintiff's ownership, or  
18   any cloud upon Plaintiff's title thereto  
19   (DOES 1 through 10, inclusive),

20                                   Respondents.

21                                   **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

22       LEGAL AID CENTER OF SOUTHERN NEVADA, INC., a Nevada non-  
23   profit corporation ("Legal Aid Center"), through its attorney, Barbara E. Buckley,  
24   Esq., Executive Director of the Legal Aid Center;

25   ///

26   ///

1 Hereby moves this Honorable Court for leave to file its Proposed Brief of  
2 Amicus Curiae in Support of Respondents, WILLIAM L. RILEY and DEUTSCHE  
3 BANK NATIONAL TRUST COMPANY, attached hereto as **Exhibit A**.  
4

5 This Motion is made pursuant to Rule 29 of the Nevada Rules of Appellate  
6 Procedure ("NRAP") and is based upon all other pleadings, papers, and documents  
7 on file with the Court, and the following Memorandum of Points and Authorities  
8 offered in support of the Motion.  
9

10 DATED this 8<sup>th</sup> Day of August, 2013.  
11

12 **LEGAL AID CENTER OF**  
13 **SOUTHERN NEVADA, INC.**

14 BY: 

15 Jennifer Yim, Esq.

16 Nevada Bar No. 12922C

17 Barbara E. Buckley, Esq.

18 Nevada Bar No. 03918

19 Michael Joe, Esq.

20 Nevada Bar No. 10626

21 725 E. Charleston Blvd

22 Las Vegas, NV 89104

23 (702) 386-1408

24 *Attorneys for Proposed Brief of Amicus*  
25 *Curiae In Support Of Respondents*  
26  
27  
28

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

In 1991, the Nevada legislature adopted the Uniform Common Interest Ownership Act (UCIOA), which was promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws to provide a model set of laws to govern common interest communities (CICs). The provision was contained in Assembly Bill 221, which is now codified in Nevada Revised Statute Chapter (NRS) 116. Contained within NRS Chapter 116 is a section which provides that a homeowner association (HOA) may have a lien against a unit for assessments. NRS 116.3116. Under NRS 116.3116, a first mortgage recorded before HOA assessments become delinquent is senior to an HOA lien, except to the extent of nine months of regular HOA assessments immediately preceding the action to enforce the HOA lien and any HOA fees and costs related to exterior maintenance of the unit at issue or the removal or abatement of a public nuisance related to the unit at issue. NRS 116.3116 (1) & (2) (a), (b). The nine month limited portion of the association's lien that has statutory priority over the first mortgage is commonly referred to as a "super-priority lien."

The Proposed Amicus through its Proposed Brief of Amicus Curiae represents the interests of residential homeowners. Commercial lenders and Legal Aid Center do not often find themselves directly aligned. However, in this

1 particular matter, the actions of those seeking to capitalize on Nevadans who have  
2 already suffered through the unprecedented events of the last few years impact  
3 both commercial lenders and residential homeowners.  
4

5 Respondent's submitted their Answering Brief on July 30, 2013. The  
6 Proposed Brief of Amicus Curiae, in support of Respondent's position is timely  
7 filed pursuant to NRAP 29. The Proposed Amicus believes it is necessary to add  
8 to the discussion of the legal issues to the extent that residential homeowners are  
9 affected by the issue presented in the instant case. In addition to determining  
10 whether an HOA can foreclose on its super-priority lien and, if so, whether such  
11 action extinguishes a bank's first deed of trust, this Court's ruling in the instant  
12 case will have a significant impact on individual homeowners. The Proposed Brief  
13 of Amicus Curiae addresses NRS 116.3116 in addition to providing this Court with  
14 a view of the issue from a public policy standpoint.  
15

16 It is for this purpose that the Proposed Amicus respectfully requests that this  
17 Court grant the Motion and consider the Proposed Brief of Amicus Curiae when  
18 considering the issue presented in the underlying appeal.  
19

## 20 **II. LEGAL ARGUMENT**

21 An "amicus curiae" is "[a] person who is not a party to a lawsuit but who  
22 petitions the court or is requested by the court to file a brief in the action because  
23 that person has a strong interest in the subject matter." BLACKS LAW  
24  
25  
26  
27  
28

1 DICTIONARY 93 (8th ed. 2004). In this capacity, amicus curiae participate in  
2 litigation exclusively for the court's benefit by "assisting the court in cases of  
3 general public interest, by making suggestions to the court, by providing  
4 supplementary assistance to existing counsel, and by insuring a complete and  
5 plenary presentation of difficult issues so that the court may reach a proper  
6 decision." Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (citations  
7 omitted).

10 The Nevada Rules of Appellate Procedure provide the process by which a  
11 non-party may participate in an action as amicus curiae. In pertinent part, NRAP  
12 29 provides:  
13

14 [An] amicus curiae may file a brief only by leave of court granted on  
15 motion . . . .  
16

17 . . .

18 A motion for leave to file an amicus brief shall be accompanied by the  
19 proposed brief and state:

- 20 (1) the movant's interest; and  
21 (2) the reasons why an amicus brief is desirable.

22 NRAP 29(a), (c).

23 **A. PROPOSED INTEREST OF AMICUS CURIAE IN THE**  
24 **UNDERLYING CASE.**

25 **1. Legal Aid Center's Interest.**

26 Established in 1958, the mission of the Legal Aid Center is the preservation  
27 of access to justice and the provision of quality legal counsel, advice and  
28

1 representation for individuals who are unable to protect their rights because they  
2 cannot afford an attorney. See 2011 Annual Report at 3 (Legal Aid Center of  
3 Southern Nevada), available at: [http://www.lacsn.org/2011-annual-](http://www.lacsn.org/2011-annual-report/LACSN_2011_AR.pdf)  
4 [report/LACSN\\_2011\\_AR.pdf](http://www.lacsn.org/2011-annual-report/LACSN_2011_AR.pdf). As a nonprofit organization, the Legal Aid Center  
5 is dedicated to assisting individuals who cannot afford an attorney in civil law  
6 matters. For the past five years, the Legal Aid Center, through its staff attorneys  
7 and pro bono attorneys, have assisted thousands of residential homeowners with  
8 foreclosure issues. The Legal Aid Center has educated homeowners, participated  
9 in dozens of fairs advising homeowners of their rights, developed materials to help  
10 homeowners, as well as direct representation of homeowners. Many of these  
11 distressed homeowners are the “new poor”; they worked every day of their lives in  
12 Nevada and because of the housing crisis that led to the nationwide recession,  
13 found themselves unemployed or underemployed due to no fault of their own.  
14 Because of this, they either lost or will lose their homes to foreclosure. Many of  
15 these individuals have now secured alternate jobs, albeit at a lower rate of income.  
16 If their homes are sold at a foreclosure sale and a bank loses its security interest in  
17 the property, the homeowner could be ultimately liable for a large judgment  
18 because of the significant difference between the debt owed to the bank and the  
19 sale price at the foreclosure sale.  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 The underlying facts in the instant appeal involve an HOA foreclosure. The  
2 legal issues being considered by this Court in the appeal, however, have substantial  
3 importance to residential homeowners. As a result, on behalf of the clients it  
4 represents and will represent, the Legal Aid Center hereby requests the opportunity  
5 to filed the Proposed Brief of Amicus Curiae to the extent the that the brief applies  
6 to residential homeowners.  
7  
8

9 **B. THE REASONS WHY AN AMICUS BRIEF IS DESIRABLE.**

10 Legal Aid Center respectfully submits that it can offer this Court an  
11 important perspective on the issues in this case. The devastating effects from the  
12 recent real estate collapse have been felt worldwide. With little doubt, Nevada has  
13 been one of the places hardest hit. Some would even consider Nevada the epicenter  
14 of the real estate crisis. While other economic factors have played a role, the severe  
15 real estate downturn is clearly one of the primary forces behind the unprecedented  
16 decline in Nevada's economy. Although recent upticks in various indicators are  
17 showing signs of life, the Nevada economy will not be able to truly mount a  
18 comeback until the pressures from huge debts in both the residential and  
19 commercial markets are relieved.  
20  
21  
22  
23  
24

25 One significant roadblock impeding Nevada's recovery is the prevalence of  
26 foreclosures by banks, and more recently, HOAs. The actual homeowner in this  
27 case (who is in fact a party), is notably silent. Massive legislation has been enacted  
28

1 and billions of dollars have been spent for one purpose: to help him, and other  
2 homeowners facing economic hardship, find an alternative to foreclosure.  
3 Although this case involves an investor and a bank, this Court's ruling in the  
4 matter will significantly impact homeowners who have lost, or are in danger of  
5 losing their homes from HOA foreclosures. Proposed Amicus, through its  
6 Proposed Brief of Amicus Curiae respectfully request an opportunity to present the  
7 public policy support regarding the interpretation and application of NRS  
8 116.3116.  
9  
10  
11

### 12 **III. CONCLUSION**

13 For the reasons and on the basis set forth in this Motion, Legal Aid Center,  
14 respectfully requests that this Court GRANT the Motion and ORDER that the  
15 Proposed Brief of Amicus Curiae in Support of Respondents, attached thereto, be  
16  
17

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///



1 placed on file with this Court.

2 DATED this 8th day of August, 2013.

3  
4 **LEGAL AID CENTER OF**  
5 **SOUTHERN NEVADA, INC.**

6  
7 BY: 

8 Jennifer Yim, Esq.

9 Nevada Bar No. 12922C

10 Barbara E. Buckley, Esq.

11 Nevada Bar No. 03918

12 Michael Joe, Esq.

13 Nevada Bar No. 10626

14 725 E. Charleston Blvd

15 Las Vegas, NV 89104

16 (702) 386-1408

17 *Attorneys for Proposed Brief of Amicus*  
18 *Curiae In Support Of Respondents*  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

I caused service of a true and correct copy of the above and forgoing **MOTION**  
**FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE** pursuant to the  
Supreme Court Electronic Filing System, and by first class United States mail,  
postage prepaid, Las Vegas, to the following:

Christopher M. Hunter, Esq.  
Kristen A. Shuler-Hintz, Esq.  
McCarthy & Holthus, LLP  
9510 West Sahara Ave., Suite 110  
Las Vegas, NV 89117

Michael V. Infuso, Esq.  
Zachary P. Takos, Esq.  
3030 South Jones Boulevard, Suite 101  
Las Vegas, NV 89146  
Counsel for Appellant Villa Palms  
Court 102 Trust

/s/ Amy Berlin  
An employee of Legal Aid Center  
of Southern Nevada, Inc.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT A

# EXHIBIT A

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 BNK 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

---

**PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF  
RESPONDENTS WILLIAM L. RILEY AND DEUTSCHE BANK  
NATIONAL TRUST COMPANY**

---

Jennifer Yim, Esq. Nevada Bar No. 12922C  
Barbara E. Buckley, Esq., Nevada Bar No. 03918  
Michael Joe, Esq., Nevada Bar No. 10626  
725 E. Charleston Blvd.  
Las Vegas, NV 89104  
(702) 386-1408

*Attorney for Proposed Brief of Amicus Curiae In  
Support Of Respondents*

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

2 VILLA PALMS COURT 102 TRUST,

**Supreme Court No. 62528**

3 Appellant,

4 vs.

5  
6 WILLIAM L. RILEY, an individual;  
7 DEUTSCHE BANK NATIONAL  
8 TRUST COMPANY, an expired Nevada  
9 Corporation, in its capacity as indenture  
10 trustee for the Noteholders of AAMES  
11 MORTGAGE INVESTMENT TRUST  
12 2005-3, a Delaware Statutory Trust; and  
13 any and all other persons unknown  
14 claiming any right, title, estate, lien or  
15 interest in the Property adverse to the  
16 Plaintiff's ownership, or any cloud upon  
17 Plaintiff's title thereto (DOES 1 through  
18 10, inclusive),

19 Respondents.

20  
21                   **PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF**  
22                   **RESPONDENTS WILLIAM L. RILEY AND DEUTSCHE BANK**  
23                   **NATIONAL TRUST COMPANY**

24                   **LEGAL AID CENTER OF**  
25                   **SOUTHERN NEVADA, INC.**

26 BY: 

27 Jennifer Yim, Esq., Nevada Bar No. 12922C

28 Barbara E. Buckley, Esq., Nevada Bar No. 03918

Michael Joe, Esq., Nevada Bar No. 10626

725 E. Charleston Blvd., Las Vegas, NV 89104

(702) 386-1408 *Attorney for Proposed Brief of*  
*Amicus Curiae In Support Of Respondents*

## TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | Introduction . . . . .  | 1  |
| II.  | Legal Argument. . . . .   | 2  |
|      | A. Origin of the Super Priority Lien. . . . .   | 2  |
|      | 1. With the increase of CICs in the United States, the super-priority<br>lien was created to strike a balance between the need to enforce<br>collection of unpaid assessments and the need to protect the<br>priority of the security interests of lenders. . . . . | 4  |
|      | 2. Adoption of the super priority lien in Nevada. . . . .   | 6  |
|      | B. To Conclude That A Foreclosure Of An HOA Lien Extinguishes A<br>First Mortgage Would Render Portions Of NRS 116.3116<br>Superfluous And Lead To An Absurd Result . . . . .   | 7  |
|      | 1. NRS 116.3116 (2)(b) expressly states that an HOA lien is<br>subordinate to a first mortgage. . . . .   | 8  |
|      | 2. Villa Palms Court 102 Trust's interpretation of NRS 116.3116<br>conflicts with the statute's provisions governing notice,<br>foreclosure, and distribution of sale proceeds. . . . .   | 11 |
|      | C. HOA Lien Statutes Must Be Harmonized With, Or At Least Not<br>Directly Contravene, Laws And Public Policy Protecting Struggling<br>Homeowners Facing Economic Hardship. . . . .  | 12 |
| III. | Conclusion. . . . .   | 16 |
| IV.  | Certificate of Compliance . . . . .   | 18 |
| V.   | Certificate of Service. . . . .   | 20 |

## TABLE OF AUTHORTIES

### CASES

|   |          |
|---|----------|
| <i>A.F. Const. Co. v. Virgin River Casino Corp</i><br>118 Nev. 699, 703, 56 P. 3d 887, 890 (2002).....                        | 7        |
| <i>Bayview Loan Servicing, LLC, v. Alessi &amp; Koenig, LLC</i><br>Slip Copy, 2013 WL 2460452 * 3 (D. Nev. June 6, 2013)..... | 8,10, 11 |
| <i>Cromer v. Wilson</i><br>126 Nev._____, 225 P.3d 788, 790 (2010).....   | 8        |
| <i>MGM Mirage v. Nevada Ins. Guaranty Ass'n,,</i><br>125 Nev.485, 488 78 P.3d 71,73 (2009) .....                              | 7        |
| <i>State, Dep't Mtr. Vehicles v. Vezeris</i><br>102 Nev. 232, 236, 720 P.2d 1208, 2011 (1986) .....                           | 8        |
| <i>Smith v. Kisorin USA Inc.</i><br>127 Nev._____, 254 P.3d 636, 639 (2011) .....   | 8, 9, 12 |
| <i>Smith v. Kisorin USA Inc.</i><br>127 Nev._____, 254 P.3d 636, 639 (2011) .....   | 8, 9     |

### STATUTES

|  |                |
|--|----------------|
| NRS 116.3116 .....                           | 2, 5, 6, 9, 15 |
| UCIOA §1-103(2)-(7) .....                    | 3              |
| UCIOA § 3-116, ULA Com Interest § 3-116..... | 3, 6, 12       |
| NRS 116.310312 .....                         | 7, 12          |
| NRS 116.3116 2(b) .....                      | 8, 9           |

|   |                        |    |
|---|------------------------|----|
| 1 | NRS 116.31162.....     | 12 |
| 2 | NRS 116.31163 .....    | 12 |
| 3 | NRS 116.311635.....    | 12 |
| 4 | Assembly Bill 149..... | 14 |
| 5 | NRS 107.....           | 14 |

### OTHER

|   |   |
|---|---|
| James Winokur, Meaner Lienor Community Associations: The “Super Priority”<br>Lien and Related Reforms Under The Uniform Common Interest Ownership Act,<br>27 Wake Forest L. Rev. 353, 359 (1992)..... | 5 |
|---|---|



1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

## 3

4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6

7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7

1 One significant roadblock impeding Nevada's economic recovery is the  
2 prevalence of foreclosures by banks, and more recently, HOAs. Nevada's  
3 Common Interest Ownership Act, Nevada Revised Statute (NRS) Chapter 116,  
4 provides that an HOA has a lien on a property for delinquent assessments and that  
5 the association may foreclose on its lien, and NRS 116.3116 provides that a portion  
6 of the HOA lien, limited to nine months worth of assessments, takes priority over a  
7 first security interest. Although the Uniform Act was adopted in Nevada in 1991,  
8 the provision concerning this "super-priority lien" and HOA foreclosures was not  
9 put to the test until the real estate crisis of the last few years. Now, investors and  
10 collection agencies are using this "super-priority" lien provision to acquire homes  
11 far below fair market value. In the process, they are attempting to extinguish  
12 lenders' security interests and in turn, any chance of mortgage relief available to  
13 struggling homeowners. For all of the reasons set forth herein, this Court should  
14 interpret NRS 116.3116 in a manner that would avoid absurd results for both  
15 lenders and residential homeowners.

## 22 **II. LEGAL ARGUMENT**

### 23 **A. Origin of the Super Priority Lien**

24 The Uniform Common Interest Ownership Act (UCIOA) was promulgated  
25 in 1982 by the National Conference of Commissioners on Uniform State Laws to  
26 provide a model set of laws to govern common interest communities (CICs). CICs  
27  
28

1 include developments that have mandatory community associations that are  
2 responsible for managing common areas or assets, with funds assessed by the  
3 association against individual unit owners. See UCIOA §1-103(2)-(7). Article 3  
4 of the UCIOA addresses the management of CICs, assessment delinquencies and  
5 the collection of delinquent assessments. Section 3-116 of the UCIOA provides in  
6 relevant part:  
7

8  
9 (a) The association has a lien on a unit for any assessment levied against  
10 that unit or fines imposed against its unit owner from the time the  
11 assessment or fine becomes due.

\*\*\*

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

\*\*\*

14 (ii) a first security interest on the unit recorded before the date  
15 on which the assessment sought to be enforced became  
16 delinquent....and

17 (iii) liens for real estate taxes and other governmental  
18 assessments or charges against the unit or cooperative. **The**  
19 **lien is also prior to all security interests described in clause**  
20 **(ii) above to the extent of the common expense assessments**  
21 **based on the periodic budget adopted by the association**  
22 **pursuant to Section 3-115(a) which would have become**  
23 **due in the absence of acceleration during the 6 months**  
**immediately preceding institution of an action to enforce**  
**the lien.**

24 UCIOA § 3-116, ULA Com Interest § 3-116.<sup>1</sup>

---

25  
26 <sup>1</sup> Section 3-115 provides: (a) Until the association makes a common expense  
27 assessment, the declarant shall pay all common expenses. After an assessment has  
28 been made by the association, assessments must be made at least annually, based  
on a budget adopted at least annually by the association.

1 Thus, under section 3-116, a portion of the association's lien, limited to six  
2 months of assessments immediately preceding an action to enforce the lien, is  
3 given statutory priority over a previously perfected first security interest. This  
4 portion of the lien is commonly referred to as a "super-priority lien." Typically,  
5 the previously perfected first security interest that becomes subordinate to the  
6 super priority lien belongs to the lender/bank that holds the note and the deed of  
7 trust, i.e. the first mortgage.  
8

- 9  
10  
11 **1. With the increase of CICs in the United States, the super-**  
12 **priority lien was created to strike a balance between the**  
13 **need to enforce collection of unpaid assessments and the**  
14 **need to protect the priority of the security interests of**  
15 **lenders.**

16 CICs account for a substantial portion of housing in the United States. The  
17 Community Associations Institute (CAI), which tracks data regarding the number  
18 of CICs and their residents in the United States, indicates that from 1970 to 2012,  
19 the number of association governed communities increased from 10,000 to  
20 323,600 (25.9 million housing units). Industry Data, Community Associations  
21 Institute, National Statistics.<sup>2</sup> In difficult economic times, assessment collection  
22 becomes increasingly difficult. When assessments go uncollected, the defaulting  
23 homeowner's share of assessments often times falls upon the non-defaulting  
24 homeowners who are forced to pay additional amounts to fill the budgetary gap.  
25  
26  
27

28 <sup>2</sup> <http://www.caionline.org/info/research/Pages/default.aspx>

1 See James Winokur, *Meaner Lienor Community Associations: The “Super*  
2 *Priority” Lien and Related Reforms Under The Uniform Common Interest*  
3 *Ownership Act*, 27 Wake Forest L. Rev. 353, 359 (1992). As the assessments of  
4 non-defaulting owners rise, these owners face greater pressure to default if they  
5 cannot afford those assessment increases. Id. These factors obviously can have a  
6 negative impact upon the financial strength of an association, which in turn often  
7 bears strongly on the value of housing units in the CIC as well as surrounding  
8 areas. Id.

9  
10  
11  
12 The super-priority lien was a response to the difficulties CICs experienced  
13 with the assessment collection process. The comment to section 3-116 provides in  
14 relevant part:

15  
16 To ensure prompt and efficient enforcement of the  
17 association’s lien for unpaid assessments, such liens should  
18 enjoy statutory priority over most other liens. Accordingly,  
19 subsection (b) provides that the association’s lien takes  
20 priority over all other liens and encumbrances except those  
21 recorded prior to the recordation of the declaration, those  
22 imposed for real estate taxes or other governmental  
23 assessments or charges against the unit, and first security  
24 interests recorded before the date the assessment became  
25 delinquent. However, as to prior first security interests the  
26 association’s lien does have priority for 6 months’ assessments  
27 based on the periodic budget. **A significant departure from**  
28 **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

1 will most likely pay the 6 months' assessments demanded by  
2 the association rather than having the association foreclose on  
3 the unit. If the lender wishes, an escrow for assessments can  
be required.... (Emphasis added).

## 4 **2. Adoption of the super priority lien in Nevada**

5 In 1991, the Nevada legislature adopted the UCIOA and introduced NRS  
6  
7 116. NRS 116.3116 includes the super-priority lien language and is virtually  
8 identical to section 3-116 of the UCIOA. NRS 116.3116 provides in relevant part:  
9

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

12 \*\*\*

13 (b) A first security interest on the unit recorded before the  
14 date on which the assessment sought to be enforced became  
delinquent...; and

15 \*\*\*

16 The lien is also prior to all security interests described in  
17 paragraph (b) to the extent of any charges incurred by the  
18 association on a unit pursuant to NRS 116.310312 and to the  
19 extent of the assessments for common expenses based on the  
20 periodic budget adopted by the association pursuant to NRS  
21 116.3115 which would have become due in the absence of  
acceleration during the 9 months immediately preceding  
institution of an action to enforce the lien...

22 NRS 116.3116 deviates from section 3-116 of the UCIOA only in that it expands  
23 the super-priority period to include unpaid assessments occurring during the  
24 preceding nine months instead of six months.  
25

26 Thus, under NRS 116.3116, a previously perfected first security interest, i.e.  
27 the first mortgage, retains its priority over a subsequent lien asserted by the HOA,  
28

1 **except** to the extent that the subsequent lien is based on unpaid periodic  
2 assessments for common expenses. When this occurs, a portion of the HOA's lien,  
3 limited to the nine months immediately preceding the institution of an action to  
4 enforce the lien, is given priority over the bank's first mortgage. The super-  
5 priority portion of the lien can never exceed nine months worth of association  
6 assessments based upon its periodic budget, plus exterior repair costs pursuant to  
7 NRS 116.310312.  
8

9  
10 **B. To Conclude That A Foreclosure Of An HOA Lien Extinguishes A**  
11 **First Mortgage Would Render Portions Of NRS 116.3116**  
12 **Superfluous And Lead To An Absurd Result.**

13 The construction of a statute is a question of law that this Court reviews de  
14 novo. A.F. Const. Co. v. Virgin River Casino Corp., 118 Nev. 699, 703, 56 P.3d  
15 887, 890 (2002). "When the language of a statute is plain and unambiguous, such  
16 that it is capable of only one meaning, this court should not construe that statute  
17 otherwise." MGM Mirage v. Nevada Ins. Guaranty Ass'n., 125 Nev. 223, 229,  
18 209 P.3d 766, 769 (2009) (citation omitted). In construing statutes, this Court  
19 seeks to give effect to the legislature's intent, and in so doing, the court first looks  
20 to the plain language of the statute. However, if the statutory language is  
21 ambiguous or fails to address the issue, this Court will construe the statute  
22 according to that which "reason and public policy would indicate the legislature  
23 intended." A.F. Const. Co., 118 Nev. at 703, 56 P.3d at 890 (quoting State, Dep't  
24  
25  
26  
27  
28

1 Mtr. Vehicles v. Vezeris, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986) (internal  
2 quotations and citation omitted)). This Court has specifically held that it “has a  
3 duty to construe statutes as a whole, so that all provisions are considered together  
4 and, to the extent practicable, reconciled and harmonized.” Smith v. Kisorin USA  
5 Inc., 127 Nev. \_\_\_\_, 254 P.3d 636, 639 (2011) (quoting Cromer v. Wilson, 126  
6 Nev. \_\_\_\_, 225 P.3d 788, 790 (2010)). Careful consideration of the “policy and  
7 spirit of the law” is necessary to avoid an interpretation that leads to an absurd  
8 result. Smith, 254 P.3d at 639-40.

9  
10  
11  
12 **1. NRS 116.3116 (2)(b) expressly states that an HOA lien is**  
13 **subordinate to a first mortgage.**

14 NRS 116.3116 sets forth (1) a general rule; (2) an exception to that general  
15 rule; and (3) an exception to the exception. See Bayview Loan Servicing, LLC v.  
16 Alessi & Koenig, LLC, 2013 WL 2460452 \* 3 (D. Nev. June 6, 2013). Under the  
17 clear language of the statute, the general rule is that HOA liens are prior to all other  
18 liens. The exception to this rule is that HOA liens are not prior to a first mortgage.  
19 See NRS 116.3116 2(b). The statute then provides an exception to the exception,  
20 which states that “[t]he [HOA] lien is also prior to all security interests described  
21 in paragraph (b) to the extent [of nine months worth of assessments.]” NRS  
22 116.3116 (unnumbered paragraph following subsection (2) (c)). The super-priority  
23 language does nothing to alter or modify the rule that a first mortgage is always  
24  
25  
26  
27  
28



1 prior to an HOA lien. Rather, the language simply provides an exception for nine  
2 months worth of assessments immediately preceding an action to enforce the lien.

3  
4 Villa Palms' interpretation of NRS 116.3116 negates both (1) the express  
5 exception for first mortgages in subsection (2)(b); and (2) the express limited  
6 exception to that exception in the unnumbered paragraph following subsection  
7 (2)(c). Villa Palms seeks to exclude language the legislature expressly included in  
8 the statute, which invites an absurd result. Had the legislature intended for an  
9 HOA foreclosure to extinguish a first mortgage, it never would have included  
10 subsection (2)(b), the provision stating that a first mortgage is prior to an HOA  
11 lien. To conclude that a first mortgage is extinguished upon an HOA foreclosure  
12 sale would render subsection (2)(b) immaterial and superfluous.

13  
14 Furthermore, Villa Palms' interpretation of the statute is not consistent with  
15 this Court's duty to reconcile the statute as a whole. See Smith, 254 P.3d at 639.  
16 In Bayview, a federal district court rejected the argument that an HOA foreclosure  
17 extinguished an earlier-recorded first mortgage. In that case, the court correctly  
18 read NRS 116.3116 to mean that a first mortgage recorded before HOA  
19 assessments become delinquent is senior to an HOA lien, except to the extent of  
20 nine months of regular HOA dues immediately preceding the action to enforce the  
21 HOA lien and any HOA fees and costs related to exterior maintenance of the unit  
22 at issue or the removal or abatement of a public nuisance related to the unit at  
23  
24  
25  
26  
27  
28

1 issue. Bayview, 2013 WL 2460452 \* 3. The court correctly concluded that the  
2 first mortgage rule prevents a prior-recorded first mortgage from being  
3 extinguished by foreclosure of an HOA lien that contains a super-priority amount.  
4

5 As further support for its reasoning, the court looked to the real estate  
6 community itself:  
7

8 [T]he real estate community in Nevada clearly understands  
9 the statutes to work the way the Court finds. In the current  
10 real estate market in Nevada, most homes sold at  
11 foreclosure are purchased by investors for cash in order to  
12 renovate the homes and then resell them for a quick profit  
13 or rent them. If investors believed that HOA foreclosures  
14 extinguished first mortgages, homes sold at HOA  
15 foreclosure sales would sell for significant fractions of their  
16 fair market value, not for the tiny fractions of their fair  
17 market value approximating the HOA lien at which HOA-  
18 foreclosed homes invariably sell. That investors will not  
19 pay significant amounts, i.e. fair amounts, for HOA-  
20 foreclosed homes indicates their perception that the first  
21 mortgage survives, preventing any profit through resale. If  
22 the actors in the real estate market in Nevada believed that  
23 an HOA foreclosure extinguished the first mortgage, one  
24 would expect the Property here to have sold for something  
25 on the order of \$80,000 (assuming the home is worth  
26 roughly half of the \$176,000 for which Borrower refinanced  
27 it in 2004). But the Property sold for a mere \$10,000, only  
28 slightly more than HOA's lien. This shows that the Nevada  
real estate community does not operate as if HOA  
foreclosures extinguish first mortgages recorded before the  
HOA delinquency arises.

25 Bayview, 2013 WL 246045, at \* 4.  
26  
27  
28

1 Villa Palms' position, if applied, would lead to absurd results. Here, the property  
2 was purchased at the foreclosure sale for \$5,800. See Opening Brief 2. However,  
3 at least one real estate related website values the subject property at approximately  
4 \$73,578. See [http://www.zillow.com/homedetails/1908-Villa-Palms-Ct-UNIT-  
5 102-Las-Vegas-NV-89128/6950010\\_zpid/](http://www.zillow.com/homedetails/1908-Villa-Palms-Ct-UNIT-102-Las-Vegas-NV-89128/6950010_zpid/). Should this Court conclude that the  
6 HOA foreclosure extinguished Respondent, Deutsche Bank's, interest, Villa Palms  
7 will have purchased the subject property, free and clear, for less than ten percent of  
8 its fair market value. To allow such a substantial windfall to the purchaser is both  
9 absurd and an unintended outcome of the statute. More importantly, however, the  
10 deficiency judgment the homeowner potentially faces is much more distorted than  
11 if the home had been sold at a price closer to fair market value.

12  
13 The legislative intent behind the statute was "to ensure that no matter which  
14 entity forecloses, an HOA will be made whole (up to a limited amount), while also  
15 ensuring that first mortgagees who record their interest before notice of any  
16 delinquencies giving rise to a super-priority lien do not lose their security."  
17 Bayview, 2013 WL 246045 at \*5. To give each part of the statute some effect, the  
18 court must read them together to mean "the super-priority rule affects the priority  
19 of *reimbursement*, but not extinguishment. Reading the super-priority rule to  
20 affect extinguishment would read the first mortgage rule out of the statutes almost  
21 entirely." Id. (emphasis added)

1           **2.     Villa Palms Court 102 Trust’s interpretation of NRS 116.3116**  
2           **conflicts with the statute’s provisions governing notice,**  
3           **foreclosure, and distribution of sale proceeds.**

4           Noticeably absent from NRS Chapter 116 is a provision requiring that the  
5 holder of the first deed of trust be notified of the delinquent assessments with a  
6 notice of default or notice of sale. NRS 116.31162 outlines the procedure for  
7 mailing a notice of default, which triggers the foreclosure. Absent a specific  
8 request, the holder of the first deed of trust is not entitled to notice of the default or  
9 notice of sale. See NRS 116.31163; 116.311635. The comment to section 3-116  
10 of the UCIOA specifically states that “[a]s a practical matter, secured lenders will  
11 most likely pay the 6 months’ assessments demanded by the association rather than  
12 having the association foreclose on the unit.” As a practical matter, however,  
13 secured lenders cannot step up to cure a deficiency they know nothing about. The  
14 creators of the UCIOA clearly contemplated that the holder of the first deed of  
15 trust would be notified of any action that could affect its security interest. To  
16 accept Villa Palms’ position would condone a process whereby an HOA could  
17 foreclose on a home for a tiny fraction of its fair market value without notifying the  
18 holder of the first deed of trust. This interpretation of the statute would not only  
19 lead to absurd results, but also fails to reconcile the statute as a whole. See Smith  
20  
21  
22  
23  
24  
25  
26 254 P.3d at 639.  
27  
28

1 **C. HOA Lien Statutes Must Be Harmonized With, Or At Least Not**  
2 **Directly Contravene, Laws And Public Policy Protecting Struggling**  
3 **Homeowners Facing Economic Hardship.**

4 Federal and state public policy favors bringing relief to homeowners  
5 struggling to make their mortgage payments. In early 2009, the Obama  
6 administration announced a program called Making Home Affordable (MHA). The  
7 program is a multipronged foreclosure prevention plan which was expected to help  
8 as many as nine million homeowners *keep their homes* and avoid foreclosure  
9 through refinancing and modified loans designed to lower monthly mortgage  
10 payments.  
11

12  
13 The Making Home Affordable ® Program (MHA) ® is an important  
14 part of the Obama Administration's comprehensive plan to stabilize  
15 the U.S. housing market by *helping homeowners get mortgage relief*  
16 and avoid foreclosure. To meet the various needs of homeowners  
17 across the country, Making Home Affordable ® programs offer a  
18 range of solutions that may be able to help you take action before it's  
too late.

19 <http://www.makinghomeaffordable.gov/about-mha/Pages/default.aspx>

20 The Department of the Treasury has obligated \$29.9 *billion* of Troubled Asset  
21 Relief Program (TARP) funds to the MHA program. See Office of the Special  
22 Inspector General For the Troubled Asset Relief Program, Quarterly Report to  
23 Congress, July 24, 2013 at 47. The MHA program includes the Home Affordable  
24 Modification Program ("HAMP"); the Home Affordable Foreclosure Alternative  
25 ("HAFA") program; Home Price Decline Protection ("HPDP"), the Principal  
26  
27  
28

1 Reduction Alternative (“PRA”); and the Home Affordable Unemployment  
2 Program (“UP”). *Id.* As of June 30, 2013, \$8.6 *billion* of TARP funds had been  
3 expended on TARP housing support programs, \$5.8 *billion* of which had been  
4 specifically expended on the MHA program. *Id.* at 47-48.

6 The state of Nevada has a similar goal when it comes to foreclosures. In  
7 2009, the Nevada Legislature created the State of Nevada Foreclosure Mediation  
8 Program (FMP) with the passage of Assembly Bill (AB) 149, which amended NRS  
9 Chapter 107. The purpose of AB 149 was to directly address the foreclosure crisis  
10 and to help “*keep families in their homes*”<sup>3</sup>. The FMP provides an opportunity for  
11 homeowners and lenders to discuss alternatives to foreclosure. The FMP’s mission  
12 statement provides:  
13  
14  
15

16 Through state-wide collaboration, education, and best practices, the  
17 State of Nevada Foreclosure Mediation Program provides a viable  
18 mediation process bringing together key stakeholders, including  
19 property owners, lenders, and their respective representatives, in a  
20 neutral setting to discuss alternatives to foreclosure, thus helping to  
21 reduce the number of foreclosures in Nevada under the guiding  
22 principles of respect, equity, accountability and sensitivity.

23 <http://foreclosure.nevadajudiciary.us/index.php/about-programmission>.

24 It is clear that both federal and state public policy favors providing willing  
25 homeowners with the opportunity to, at a minimum, explore alternatives to  
26 foreclosure, which may include a loan modification, a re-finance, or possibly a  
27

28 <sup>3</sup> See <http://foreclosure.nevadajudiciary.us/index.php/about-program>

1 short-sale. Significant resources and *billions* of dollars have been devoted to  
2 programs specifically designed to make these options available to “responsible  
3 homeowners struggling to make their mortgage payment.” See Office of the  
4 Special Inspector General For the Troubled Asset Relief Program, Quarterly  
5 Report to Congress, July 24, 2013 at 47 (the MHA is the umbrella program for  
6 Treasury’s foreclosure mitigation efforts).

9       Defaulted mortgages and HOA liens spring from the same well:  
10 homeowners facing economic hardship. This is the very group that state and  
11 federal programs are designed to protect to further public policy. The  
12 interpretation of NRS 116.3116 proffered by the investor in this case, that a  
13 foreclosure by an HOA can extinguish a first mortgage, would directly contravene  
14 this public policy because, unlike a foreclosure of a deed of trust where the bank is  
15 required to discuss alternatives to foreclosure with a homeowner, an HOA can,  
16 will,- and does - simply foreclose even if the homeowner is in the middle of a loan  
17 modification or a short sale, which, absent the HOA foreclosure, would have made  
18 everyone whole. Public policy disfavors this result. Allowing HOAs to extinguish  
19 the first mortgage, without notice, and take the home from its owner does this:

- 25       1.     irrationally favors one investor’s windfall over billions of  
26             dollars in mortgage relief funds;
- 27       2.     potentially exposes the homeowner to a greater deficiency than if the  
28             home were sold for fair market value;

3. discourages banks from making mortgage loans in the state of Nevada for fear that they could lose their security interest without proper notice;
4. effectively eviscerates every state and federal program specifically designed to help economically distressed homeowners;
5. distorts the real estate market because properties are sold drastically below fair market value to investors.

Given the law, efforts, and resources that have been applied to the foreclosure crisis in these past years, this Court should reject Villa Palms' interpretation of NRS 116.3116 and decline the invitation to subvert broad public policy.

### CONCLUSION

Based on the foregoing, this Court should affirm the district court's ruling that the foreclosure of the HOA's super-priority lien did not extinguish Deutsche

///

///

///

///

///

///

///

///



1 ///

2  
3 Bank's deed of trust.

4  
5 DATED this 8<sup>th</sup> day of August, 2013

6  
7 **LEGAL AID CENTER OF**  
8 **SOUTHERN NEVADA, INC.**

9  
10 BY: 

11 Jennifer Yim, Esq.

12 Nevada Bar No. 12922C

13 Barbara E. Buckley, Esq.

14 Nevada Bar No. 03918

15 Michael Joe, Esq.

16 Nevada Bar No. 10626

17 725 E. Charleston Blvd

18 Las Vegas, NV 89104

19 (702) 386-1408

20 *Attorney for Proposed Brief of*  
21 *Amicus*

22 *Curiae In Support Of Respondents*  
23  
24  
25  
26  
27  
28

1  
2  
3  
4 **CERTIFICATE OF COMPLIANCE**

5 1. I hereby certify that this Amicus Brief complies with the formatting  
6 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
7 the type style requirements of NRAP 32(a)(6) because:  
8

9 ☒ This Amicus Brief has been prepared in a proportionally spaced typeface  
10 using **Microsoft Word 2010 in 14 point Times New Roman** font; or  
11

12 ☐ This Amicus Brief has been prepared in a monospaced typeface using  
13 [state name version of word processing program] with [state number characters per  
14 inch and name of type style].  
15

16 2. I further certify that this Amicus Brief complies with the page or type-  
17 volume  
18 limitations of NRAP 32(a)(7) and NRAP 29(e) because, excluding the parts of  
19 Amicus Brief exempted by NRAP 32(a)(7)(c), it is either:  
20

21 ☒ Proportionally spaced, has typeface of 14 points or more and contains  
22 5,661 words; or  
23

24 ☐ Monospaced, has 10.5 fewer characters per inch, and  
25 contains \_\_\_ words or \_\_\_\_; lines of text; or  
26

27 ☐ Does not exceed \_\_\_\_ pages.  
28

1           3. Finally, I hereby certify that I have read this Amicus Brief, and to the  
2 best of my knowledge, information, and belief, it is not frivolous or interposed for  
3 any improper purpose. I further certify that this Amicus Brief complies with all  
4 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
5 which requires every assertion in the brief regarding matters in the record to be  
6 supported by a reference to the page and volume number, if any, of the transcript  
7 or appendix where the matter relied on is to be found. I understand that I may be  
8 subject to sanctions in the event that the accompanying brief is not in conformity  
9 with the requirements of the Nevada Rules of Appellate Procedure.  
10  
11  
12

13           DATED this 8<sup>th</sup> day of August, 2013.

14  
15                               **LEGAL AID CENTER OF**  
16                               **SOUTHERN NEVADA, INC.**

17  
18                               BY: 

19                               Jennifer Yim, Esq.

20                               Nevada Bar No. 12922C

21                               Barbara E. Buckley, Esq.

22                               Nevada Bar No. 03918

23                               Michael Joe, Esq.

24                               Nevada Bar No. 10626

25                               725 E. Charleston Blvd

26                               Las Vegas, NV 89104

27                               (702) 386-1408

28                               *Attorney for Proposed Brief of Amicus*  
                                  *Curiae In Support Of Respondents*

1  
2  
3                   **CERTIFICATE OF SERVICE**

4           I HEREBY CERTIFY that, on the 8<sup>th</sup> day of August, 2013 and pursuant to  
5 NRAP 25(1), I served via the Nevada Supreme Court's electronic filing system  
6 and/or deposited for mailing in the U.S. Mail a true and correct copy of the  
7 foregoing **PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF**  
8 **RESPONDENTS WILLIAM L. RILEY AND DEUTSCHE BANK**  
9 **NATIONAL TRUST COMPANY** postage prepaid and addressed to:  
10  
11  
12  
13  
14

15                                   /s/Amy Berlin  
16                                   An employee of Legal Aid Center of  
17                                   Southern Nevada  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28