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 REPLY TO AMICUS CURIAE BRIEF BY THE STATE BAR OF NEVADA

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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**

RESPONDENT'S REPLY TO AMICUS CURIAE BRIEF

BY THE STATE BAR OF NEVADA

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INTRODUCTION

The Report of the Joint Editorial Board for Uniform Real Property Acts regarding the "Limited Priority Lien" (the "Report") to which the State Bar of Nevada, Real Property section seeks to direct the Court's attention is fatally flawed in at least two assumptions.

First, based on nothing more than "anecdotal evidence" (Exhibit "A" page 5, paragraph 1) the Report suggests that lenders and servicers are intentionally delaying foreclosure to avoid paying common area expenses; a suggestion starkly in contrast to the requirements imposed by the National Mortgage Settlement, Fannie Mae (HAMP and HARP), the Consumer Financial Protection Bureau (CFPB) , the Nevada Foreclosure Mediation Program, and the Nevada Homeowner Bill of Rights, all with requirements created to ensure that every effort possible is made to insure that foreclosure is the last resort applied to a delinquent loan. The public policy of the State of Nevada is in favor of home retention and ownership.

Secondly, and more importantly, the Report is fatally flawed and misleading as it, and its examples, are premised on the belief that the first lien holder has received notice of the priority lien and an opportunity to pay the priority lien and therefor protect its first lien interest. However, in the State of Nevada no such notice and opportunity is, or has been, afforded to the first priority lien holder.

ARGUMENT

I. INTERPRETATING THE LAW TO PERMIT A LIMITED PRIORITY LIEN, TO WIPE OUT A FIRST DEED OF TRUST CREATES A RACE TO FORECLOSURE WHICH CONTRAVENES THE STATE AND FEDERAL POLICIES OF HOME RETENTION.

In 2009 the Nevada Legislature passed AB149, creating the Nevada Foreclosure Mediation Program to afford struggling homeowners the opportunity to obtain a loan modification. Due to the overwhelming response to the program, foreclosure timelines in Nevada were dramatically increased. Thereafter, in 2011, the Nevada Legislature passed AB300, which was designed to insure the borrower had clear information regarding the loan and foreclosure, however due to unclear language in the statute; foreclosures in Nevada came to a virtual halt. In February 2012, the National Mortgage Settlement was reached with five of the country's largest loan servicers, which provided specific provisions requiring review, and re-review in some cases, of borrowers for alternatives to foreclosure. Thereafter in September 2012 the CFPB instituted oversight and released rules with mandated timelines and procedures for review for loss mitigation alternatives (the effective date of the final rules was January 10, 2014). This was followed in 2013 by the Nevada Legislature's adoption of SB321, otherwise known as the Homeowners Bill of Rights or "NVHOBR". Each of these changes extended both the timeframe before a foreclosure can be commenced for a payment default and the time to complete a foreclosure once a Notice of Default has been recorded. While the

Report suggests that the delay in foreclosure is for the lender/servicer's benefit, these foreclosure-avoidance programs contribute in large part to the length of the process.

However, what has not significantly changed is the process whereby an HOA can foreclose. In 2009, the Nevada Legislature in AB204 changed the HOA's "super-priority" lien to 9 months, except for loans governed by Fannie Mae or Freddie Mac where the priority continues to be limited to 6 months. Undersigned Counsel speculates that the legislature may have believed that the additional three months would accommodate the delays that could occur in foreclosure in response to mediation, without knowing exactly how the mediation program would affect the foreclosure process in Nevada. In October 2013, new legislation went into effect placing some limits on the ability of the HOA to foreclose on owner occupied properties where a Notice of Default was recorded by a lienholder, the majority of the foreclosures at issue occurred well before the operative date of the new law (AB273, 2013).

The significance herein is that while State and Federal governments have gone to great lengths to insure that every opportunity is afforded to a borrower to be reviewed for loan modification and retain the property or explore other more attractive alternatives to foreclosure, and slow the foreclosure process, nothing has been done to slow or prevent HOA foreclosure. An HOA as the ability to

foreclose in as little as 9 months: 3 months of delinquent dues, one month of notice of breach/intent, three month notice of default, less than one month notice of sale (See NRS 116.3116 et. seq.). In contrast under the CFPB rules, a foreclosure cannot be commenced by a mortgage holder for a minimum of 120 days after the homeowner's default while alternatives to foreclosure are being considered. Such period on the lender/servicers side, may be significantly extended while financial information is gathered and reviewed to qualify the borrower for a loan modification or other foreclosure prevention alternative. As such, the HOA could be halfway through its 240 day foreclosure period before the first mortgage holder can even refer the matter to foreclosure.

If the interpretation favored by the investors purchasing at the HOA foreclosures is favored, the HOA communities are heavily incentivized to rush forward with foreclosure; thereby ensuring that the entirety of its lien, including any and all charges and other fees and costs tacked on, are paid in full at is foreclosure sale. While the investor-purchasers and HOAs make much ado over a single line in the State of Nevada Department of Business and Industry Real Estate Division Advisory Opinion 12-01 (December 12, 2012) that the foreclosure of the HOA lien would result in the loss of the security by the first security holder, they ignore the other portions of the opinion (1) that the super-priority lien does not include costs of collecting (2) that the lien is limited to 9 months of the regular

assessments, only; and (3) that the HOA (or its collection company) should ensure that the amount of the super-priority portion is made known to the first deed of trust holder to enable them to pay to protect its interest.

As such, if an HOA foreclosure of the entirety of its lien (6 or 9 months of dues + X additional months of dues + other fines, penalties, late fees + interest + costs of collection) is permitted to wipe out first deed of trust, the HOA and its counsel have a substantial benefit in proceeding at the earliest opportunity, as the collection of the entirety of a lien is preferable to merely 9 months of regular assessments.

The State and Federal governments' efforts to preserve homeownership should not be rendered moot by interpreting NRS 116 in such a way as to incentivize HOAs to race to foreclosure and extinguish both the homeowner's interest in the property, as well as the interest of the lender with whom they are exploring foreclosure prevention alternatives.

II. CONTRA TO THE REPORT FIRST LIEN HOLDERS ARE NOT AFFORDED NOTICE AND OPPORTUNITY TO PAY THE SUPER-PRIOIRTY LIEN AND PROTECT THEIR INTEREST, NOR IS SUCH NOTICE REQUIRED BY STATUTE.

Each example in the Report (at pg. 7-14) proceeds under a common theme: there is an action instituted by a necessary party, the other necessary parties are joined,

and each party is afforded an opportunity to either protect its position, or obtain the benefit conferred upon it by statute, to wit, the payment of the limited priority.

However, this is not what occurs in Nevada. As Respondent argued at the injunction hearing at issue herein, the lienholder is unable to obtain the amount of the super-priority portion of the lien to pay it and preserve its rights; where a statute eliminates the lien rights of a party without notice and opportunity to be heard, that statute cannot stand.

HOAs and their representatives have routinely and adamantly refused to disclose the amount of their super-priority lien, instead only providing, (1) no information (2) the entire amount of the lien, or (3) the HOAs chosen amount of the super-priority lien, inclusive of all other fees and costs. Respondent has learned and believes that HOAs withhold information about the amount required to cure the 9-month super-priority lien based on the following arguments:

(1) A violation of FDCPA is a violation of NRS 649.370, and the FDCPA forbids the disclosure of the account information to third parties;

(2) assessments is defined more broadly in NRS 38.300(1) than it is NRS 116.3116 so the super-priority assessment is not limited to the definition of assessments contained within NRS 116.3116 2(c);

(3) the super-priority lien only comes into existence *after* the first deed of trust forecloses its lien. (*See* Exhibit 1.)[1]

While in the Report examples, the association provided the first deed of trust holder with the amount of the super-priority lien (regardless of how it is calculated) in Nevada at least one major association has flatly refused to provide ***any amount***, much less a limited super-priority.

NRS 116.3116 does not require notice to the holders of all liens that may be affected by the foreclosure of the HOA lien. Instead of requiring notice to the mortgage holder, the various provisions relating to the foreclosure of an assessment lien focus on notifying the unit owner, the definition of which expressly excludes the holder of any security interest. In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983), the Supreme Court held: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." The notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the

[1] Of note, the HOA in the cited case utilizes the services of Nevada Association Services, the same service that commenced and completed the HOA foreclosure in the instant case.

pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In addition to the lack of a statutory requirement to provide notice to ALL affected lienholders, the statute in effect at the time of foreclosure in this case did not even allow a lienholder to obtain a payoff statement. Specifically, NRS 116.3116(8) stated: "The association, upon written request, shall **furnish to a unit's owner a statement** setting forth the amount of unpaid assessments against the unit. (Emphasis added.) In 2013 a legislative change authorized the HOA to provide a lienholder with a statement (upon payment of a fee), as well as providing one to the unit's owner. (*See* 2013 Nev. Stat. 3794.)

Like NRS 116's failure to require the association to provide a first security interest holder with notice of the non-judicial foreclosure or to require the HOA to provide the first security interest holder with a statement of the amounts due, the statute also fails to specifically provide notice of the "super priority" amount of the lien. Although the notice of delinquent assessment, the notice of default and election to sell, and the notice of sale all require the HOA to provide the amount of the lien, none of those provisions require the HOA to provide notice that it will foreclose upon a "super-priority" lien, or the extent of that lien.

In the *Bank of New York v. Petrillo*, cited above and attached as Exhibit "1" the Bank did in fact institute an action to enforce its lien, was proceeding in the

action, sought to pay the HOA super-priority lien, and was specifically refused the ability to pay the super-priority portion by the HOA. This is a common scenario in Nevada and shows that the reality in this State is quite different from the cooperative examples provide in the Report.

III. EXAMPLE TWO OF THE REPORT RELIES ON SUMMERHILL VILLAGE HOA BUT IGNORES THE DIFFERENCES BETWEEN A JUDICIAL FORECLOSURE AND A NON-JUDICIAL FORECLSOURE.

Respondent's Answering Brief addressed the need for a judicial action providing notice and opportunity to be heard in order to allow an HOA's super-priority lien to foreclose over a first deed of trust. Those same arguments are relevant here, and will not be repeated, other than to note the key differences between judicial and non-judicial foreclosure that are entirely overlooked by the Report. A judicial foreclosure provides for: (1) Personal service or statutorily/court defined substituted service, (2) a Judge and forum to calculate the alleged super-priority, (3) the right to appeal, and (4) Redemption rights. But in the non-judicial process, notice is not even required by statute to a party who could lose its interest, and an Association may refuse to disclose the amount of the super-priority lien and allow an investor to push out a homeowner.

Non-judicial foreclosure is a statutorily derived process, specifically agreed upon in the deed of trust by the borrower and lender (or its successors and assigns) permitting the type of due process provided. The Report fails to address the

provisions of the CC&R's found in almost all associations which specifically provide that assessments levied by the HOA are subordinate to the lien of a first mortgage. The contract (the CC&R's) undertaken by the borrower and understood by the lender specifically provide that the assessments are subordinate to the deed of trust. Counsel will note for the record and request that the Court take judicial notice of the recording of the CC&R's at issue herein on June 22, 1993, 01118-930622, while NRS 116.3116 was added in 1991. The Report fails to address the situation where despite the statute, the parties contracted around it.

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: March 6, 2014

Respectfully Submitted,
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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 10 pages in compliance with the requirements of Nev. R. App. P. 32(a)(4)-(6) or the Court's Order. 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: March 6, 2014

Respectfully Submitted,
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on March 7, 2014, 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 **RESPONDENT'S REPLY TO AMICUS CURIA BRIEF BY THE STATE BAR OF NEVADA**, postage paid and addressed as follows:

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