IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY S. NOONAN IRA, LLC; LOU NOONAN; AND JAMES M. ALLRED IRA, LLC, Appellants, v. U.S. BANK NATIONAL ASSOCIATION EE; AND NATIONSTAR MORTGAGE, LLC, Respondent.	**Supreme Court Case No. 78624** District Court Case No. A710465

APPEAL
From the Eighth Judicial District Court, Department II
The Honorable Judge Kerry Early, District Judge

APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION

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ATTORNEY'S NRAP 26.1 DISCLOSURE

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

Anthony S. Noonan IRA, LLC – Appellant

Lou Noonan – Appellant

James M. Allred IRA, LLC – Appellant

The law firm of Shumway Van – Attorney for Appellants

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STANDARD OF REVIEW

En banc reconsideration of a decision issued by a panel of this Court is explicitly "not favored" by Nevada's Rules of Appellate Procedure and is available only under "limited circumstances." NRAP 40A(a). More specifically, en banc reconsideration "ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue."

ARGUMENT

En banc reconsideration is not appropriate in this appeal and Respondents' Petition should be denied. In their Petition for En Banc Reconsideration (the "Petition"), Respondents US Bank National Association EE and Nationstar Mortgage LLC (collectively, "Respondents") submit three primary arguments. First, Respondents argue that this Court's Opinion in this matter[1] is inconsistent with the unpublished order of affirmance in Sage Realty LLC Series 2 v. Bank of N.Y. Mellon, No. 73735, 2018 WL 6617730 (Nev. Dec. 11, 2018) (unpublished).

[1] Reported as Anthony S. Noonan Ira, LLC v. U.S. Bank Nat'l Ass'n, 136 Nev. Adv. Op. 41, 466 P.3d 1276 (2020), referenced hereafter as "the Opinion."

Respondents' Pet., Nov. 30, 2020, at pp. 4-6. But this argument fails because it ignores or evades the fact that the Sage decision was an unpublished order of affirmance, and the decision at issue in this matter was a published opinion. There is no "lack of uniformity" in decisions as Respondents suggest because between Sage and this Court's prior order, only one decision carries any precedential value.

Next, Respondents argue that the analysis conducted by this Court in its decision in this matter was "too technical." Respondents' Pet., at pp. 6-18. This argument must also fail on its merits because the hypotheticals and conjecture offered by Respondents fail to acknowledge the well-reasoned analysis employed by this Court in its decision and also ignore key aspects of NRS 116's statutory scheme. And finally, Respondents briefly argue that "other issues were not developed fully below." Respondents' Pet., at pp. 18-20. This argument is indisputably insufficient to warrant en banc reconsideration and should be rejected outright based on the plain language of NRAP 40A. Accordingly, and as discussed further below, this Court should deny Respondents' Petition.

I. Respondents' Petition Fails to Demonstrate a Sufficient Basis for En Banc Reconsideration Under NRAP 40A(a).

As a preliminary matter, none of the arguments proffered by Respondents articulate any sufficient basis for en banc reconsideration under NRAP 40A. Respondents suggest in their opening argument that en banc reconsideration is appropriate "to secure uniformity of decisions" and because this matter "involves a

substantial precedential and public policy issue." Respondents' Pet., at p. 1. However, Respondents fail to articulate any actual issue with uniformity of this Court's precedent on the issue that was the subject of this Court's previous decision—the calculation of the HOA's superpriority lien amount when the underlying assessments are assessed annually. Respondents specifically point to two cases in support of this position, the Sage case, and this Court's original decision in SFR Invs. Pool 1, LLC, v. U.S. Bank, N.A., 130 Nev. 742, 334 P.3d 408 (2014). Respondents' Pet., at pp. 4-6.[2] But these arguments both fail.

Regarding the SFR decision, the Court did not specifically address the issue of how to calculate superpriority amounts where an HOA charges assessments annually, and therefore there is no lack of uniformity between this Court's Order in this appeal and its prior decision in SFR. In fact, this Court's Order, and the analysis therein, is entirely consistent with SFR and its progeny. Turning to Respondents' reliance on the Sage decision, this Court explicitly rejected Respondents' position in its Order when it correctly noted that the Sage decision is an unpublished order of affirmance is not binding precedent. Noonan, 466 P.3d at 1280 n.3. Importantly, this Court specifically stated that the "[Sage] decision is not binding precedent and

[2] Respondents cite to a host of this Court's decisions that amount to SFR's progeny, but specifically cites to SFR and Sage as the primary support for its argument.

did not rely on NRS 116.3116(2)'s plain language." Id. This Court's conclusion is consistent with NRAP 36 and other decisions from this Court which confirm that unpublished orders have no precedential value and that this Court has discretion to decide a case through published opinion if it "[a]lters, modifies, or significantly clarifies a rule of law previously announced by [. . .] the Supreme Court." NRAP 36(c)(1)(B); see also Segovia v. Eighth Judicial Dist. Court of Nev., 407 P.3d 783 (2017) ("Unpublished orders do not establish mandatory precedent"). Consequently, en banc reconsideration is not necessary to ensure uniformity of this Court's precedent. There can be no question that this Court considered (and specifically rejected) the very arguments that Respondents now assert in its Opinion, and that this Court intended for that Opinion to have precedential value.

Respondents also fail to support their bald, conclusory assertion that en banc reconsideration is necessary based on public policy concerns. After simply reciting the language of NRAP 40A on page 1, Respondents offer no explanation of how this proceeding involves a "substantial precedential and public policy issue" such that this Court's prior, binding Opinion would be so insufficient as to warrant the disfavored and unordinary en banc reconsideration requested. Thus, Respondents have not satisfied the required legal standard for en banc reconsideration, and their Petition should be denied.

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II. This Court's Opinion is Well-Reasoned and Consistent with NRS 116's Language.

Respondents' primary, substantive argument in support of the Petition is that this Court's Opinion is "overly-technical" based on a number of irrelevant hypotheticals and one-sided distinctions. Respondents' Pet., pp. 6-18. Respondents begin by arguing that this Court's Opinion "introduces uncertainty and arbitrariness into HOA lien priority issues," and constitutes a "new rule of law." Respondents' Pet., p. 8. Yet these arguments turn on Respondents' insistence that the language "would have become due" used in NRS 116.3116 precludes consideration of all assessments that came due (rather than just accelerated payments, which is the real purpose of the language) and a series of hypotheticals that do not relate to the issues actually before this Court and do not support en banc reconsideration. Respondents' Pet., p. 8. Respondents also rely heavily on an attempt to call into question this Court's interpretation of the word "acceleration" within the statute. Respondents' Pet., pp. 8-9. Importantly, none of these arguments demonstrate any actual deficiency in this Court's reasoning or conclusions within the Opinion, nor do they establish a basis for en banc reconsideration under NRAP 40A.

Respondents begin by diving into a lengthy rabbit hole of grammatical interpretation and conjecture that attempts to argue that NRS 116 does not contemplate annual assessments. Respondents' Pet., at pp. 7-15. However, the foundation of this position is contradicted by the plain language of NRS 116. As

noted by this Court in its opinion, "NRS 116.3115(1) (2009) states that 'assessments must be made *at least annually*, based on a budget adopted at least annually by the [HOA].'" Noonan, 466 P.3d at 1279 (emphasis in original). Not only does this language contemplate annual assessments, but it also specifically establishes annual assessments as proper by setting them as the minimum requirement for HOAs. Respondents do not and cannot dispute that an annual assessment scheme is a legally available option to any HOA under the language of NRS 116.

Respondents argue that the reference to "acceleration" within the statutory language forces an interpretation of the statute as requiring monthly assessments, similar to the position articulated in the Dissenting opinion in Noonan. Respondents' Pet., at pp. 8-10; see also Noonan, 466 P.3d at 1280. But importantly, the language of NRS 116 does not support this interpretation or "presuppose" monthly assessments, as Respondents suggest. Noonan, 466 P.3d at 1280. In fact, NRS 116 contains no specific reference to "nine months of assessments" or to "monthly assessments" anywhere. Rather, the statute refers to "assessments [. . .] which would have become due [. . .] during the nine months immediately preceding institution of an action to enforce the lien." The word "assessments" is not modified by the word "monthly" and "nine months" explicitly refers to a calendar period, not an assessment method. The plain language of the statute, therefore, does not preclude any type of assessment, whether annual, quarterly, monthly or weekly,

from inclusion in the superpriority lien. The only statutory limitation is the time within which the assessment comes due without acceleration.

This language also directly contradicts Respondents' position that "legislative history confirms '9 months' refers to an amount, not a period of time predating enforcement of the lien." Respondents' Pet., at p. 12. The plain language of NRS 116 is explicitly temporal. The legislature could have specified that an HOA's superpriority lien was for "an amount equal to nine times a monthly assessment," or could have otherwise utilized language explicitly referring to an amount as the cap. Importantly, however, the legislature specifically articulated a time period as the relevant indicator of an HOA's superpriority lien, and specified that calculation as those amounts "that would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2). Therefore, this Court's Opinion is completely consistent with the plain language of NRS 116, and Respondents' strained, and unsupported interpretation of that language should be rejected.

Respondents' interpretation of the statute also violates the canon of statutory construction that every part of a statute should, when possible, be interpreted "in harmony with the remainder of the statute. Bank of Am., N.A. v. SFR Invs. Pool 1, LLC, 427 P.3d 113 (2018); see also State, Div. of Insurance v. State Farm, 116 Nev. 290, 995 P.2d 482 (2000) (confirming that statutory interpretation may include

looking to the language of related statutory provisions). Respondents implicitly argue the position of the dissent, that NRS 116.3116 "presupposes" a monthly assessment method based on purported legislative intent. Respondents' Pet., pp. 8-10. Yet the same legislature expressly approved, through the language ultimately used in NRS 116, a wide variety of assessment methods in NRS 116, and indeed HOA's have adopted many different methods. It strains reason to believe that a legislature that approved the adoption of any assessment method, as long as the assessments are made at least annually, would in the same legislation "presuppose" that all HOAs would adopt a monthly assessment method without any language to that effect in the text of the statute. Respondents' interpretation of NRS 116.3116 therefore creates an inconsistency tending towards contradiction between different parts of the same statute.

Meanwhile, this Court's Opinion properly reconciles both parts of the statute by acknowledging the reality that the legislature approved a multitude of assessment methods and would therefore not "presuppose" that just one method would be adopted by all HOAs. Noonan, 466 P.3d at 1279. The Opinion also correctly recognizes that the legislature's use of the word "assessments" in NRS 116.3116 was not modified by "monthly" and is intentionally broad so as to include all of the various assessment methods available to an HOA, including those assessed and collected on an annual basis. Id.

Respondents' interpretation of the word "acceleration" creates an additional multitude of difficult issues for which the actual language of NRS 116 offers no solutions. In particular, if an annual assessment constitutes an "acceleration" as Respondents suggest, Respondents fail to articulate what assessment method is being accelerated, if quarterly assessments would also be treated as an acceleration, or how this interpretation of "accelerated" could be applied to other assessment structures that are otherwise completely consistent with the language of NRS 116. Respondents' Pet., at pp. 8-18. The language of the statute offers no resolution to these issues, which is further indication that the legislature never intended the interpretation advocated by Respondents. In stark contrast, all of these issues are avoided by this Court's interpretation of the common, legal meaning of the word "acceleration" because only payments whose due dates are moved to an earlier date are "accelerated" and those payments are easy to identify. Noonan, 466 P.3d at 1279-80.

Respondents also argue more broadly that this Court's decision to decline to consider legislative history or public policy in its Opinion supports Respondents' Petition. Respondents' Pet., at pp. 12-15. This argument too must fail, because the mere fact that this Court's Opinion did not contain specific consideration of legislative history does not render the Opinion defective. Within the discussion in the Opinion, this Court included reference to numerous, binding Nevada cases that

have addressed various issues within the context of NRS 116 litigation and specifically concluded that the subject provisions of NRS 116 contain plain and unambiguous language. Noonan, 466 P.3d at 1279-80. Respondents ask this Court to ignore its previous conclusions, ignore binding Nevada precedent, and instead accept irrelevant hypotheticals and conjecture coupled with non-binding precedent and strained interpretations of legislative intent to justify reconsideration of its well-reasoned Opinion. This position is not consistent with the standard for en banc reconsideration, Nevada's standard for statutory interpretation, or Nevada's principles of precedential value, and should therefore be rejected.

Finally, Respondents offer a series of irrelevant and speculative hypotheticals in an attempt to demonstrate misgivings with this Court's Opinion. To reiterate, these arguments are not sufficient to satisfy the limited standard for en banc reconsideration of this Court's published Opinion. In fact, dreaming up hypothetical factual scenarios that may present the Court with different issues is not even remotely relevant to the issues in this appeal. Therefore, this Court can and should decline to consider these hypotheticals. But even if the Court does entertain Respondents' conjecture, the purported problems called out by Respondents are not resolved by Respondents' reading of the statutory language.

For example, Respondents argue that the panel's interpretation of the statute would lead to an "absurd result" because an HOA would have no super priority lien

if it failed to commence its foreclosure process within nine months of the due date of its annual assessment. Respondents' Pet., at pp. 15-18. Yet this same result could occur under Respondents' interpretation of the statute. If an HOA uses a monthly assessment method and waits until November of the calendar year to commence a foreclosure pertaining to two missed monthly assessments for January and February, the HOA would potentially have no super priority lien if those are the only missed payments. In neither case is this an absurd result because the forfeiture of rights for failure to timely enforce them is a principle found frequently at law and equity (statutes of limitations, loss of lien rights if not renewed, forfeiture of trademark and patent rights when not renewed, laches, etc.).

There is no absurd result under this Court's interpretation of the statute, and Respondents have failed to prove any ambiguity whatsoever in the statutory language. Accordingly, Respondents have failed to articulate any meritorious argument that would suggest any flaw in the analysis presented in this Court's Opinion. Therefore, and based on the rigorous standard for en banc reconsideration, this Court should deny Respondents' Petition.

III. Respondents' Contentions Regarding "Other Issues" Blatantly Ignores the Standard Under NRAP 40A.

The final section of Respondents' Petition attempts to improperly present issues outside of the scope of a request for en banc reconsideration, and outside the scope of this Court's Opinion. Respondents' Petition at pp. 18-20. These arguments

blatantly ignore the standard for en banc reconsideration set forth in NRAP 40A and should be rejected outright. The issues referenced by Respondents were raised in the initial briefing and attempting to re-argue those positions is procedurally improper at this time.

CONCLUSION

For all of the foregoing facts, authority and argument, this Court should deny Respondents' Petition. Respondents have failed to articulate any basis for en banc reconsideration of this Court's Opinion. Moreover, the plain language of NRS 116 bolstered by binding precedent from this Court demonstrate that en banc reconsideration is not appropriate.

DATED this 6th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer to Respondents' Petition for En Banc Reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Answer has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this Answer complies with the page or type-volume limitations of NRAP 40A(d) because it is proportionally spaced, has a typeface of 14 points or more, and complies with the type-volume limitation because it contains exactly 3,607 words.

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FINALLY, I CERTIFY that I have read this Answer, 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the document regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of January, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 6, 2021, I caused to be served a true and correct copy of the foregoing APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION upon the following by the method indicated:

[X] BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

[] BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

/s/ Marina Scott
An Employee of Shumway Van