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8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9 ***

10 LAS VEGAS DEVELOPMENT
11 GROUP, LLC, A NEVADA LIMITED
LIABILITY COMPANY,)
12)
Appellant,)
13)
vs.)
14)
THE BANK OF NEW YORK
15 MELLON, F/K/A THE BANK OF NEW
YORK, AS TRUSTEE FOR THE)
16 CERTIFICATEHOLDERS OF CWABS,
INC., ASSET-BACKED)
17 CERTIFICATES, SERIES 2006-7,
Respondent.)
18)

Supreme Court No. 81961

CONSOLIDATED WITH

Supreme Court No. 82266

District Court Case No. A756215

19 **APPELLANT'S MOTION TO STAY APPEAL OR, ALTERNATIVELY,**
20 **FOR EXTENSION OF TIME TO FILE OPENING BRIEF AND APPENDIX**

21 **(Third Request)**

22 COMES NOW, Appellant, LAS VEGAS DEVELOPMENT GROUP, LLC,
23 by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and
24 hereby presents its Motion to Stay Appeal or, Alternatively, For Extension of
25 Time to File Opening Brief and Appendix. This Motion is made and based upon

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1 the attached Memorandum of Points and Authorities and all papers and pleadings
2 on file herein.

3 DATED this 25th day of August, 2021.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

5
6 /s/ Timothy E. Rhoda
7 ROGER P. CROTEAU, ESQ.
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14 *Attorney for Appellant*
15 **LAS VEGAS DEVELOPMENT GROUP, LLC**

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **INTRODUCTION**

18 On March 4, 2021, Appellant filed a Motion to Stay Appeals and to Hold all
19 Deadlines in Abeyance in relation to the two consolidated appeals herein, Nos.
20 81961 and 82266. Said Motion sought a stay pending the resolution of two issues
21 pending before this Court: (1) the entitlement of the entirety of an annual
22 homeowners assessment to superpriority status as originally determined in
23 *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 466 P.3d 1276, 1277-78
24 (Nev. 2020); and (2) the statute of limitations, if any, governing a bank's claim
25 that its secured interest was unaffected by a homeowners association lien
26 foreclosure sale as currently pending before this Court pursuant to a certified
27 question from the Ninth Circuit Court of Appeals in the matter of *U.S. Bank, N.A.,*
28 *as Trustee for the Specialty Underwriting and Residential Finance Trust*
Mortgage Loan Asset-Backed Certificates Series 2006-BC4 vs. Thunder
Properties, Inc., Case No. 17-16399. The certified question was accepted by this
Court and is currently the subject of Appeal No. 81129 ("*Thunder Properties*").

1 These two issues were the primary issues at play in the instant appeal. On April 2,
2 2021, this Court adjudicated the motion, issuing an Order consolidating the two
3 appeals and directing that Appellant shall have until June 28, 2021, in which to
4 file and serve its Opening Brief.

5 Pursuant to its decision in *Anthony S. Noonan Ira, LLC v. U.S. Bank Nat'l*
6 *Ass'n EE*, 485 P.3d 206 (Nev. 2021), upon *en banc* reconsideration, this Court
7 reversed its earlier panel decision in the matter of *Anthony S. Noonan IRA, LLC v.*
8 *U.S. Bank Nat'l Ass'n EE*, 466 P.3d 1276 (Nev. 2020), pursuant to which it had
9 held that, because the entire annual assessment at issue therein became due in the
10 9 months preceding the HOA Lien, the entire amount of the yearly assessment was
11 entitled to superpriority status. This decision likely resolves one of the two
12 primary issues of this appeal. However, the remaining issue is the appropriate
13 statute of limitations applicable to claims such as those raised by the bank herein.
14 The certified question of *Thunder Properties*, which will address this issue,
15 remains outstanding, with oral argument having taken place on June 29, 2021, and
16 no decision yet having been issued.

17 On June 22, 2021, because an answer to the certified question of *Thunder*
18 *Properties* had not yet issued, Appellant filed a second motion to hold all
19 deadlines in abeyance. Respondent filed an opposition but did not oppose an
20 extension of time. On July 8, 2021, this Court issued an Order granting an
21 extension of time to file and serve the opening brief until August 27, 2021.
22 Because an answer to the certified question has still not issued, Appellant
23 respectfully requests an additional extension or stay.

24 **STATEMENT OF THE FACTS**

25 The instant appeal involves real property commonly known as 1524
26 Highfield Court, Las Vegas, Nevada (*the "Property"*). The Property was the
27 subject of a homeowners association lien foreclosure sale (*"HOA Foreclosure*
28 *Sale"*) conducted pursuant to NRS Chapter 116. The HOA Foreclosure Sale

1 occurred on March 2, 2011, and was conducted by Alessi & Koenig, LLC (“*HOA*
2 *Trustee*” or “*Alessi*”) on behalf of Hidden Canyon Owners Association (“*HOA*”).
3 HOA purchased the Property at the HOA Foreclosure Sale and thereafter
4 conveyed it to the Appellant, Las Vegas Development Group, LLC (“*LVDG*”).
5 LVDG remains the title owner of the Property to this date. The Respondent, Bank
6 of New York Mellon (“*BONY*”), claims to have possessed a secured interest
7 (“*First Deed of Trust*”) in the Property at the time of the HOA Foreclosure Sale.

8 Prior to the HOA Foreclosure Sale, Miles Bauer Bergstrom & Winters
9 (“*Miles Bauer*”) transmitted a check in the amount of \$88.50 to Alessi, purporting
10 to represent 9 months of assessments, i.e., nine-twelfths of the HOA’s annual
11 assessment of \$118.00. However, the HOA’s assessments were due annually, not
12 monthly. One of the issues in this appeal was whether Miles Bauer’s tender of
13 9/12 of the annual assessment was sufficient to protect the bank’s interest. As
14 stated above, this Court’s *en banc* decision in *Anthony S. Noonan Ira, LLC v. U.S.*
15 *Bank Nat’l Ass’n EE*, 485 P.3d 206 (Nev. 2021) has likely answered that question.
16 However, the second issue of this appeal remains outstanding.

17 Although the HOA Foreclosure Sale at issue herein took place on March 2,
18 2011, BONY took no action to contest the force and effect of the HOA
19 Foreclosure Sale upon its First Deed of Trust until it filed its Counterclaim in the
20 underlying action herein on June 15, 2017. Thus, more than six years passed
21 between the date of the HOA Foreclosure Sale on March 2, 2011, and the filing of
22 BONY’s claims on June 15, 2017. In the interim time period, BONY took no
23 action whatsoever to assert that its interest had survived or was otherwise
24 unaffected by the HOA Foreclosure Sale. The Plaintiff/Appellant asserted at the
25 time of trial that BONY waived any opportunity to contest the force and effect of
26 the HOA Foreclosure Sale based upon the statute of limitations as a result of its
27 many years of inaction. This is an issue that *Thunder Properties* is likely to
28 address head on.

LEGAL ARGUMENT

A. STATEMENT OF THE LAW

A “court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (*Leyva v. Certified Grocers of California, Ltd.* 593 F.2nd 857, 863-4 (9th Cir. 1979).

Factors a court may consider when deciding whether to issue a stay of proceeding include the interests of the parties, the efficient use of judicial resources, and the interests of the public and persons not parties to the litigation. *See e.g. Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-5 (9th Cir. 1995).

B. THE ISSUE OF THE APPLICABLE STATUTE OF LIMITATIONS, IF ANY, GOVERNING THIS MATTER REMAINS THE SUBJECT OF AN ACTION PENDING BEFORE THIS COURT

As set forth above, the annual assessment issue of *Noonan IRA* has been addressed by the *en banc* court. The resulting opinion has likely streamlined this appeal significantly as it may justify the district court’s determination that Miles Bauer’s tender of 9 months of assessments was sufficient to satisfy the superpriority portion of the HOA Lien foreclosed upon even where the assessments were due and payable on an annual basis. However, the second issue of this appeal has not yet been resolved by the Court.

The issue of what statute of limitations applies to a lienholder’s claim that its lien was not extinguished by a foreclosure sale was presented to the Ninth Circuit Court of Appeals in the matter of *Thunder Properties* after the federal district court determined that the secured lender’s claims that its lien was unaffected by a homeowners association lien foreclosure sale was time-barred. In *Thunder Properties*, the Ninth Circuit Court of Appeals declined to determine the appropriate statute of limitations governing the secured lender’s claims under

1 Nevada law and instead certified the question to this Court. Specifically, the
2 Ninth Circuit Court of Appeals certified the following question to the Nevada
3 Supreme Court:

4 (1) When a lienholder whose lien arises from a mortgage for the
5 purchase of a property brings a claim seeking a declaratory judgment
6 that the lien was not extinguished by a subsequent foreclosure sale of
7 the property, is that claim exempt from statute of limitations under
8 *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699
(Nev. 2016)?

9 (2) If the claim described in (1) is subject to a statute of limitations:

10 (a) Which limitations period applies?

11 (b) What causes the limitations period to begin to run?

12 *Id.* The instant appeal potentially hinges at least in part upon an identical
13 question.

14 On September 11, 2020, this Court issued an Order accepting the certified
15 question that was issued in *Thunder Properties*, Appeal No. 81129. Oral
16 argument took place on June 29, 2021, however, an opinion has not yet issued.
17 Because this Court's determination of the certified question of *Thunder Properties*
18 will very likely be dispositive of the instant appeal, this appeal should be stayed
19 pending its resolution.

20 **C. GOOD CAUSE EXISTS TO STAY THIS APPEAL**

21 The ultimate resolution of the certified question presented in *Thunder*
22 *Properties* will bear heavily on the instant appeal. Given the fact that BONY took
23 no action to contest the HOA Foreclosure Sale for over 6 years after it took place,
24 BONY's claims were time barred if ANY statute of limitations is deemed to apply.

25 At the very least, the Court's decision will likely significantly impact this appeal.
26 *Thunder Properties* remains pending before this Court. Briefing was completed
27 and this Court heard oral arguments on June 29, 2021. As a result, the certified
28 question of *Thunder Properties* will likely be resolved in the relatively near future.

Because the question at issue will soon be addressed, it is appropriate to
maintain the stay this appeal. Staying the appeal will avoid unnecessary
expenditure of judicial resources as well as the resources of the parties. At the very

1 least, the remaining primary issue in this appeal will likely be significantly
2 simplified and streamlined. To the extent that any harm might be suffered by the
3 parties as a result of a stay, such harms are outweighed by the avoidance of
4 expense on the part of the parties and the outlay of judicial resources by this
5 Court. Indeed, if briefing is completed, it may be necessary to substantially amend
6 or re-brief the matter after a decision is issued in *Thunder Properties*. Any
7 prejudice that may result from a stay will weigh approximately equally upon the
8 parties. It is very clear that the pending matters “bear upon the case,” and the
9 parties and the Court will be best served if the briefing of this appeal is completed
10 based upon the most current and accurate law. Appellant proposes that this
11 appeal be stayed and that the Opening Brief and Appendix be due 30 days after a
12 decision is issued in *Thunder Properties*.

13 **D. IN THE EVENT THAT THE COURT IS NOT INCLINED TO STAY**
14 **THIS APPEAL, APPELLANT RESPECTFULLY REQUESTS AN**
15 **ADDITIONAL EXTENSION OF TIME IN WHICH TO FILE THE**
16 **OPENING BRIEF**

17 NRAP 31(b) provides in pertinent part as follows:

18 **(2) Stipulations.** Unless the court orders otherwise, in all appeals
19 except child custody, visitation, or capital cases, the parties may
20 extend the time for filing any brief for a total of 30 days beyond the
21 due dates set forth in Rule 31(a)(1) by filing a written stipulation with
22 the clerk of the Supreme Court on or before the brief’s due date. No
23 extensions of time by stipulation are permitted in child custody,
24 visitation, or capital cases.

25 **(3) Motions for Extensions of Time.** A motion for extension of time
26 for filing a brief may be made no later than the due date for the brief
27 and must comply with the provisions of this Rule and Rule 27.

28 **(A) Contents of Motion.** A motion for extension of time for filing a
brief shall include the following:

- (i) The date when the brief is due;
- (ii) The number of extensions of time previously granted (including a 5-day telephonic extension), and if extensions were granted, the original date when the brief was due;
- (iii) Whether any previous requests for extensions of time have been denied or denied in part;
- (iv) The reasons or grounds why an extension is necessary; and
- (v) The length of the extension requested and the date on which the brief would become due.

1 As stated above, the Opening Brief and Appendix are presently due on August 27,
2 2021, pursuant to this Court's Order dated July 8, 2021.

3 As described above, this Court has previously granted two prior extensions.
4 Appellant's counsel has communicated with Respondent's counsel, Natalie
5 Winslow, Esq. Ms. Winslow required input from her client regarding its position
6 on a stay or extension and, to date, has not been able to provide a response.
7 Because the current deadline is rapidly approaching, Appellant has filed the
8 instant Motion. Appellant respectfully suggests that a stay or extension of time
9 until after the certified question of *Thunder Properties* has been answered is in the
10 best interest of both parties, as well as the Court.

11 CONCLUSION

12 For the reasons discussed above, LVDG respectfully requests that this Court
13 stay this appeal and hold all deadlines in abeyance until this Court resolves the
14 certified question of *Thunder Properties*. This decision will significantly impact
15 this appeal and the parties should have the opportunity to brief this matter based
16 upon the most current and accurate law. Doing otherwise will likely drain the
17 resources of not only the parties but also this Court. In the event that this matter is
18 stayed, Appellant proposes that the Opening Brief should be due within 30 days
19 after a decision is entered in *Thunder Properties*.

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1 Alternatively, if the Court is not inclined to stay this matter, Appellant
2 respectfully requests an additional extension of time in which to file the Opening
3 Brief and Appendix herein for 60 days until October 26, 2021, It is quite possible
4 that *Thunder Properties* may be resolved by that time in any event.

5 DATED this 25th day of August, 2021.

6 ROGER P. CROTEAU & ASSOCIATES, LTD.

7
8 /s/ Timothy E. Rhoda
9 ROGER P. CROTEAU, ESQ.
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17 LAS VEGAS DEVELOPMENT GROUP, LLC
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 25th day of August, 2021, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's efile and serve system.

____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

Stephen E. Haberfeld
8224 Blackburn Ave #100
Los Angeles, CA 90048
Settlement Judge

____ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda
An employee of ROGER P. CROTEAU & ASSOCIATES, LTD.