IN THE SUPREME COURT OF NEVADA

DAISY TRUST, A NEVADA TRUST Appellant, v. GREEN VALLEY SOUTH OWNERS ASSOCIATION NO. 1, A NEVADA NON-PROFIT CORPORATION; AND NEVADA ASSOCIATION SERVICES, A DOMESTIC CORPORATION Respondents.	Supreme Court No. 82611 Electronically Filed Jul 20 2021 12:32 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S OPENING BRIEF**

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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.

1. Law firms that have appeared for Daisy Trust ("Appellant"): Roger P. Croteau & Associates, Ltd.

2. Parent corporations/entities: Appellant is a Nevada trust. Resources Group, LLC, is the trustee for Daisy Trust. Iyad Haddad is the manager for Resources Group, LLC. No publicly held corporation owns 10% or more of the beneficial interest in the Appellant and/or Daisy Trust.

Dated this July 20, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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II. JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The Order Granting Respondent Green Valley South Owners Association No.1's (the "HOA") Motion to Dismiss alternatively Motion for Summary Judgment (the "HOA MSJ") and the Joinder of Nevada Association Services, Inc., ("NAS" or "HOA Trustee") thereto is a final judgment ("HOA Order"), appealable under NRAP 3A(b)(1). That final judgment made the interlocutory Order Granting in Part Defendant Green Valley South Homeowners Association's Motion to Dismiss Complaint (the "HOA MTD") appealable.

(B) The filing dates establishing the timeliness of the appeal: The Notice of Entry of Order Granting the HOA MSJ was filed and served on Appellant on February 16, 2021. JA0613. The Notice of Appeal was filed on March 9, 2021. JA0633.

(C) The appeal is from a final judgment.

III. NRAP 17 ROUTING STATEMENT

The instant matter should be retained by the Supreme Court of Nevada, because this appeal raises as a principal issue a question of ongoing statewide concern involving the common law and statutory interpretation of NRS Chapter 116. NRAP 17(a)(12). The issue presented in this appeal represents a case regarding the

scope of the duty owed by the HOA and the HOA Trustee of good faith, honesty in fact, observance of reasonable standards of fair dealing, and candor in the conduct and performance of a homeowners' association assessment lien foreclosure sale. Specifically, pursuant to common law and/or NRS Chapter 116, and specifically NRS 116.1113, what are the duties and obligations of a homeowners association, and its agent, the association's foreclosure trustee, in disclosing a "tender" as defined in *Bank of America N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113 (Nev. 2018) to the bidding public at or before a homeowners association's lien foreclosure sale following reasonable inquiry by the Appellant if such a tender of the superpriority lien amount had been attempted or in fact paid by any individual or entity prior to the homeowners associations assessment lien foreclosure sale?

IV. STATEMENT OF ISSUES PRESENTED

Whether the district court erred by granting the HOA MSJ and the HOA Trustee Joinder in light of the following:

1. Does a homeowners' association and/or its agent, the homeowners' association's foreclosing trustee, have a duty and obligation to disclose a lender's tender of the superpriority amount of a homeowners association's lien prior to the homeowners association's assessment lien foreclosure sale after reasonable inquiry from a bidder and/or Appellant before or at the foreclosure sale?

2. Based on the pre-2015 version of NRS Chapter 116, and after reasonable inquiry by the bidders and/or the Appellant at or before the homeowners association's assessment lien foreclosure sale, are the homeowners association and/or the foreclosing trustee relieved of liability if the homeowners association and/or its foreclosing trustee intentionally withhold materially adverse information of an attempted request or actual tender, or are the homeowners association and the homeowners association's foreclosing agent obligated in good faith pursuant to the mandates of NRS 116.1113, NRS 116.1108, and common law to be truthful and candidly respond to reasonable inquiries of whether a tender had occurred prior to the homeowners association's lien foreclosure sale?

3. Does a homeowner association and/or its foreclosing agent have a duty to disclose a tender or attempted payment under NRS Chapter 113 since a tender and/or attempted payment materially affects the value of the property being sold, and NRS Chapter 113 does not exclude NRS Chapter 116 foreclosure sales from the disclosure requirements contained in Chapter 113?

4. Did the district court commit errors of law and abuse its discretion by granting the HOA MSJ under NRCP 56(b) and HOA MTD under NRCP 12(b)(5) when the Complaint and the record provides facts, which if true, would entitle Appellant to relief?

V. STATEMENT OF THE CASE

On March 15 2019, Appellant filed its Complaint. JA001. Appellant's Complaint asserted four (4) claims for relief against the HOA and HOA Trustee: (i) intentional, or alternatively negligent, misrepresentation; (ii) breach of the duty of good faith; (iii) conspiracy; and (iv) violations of NRS 113. *See id*. These claims are related to Appellant's purchase of real property commonly known as 137 Elegante Way, Henderson, Nevada 89074 (APN 177-13-214-086) (the "Property") at a homeowners association foreclosure conducted by the HOA Trustee on behalf of the HOA.

On April 5, 2019, the HOA filed an Answer to the Complaint. JA0022. On September 20, 2019, the HOA filed the HOA MTD. JA0028. On October 18, 2019, the HOA Trustee filed a joinder to the HOA MTD. JA0086. On October 29, 2019, Appellant filed its Opposition to the HOA's MTD and HOA Trustee's joinder. JA0089. On December 3, 2019, the HOA filed a Reply in support of the HOA MTD. JA206. February 7, 2020 the district court entered the Order granting in part the HOA's MTD and HOA Trustee's joinder as to the conspiracy claim. JA0238. On May 1, 2020, the HOA Trustee filed an Answer to the Complaint. JA0245. On October 25, 2020 the HOA filed the HOA MSJ. JA0255. On October 29, 2020, the HOA Trustee filed a joinder to the HOA MSJ. JA0295. On November 9, 2020, the

Appellant filed its Opposition to the HOA's MSJ and HOA Trustee's joinder. JA0298. On November 24, 2020, the HOA filed its Reply in support of the HOA MSJ. JA416. On December 1, 2020, the district court heard oral argument on the HOA MSJ and granted the same, with the HOA Trustee's joinder. JA0567.

VI. STATEMENT OF RELEVANT FACTS

1. Appellant is the record title holder of the Property, which Appellant acquired by Foreclosure Deed dated September 7, 2012 and recorded in the Clark County Recorder's office on September 7, 2012 pursuant to a homeowners' association lien foreclosure sale conducted on August 31, 2012 (the "HOA Foreclosure Sale"), performed by the HOA Trustee on behalf of the HOA. *See* JA0002.

2. The HOA is a Nevada common interest community association or unit owners' association as defined in NRS 116.011. *Id*. at ¶ 4.

3. The HOA Trustee is a debt collection agency retained by the HOA as its agent to act as foreclosing trustee. *Id*. at ¶ 5.

4. Under Nevada law, homeowners associations have the right to charge property owners residing within the community assessments to cover the homeowners associations' expenses for maintaining or improving the community, among other things. *Id*. at ¶ 8.

5. When the assessments are not paid, the homeowners association may impose a lien against real property which it governs and thereafter foreclose on such lien. *Id*. at ¶ 9.

6. NRS 116.3116 makes a homeowners association's lien for assessments junior to a first deed of trust beneficiary's secured interest in the Property, with one limited exception; a homeowners association's lien is senior to a deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 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." NRS 116.3116(2)(c). *Id*. at ¶ 10.

7. In Nevada, when a homeowners' association properly forecloses upon a lien containing a superpriority lien component, such foreclosure extinguishes a first deed of trust. JA0003 at ¶ 11.

8. On or about June 5, 2008, Dennis L. Scott (the "Former Owner") purchased the Property and entered into the first deed of trust in the amount of $ 179,188.00 with CTX Mortgage Company, LLC, a Delaware corporation

("Lender"[1]), which deed of trust was recorded against the Property on June 27, 2008 (the "Deed of Trust"). *Id*. at ¶ 12.

9. The Former Owner executed a Planned Unit Development rider along with the Deed of Trust. *Id*. at ¶ 13.

10. On September 26, 2011, MERS, on behalf of Lender, assigned its beneficial interest by Assignment of Deed of Trust to Bank of America, N.A. ("BANA") and recorded the document in Clark County Recorder's Office on October 5, 2011. *Id*. at ¶14.

11. The Former Owner of the Property failed to pay to HOA all amounts due pursuant to HOA's governing documents. *Id*. at ¶15.

12. Accordingly, on August 23, 2011, HOA Trustee, on behalf of HOA, recorded a Notice of Delinquent Assessment Lien, which stated that the amount due to the HOA was $818.70, plus continuing assessments, interest, late charges, costs, and attorney's fees (the "HOA Lien"). *Id*. at ¶ 16.

13. On November 18, 2011, HOA Trustee, on behalf of the HOA, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien (the "NOD") against the Property, which stated the amount due to the HOA was

[1] The term "Lender" applies to any assignee of the subject deed of trust.

$1,819.50 as of November 16, 2011, plus continuing assessments, late fees, interest and attorney's fees and costs. *Id*. at ¶17.

14. Upon information and belief, after the NOD was recorded, BANA, through counsel Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer") contacted the HOA Trustee and requested a ledger identifying the Super-Priority Lien Amount, comprising of up to 9 months of delinquent assessments that were owed to the HOA as of the HOA Lien ("Super-Priority Lien Amount"). *Id*. at ¶ 17.

15. Thereafter, BANA, through Miles Bauer, provided a payment of $882.00 to the HOA Trustee, which included payment of up to nine months of delinquent assessments (the "Attempted Payment"). *Id*. at ¶ 22.

16. HOA Trustee, on behalf of the HOA, rejected BANA's Attempted Payment of $882.00. *Id*. at ¶ 23.

17. On April 23, 2012, HOA Trustee, on behalf of the HOA, recorded a Notice of Sale against the Property ("NOS"). *Id*. at ¶ 24. The NOS provided that the total amount due the HOA was $2,946.17and set a sale date for the Property of May 18, 2012, at 10:00 A.M., to be held at Nevada Legal News, 930 So. Fourth Street, Las Vegas, Nevada. *See id*.

18. Neither the HOA nor the HOA Trustee informed or advised the bidders and potential bidders at the HOA Foreclosure Sale, either orally or in writing, that

any individual or entity had attempt to pay the Super-Priority Lien Amount. JA0005 at ¶ 30.

19. Plaintiff appeared at the HOA Foreclosure Sale and presented the prevailing bid in the amount of $3,555.00, thereby purchasing the Property for said amount. *Id*. at ¶ 29.

20. Upon information and belief, Lender alleges that its Attempted Payment of the Super-Priority Lien Amount served to satisfy and discharge the Super-Priority Lien Amount, thereby changing the priority of the HOA Lien vis a vis the Deed of Trust. *Id*. at ¶ 32.

21. Upon information and belief, Lender alleges that as a result of its Attempted Payment of the Super-Priority Lien Amount, Appellant acquired title to the Property subject to the Deed of Trust. *Id*. at ¶ 33.

22. Upon information and belief, if the bidders and potential bidders at the HOA Foreclosure Sale were aware that an individual or entity had attempted to pay the Super-Priority Lien Amount and/or by means of the Attempted Payment prior to the HOA Foreclosure Sale and that the Property was therefore ostensibly being sold subject to the Deed of Trust, the bidders and potential bidders would not have bid on the Property. *Id*. at ¶ 34.

23. Had the Property not been sold at the HOA Foreclosure Sale, HOA and HOA Trustee would not have received payment, interest, fees, collection costs and assessments related to the Property and these sums would have remained unpaid. JA0006 at ¶ 35.

24. HOA Trustee acted as an agent of HOA. *Id*. at ¶ 36.

25. HOA is responsible for the actions and inactions of HOA Trustee pursuant to the doctrine of respondeat superior. *Id*. at ¶ 37.

26. HOA, by and through its agent, and HOA Trustee, sought to hide material information related to the Property: the HOA Lien; the Attempted Payment of the Super Priority Lien Amount; the rejection of the Attempted Payment; and the priority of the HOA Lien vis a vis the Deed of Trust, from the bidders and potential bidders at the HOA Foreclosure Sale. *Id*. at ¶ 38.

27. The information related to any Attempted Payment or payments made by Lender, BANA, the homeowner or others to the Super-Priority Lien Amount was not recorded and would only be known by BANA, Lender, the HOA, and HOA Trustee. *Id*. at ¶ 39.

28. Upon information and belief, HOA and HOA Trustee withheld the aforementioned information for their own economic gain and to the detriment of the bidders and potential bidders at the HOA Foreclosure Sale. *Id*. at ¶ 40.

29. It was Appellant's practice and procedure that when it would attend NRS Chapter 116 sales, by and through its agent, at all times relevant to this case, the Trustee would attempt to ascertain whether anyone had attempted to or did tender any payment regarding the homeowner association's lien, including but not limited to the Attempted Payment. JA0334.

30. At all times relevant to this matter, if Appellant's agent had learned of a "tender" either having been attempted or made, the Trustee would not purchase the Property offered in that HOA Foreclosure Sale. *Id*.

31. The HOA and HOA Trustee are required to and must provide a Seller's Real Property Disclosure Form ("SRPDF") to the "Purchaser" as defined in NRS 116, *et seq*., at the time of the HOA Foreclosure Sale. JA0012 at ¶ 91.

32. NRS 116 *et seq*. foreclosure sales are not exempt from the mandates of NRS 113 *et seq*. *Id*. at ¶ 92.

33. The HOA and HOA Trustee must complete and answer the questions posed in the SRPDF in its entirety, but specifically, Section 9, Common Interest Communities, disclosures (a) - (f), and Section 11, that provide as follows:

> 9. Common Interest Communities: Any "common areas" (facilities like pools, tennis courts, walkways or other areas co-owned with others) or a homeowner association which has any authority over the property?
> (a) Common Interest Community Declaration and Bylaws available?
> (b) Any periodic or recurring association fees?

> (c) Any unpaid assessments, fines or liens, and any warnings or notices that may give rise to an assessment, fine or lien?
> (d) Any litigation, arbitration, or mediation related to property or common areas?
> (e) Any assessments associated with the property (excluding property tax)?
> (f) Any construction, modification, alterations, or repairs made without required approval from the appropriate Common Interest Community board or committee?
>
> . . .
>
> 11. Any other conditions or aspects of the [P]roperty which materially affect its value or use in an adverse manner?

Id. at ¶ 93 (emphasis added).

34. Section 11 of the SRPDF relates directly to information known to the HOA and the HOA Trustee that materially affects the value of the Property, and in this case, if the Super Priority Lien Amount is paid, or if the Attempted Payment is accepted, it would have a material, adverse effect on the overall value of the Property, and therefore, must be disclosed in the SRPDF by the HOA and the HOA Trustee when the SRPDF is completed and disclosed to the purchaser/Appellant. *Id*. at ¶ 94.

35. Section 9(c) - (e) of the SRPDF would provide notice of any payments made by BANA or others on the HOA Lien. *Id*. at ¶ 95.

36. Section 11 of the SRPDF generally deals with the disclosure of the condition of the title to the Property that would only be known by the HOA and the HOA Trustee. JA0012 at ¶ 96.

37. Pursuant to Nevada Real Estate Division's ("NRED"), Residential Disclosure Guide (the "Guide"), the Guide provides at page 20 that the HOA and HOA Trustee shall provide the following to the purchaser/Appellant at the HOA Foreclosure Sale:

> The content of the disclosure is based on what the seller is aware of at the time. If, after completion of the disclosure form, the seller discovers a new defect or notices that a previously disclosed condition has worsened, the seller must inform the purchaser, in writing, as soon as practicable after discovery of the condition, or before conveyance of the property.
>
> The buyer may not waive, and the seller may not require a buyer to waive, any of the requirements of the disclosure as a condition of sale or for any other purpose.
>
> In a sale or intended sale by foreclosure, the trustee and the beneficiary of the deed of trust shall provide, not later than the conveyance of the property to, or upon request from, the buyer:
>
> - written notice of any defects of which the trustee or beneficiary is aware

Id. at ¶ 97.

38. If the HOA and/or HOA Trustee fails to provide the SRPDF to Appellant/purchaser at the time of the HOA Foreclosure Sale, the Guide explains that:

> A Buyer may rescind the contract without penalty if he does not receive a fully and properly completed Seller's Real Property Disclosure form. If a Buyer closes a transaction without a completed form or if a known defect is not disclosed to a Buyer, the Buyer may be entitled to treble damages, unless the Buyer waives his rights under NRS 113.150(6).

Id. at ¶ 98.

39. Pursuant to NRS 113.130(4), the HOA and HOA Trustee are required to provide the information set forth in the SRPDF to Appellant at the HOA Foreclosure Sale. *Id*. at ¶ 99.

40. The HOA and the HOA Trustee did not provide an SRPDF to Appellant at the HOA Foreclosure Sale. *Id*. at ¶ 100.

41. As a result of the HOA and HOA Trustee's failure to provide Appellant with the mandated SRPDF and disclosures required therein that were known to the HOA and HOA Trustee, Appellant has been economically damaged. JA0014 at ¶ 101.

42. BANA first disclosed the Attempted Payment to the HOA Trustee in BANA's Complaint filed against Appellant (the "Case"), filed on February 29, 2016, but not served on the Plaintiff until March 16, 2016 (the "Discovery"). *Id*. at ¶ 41.

VII. STANDARD OF REVIEW

This Court reviews de novo an order granting a motion to dismiss for failure to state a claim, applying a rigorous standard, accepting the plaintiff's factual allegations as true and drawing every intendment in favor of the non-moving party. *Pack v. LaTourette*, 128 Nev. 264, 268 (2012). In asserting a claim in the complaint, the plaintiff only needs to state "a short and plain statement of the claim showing

that the pleader is entitled to relief." NRCP 8(a). A pleading is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. *Crucil v. Carson City*, 95 Nev. 583, 585 (1979). Based upon *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635 (2006), the Court must accept the nonmoving party's factual allegations and true and draw every fair factual inference from there.

This Court reviews summary judgment orders de novo. *Wood v. Safeway Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the non-moving party, demonstrates that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id*. Conclusory statements fail to create issues of fact. *Yeager v. Harrah's Club, Inc.,* 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995). NRCP 56's plain language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (adopted by *Wood*, 121 Nev. at 731, 121 P.3d at 1031).

Likewise, when the issue is purely a question of law, such as in cases where statutory construction is at issue, the review is also de novo. *Boulder Oaks Cmty.*

Ass'n v. B & J Andrews Enters., LLC, 125 Nev. 397, 403 (2009). "[A] complaint should not be dismissed for insufficiency, for failure to state a cause of action, unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim." *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169 (1965) (citation omitted). On a motion to dismiss for failure to state a claim for relief, the trial court, and the Supreme Court must draw every fair intendment in favor of the plaintiff. *Merluzi v. Larson*, 96 Nev. 409, 411 (1980), over ruled on the other grounds, *Smith v. Clough*, 106 Nev. 568 (1990).

VIII. SUMMARY OF ARGUMENT

The district court erred when it granted the HOA's MTD and HOA MSJ's for the following reasons:

1. Appellant properly stated a claim for relief for misrepresentation.

2. NRS Chapters 113 and 116 required the HOA and HOA Trustee to disclose the Attempted Payment and they breached those duties.

3. Appellant stated a viable claim for conspiracy.

IX. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW, BECAUSE APPELLANT PROPERLY STATED A CLAIM FOR RELIEF FOR MISREPRESENTATION

In the HOA Order, the district court held that Appellant's claim for relief for misrepresentation failed as a matter of law, because, pursuant to *Noonan*, that neither the HOA nor the HOA Trustee had a duty to inform foreclosure buyers of a tender or attempted tender. JA0602. However, this holding is incorrect. In *Nelson v. Heer*, the Court defined intentional misrepresentation as being established by demonstrating:

> (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance.
>
> With respect to the false representation element, the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist." And, with respect to the damage element, this court has concluded that the damages alleged must be proximately caused by reliance on the original misrepresentation or omission. Proximate cause limits liability to foreseeable consequences that are reasonably connected to both the defendant's misrepresentation or omission and the harm that the misrepresentation or omission created.

123 Nev. 217, 225 (2007). The district court acknowledged that the *Nelson* Court provided that the omission of a material fact, such as the Lender's tender/Attempted Payment of the Super-Priority Lien Amount, is deemed to be a false representation

which the HOA and HOA Trustee are bound by the mandates of NRS 116.1113 and NRS 113.130 to disclose to potential bidders, and this duty is a good faith obligation to disclose upon reasonable inquiry from potential bidders at the HOA Foreclosure Sale, and such intentional omission is equivalent to a false representation under the facts of this case. JA0602.

With regard to Appellant's claim of negligent misrepresentation, the district court ostensibly dismissed it for the same reason as the intentional misrepresentation – lack of duty. *See* JA0601-3. However, the district court also erred in dismissing this claim, because Appellant adequately pled facts sufficient to support a claim for negligent misrepresentation. In, *Barmettler v. Reno Air, Inc.*, this Court defined the tort of negligent misrepresentation as follows:

> One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

114 Nev. 441, 449 (1998). Here, Appellant pled facts, relevant and disputed, sufficient to survive the HOA MSJ under NRCP 56. Specifically, Appellant alleged that the HOA and HOA Trustee had a pecuniary interest in the outcome of the HOA Foreclosure Sale and that they supplied false information (or at least omitted information) when asked whether a tender/Attempted Payment had been made, upon

which Appellant justifiably relied. JA0473. Therefore, the district court erred in dismissing this claim for relief.

B. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT, BECAUSE RESPONDENTS HAD DUTIES UNDER NRS CHAPTERS 113 AND 116 TO DISCLOSE THE ATTEMPTED PAYMENT/TENDER TO APPELLANT AT THE HOA FORECLOSURE SALE

In its orders, the district court held that the HOA and HOA Trustee did not have a duty to disclose the Attempted Tender under NRS Chapter 116. JA0603-6. Further, the HOA argued that neither the HOA nor the HOA Trustee had a duty to disclose the Attempted Tender under NRS Chapter 113, because the term "defect" does not include a condition such as a deed of trust, and NRS Chapter 113 does not apply to forced sales under NRS Chapter 116. *See* JA0604-6. However, these conclusions are incorrect under NRS Chapter 113 and NRS Chapter 116.

1. RESPONDENTS HAD A DUTY UNDER NRS CHAPTER 116 TO DISCLOSE THE ATTEMPTED PAYMENT/TENDER TO APPELLANT

The Complaint adequately states claims for relief consistent with the HOA's and HOA Trustee's obligation of good faith, honesty in fact, reasonable standards of fair dealing, and candor pursuant to NRS 116.1113. However, the HOA's argument fails.

NRS 116.1113 is not only implicated but clearly governs the HOA's and HOA Trustee's duties and contracts when dealing with the performance of their duties in foreclosing a lien for delinquent assessments and with a Purchaser at such sale. NRS 116.1113 provides, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." In the actions of the HOA and the HOA Trustee leading up to and at the HOA Foreclosure Sale, the statute imposes a duty of good faith as further clarified by the Comments to Section 1-113 of the Uniform Common Interest Ownership Act ("UCIOA") regarding the HOA's performance in its enforcement of the provisions included in NRS Chapter 116 that constitute the foreclosure sale and selling the Property to a Purchaser that will eventually be a member of the HOA. The duties of good faith and fair dealing go hand and hand with the duty of candor.

For example, the Restatement (Second) of Contracts, § 205, expressly provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." Restat. 2d of Contracts, § 205 (2nd 1981). Comment (d) to Section 205 further suggests: "fair dealing may require more than honesty." Accordingly, the duty of candor is an integral component of the duty of fair dealing. Though a contract interpretation, it has application in the HOA Foreclosure Sale. Nevada's HOA lien statute, NRS 116.3116, is modeled after

the UCIOA, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008), which Nevada adopted in 1991, *see* NRS 116.001. The purpose of the UCIOA is "to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). *See Carrington Mortg. Holdings, LLC v. R Ventures VIII, LLC*, 419 P.3d 703, 705 (Nev. 2018) (unpublished disposition). In *Carrington*, this Court made clear that it would turn to case law from other jurisdictions to support its conclusions interpreting the UCIOA. *See id*.

In its HOA Order, the district court held that the HOA and HOA Trustee did not have a duty of disclosure pursuant to *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev. 2019) (unpublished disposition), which compares the duties contained in the 2013 and 2017 versions of NRS 116.31162. JA0603. However, the district court's reliance on *Noonan* is misplaced, because it is factually distinguishable from the facts of this case. While it is true the *Noonan* court stated, "Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose," *Noonan*, 438 P.3d at 335, certainly the HOA and the HOA Trustee were bound to tell the truth when Appellant inquired whether a tender payment had been attempted or made.

Further, the *Noonan* decision is based upon a factual determination of whether a material fact question had been asked and if it was answered or there was a material

omission of fact. The *Noonan* court did not consider the arguments presented in this appeal about NRS 116.1113, NRS Chapter 113, and their relevant analysis. Thus, the HOA's, and district court's, reliance on *Noonan* is, and was, erroneous.

The HOA Trustee could have disclosed that the Super-Priority Lien Amount had been satisfied prior to the HOA Foreclosure Sale by the Attempted Payment or at least responded to the Appellant's inquiries regarding the HOA Trustee's rejection of the Attempted Payment, but it did not. Neither the HOA nor the HOA Trustee did so. The HOA or the HOA Trustee could have provided notice to all potential bidders, and/or the public at large, in their actions leading up to the HOA Foreclosure Sale, such as including a phrase concerning the absence of any superpriority portion of the HOA Lien being foreclosed upon within any and/or all of the notices recorded against the Property and/or advertising the sale, or it could have announced that fact at the foreclosure sale, especially after reasonable inquiry by Appellant. At the very least, it could have responded to Appellant's inquiries. JA0473.

However, neither the HOA nor the HOA Trustee did so, as that would have had the effect of chilling bidding at the sale. At the time of the HOA Foreclosure Sale, only three parties knew of Lender's Attempted Payment – the HOA, the HOA Trustee, and Lender. The Attempted Payment was sent directly to the HOA Trustee

in response to its recording of the NOD, which the HOA Trustee rejected. JA0004 ¶ 23.

Arguably, the HOA and the HOA Trustee knew that the Attempted Payment may be deemed to have satisfied the HOA Lien, which was determined to extinguish any Super-Priority Lien Amount of the HOA Lien. The HOA and the HOA Trustee knew that fact and intentionally failed to disclose that material fact to the bidders at the HOA Foreclosure Sale and upon inquiry from Appellant. Frankly, the HOA and HOA Trustee knew or should have known that such an omission would drastically affect the financial outcome for the Appellant as the winning bidder at the HOA Foreclosure Sale. An intentional failure to disclose Lender's Attempted Payment had the effect of causing the Property to sell at the HOA Foreclosure Sale.

Therefore, Appellant alleged that the HOA and the HOA Trustee conspired together to intentionally withhold information regarding Lender's Attempted Payment of the HOA Lien that effectively defrauded the public and/or potential bidders concerning the true economic consequence of the HOA Foreclosure Sale. The HOA and HOA Trustee asserted, and the district court held, that they were under no contract or duty to operate under good faith and with candor to disclose such a material fact of the Attempted Payment when asked by potential bidders as mandated by NRS Chapter 116. JA0604-6. If allowed to stand, that interpretation of NRS

116.1113 would serve to emasculate Chapter 116's mandate of good faith and render it completely meaningless and ineffective.

The plain language of NRS 116.1113 does not limit the good faith obligation to those in contractual privity. The HOA and/or HOA Trustee are not given authority to conceal material facts from potential bidders in their efforts to sell the Property to reap the sale proceeds to fund their foreclosure expenses. The obligations of good faith under NRS 116.1113 apply to a "Purchaser" at the foreclosure sale. NRS 116.31166(3) provides that title vests in the Purchaser at an HOA Foreclosure Sale.

The relationship of the HOA Trustee as an agent for the HOA created a new contract at the HOA Foreclosure Sale for the sale of a "unit" to a "Purchaser" that as a result of its purchase shall become a member of the HOA. In the foreclosure section of NRS 116.31162 to NRS 116.3117, the term Purchaser refers to a buyer at an HOA Foreclosure Sale in addition to direct sales and as such the obligation of good faith operates to encompass a successful bidder.

NRS 116.1108 provides for the application of general principles of law to the HOA Foreclosure Sale and the Purchaser as stated below:

> NRS 116.1108 Supplemental general principles of law applicable. The principles of law and equity, including the law of corporations, the law of unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, ***misrepresentation***, duress, coercion, mistake, receivership, substantial performance, or other validating or

> invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

NRS 116.1108 actually cites the enumerated claims and issues raised in the Complaint as "supplemental general principles of law applicable" to NRS Chapter 116. The concepts of "law and equity," "law of real property," "principal and agent," "fraud, misrepresentation," and "mistake" are all at the basis of the claims asserted in the Complaint.

The HOA Foreclosure Sale was performed pursuant to NRS 116.31162 through 116.31168, and Appellant reasonably relied upon the recitals included in the HOA Foreclosure Deed that stated the foreclosure sale was in compliance with all laws and with NRS Chapter 116. *See Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, 2017 Nev. App. Unpub. LEXIS 229 at *2 (Nev. App. Apr. 17, 2017) (unpublished disposition) ("And because the recitals were conclusive evidence, the district court did not err in finding that no genuine issues of material fact remained regarding whether the foreclosure sale was proper and granting summary judgment in favor of SFR."). In this case, Appellant had no reason to question the recitals contained in the HOA Foreclosure Deed and recorded documents. The foreclosure of the HOA Lien is presumably valid based upon the recitals in the HOA Foreclosure Deed. In *Nationstar Mortgage*, the court explained the foreclosure procedure:

> A trustee's deed reciting compliance with the notice provision of NRS 116.31162 through NRS 116.31168 "is conclusive" as to the recitals "against the unit's former owner, his or her heirs and assigns, and all other persons." NRS 116.31166(2). And, '[t]he sale of a unit pursuant to NRS 116.31162, 11631163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3).

Nationstar, 2017 Nev. App. Unpub, Lexis 229 at *3-4. As such, there would have been no reason for Appellant to question the legitimacy of the HOA Foreclosure Sale based exclusively upon the recorded documents. At foreclosure sales conducted pursuant to NRS Chapter 116, bidders, potential bidders, and buyers do not have access to any more information than is recorded. Appellant's inquiries, and the failure of the HOA Trustee to respond, violated the duty of good faith.

Here, Appellant was the Purchaser at the HOA Foreclosure Sale. The HOA and/or the HOA Trustee's actions leading up to and at the HOA Foreclosure Sale intentionally obstructed Appellant's opportunity to conduct its own due diligence regarding the Property, and ultimately affected Appellant's decision whether to actually submit a bid on the Property or not. Had Appellant known that it was purchasing the Property subject to the Deed of Trust, Appellant never would have submitted a bid in the first place, thus avoiding this entire controversy. JA0473.

Nonetheless, in light of the inquiry by the Appellant, the HOA and the HOA Trustee were required to be truthful in their contracts and duties and to follow the

law as set forth in NRS 116.1113. Because Appellant sufficiently pled that the HOA and HOA Trustee did not comply with their duties under NRS Chapters 113 and 116, the district court erred by granting the HOA MTD and HOA MSJ.

2. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT, BECAUSE APPELLANT SUFFICIENTLY ALLEGED RESPONDENTS' BREACH OF THE DUTY OF GOOD FAITH UNDER NRS CHAPTER 116

In its Complaint, Appellant alleged that the HOA and the HOA Trustee's actions were not conducted in good faith. *See* JA0010. Appellant further alleged that the HOA and the HOA Trustee intentionally and/or negligently misrepresented tender and the Attempted Payment by the Lender up to and including at the time they conducted the HOA Foreclosure Sale. *See* JA0006-10. Appellant also alleged that the HOA and the HOA Trustee failed to disclose mandated information specifically known to them regarding assessments and any tender/Attempted Payment as mandated by NRS 116.1113. *See id*. In addition to the foregoing, the following are further examples of Respondents' breach of the duty of good faith under NRS Chapter 116.

First, the HOA Foreclosure Deed provides in relevant part, "[a]ll requirements of law … have been complied with." JA0084. However, the HOA and HOA Trustee did not comply with all requirements of law. The HOA and HOA Trustee cannot intentionally withhold information known only to the Lender, the HOA, and HOA

Trustee that materially, adversely affects the purchaser (Appellant) as defined under NRS Chapter 116, as to the value and nature of the bifurcated lien status of the HOA Lien as it relates to the Deed of Trust. Appellant would concede that Respondents would not be liable for matters not specifically known to the HOA and HOA Trustee at the time of the HOA Foreclosure Sale that cannot be adduced by a public record review as occurs in NRS Chapter 107 foreclosure sales. However, in the instant case, the HOA and HOA Trustee are the actual parties with the information regarding the Attempted Payment and had an obligation to inform Appellant. This fact alone constitutes sufficient proof of the HOA's, by and through its agent, the HOA Trustee, obligation and duty to disclose the Attempted Payment upon inquiry by Appellant.

Second, Respondents have a duty to disclose the Attempted Payment to a Purchaser, as defined in NRS 116.079, at an HOA Foreclosure Sale pursuant to NRS 116.1113, in response to Appellant's inquiries. At the time and place of the HOA Foreclosure Sale, the HOA, by and through its agent, the HOA Trustee, entered into a sale governed by a statute, NRS Chapter 116, by the function of the auction conducted by the HOA Trustee. Inherently, the material aspects of the factors affecting the lien priority of the secured debt that are only known solely to the HOA, HOA Trustee, and the Lender are material to the HOA Lien being foreclosed upon

and must be disclosed to the HOA Foreclosure Sale bidders. To infer otherwise, would destroy the statutory scheme of NRS Chapter 116 sales.

Third, a common argument among all parties to the HOA litigation has been the low prices adduced at the HOA Foreclosure Sales for the real property sold. Typically, the low sales prices have been driven by the mountain of litigation that has occurred over the last eight years seeking to define the rights and obligations of the various parties. However, it is untenable to hold that the HOA does not have a duty to disclose information known only to the HOA and the HOA Trustee that materially affects the value that a willing buyer would be willing to pay for the property offered at auction that relates directly to the status and priority of the Deed of Trust when the Appellant inquires. Essentially, Respondents argue that the HOA will sell to the highest cash bidder the real property without any way for the bidder to know if it will acquire the real property free and clear of the Deed of Trust or subject thereto, especially when the HOA and HOA Trustee know that a tender or attempted payment was made that affects the lien being foreclosed. Adopting Respondents' argument would effectively forever destroy the foreclosure process under NRS 116.3116.

Based on the foregoing, it is evident that Appellant sufficiently pled a claim for relief for breach of duty of good faith, pursuant to NRS Chapter 116, and

thereafter presented facts sufficient to prevent a granting of summary judgment; thus, the district court erred as a matter of law in dismissing the claim.

3. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT, BECAUSE RESPONDENTS HAD A DUTY TO DISCLOSE THE ATTEMPTED PAYMENT/TENDER UNDER NRS CHAPTER 113

As additional proof of the intentional/negligent misrepresentation, the HOA and HOA Trustee are obligated to follow the disclosures mandated by NRS Chapter 113. As used in NRS Chapter 113, the term "defect" means a condition that materially affects the value or use of the residential property in an adverse manner. NRS 113.100(1). Therefore, the HOA and HOA Trustee are required to provide a Seller's Real Property Disclosure Form ("SRPDF") to the "Purchaser" as defined in NRS Chapter 116, at the time of the HOA Foreclosure Sale. *See* JA0011-14. Therefore, the HOA and HOA Trustee must provide information known to them.

NRS Chapter 116 foreclosure sales are not exempt from the mandates of NRS Chapter 113. According to the plain language of NRS 113.130(2)(a), only NRS Chapter 107 foreclosure sales are specifically excluded from NRS 113.130(1). *See* NRS 113.130(2)(a). This Court has repeatedly upheld and applied the maxim *expressio unius est exclusio alterius*. *Ex parte Arascada*, 44 Nev. 30, 35 (1920) ("***This a well-recognized rule of statutory construction and one based upon the very soundest of reasoning; for it is fair to assume that, when the legislature***

enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; <u>otherwise what is the necessity of specifying any</u>? The rule invoked is so thoroughly recognized, not only by the courts generally, but by our own court, that it would be puerile to dwell upon the question presented, further than to quote from the decisions of our own court.") (emphasis added); *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 373 P.3d 66, 71 (Nev. 2016) ("The *maxim expressio unius est exclusio alterius* . . . instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, ***courts should infer that all omissions were intentional exclusions***.") (emphasis added) (citation omitted).

By stating expressly that NRS Chapter 107 is excluded from NRS 113.130's application, the Legislature plainly intended to include NRS Chapter 116 and subject it to NRS 113.130's scope. This means, of course, that Respondents are a "seller" under NRS Chapter 113, and Respondents should have complied with the disclosure requirements under NRS 113.130(1).

To the extent known to the HOA, and the HOA Trustee, as the agent of the HOA, the HOA and HOA Trustee must complete and answer the questions posed in

the SRPDF in its entirety, but specifically, Section 9, Common Interest Communities, disclosures (a) - (f), and Section 11, that provide as follows:

> 9. Common Interest Communities: Any "common areas" (facilities like pools, tennis courts, walkways or other areas co-owned with others) or a homeowner association which has any authority over the property?
>
> (a) Common Interest Community Declaration and Bylaws available?
> ***(b) Any periodic or recurring association fees?***
> ***(c) Any unpaid assessments, fines or liens, and any warnings or notices that may give rise to an assessment, fine or lien?***
> ***(d) Any litigation, arbitration, or mediation related to property or common areas***?
> (e) Any assessments associated with the property (excluding property tax)?
> (f) Any construction, modification, alterations, or repairs made without required approval from the appropriate Common Interest Community board or committee?
> . . .
>
> 11. ***Any other conditions or aspects of the [P]roperty which materially affect its value or use in an adverse manner?***

See JA0012 (emphasis added). Section 11 of the SRPDF relates directly to information known to the HOA and the HOA Trustee that materially affects the value of the Property defined as a "defect" in NRS 113.100(1). In this case, if the Super-Priority Lien Amount is paid, or if the Attempted Payment is rejected, it would have a materially, adverse effect on the overall value of the Property and, therefore, must be disclosed in the SRPDF by the HOA and the HOA Trustee.

Section 9(c) - (e) of the SRPDF would provide notice of any payments made by Lender or others on the HOA Lien.

Section 11 of the SRPDF generally deals with the disclosure of the condition of the title to the Property that would only be known by the HOA and the HOA Trustee. Pursuant to the Nevada Real Estate Division's ("NRED"), Residential Disclosure Guide (the "Guide"), the HOA and HOA Trustee shall provide the following to the purchaser (Appellant) at the HOA Foreclosure Sale:

> The content of the disclosure is based on what the seller is aware of at the time. If, after completion of the disclosure form, the seller discovers a new defect or notices that a previously disclosed condition has worsened, the seller must inform the purchaser, in writing, as soon as practicable after discovery of the condition, or before conveyance of the property.
>
> The buyer may not waive, and the seller may not require a buyer to waive, any of the requirements of the disclosure as a condition of sale or for any other purpose.
>
> ***In a sale or intended sale by foreclosure, the trustee*** and the beneficiary of the deed of trust ***shall provide, not later than the conveyance of the property to, or upon request from, the buyer:***
>
> > ● ***written notice of any defects of which the trustee or beneficiary is aware***.

(emphasis added). If the HOA and/or HOA Trustee fail to provide the SRPDF to the purchaser (Appellant) at the time of the HOA Foreclosure Sale, the Guide explains that:

> A Buyer may rescind the contract without penalty if he does not receive a fully and properly completed Seller's Real Property Disclosure form. If a Buyer closes a transaction without a completed form or if a known defect is not disclosed to a Buyer, the Buyer may be entitled to treble damages, unless the Buyer waives his rights under NRS 113.150(6).

Pursuant to NRS 113.130(4), the HOA and HOA Trustee are required to provide the information set forth in the SRPDF to Appellant at or before the HOA Foreclosure Sale, but no later than the drop of the gavel.

Appellant alleges that as "used in NRS 113, the term 'Defect' means a condition that materially affects the value or use of the residential property in an adverse manner." NRS 113.100. JA77. While Appellant contends that the "value" of the Property is impacted by it remaining encumbered by the First Deed of Trust, Appellant did not abandon the remainder of the NRS 113 claim, namely, that the "use" of the residential property could be impacted, which in turn could affect the "value."

Thus, while the Nevada Supreme Court Orders cited in the HOA's briefing notes that the "value" of the Property technically remains the same whether encumbered or not, to the extent that it differs from a construction defect or other physical impairment that could decrease the value by a fixed amount for repairs of same, it fails to account for the entirety of the definition of "Defect" set forth in NRS 113.100. If the First Deed of Trust remains an encumbrance on the Property,

Appellant, or any other buyer, cannot know 1) when the First Deed of Trust will be foreclosed and the junior interest eliminated, 2) the price to avert foreclosure under the First Deed of Trust (i.e. what the principal, interest, escrow, fees etc.. are under the First Deed of Trust), and 3) the use during that time period (i.e. short-term rental, long-term rental, sale, etc…). Thus, while the value of the Property as a *res* may remain unchanged by an encumbrance, NRS 113 sets forth "value or use" which implies a more extensive definition then merely the value of the Property as a collection of boards, pipes, and wires.

Here, Appellant set forth facts relevant to the disputed issues that the HOA and the HOA Trustee did not provide an SRPDF to Appellant at the HOA Foreclosure Sale nor did the HOA and HOA Trustee provide any information orally to Appellant about the Attempted Payment. JA0005-6. Therefore, the district court erred as a matter of law in dismissing Appellant's claim for relief for violation of NRS Chapter 113.

C. APPELLANT'S CLAIM FOR CONSPIRACY DOES NOT FAIL AS A MATTER OF LAW

In the HOA MTD, the district court held that Appellant's conspiracy claim fails as a matter of law, based on the HOA's argument that there is no duty to disclose the Attempted Payment by BANA/Lender. JA0223 and JA0239. However, the district court was incorrect.

This Court has recognized that co-conspirators, like the HOA and the HOA Trustee in this matter, are deemed to be each other's agents while acting in furtherance of the conspiracy. *Tricarichi v. Cooperative Rabobank, U.A.*, 440 P.3d 645, 653 (Nev. 2019) (observing in the context of a conspiracy claim for purposes of establishing personal jurisdiction, "co- conspirators are deemed to be each other's agents, the contacts that one co-conspirator made with a forum while acting in furtherance of the conspiracy may be attributed for jurisdictional purposes to the other co-conspirators."). Likewise, Appellant here contends in its Complaint – at least under any fair reading of it under the applicable standard set forth in NRCP 12(b)(5) – that the HOA and the HOA Trustee were co-conspirators of one another in failing or refusing to disclose the alleged tender/Attempted Payment to Appellant, which the HOA and the HOA Trustee had a duty to disclose, as discussed herein.

The actions of one co-conspirator, those of the HOA Trustee, are properly attributable to the other co-conspirator, the HOA, and vice versa. *See id*. As the HOA and the HOA Trustee are separate legal entities which can form a conspiracy, as alleged here by Appellant. *See, e.g., Nanopierce Techs. Inc. v. Depository Trust and Clearing Corp.,* 168 P.3d 73, 85 n.49 (Nev. 2007). Based on the foregoing, the HOA and HOA Trustee had a duty to disclose the Attempted Payment to Appellant, and their failure to do so for their financial gain was a conspiracy under Nevada law

that resulted in economic damages to Appellant. As such, the district court erred in dismissing this claim for relief.

X. CONCLUSION

Based upon the foregoing, the district court committed reversible error in multiple ways. Appellant respectfully requests that this Honorable Court reverse the orders granting the HOA MTD and MSJ and HOA Trustee 's joinders thereto.

Dated this July 20, 2021.

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

[a.] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

[a.] Proportionately spaced, has a typeface of 14 points or more, and contains 7,859 words; or

[b.] does not exceed 30 pages.

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3. Finally, I hereby certify that I have read this 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 NRAP 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. 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 this July 20, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on July 20, 2021, I caused a copy of **Appellant's Opening Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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