SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST, A NEVADA TRUST Appellant, vs. EL CAPITAN RANCH LANDSCAPE MAINTENANCE ASSOCIATION Respondents.	Supreme Court Case No.: 83404 Consolidated with Supreme Court Case No. 84037 District Court Case No. A-19-789674-C
EL CAPITAN RANCH LANDSCAPE MAINTEANCE ASSOCIATION Appellant, vs. DAISY TRUST, A NEVADA TRUST Respondents	

From the Eighth Judicial District Court
The Honorable Adriana Escobar

EL CAPITAN RANCH LANDSCAPE MAINTENANCE ASSOCIATION'S ANSWERING BRIEF AND 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(1), and must be disclosed:

El Capitan Ranch Landscape Maintenance Association ("Association") has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% of the stock of Association.

The attorneys who have appeared on behalf of the Association in this Court and in district court are:

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 4th day of April 2022.

LEACH KERN GRUCHOW ANDERSON SONG

/s/ T. Chase Pittsenbarger
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JURISDICTIONAL STATEMENT

This Court has jurisdiction the portion of the appeal regarding the District Court's award of summary judgment pursuant to Nevada Rules of Appellate Procedure ("NRAP") Rule 3A(b)(1).

On July 21, 2021, the district court entered its Order Granting the Association's Motion for Summary Judgment. On August 18, 2021, Appellant filed its Notice of Appeal of the district court's Order Granting the Association's Motion for Summary Judgment.

This Court has jurisdiction to hear the portion of the appeal regarding the District Court's denial of the Association's Motion for Attorney's Fees and Costs pursuant to appeal pursuant to Nevada Rules of Appellate Procedure ("NRAP") Rule 3A(b)(8).

On December 2, 2021, the district court entered its Order denying the Association's Motion for Attorney's Fees and Costs. (092-101). On December 20, 2021, the Association filed its Notice of Appeal of the district court's Order denying the Association's Motion for Attorney's Fees and Costs.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court err in awarding summary judgment in favor of the Association finding that NRS 116.31162 through NRS 116.31168 did not contain a duty to disclose an attempt to make a partial payment of the

Association's lien?

B. Did the District Court err in awarding summary judgment in favor of the Association on Appellant's claim for breach of good faith premised on NRS 116.1113, finding that Appellant failed to establish a duty set forth in NRS Chapter 116 that would implicate the good faith standard set forth in NRS 116.1113?

C. Did the District Court err in awarding summary judgment in favor of the Association on Appellant's claim for negligent/intentional misrepresentation finding that NRS 116.31162 through NRS 116.31168 did not contain a duty to disclose an attempt to make a partial payment of the Association's lien?

D. Did the District Court err in awarding summary judgment in favor of the Association on Appellant's claim for civil conspiracy finding that NRS 116.31162 through NRS 116.31168 did not contain a duty to disclose an attempt to make a partial payment of the Association's lien?

E. Whether the district court erred in holding that NRS 116.4117 does not allow for an award of attorney's fees.

STATEMENT OF FACTS

On September 5, 2012, Appellant purchased the property located at 8721 Country Pines Avenue, Las Vegas, Nevada 89129 (the "Property") for $3,700.00 at

an HOA foreclosure sale conducted pursuant to NRS 116.31162 through NRS 116.31168. (JA047). Appellant was the successful bidder at the foreclosure sale obtaining the Property by way of a foreclosure deed conveyed "without warranty expressed or implied [.]" *Id*.

On July 13, 2018, Appellant filed its Complaint asserting claims for misrepresentation, breach of duty of good faith under NRS 116.1113 and civil conspiracy. (JA1-JA012). On or about April 19, 2019, the case was assigned to the Court Annexed Arbitration Program. (JA032).

On February 24, 2020, the Arbitration was held. (JA050-56) On March 9, 2020, the Arbitrator issued his decision finding in favor of the Association. *Id.*

Despite the Arbitrator's decision and the numerous Supreme Court of Nevada Decisions rejecting Appellant's arguments, Appellant file a Request for Trial de Novo on April 6, 2020. On January 28, 2019, the district court entered its Order Granting the Association's Motion for Summary Judgment. (JA179-JA192).

On August 11, 2021, the Association filed its Motion for Attorney's Fees and Costs. (036-052). The Association argued that it was entitled to an award of attorney's fees and costs pursuant to NRS 116.4117 because it was the prevailing party in any action for damages for the failure to comply with any provision of NRS Chapter 116, i.e., Respondents claim for breach of the duty of good faith set forth in NRS 116.1113. *Id.*

On December 2, 2021, the District Court entered its Order erroneously finding that "[t]his lawsuit, for misrepresentation, civil conspiracy, and **NRS 116.1113 violations** . . . does not fit the types od actions covered by NRS 116.4117." (086-091) (emphasis added). The District Court, despite correctly stating that "Section 116.4117 allows a civil action to be brought "for a failure or refusal to comply with any provision of this chapter or the governing documents of an association" arrived at this conclusion by holding that "Plaintiff's claims do not arise from the HOA's assessments or operation of the HOA, so Section 116.4117 does not allow for an award of attorney's fees." *Id.* On December 20, 2021, the Association filed its Notice of Appeal of the district court's Order denying the Association's Motion for Attorney's Fees and Costs.

STANDARDS OF REVIEW

A. Standard of Review of the District Court's Order Granting Summary Judgment in Favor of the Association.

This Court reviews the district court's legal conclusions under NRCP 12(b)(5) *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Statutory interpretation is an issue of law that this Court reviews *de novo*. *Washoe Medical Center v. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe,* 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006).

B. Standard of Review of the District Court's Order Denying the Association's Motion for Attorney's Fees and Costs.

Questions of whether the district court had a statutory basis to award attorneys' fees will be reviewed de novo. *See, e.g., Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (Noting "when the attorney fees matter implicates questions of law, the proper review is de novo.").

SUMMARY OF ARGUMENT

Appellant's Complaint is premised on the allegations that NRS 116.31162 through NRS 116.31168 contained a duty to disclose an attempt to make a partial payment of the Association's lien at the time of the foreclosure sale— September 5, 2012. However, this Court has rejected this allegation on numerous occasions, holding, that at the time of the foreclosure sale at issue, NRS 116.31162 through NRS 116.31168 did not contain a duty to disclose an attempt to make a partial payment of the Association's lien. *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019); *Mann St. Tr. v. Elsinore Homeowners Ass'n*, 466 P.3d 540 (Nev. 2020); *Saticoy Bay, LLC Series 8320 Bermuda Beach v. South Shores Community Association*, No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay LLC 6408 Hillside Brook v. Mountain Gate Homeowners' Association*, No. 80134, 2020 WL 6129970, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Cmty. Ass'n*, No. 80039, 2020 WL 6129887, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 3123 Inlet*

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Furthermore, Appellant's claims are premised on the argument that the Association somehow warranted the title being conveyed at the foreclosure sale.

However, pursuant to NRS 116.31164 and the express language of the foreclosure deed, Appellant received a deed without warranty as to the title.

Additionally, Appellant failed to establish a contract or duty set forth in NRS Chapter 116 that would implicate the good faith standard set forth in NRS 116.1113. For these reason and others set forth below, the District Court did not err granting summary judgment in favor of the Association.

Finally, the District Court erred in holding that "[t]his lawsuit, for misrepresentation, civil conspiracy, and **NRS 116.1113 violations** . . . does not fit the types od actions covered by NRS 116.4117." (086-091) (emphasis added). NRS 116.4117 allows the district court to award fees to a prevailing party in an action alleging "a failure or refusal to comply with any provision of [NRS Chapter 116] or the governing documents of an association." Respondent brought its claim for breach of NRS 116.1113, a provision of NRS Chapter 116, against the Association. Because a claim for breach of NRS 116.1113 is a claim for a failure or refusal to comply with *any* provision of NRS Chapter 116, this action falls within the scope of NRS 116.4117.

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ARGUMENTS

A. The Court Did Not Err in Awarding Summary Judgment to the Association because there is no Duty under NRS Chapter 116 to Disclose the Existence or Not of a Purported Attempt to Make a Partial Payment Towards a Lien.

Appellant's claims purportedly arise from the non-existent duty in NRS Chapter 116 to disclose that an attempt was made to submit a partial payment towards the Association's lien. *See* Opening Brief. NRS 116.31162 through NRS 116.31168 details the procedures with which an HOA must comply to initiate and complete a foreclosure on its lien. Absent from NRS 116.31162 through NRS 116.31168 is any requirement to announce at the foreclosure sale that an attempt was made to submit a payment towards the Association's lien prior to the foreclosure sale. State foreclosure statutes should not be second guessed or usurped, otherwise "every piece of realty purchased at foreclosure" would be challenged and title would be clouded in contravention of the very policies underlying non-judicial foreclosure sales. *BFP v. Resolution Trust Company,* 511 U.S. 531, 539-40, 544, 144 S.Ct. 1757, 128 L.Ed.2d 556 (1994); *Golden v. Tomiyasu,* 79 Nev. 503, 387 P.2d 989, 997 (1969). Nevada has followed this same line, *i.e. Charmicor Inc. v. Bradshaw Finance Co.,* 550 P.2d 413, 92 Nev. 310 (1976) (Court did not abuse its discretion in denying an injunction of the foreclosure procedure under the theory that non-judicial foreclosure sales violate the principles of due process and equal protection). The Association was simply

not required pursuant to NRS 116.31162 through NRS 116.31168 to disclose an attempt was made to submit a partial payment towards the Association's lien.

There is no Nevada authority creating a separate common law duty to announce at the foreclosure sale that an attempt was made to submit a payment towards the Association's lien prior to the foreclosure sale. An HOA non-judicial foreclosure sale is a creature of statute. NRS Chapter 116 contains a comprehensive statutory scheme regulating non-judicial foreclosures. *See generally* NRS 116.3116-31168. The scope and nature of the Association's duties are exclusively defined by these governing statutes.

In *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019) this Court agreed. Specifically, this Court affirmed the district court's award of summary judgment in favor of the collection company holding that "[s]ummary judgment was appropriate on the negligent misrepresentation claim because Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose." *Id.* (citing *Halcrow, Inc. v. Eighth Judicial Dist. Court,* 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (providing the elements for a negligent misrepresentation claim); *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) ("[T]he suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation."(internal quotation marks omitted)). *Compare* NRS 116.31162(1)(b)(3)(II)(2017) (requiring

an HOA to disclose if tender of the superpriority portion of the lien has been made), *with* NRS 116.31162 (2013) (not requiring any such disclosure). There are simply no duties imposed upon the Association beyond those set forth in the applicable foreclosure statutes. As such, the Court did not err in awarding summary judgment to the Association.

Since *Noonan*, this Court has reaffirmed on numerous occasions its holding that the HOA "did not have a duty to proactively disclose whether a superpriority tender had been made. *Compare* NRS 116.31162(1)(b)(3)(II) (2017) (requiring an HOA to disclose if tender of the superpriority portion of the lien has been made), *with* NRS 116.31162 (2004) (not requiring any such disclosure)." 466 P.3d 540 (Nev. 2020). *See Mann St. Tr. v. Elsinore Homeowners Ass'n,* 466 P.3d 540 (Nev. 2020)*; Saticoy Bay, LLC Series 8320 Bermuda Beach v. South Shores Community Association,* No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay LLC 6408 Hillside Brook v. Mountain Gate Homeowners' Association,* No. 80134, 2020 WL 6129970, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Cmty. Ass'n,* No. 80039, 2020 WL 6129887, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Court Homeowners Ass'n, Inc.,* No. 80135, 2020 WL 6130912, at *1 (Nev. Oct. 16, 2020); *LN Management LLC Series 4980 Droubay v. Squire Village at Silver Springs Community Association,* No. 79035, 2020 WL 6131470,

at *1 (Nev. Oct. 16, 2020); *Cypress Manor Drive Trust v. The Foothills at Macdonald Ranch Master Association,* No. 78849, 2020 WL 6131467, at *1 (Nev. Oct. 16, 2020); *Tangiers Drive Trust v. The Foothills at Macdonald Ranch Master Association,* No. 78564, 2020 WL 6131435, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay LLC, Series 11339 Colinward v. Travata and Montage,* No. 80162, 2020 WL 6129987, at *1 (Nev. Oct. 16, 2020); *LN Management LLC Series 2216 Saxton Hill, v. Summit Hills Homeowners Association*, No. 80436, 2021 WL 620513, at *1 (Nev. Feb. 16, 2021); *LN Management LLC Series 5246 Ferrell, v. Treasures Landscape Maintenance Association*, No. 80437, 2021 WL 620930, at *1 (Nev. Feb. 16, 2021); *Saticoy Bay, LLC, Series 3237 Perching Bird, v. Aliante Master Association*, No. 80760, 2021 WL 620978, at *1 (Nev. Feb. 16, 2021); *Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n*, No. 80969, 2021 WL 620427, at *1 (Nev. Feb. 16, 2021). This Court has not waivered on this issue. There are simply no duties imposed upon the Association beyond those set forth in the applicable foreclosure statutes. As such, the Court did not err in awarding summary judgment to the Association.

Appellant's attempts to distinguish this case from the above cases cited by framing the issue as a duty to disclose after "reasonable inquiry" has already been rejected by this Court. *See* Opening Brief at 14. For example, in *Saticoy Bay, LLC Series 8320 Bermuda Beach*, this Court held "[a]lthough appellant's complaint

alleges generally that appellant had a 'pattern and practice' of 'attempt[ing] to ascertain whether anyone had attempted to or did tender any payment,' the complaint does not allege that appellant specifically asked respondents whether a superpriority tender had been made in this case, much less that respondents misrepresented that a superpriority tender had not been made." 2020 WL 6130913 fn. 2. Appellant's Complaint in this matter contains no such allegation. In fact, Appellant fails to even allege in the Complaint that it was its pattern and practice to inquire. (JA001-0011). As this Court held in *Saticoy Bay, LLC Series 8320 Bermuda Beach*, this is not enough. Accordingly, the Court did not err in awarding summary judgment to the Association.

B. The Court Did Not Err in Awarding Summary Judgment in Favor of the Association because Appellant Obtained a Foreclosure Deed Without Warranty.

Appellant believes it has a claim against the Association because Appellant did not obtain the Property free and clear of the deed of trust. (JA1-JA12); *see also* Opening Brief. However, Appellant's belief is irrelevant. Appellant acquired an interest in the Property via a deed without warranty. There was no guarantee the title received would be free and clear of encumbrance. *Id*. After an HOA's nonjudicial foreclosure sale, the person conducting the sale must "[m]ake, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's

owner to the unit…" NRS 116.31164(3)(a). By definition, a deed without warranty carries the risk of a defect in title. *See e.g.* NAC 375.100 ("Quitclaim deed" means a deed of conveyance operating by way of release, that is, intended to pass any title, interest or claim which the grantor may have in the premises, but not professing that the title is valid nor containing any warranty or covenants for title"); Black's Law Dictionary (10th ed. 2014) (Deed - Quitclaim Deed) ("A deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid. — Often shortened to quitclaim. — Also termed deed without covenants."); Robert Kratovil, *Real Estate Law* 49 (6th ed. 1974) ("A quitclaim deed purports to convey only the grantor's present interest in the land, if any, rather than the land itself. Since such a deed purports to convey whatever interest the grantor has at the time, its use excludes any implication that he has good title, or any title at all. Such a deed in no way obligates the grantor. If he has no interest, none will be conveyed. … A seller who knows that his title is bad or who does not know whether his title is good or bad usually uses a quitclaim deed in conveying.")

Therefore, a purchaser who takes title without warranty is presumed to take it with notice of all outstanding equities and interests. *See e.g.* 59 A.L.R. 632 (Originally published in 1929) ("In all cases … where a purchaser takes a quitclaim deed he must be presumed to take it with notice of all outstanding

equities and interests of which he could, by the exercise of any reasonable diligence, obtain notice from an examination of all the records affecting the title to the property … The very form of the deed indicates to him that the grantor has doubts concerning the title, and the deed itself is notice to him that he is getting only a doubtful title."); *Blachy v. Butcher*, 221 F.3d 896, 908 (6th Cir. 2000) ("one who accepts a quitclaim deed is conclusively presumed to have agreed to take the title subject to all risks as to defects and encumbrances [sic]." (quoting *Fla. E. Coast Rv Co. v. Patterson*, 593 So. 2d 575, 577 (Fla. Dist. Ct. App. 1992)). To hold a grantor liable for the title conveyed – when it has made no guarantee as to title – is contrary to the intended purpose of a deed without warranty.

The explicit language in the Foreclosure Deed made clear that there was no warranty of title, possession or encumbrances. Thus, the Court did not err in awarding summary judgment to the Association, as there were no warranties as to the title Appellant was obtaining at the foreclosure sale.

C. The Court Did Not Err in Awarding Summary Judgment in Favor of the Association as to Appellant's Claim for Intentional/Negligent Misrepresentation.

1. The Supreme Court of Nevada has expressly held that parties such as Appellant cannot maintain a claim for misrepresentation against an HOA in this exact factual scenario.

As set forth above, in *Noonan*, Appellants argued the district court erred in awarding summary judgment in favor of the collection company on Appellants'

claim for negligent misrepresentation. *Id.* Appellants' claim for misrepresentation was premised on the same allegations asserted by Appellant in this matter—that Hampton and Hampton failed to disclose an attempt to pay a portion of the Association's lien. *Id.* The Supreme Court of Nevada affirmed the lowers court's award of summary judgment in favor of the collection company holding that "[s]ummary judgment was appropriate on the negligent misrepresentation claim because Hampton neither made an affirmative false statement **nor omitted a material fact it was bound to disclose**." *Id.* (citing *Halcrow, Inc. v. Eighth Judicial Dist. Court,* 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (providing the elements for a negligent misrepresentation claim); *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) ("[T]he suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation."(internal quotation marks omitted)). *Compare* NRS 116.31162(1)(b)(3)(II)(2017) (requiring an HOA to disclose if tender of the superpriority portion of the lien has been made), *with* NRS 116.31162 (2013) (not requiring any such disclosure).) As such, Appellant's argument that there was a misrepresentation by omission fails because the Association did not "omit a material fact it was bound to disclose." *Id.*

Since *Noonan*, the Supreme Court of Nevada has rejected Plaintiff's claims of misrepresentation on numerous occasions. *See Saticoy Bay, LLC Series 8320*

Bermuda Beach, 2020 WL 6130913, at *1 ; *Saticoy Bay LLC 6408 Hillside Brook,* 2020 WL 6129970, at *1 ; *Saticoy Bay, LLC, Series 8920 El Diablo,* 2020 WL 6129887, at *1 ; *Saticoy Bay, LLC, Series 3123 Inlet Bay,* 2020 WL 6130912, at *1; *Saticoy Bay LLC, Series 11339 Colinward*, 2020 WL 6129987, at *1. Specifically, the Supreme Court of Nevada held "appellant's claims for misrepresentation and breach of NRS 116.1113 fail because respondent had no duty to proactively disclose whether a superpriority tender had been made." *Id.* Accordingly, the District Court did not err in awarding summary judgment to the Association.

2. Appellant's claim for negligent misrepresentation fails.

The Supreme Court of Nevada 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.

Barmettler v. Reno Air, Inc., 114 Nev. at 449, 956 P.2d at 1387 (emphasis added).

Appellant's claims purportedly arise from its acquisition of the Property at a foreclosure sale conducted pursuant to NRS Chapter 116. NRS Chapter 116 details the procedures with which an HOA must comply to initiate and complete a

foreclosure on its lien. With regard to the process for the actual foreclosure sale, the person conducting the sale may sell the unit at public auction to the **highest cash bidder**. *See* NRS 116.31164(2). "Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it." *Id*. "After the sale, the person conducting the sale shall: (a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without warranty** which conveys to the grantee all title of the unit's owner to the unit; (b) Deliver a copy of the deed to the Ombudsman; and (c) Apply the proceeds of the sale in the manner prescribed by law." *See* NRS 116.31164(3).

Here, Appellant alleges that the Association had a duty to disclose a purported attempt to make a partial payment towards the Association's lien and its failure to do so arises to the level of a conspiracy driven misrepresentation. (JA6-JA9). Appellant's claims in this regard fail for a number of reasons. As a preliminary matter, state foreclosure statutes should not be second guessed or usurped, otherwise "every piece of realty purchased at foreclosure" would be challenged and title would be clouded in contravention of the very policies underlying non-judicial foreclosure sales. *BFP v. Resolution Trust Company,* 511 U.S. 531, 539-40, 544, 144 S.Ct. 1757, 128 L.Ed.2d 556 (1994); *Golden v. Tomiyasu,* 79 Nev. 503, 387 P.2d 989, 997 (1969). Nevada has followed this same

line, *i.e. Charmicor Inc. v. Bradshaw Finance Co.,* 550 P.2d 413, 92 Nev. 310 (1976) (Court did not abuse its discretion in denying an injunction of the foreclosure procedure under the theory that non-judicial foreclosure sales violate the principles of due process and equal protection). The Association was simply not required under the law to disclose the existence, or not, of an alleged communication between an assigned beneficiary of a deed of trust and a debt collector. Nor was the Association required to notify potential buyers of this information. This should represent an end to this inquiry and Appellant's efforts to impose additional "duties" or "obligations" upon the Association that are not contemplated by statute should not be entertained by this Court.

Moreover, the Property was sold at public auction to the **highest cash bidder** as set forth in NRS 116.31164(2). "After the sale, the person conducting the sale shall: (a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed **without warranty**," which is precisely what occurred. *See* NRS 116.31164(3)(emphasis added.) Appellant's efforts to assert a breach of duty, or misrepresentation, in light of the plain language of a Foreclosure Deed conveyed without warranty lacks merit.

Furthermore, there is no Nevada authority creating a separate common law duty to disclose the existence, or not, of an alleged communication between an assigned beneficiary of a deed of trust and a debt collector. An HOA non-judicial

foreclosure sale is a creature of statute. NRS Chapter 116 contains a comprehensive statutory scheme regulating non-judicial foreclosures. *See generally* NRS 116.3116-31168. "[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." *Verdugo v. Target Corp.,* 770 F.3d 1203, 1219 (9th Cir. 2014).

The scope and nature of the Association's duties are exclusively defined by these governing statutes. There are no duties imposed upon the Association beyond those set forth in the applicable foreclosure statutes. Appellant has not alleged that the Association breached any requirement imposed by the foreclosure statutes.

Finally, Appellant cannot and did not, allege that the Association "supplied false information," and it would be nonsensical to give any credence to any assertion that Appellant somehow could have "justifiably relied" on any alleged false information.

3. Appellant's claim for intentional misrepresentation fails.

"Intentional misrepresentation is established by three factors: (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" *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007). "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.'" *Id*.

Appellant alleges that the Association had a duty to disclose the existence, or not, of an alleged communication between an assigned beneficiary of a deed of trust and a debt collector and its failure to do so arises to the level of intentional misrepresentation. (JA6-JA9). As explained above, NRS Chapter 116 does not require the Association to disclose the existence, or not, of an alleged communication between an assigned beneficiary of a deed of trust and a debt collector. The scope and nature of the Association's duties are exclusively defined by NRS Chapter 116. There are simply no duties imposed upon the Association beyond those set forth in NRS Chapter 116. As such, Appellant cannot establish that the Association made a purported false representation, nor can Appellant establish that the purported representation was made with knowledge that it was false. Additionally, Appellant cannot establish that the Association had the requisite intent. Finally, because Appellant received an unwarranted deed, it cannot establish that it was damaged. Accordingly, the District Court did not err in awarding summary judgment to the Association.

D. The Court Did Not Err in Awarding Summary Judgment in Favor of the Association as to Appellant's Claim for Breach of Good Faith.

As set forth in the Opening Brief, Appellant's claim for breach of good faith is premised on the duty of good faith set forth in NRS 116.1113. *See* Opening Brief at 9. NRS 116.1113 provides that, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." Therefore, in order for NRS 116.1113 to apply, Appellant must meet the condition precedent to the implication of good faith, which is establishing the existence of a contract, or a duty governed by NRS Chapter 116.

As set forth above, Appellant's dilatory claims purportedly arise from the non-existent duty in NRS Chapter 116 to disclose that an attempt was made to submit a partial payment towards the Association's lien prior to the foreclosure sale. *Id*. However, absent from NRS 116.31162 through NRS 116.31168 is any requirement to announce at the foreclosure sale that an attempt was made to submit a payment towards the Association's lien prior to the foreclosure sale. *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019); *Mann St. Tr. v. Elsinore Homeowners Ass'n,* 466 P.3d 540 (Nev. 2020)*; Saticoy Bay, LLC Series 8320 Bermuda Beach v. South Shores Community Association,* No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay LLC 6408 Hillside Brook v. Mountain Gate Homeowners' Association,* No. 80134, 2020 WL 6129970, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone*

Ranch Cmty. Ass'n, No. 80039, 2020 WL 6129887, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Court Homeowners Ass'n, Inc.,* No. 80135, 2020 WL 6130912, at *1 (Nev. Oct. 16, 2020); *LN Management LLC Series 4980 Droubay v. Squire Village at Silver Springs Community Association,* No. 79035, 2020 WL 6131470, at *1 (Nev. Oct. 16, 2020); *Cypress Manor Drive Trust v. The Foothills at Macdonald Ranch Master Association,* No. 78849, 2020 WL 6131467, at *1 (Nev. Oct. 16, 2020); *Tangiers Drive Trust v. The Foothills at Macdonald Ranch Master Association,* No. 78564, 2020 WL 6131435, at *1 (Nev. Oct. 16, 2020); *Saticoy Bay LLC, Series 11339 Colinward v. Travata and Montage,* No. 80162, 2020 WL 6129987, at *1 (Nev. Oct. 16, 2020). There are simply no duties imposed upon the Association beyond those set forth in the applicable foreclosure statutes. As such, the Court did not err in awarding summary judgment to the Association.

Appellant unsuccessfully attempts to argue that NRS 116.1113 provides for a general duty of good faith and a duty of candor. *See* Opening Brief at 10-13. However, the Opening fails to cite to any provision within NRS Chapter 116 or Nevada case law that supports its position. Rather, Appellant cites to non-persuasive case law from analyzing issues surrounding the duty of candor in corporate law, not HOA foreclosure law. *Id*. Appellant also argues that UCIOA § 1-113 cmt (1982) provides for a duty of candor. *Id.* at 11-12. However, UCIOA §

1-113 cmt (1982) does not contain the words "duty of candor." *Id.*

Appellant's reliance on NRS 116.1108 and the deed recitals to establish a duty of candor similarly fails. First, NRS 116.1108 is intended to supplement NRS Chapter 116 to the extent NRS Chapter 116 is silent. However, NRS Chapter 116 is not silent on the applicability of the duty of good faith. Rather, it expressly imposes a duty of good faith in relation to every "contract or duty governed by" NRS Chapter 116. *See* NRS 116.1113. Furthermore, Appellant does not dispute the Association's compliance with notice provisions set forth in NRS 116.31162 through NRS 116.31168 in conducting the foreclosure sale. Accordingly, Appellant's arguments regarding its reliance on the deed recitals are simply irrelevant, as recitals are nothing more than a confirmation that the foreclosure sale was conducted in compliance with notice provisions set forth in NRS 116.31162 through NRS 116.31168. *See* Opening Brief at 16 (citing *Nationstar*, 2017 Nev. App. Unpub, Lexis 229 at *3-4.).

Appellant's inability to find anything of precedential value to support its position is not surprising. Contrary to Appellant's arguments, NRS Chapter 116 does <u>not</u> set forth a general duty of good faith. Instead, NRS 116.1113 provides, "[e]very **<u>contract or duty</u>** governed by **<u>this chapter</u>** imposes an obligation of good faith in its performance or enforcement." As this Court is aware, when interpreting a statute: "where the language of a statute is plain and unambiguous,

and it's meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Pro-Max*, 16 P.3d at 1077 (interpreting NRS 106.240). Here, NRS 116.1113 is clear and unambiguous. NRS 116.1113 imposes an obligation of good faith only upon entities who are parties to a contract or bear a duty subject to Chapter 116 of the Nevada Revised Statutes. Because the Complaint and the Opposition fail to identify such a contract, or the duty under NRS 116 to disclose that an attempted partial payment was made of an amount less than what was owed, Appellant's arguments premised upon NRS 116.1113 (which substantiate that dismissal is required pursuant to NRS 11.190(3)(a)) fail. Accordingly, the District Court did not err in awarding summary judgment to the Association.

E. The Court Did Not Err in Awarding Summary Judgment in Favor of the Association as to Appellant's Claim for Civil Conspiracy.

Pursuant to Nevada law, "an actionable conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993) (citing *Collins v. Union Fed. Savings & Loan,* 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). Again, this claim is premised on the allegation that the Association had a duty to disclose a purported attempt to make a partial payment towards the Association's lien and the Association

conspired to not disclose the same. *See* Opening Brief at 19.

As explained above, NRS Chapter 116 does not require the Association to disclose a purported attempt to make a partial payment towards the Association's lien. The scope and nature of the Association's duties are exclusively defined by NRS Chapter 116. There are simply no duties imposed upon the Association beyond those set forth in NRS Chapter 116.

Furthermore, in Nevada, "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). Thus, where there is no "separate legal existence" between the two parties it is "impossible for a civil conspiracy to have occurred." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp*., 123 Nev. 362, 379 fn 49, 168 P.3d 73, 85 fn 49 (2007) (quoting *Laxalt v. McClatchy*, 622 F. Supp. 737, 745-46 (D. Nev. 1985) (granting motion to dismiss civil conspiracy claim where plaintiff alleged defendants were acting in the scope of their employment for co-defendant)).

Here, Appellant has alleged that Alessi & Koenig was acting as the Association's agent when the alleged conspiracy occurred. (JA1-JA11). Appellant has therefore admitted that the Association is legally incapable of conspiring with

Alessi & Koenig and it is impossible for a civil conspiracy to have occurred. As such, the District Court did not err in awarding summary judgment in favor of the Association.

F. The Court Erred in Holding that NRS 116.4117 does not Provide a Basis for an Award of Attorney's Fees and Costs.

The District Court erred in holding that "[t]his lawsuit, for misrepresentation, civil conspiracy, and **NRS 116.1113 violations** . . . does not fit the types of actions covered by NRS 116.4117." (086-091) (emphasis added). Pursuant to NRS 116.4117(6) "[t]he court may award reasonable attorney's fees to the prevailing party" in a civil action against any person "subject to this chapter" or in a civil action for damages arising from "a failure or refusal to comply with any provision of this chapter or the governing documents of an association." NRS 116.4117(1), (2), (6). Respondent's Complaint alleges the Association failed or refused to comply with certain provisions of NRS Chapter 116. Accordingly, the Association requests this Court reverse the District Court's order denying the Association's Motion for Attorney's Fees and Costs.

On February 19, 2019, Respondent filed its Complaint asserting numerous causes of action including, but not limited to, a claim for breach of the duty of good faith premised on NRS 116.1113. (JA001-012). Specifically, Respondent alleged that NRS 116.1113 contained a general duty of good faith that was purportedly breached by the Association by certain actions taken during the

Association's foreclosure sale. *Id.* Respondent does not and cannot dispute that this claim is entirely premised on a purported breach of NRS 116.1113, as its entire Opening Brief of its appeal of the District Court's decision granting summary judgment in favor of the Association is premised on the Association's purported breach of the duty of good faith found in NRS 116.1113. *See* Daisy Trust Opening Brief. For this reason, after the District Court granted summary judgment in favor of the Association, the Association promptly filed its Motion for Attorney's Fees and Costs arguing, in sum, that it was entitled to an award of attorney's fees and costs pursuant to NRS 116.4117(6).

On November 30, 2021, the District Court entered its Order erroneously finding that "[t]his lawsuit, for misrepresentation, civil conspiracy, and **NRS 116.1113 violations** . . . does not fit the types od actions covered by NRS 116.4117." (086-091) (emphasis added). The District Court, despite correctly stating that "Section 116.4117 allows a civil action to be brought "for a failure or refusal to comply with any provision of this chapter or the governing documents of an association" arrived at this conclusion by holding that "Plaintiff's claims do not arise from the HOA's assessments or operation of the HOA, so Section 116.4117 does not allow for an award of attorney's fees." *Id.*

This holding is clearly erroneous. NRS 116.4117 allows for the award of attorney's fees to the prevailing party in any action for damages for the failure to

comply with any provision of NRS Chapter 116. *See* NRS 116.4117(2), (6). Respondent's claim for breach or NRS 116.1113 is covered by the plain language of NRS 116.4117. NRS 116.1113 provides in whole: "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113. Accordingly, a claim for breach of NRS 116.1113 is a claim "for a failure or refusal to comply with any provision of [NRS Chapter 116] or the governing documents of an association." By definition, Respondent's claim against the Association under NRS 116.1113 was a claim for a failure or refusal to comply with a provision of NRS Chapter 116. As such, as the prevailing party, the Association is entitled to an award of reasonable attorney's fees.

This Court has upheld awards of attorney's fees pursuant to NRS 116.4117 in these exact types of cases. For example, in *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. Terra W. Collections Grp., LLC*, 491 P.3d 755 (Nev. App. 2021), Saticoy Bay (which is the same entity as Respondent under a different name) appealed an award of attorney's fees pursuant to NRS 116.4117 in which the district court rejected all of the arguments Respondent made in the instant actions. This Court affirmed the award of attorney's fees pursuant to NRS 116.4117 holding that " NRS 116.4117(6) nevertheless authorizes an award of fees to a defendant in a suit brought under the statute . . . [NRS 116.4117(6)] provides that "[t]he court may award reasonable attorney's fees to the prevailing party."

Therefore, this Court affirmed the award of attorney's fees and costs, as "the district court dismissed Saticoy Bay's claim for breach of the duty of good faith under NRS 116.1113—a claim brought under NRS 116.4117—on its merits." This Court reaffirmed this analysis and decision in *Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n*, 493 P.3d 381 (Nev. App. 2021).

For these reasons, the Association respectfully submits that the District Court erred when it denied the Association's Motion for Attorney's Fees and Costs on the basis that "[t]his lawsuit, for misrepresentation, civil conspiracy, and **NRS 116.1113 violations** . . . does not fit the types od actions covered by NRS 116.4117." (086-091)(emphasis added). Accordingly, the Association requests the Court reverse the District Court's Order and find that NRS 116.4117 applies to the instant action.

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CONCLUSION

For the reasons set forth above, the Association requests this Court affirm the District Court's order granting summary judgment in favor of the Association and reverse the District Court's order denying the Association's Motion for Attorney's Fees and Costs and find that NRS 116.4117 applies to the instant action.

DATED this 4th day of April, 2022.

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ATTORNEY CERTIFICATE

I 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 this brief has been prepared in a proportionally spaced typeface using 14 point, double-spaced Times New Roman font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 8,465 words.

I hereby certify that I have read this answering 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 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 4th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, April 4, 2022 I submitted the foregoing **EL CAPITAN RANCH LANDSCAPE MAINTEANANCE ASSOCIATION ASSOCIATION'S ANSWERING BRIEF AND OPENING BRIEF** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will be automatically sent to the following:

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