IN THE SUPREME COURT OF THE STATE OF NEVADA

RIVER GLIDER AVENUE TRUST,

Appellant,

vs.

HARBOR COVE HOMEOWNERS ASSOCIATION; and NEVADA ASSOCIATION SERVICES, INC.

Respondents.

Supreme Court Case No. 83689
District Court Case No. A819781

RESPONDENTS, HARBOR COVE HOMEOWNERS ASSOCIATION, AND NEVADA ASSOCIATION SERVICES, INC.'S ANSWERING BRIEF

KALEB D. ANDERSON, ESQ.
Nevada Bar No. 7582
DAVID T. OCHOA, ESQ.
Nevada Bar No. 10414
LIPSON NEILSON P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 – Telephone
(702) 382-1512 – Facsimile
dochoa@lipsonneilson.com
Attorneys for Respondent
Harbor Cove Homeowners Association

BRANDON E. WOOD, ESQ.
Nevada Bar No. 12900
In House Counsel for
Nevada Association Services, Inc.
6625 S. Valley View Blvd. Suite 300
Las Vegas, Nevada 89118
(702) 804-8885 - Telephone
(702) 804-8887- Facsimile
brandon@nas-inc.com
Attorney for Respondent
Nevada Association Services, Inc.

NRAP 26.1 DISCLOSURE STATEMENT

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 disqualifications or recusal.

Lipson Neilson P.C. states that it has no parent corporation and that no publicly held corporation owns 10% more of its stock.

Kaleb D. Anderson and David T. Ochoa are the attorneys who have appeared for Respondent in this case.

Respondent, Harbor Cove Homeowners Association is a non-profit corporation and has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED this 18th day of April, 2022

LIPSON NEILSON P.C.

/s/ David Ochoa

Kaleb D. Anderson, Esq. (Bar No. 7582)
David T. Ochoa, Esq. (Bar No. 10414)
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89148

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:

Rocktower Capital, Inc., a Nevada Corporation

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

Brandon E. Wood, (NV Bar No. 12900)
Nevada Association Services, Inc.
6625 S. Valley View Blvd., Ste. 300
Las Vegas, NV 89118
Attorney for Respondent Nevada Association Services, Inc.

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

DATED this 18th day of April, 2022.

NEVADA ASSOCIATION SERVICES, INC.

/s/ Brandon E. Wood
Brandon E. Wood
Nevada Bar No. 12900
6625 S. Valley View Blvd., Ste. 300
Las Vegas, NV 89118
Attorney for Respondent Nevada Association Services, Inc.

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE (HARBOR COVE) …… i

NRAP 26.1 DISCLOSURE (NAS) …… ii

TABLE OF CONTENTS ……... iii

TABLE OF AUTHORTIES ……v

ROUTING STATEMENT ……. 1

STATEMENT OF ISSUES PRESENTED …… 2

STATEMENT OF THE CASE …….. 3

STATEMENT OF THE FACTS ……... 4

STANDARD OF REVIEW ……..... 8

SUMMARY OF ARGUMENT ……. 8

ARGUMENT …… 10

THE DECISION OF DISTRICT COURT SHOULD BE AFFIRMED, BECAUSE THE HOA AND NAS DID NOT HAVE A DUTY TO MAKE AN ANNOUNCEMENT REGARDING TENDER AT THE FORECLOSURE SALE …… 10

1. At the Time of the Foreclosure Sale Nevada Had Not Adopted Within NRS 116 a Requirement That an HOA or Its Foreclosure Agent Had to Make an Announcement Regarding Superpriority…….. 10

2. The Court should affirm dismissal because the UCIOA and NRS 116 does not impute a duty of candor but instead requires parties to act in good faith and abide by the reasonable standards in the industry in which it operates…… 15

3. This Court should affirm dismissal because Appellant cannot now assert that it inquired of NAS whether any parties made any payments on the HOA lien prior to foreclosure…… 17

4. River Glider's Alleged Expectation of a Superpriority Sale is Irrelevant and Unreasonable……. 22

a. The HOA did not have a duty to announce it is a Homeowners Association with a potential superpriority lien……. 23

b. The HOA did not have an obligation to disclose it was foreclosing on a superpriority lien…….. 25

c. The HOA did not have an obligation to disclose the amount of the superpriority portion of the lien……. 25

d. The HOA did not have an obligation to disclose a tender of the superpriority lien……. 26

5. HOA could only provide a Non-Warranty Deed…… 28

6. River Glider Admits It Was Aware of the Publicly Recorded Notices and in This Case the Payment was Actually Publicly Recorded in this case given that there were two Notices of Sale…….. 31

7. The Decision on the NRS 113 and Conspiracy Claims should Be Affirmed as NRS 113 Does Not Apply and Does Not Create a Duty for an HOA to Disclose a Pre-Foreclosure Payment, and the HOA and NAS did not do anything unlawful. …… 34

CONCLUSION …… 35

CERTIFICATE OF COMPLIANCE …….. 37

CERTIFICATE OF SERVICE …… 39

TABLE OF AUTHORITIES

Cases

A Oro, LLC v. Ditech Financial LLC,
2019 WL 913129, 434 P.3d 929 (Nev. 2019) 2, 8, 9, 28, 29, 30

Bank of Am., N.A. v. Aspen Meadows, No. 3:16-cv-00413-MMD-WGC,
2019 WL 2437453 (D. Nev. June 10, 2019) 23

Bay v. Tripoly,
482 P.3d 699 (Nev. 2021) 2, 9, 12, 29, 30, 35

Berezovsky v. Moniz,
869 F.3d 923, 2017 U.S. App. LEXIS 16272, 2017 WL 3648519 31

Clark Cry. Sch. Dist. (CCSD) v. Bryan,
478 P.3d 344, 351 (Nev. 2020).....8

Consol. Generator-Nev., Inc. v. Cummins Engine Co.,
114 Nev. 1304, 971 P.2d 1251 (1998) 35

Cypress Manor Drive Tr. v. Foothills at MacDonald Ranch Master Assn.,
473 P.3d 1048 (Nev. 2020) 16

First Nat'l Bank v. Meyers,
40 Nev. 284, 150 P. 308, 161 P. 929 (1916) 33

Iridescent St. Tr. v. Montenegro Estates Landscape Maint. Assn.,
472 P.3d 1208 n. (Nev. 2020) 16

Landgraf v. USI Film Products,
114 S.Ct. 1483, 511 U.S. 244 (U.S.Tex.,1994) 11

LN Mgt. LLC Series 3732 v. Shadow Hills Master Assn.,
474 P.3d 333 (Nev. 2020).....16

MCM Capital Partners, L.L.C. v. Saticoy Bay L.L.C. Series 6684 Coronado Crest,
No. 2:15-CV-1154 JCM (GWF), 2018 WL 4113332, at *3 (D. Nev. Aug. 29, 2018) 23, 24, 31

Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon,
133 Nev. 740, 405 P.3d 641 (2017) 33

Nelson v. Heer,
123 Nev. 217, 163 P.3d 420 (2007) 10, 12, 29

Noonan v. Bayview Loan Servicing, LLC,
438 P.3d 335 (Nev. 2019) 2, 7, 8, 9, 10, 11, 12, 13, 14, 26, 30, 31, 35

Oaktree Capital Mgt., L.P. v. KPMG,
963 F. Supp. 2d 1064 (D. Nev. 2013) 19

PennyMac Corp. v. SFR Investments Pool 1, LLC,
2018 WL 4413612 (Nev., 2018) 14

Safron Capital Corp. v. Leadis Tech., Inc.,
274 Fed.Appx. 540 (9th Cir. 2008) 19

Sandpointe Apts. V. Eighth Jud. Dist. Ct.,
313 P.3d 849 (Nev. 2013) 11

Santa Margarita St. Tr. v. Paseo Del Rey Homeowners Assn.,
473 P.3d 1048 (Nev. 2020).....16

Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Ct. Homeowners Ass'n, Inc.,
473 P.3d 1046 (Nev. 2020) 1, 12, 21

Saticoy Bay LLC Series 3237 Perching Bird v. Aliante Master Ass'n,
480 P.3d 836 (Nev. 2021) 2, 12, 21

Saticoy Bay LLC Series 5413 Bristol Bend Ct. v. Nevada Ass'n Servs., Inc.,
475 P.3d 777 (Nev. 2020) 2

Saticoy Bay LLC Series 6212 Lumber River v. Pecos-Park Sunflower Homeowners' Ass'n,
495 P.3d 123 (Nev. 2021) 2, 12, 21

Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n,
484 P.3d 276 (Nev. 2021) 2, 7, 12, 21

Saticoy Bay, LLC Series 6132 Peggotty v. Copperfield Homeowners Ass'n,
498 P.3d 775 (Nev. 2021) 2, 12, 22

Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mountain Gate Homeowners' Ass'n,
473 P.3d 1046 (Nev. 2020) 1, 12, 21

Saticoy Bay, LLC, Series 3984 Meadow Foxtail Drive v. Sunrise Ridge Master Homeowners Ass'n,
478 P.3d 870 (Nev. 2021) 2, 12

Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Cmty. Ass'n,
473 P.3d 1046 (Nev. 2020) 1, 12, 20

Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Cmty. Ass'n,
473 P.3d 1045 (Nev. 2020) 1, 7, 12, 21, 34

Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n,
480 P.3d 266 (Nev. 2021) 2, 12, 21

Saticoy Bay, LLC, Series 11339 Colinward v. Travata & Montage at Summerlin Ctr. Homeowners' Ass'n,
474 P.3d 333 (Nev. 2020) 1, 9, 12, 13, 21, 22, 26, 30, 31

SFR Invest. Pool 1 v. U.S. Bank,
130 Nev. 742,334 P.3d 408 (2014) 15, 25, 26

SFR Invs, Pool 1, LLC v. First Horizon Home Loans, 134 Nev., Adv. Op. 4,
409 P.3d 891 (2018) 3

Vess v. Ciba-Geigy Corp. USA,
317 F .3d 1097 (9th Cir. 2003) 19

Statutes

NRS 113 ..... 3, 4, 7, 34, 35
NRS 116 ..... passim
NRS 116.1113 ..... 3, 4, 6, 9, 12, 13, 14, 15, 16, 20
NRS 116.1201 ..... 23, 24
NRS 116.3116 ..... 25, 26
NRS 116.31162 ..... 11, 22
NRS 116.31164 ..... 6, 11, 12, 13, 27, 29, 30, 31

Other Authorities

Dr. Alan D. Miller, Dr. Ronen Perry, Good Faith Performance
98 Iowa Law Review 690 (2012) 16

Rules

NRAP 17 1

ROUTING STATEMENT

Pursuant to NRAP 17, this case is neither required to be maintained by this Court, nor is it presumptively assigned to the Court of Appeals. Appellant, River Glider Avenue Trust ("River Glider" or "Appellant") states that this appeal should be retained by this Court because it "raises a principal issue involving the common law and statutory interpretation of NRS Chapter 116" pursuant to NRAP 17(a)(11). (Opening Brief p. vi). Importantly, the principal issue in this appeal – whether in 2012 HOAs and their agents owed a duty to purchasers at NRS 116 foreclosure sales to disclose if a lender had previously made a payment, or attempted to tender a payment, on the HOA lien – has already been addressed numerous times by this Court, and this Court has denied imposing such a duty on HOAs or their agents in numerous unpublished dispositions. *See,* e.g., *Saticoy Bay, LLC, Series 11339 Colinward v. Travata & Montage at Summerlin Ctr. Homeowners' Ass'n*, 474 P.3d 333 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Cmty. Ass'n*, 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mountain Gate Homeowners' Ass'n*, 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Ct. Homeowners Ass'n, Inc.*, 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Cmty. Ass'n*, 473 P.3d 1045 (Nev. 2020) (Unpublished

Disposition); *Saticoy Bay LLC Series 5413 Bristol Bend Ct. v. Nevada Ass'n Servs., Inc*., 475 P.3d 777 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 3984 Meadow Foxtail Drive v. Sunrise Ridge Master Homeowners Ass'n*, 478 P.3d 870 (Nev. 2021) (Unpublished Disposition); *Bay v. Tripoly*, 482 P.3d 699 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n*, 480 P.3d 266 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 3237 Perching Bird v. Aliante Master Ass'n*, 480 P.3d 836 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n*, 484 P.3d 276 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 6212 Lumber River v. Pecos-Park Sunflower Homeowners' Ass'n*, 495 P.3d 123 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay, LLC Series 6132 Peggotty v. Copperfield Homeowners Ass'n*, 498 P.3d 775 (Nev. 2021) (Unpublished Disposition); *A Oro, LLC v. Ditech Fin. LLC*, 434 P.3d 929 (Nev. 2019) (Unpublished Disposition); *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019) (Unpublished Disposition).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a homeowners' association or its agent have a duty under the pre-2015 version of the statute to disclose an attempted tender.

2. Whether the District Court correctly concluded there was an absence of competent evidence which would establish a phone call, or actual inquiry by River

Glider in regards to this foreclosure sale.

3. Whether NRS 116.1113 gives rise to extra-statutory duties in addition to provisions that otherwise already require strict compliance; does the obligation of good faith assert unwritten disclosure requirements.

4. Whether NRS 113 applies to an HOA foreclosure sale conducted under NRS 116, and if so whether the statute of limitations in NRS 113 had run.

STATEMENT OF THE CASE

This case primarily concerns whether HOAs and their agents owed a duty to purchasers at HOA foreclosure sales in 2012 to announce whether any lenders had previously attempted to pay off the HOA's superpriority lien. Appellant brought several claims against respondents Harbor Cove Homeowners Association (the "HOA") and Nevada Association Services, Inc. ("NAS") revolving around the foreclosure of a residential property on behalf of the HOA. IDAA Vol. I 001-017. Appellant (the current owner and related to the purchaser at that sale as explained in the fact section below) alleged that HOA or NAS did not announce that a payment on the property had been made impacting the superpriority portion of the lien. Under claims for misrepresentation, breach of NRS 116.1113, breach of NRS 113 and conspiracy, Appellant alleged that the HOA and NAS owed Appellant a duty to disclose tender and breached that duty when the HOA and NAS failed to make the disclosure at the foreclosure sale. *Id*.

The HOA joined by NAS filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, seeking dismissal of all Appellant's claims arguing primarily that the HOA and NAS owed no duty to Appellant to disclose any payments made on the HOA lien under NRS Chapters 116 or the common law. AA Vol. I 058-093 and AA Vol. I 094-096. Upon the initial motion to dismiss/summary judgment, the district court dismissed River Glider's claims for Conspiracy and Violation of NRS 113. AA Vol. II 309. The HOA later filed a renewed motion for summary judgment joined by NAS, on River Glider's remaining claims of misrepresentation and violation of duty of good faith under NRS 116.1113. AA Vol. II 173-255 and AA Vol. II 256-258. The lower court then granted the HOA and NAS summary judgment on the remaining misrepresentation and breach of NRS 116.1113 claims. AA Vol. II 309-321. The September 21, 2021 summary judgment Order addresses all the claims. *Id*. Appellant appealed the order. AA Vol. II 338-340.

STATEMENT OF THE FACTS

The case involves litigation related to real property located at 8112 Lake Hill Drive., Las Vegas, Nevada 89128 (the "Property"). AA Vol. I 001.

The Property is part of the Harbor Cove Homeowners Association. AA Vol. I 004.

The Prior Owner entered into a Deed of Trust to Purchase the Property in 2005. AA Vol I 003.

The HOA through NAS foreclosed on their lien for assessments with a non-judicial foreclosure sale that occurred on May 11, 2012. AA Vol. I 005.

Lake Hills Drive Trust was the purchaser at the sale with a bid amount of $5,500. AA Vol. I 005.

Iyad Haddad was the Trustee of Lake Hills Drive Trust, and alleged to transfer the Property to River Glider for estate planning purposes, and is the trustee of River Glider. AA Vol. I 007 and 147.

The HOA's foreclosure was previously litigated in case numbers A-13-683467-C and 76683, where River Glider sued Nationstar Mortgage, LLC, and Nationstar Mortgage LLC, had counterclaims against River Glider, the HOA, and NAS.

The District Court in case A-13-683467-C found River Glider took subject to the deed of trust, because the superpriority portion of the lien had been extinguished. River Glider unsuccessfully appealed that decision in case number 76683.

Most of the facts were adjudicated in prior litigation with the Lender in case number A-13-683467-C. AA Vol. I 081 and 88.

There were two notices of sale. AA Vol. I 83 -84

The first notice was recorded on March 31, 2011, and indicated a lien amount of $3,451.55. *Id.*, at 83.

The second notice of sale was recorded more than a year later on April 16, 2012, with a lien amount of $3,346.53. *Id.,* at 84.

In 2015, the Nevada Legislature amended NRS 116 to require an announcement regarding superpriority. *See* NRS 116.31164.

Upon the HOA's initial motion to dismiss/summary judgment joined by NAS, the district court dismissed River Glider's claims for Conspiracy and Violation of NRS 113. AA Vol. II 309.

The HOA later filed a renewed motion for summary judgment joined by NAS, on River Glider's remaining claims of misrepresentation and violation of duty of good faith under NRS 116.1113. *Id*.

The District Court here was presented with deposition testimony of Iyad Haddad, River Glider's trustee, from federal case 2:16-cv-03009-RFB-CWH, taken in 2017, where he stated he never inquired from the HOA or HOA's agent prior to a foreclosure sale whether there was an attempt to pay the super priority portion of the liens prior to the sale. AA Vol. II 178.

The District Court was also presented with the Declaration of Susan Moses from Nevada Association Services indicating that had NAS had not documented a

call from Iyad Haddad around the time of the sale, and NAS Phone Notes for the Property were also submitted. AA Vol. II 177-178

The District Court concluded the alleged misrepresentation was phased as one by omission as River Glider's trustee "alleged he called NAS prior to the nonjudicial foreclosure sale, but that NAS did not respond." AA Vol. II 313.

The District Court also concluded,

> in addition to the absence of competent evidence which would establish an actual phone call, on the alleged estimated dates of the alleged phone call, May 10 or May 11, 2012, NRS 116 did not require any extra-statutory disclosures beyond the publicly recorded nonjudicial foreclosure notices. *See Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019) (unpublished) (affirming summary judgment because there was no "affirmative false statement nor omitted a material fact it was bound to disclose." *See also Saticoy Bay v. Genevieve Court Homeowners Ass'n*, No. 80135, 2020 Nev. Unpub. LEXIS 1000, at *1 (Oct. 16, 2020) (no duty to disclose); *see also, Saticoy Bay v. Silverstone Ranch Cmty. Ass'n,* No. 80039, 2020 Nev. Unpub. LEXIS 993, at *1 (Oct. 16, 2020) (no duty to disclose, and NRS 113 does not apply to create such a disclosure); *see also, Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n*, 484 P.3d 276 (Nev. 2021) (same, issued April 16, 2021); *see also, Bay v. Tripoly*, 482 P.3d 699 (Nev. 2021) (same, issued March 26, 2021); *see also, Saticoy Bay LLC Series 3237 v. Aliante Master Ass'n*, 480 P.3d 836 (Nev. 2021) (same, issued February 16, 2021); *see also, Saticoy Bay v. Sunrise Ridge Master Homeowners Association*, 478 P.3d 870 (Nev. 2021) (same, issued January 15, 2021).

AA Vol. II 313.

STANDARD OF REVIEW

Appellant argues this appeal should receive a de novo review. (Opening Brief pp. 8-10). While this is correct, Appellant's statement is incomplete. When reviewing a district court's decision, this Court conducts a de novo review, but nevertheless gives "deference to a district court's factual findings that are supported by substantial evidence in the record." *Clark Cry. Sch. Dist. (CCSD) v. Bryan*, 478 P.3d 344, 351 (Nev. 2020). Here the district court found there was not competent evidence that River Glider's trustee actually called NAS when weighed against his own prior testimony that he did not make this type of inquiry and NAS's own phone records. Thus, no evidence of an actual inquiry was found but it is this alleged inquiry that River Glider highlights throughout its brief to attempt to distinguish from other similar Purchaser Lawsuits this Court has already reviewed. As such, the claim that Appellant inquired requiring the status of any attempted payment cannot be considered. This is an impermissible attempt to overcome a proper order granting summary judgment.

SUMMARY OF ARGUMENT

In *Noonan* and *A Oro* this Court reviewed similar Purchaser claims alleging that the HOA should announce superpriority status at a foreclosure sale. In those cases, the Court found that the HOA provides a non-warranty Deed and that NRS

116 was not amended to add a requirement to announce superpriority status until 2015.

In the evolution of these Purchaser's appellate cases, Purchasers have attempted to distinguish *Noonan* and *A Oro* by arguing those cases did not review NRS 116.1113's good faith provision. This argument is negated because a series of decisions although unpublished by this Court, including *Travata (2020)*, and *Tripoly* (2021) did review NRS 116.1113 claims along with misrepresentation claims to find similar to *Noonan* that no requirement to announce existed.

Here, because the sale was prior to the 2015 amendments to NRS 116 taking effect, and because the HOA is required to provide a non-warranty deed, and because good faith in NRS 116.1113 did not create a duty to announce tender, the HOA was not required to make an announcement at the foreclosure sale regarding superpriority status. Thus, similar to *Noonan,* the HOA and NAS did not make an "affirmative false statement nor omit[] a material fact [they] [were] bound to disclose." Further, there is no legal basis to support that inquiry by a Purchaser created a specific duty to announce tender, but more importantly there was no evidence of an inquiry by the Purchaser in this case. For those reasons the decision by the District Court should be affirmed.

ARGUMENT

THE DECISION OF DISTRICT COURT SHOULD BE AFFIRMED, BECAUSE THE HOA AND NAS DID NOT HAVE A DUTY TO MAKE AN ANNOUNCEMENT REGARDING TENDER AT THE FORECLOSURE SALE.

The District Court relied on *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019) (unpublished). This Court discussed In *Noonan* that the requirement for an HOA to make an announcement regarding the superpriority portion of the lien was not added to NRS 116 until after the foreclosure sale being reviewed. *Id*. Here, the sale also predates the amendment to the statute. This Court can end its analysis after finding the sale predated the amendment to the NRS 116, and affirm the decision.

1. At the Time of the Foreclosure Sale Nevada Had Not Adopted Within NRS 116 a Requirement That an HOA or Its Foreclosure Agent Had to Make an Announcement Regarding Superpriority.

Noonan, citing to *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007), establishes the rule that there was not a duty generally or good faith obligation to make an announcement regarding superpriority prior to NRS 116 being

amended and adding the requirement. The 2015 Legislature substantially revised NRS 116, *see* 2015 Nev. Stat., Ch. 266.[1] Under the current version of the statute, an HOA is required to record satisfaction of the super-priority lien at least 5 days before the date of sale. *See* Nev. Rev. Stat. § 116.31164(2).[2] The current version of the statute, however, is not controlling here. The version that applies is the version that was in effect at the time of the events giving rise to this action. *See* generally *Sandpointe Apts. V. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 853 (Nev. 2013) ("Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively."); *see also Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1487, 511 U.S. 244, 245 (U.S.Tex.,1994) ("The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.").

This Court has employed a similar analysis with respect to the 2013 version of NRS 116. *See Noonan. Noonan* states: "*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)." Here, the foreclosure sale occurred on May 11, 2012. AA Vol. I 005.

[1] *See* NRS 116.31164 in Addendum attached hereto at 24-27.
[2] *Id*.

Not until NRS 116 was amended in 2015 was a duty to announce tender added to the statute. *See* Amendment to NRS 116.31164. At the time of this sale, material facts related to superpriority is not something the HOA or NAS was bound in good faith to disclose. *See Noonan* and *Nelson v. Heer*.

River Glider ignores *Noonan's* reference to *Nelson v Heer* and that a material omission relates to a good faith obligation similar to NRS 116.1113's good faith obligation. River Glider also ignores a string of decisions issued in 2020 and 2021, prior to its brief here, which demonstrate that this Court dealt with the NRS 116.1113 claim similar to a misrepresentation claim.[3] In *Saticoy Bay, LLC Series 11339*

---

[3] *Saticoy Bay, LLC Series 11339 Colinward v. Travata & Montage at Summerlin Centre Homeowners' Ass'n*, 2020 Nev. Unpub. LEXIS 994, 474 P.3d 333, 2020 WL 6129987; *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Court Homeowners Ass'n*, 2020 Nev. Unpub. LEXIS 1000, 473 P.3d 1046, 2020 WL 6130912; *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Community Ass'n*, 2020 Nev. Unpub. LEXIS 993, 473 P.3d 1045, 2020 WL 6129887; *Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mountain Gate Homeowners' Ass'n*, 2020 Nev. Unpub. LEXIS 995, 473 P.3d 1046, 2020 WL 6129970; and *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. South Shores Community Association*, 2020 Nev. Unpub. LEXIS 1001, 473 P.3d 1046, 2020 WL 6130913. *Saticoy Bay, LLC, Series 3984 Meadow Foxtail Drive v. Sunrise Ridge Master Homeowners Ass'n*, 478 P.3d 870 (Nev. 2021) (Unpublished Disposition); *Bay v. Tripoly*, 482 P.3d 699 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n*, 480 P.3d 266 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 3237 Perching Bird v. Aliante Master Ass'n*, 480 P.3d 836 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n*, 484 P.3d 276 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 6212 Lumber River v. Pecos-Park Sunflower Homeowners' Ass'n*, 495 P.3d 123 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay, LLC Series 6132 Peggotty v. Copperfield Homeowners Ass'n*, 498 P.3d 775 (Nev. 2021) (Unpublished Disposition).

Colinward v. Travata & Montage at Summerlin Centre Homeowners' Ass'n, 2020 Nev. Unpub. LEXIS 994, 474 P.3d 333, 2020 WL 6129987 ("Travata"), this Court stated: "In particular, appellant's claims for misrepresentation and breach of NRS 116.1113 fail because respondents had no duty to proactively disclose whether a superpriority tender had been made."[4] It is true that NRS 116.1113 imposes a duty of good faith in the performance of every contract or duty governed by the statute. Nev. Rev. Stat. § 116.1113. However, the only "duties" owed to River Glider are outlined in sections 116.31162 through 116.31168. The HOA and NAS complied with these duties by complying with all notice and recording requirements set forth in NRS 116 as it existed at the time of the sale. The HOA or NAS were not required to make an announcement regarding superpriority. Further, the HOA was specifically prohibited from giving any purchaser at auction a so-called warranty deed. The only type of deed it could give to any purchaser was one made "without warranty" pursuant to NRS 116.31164(3)(a). As recent cases from this Court reveal, the NRS 116.1113 breach of good faith claim is dealt with similarly to misrepresentation by omission, and River Glider's attempt to create a new duty out of NRS 116.1113 and attempt to distinguish *Noonan* for not dealing with NRS 116.1113 fails.[5]

[4] Notably, this quote appears in multiple cases found in footnote 3.
[5] *See* footnote 3.

As discussed further in the next section, in an effort to circumvent the clear legislative intent, River Glider attempts to piggy-back the good-faith language of NRS116.1113 with Comments to Section 1-113 of the Uniform Common Interest Ownership Act ("UCIOA") and argue that the two statutes combined together imposed a responsibility upon the HOA to affirmatively disclose superpriority status to potential bidders to comply with a "candor" element of the good-faith duty. Implicit, however, in the application of these principles to the instant matter is the fact that NRS 116.1113 does not impose extra-statutory duties on an HOA; it only governs existing contracts and duties. *See* generally *PennyMac Corp. v. SFR Investments Pool 1, LLC*, 2018 WL 4413612, at *3 (Nev., 2018) (unpublished) ("Accordingly, we are not persuaded that the agent's failure to undertake the extra-statutory duty … amounts to unfairness sufficient to set aside the sale.").

There was not a requirement for the HOA to make an announcement regarding superpriority prior to the amendment, and thus no requirement or breach here. *Noonan*. The decisions from this Court addressing breach of NRS 116.1113 claims affirm that the district court was correct in relying on *Noonan* (which found no duty to announce superpriority status existed prior to the 2015 amendments taking effect), and this Court should Affirm.[6]

[6] *See* footnote 4.

2. The Court should affirm dismissal because the UCIOA and NRS 116 does not impute a duty of candor but instead requires parties to act in good faith and abide by the reasonable standards in the industry in which it operates.

Admittedly, NRS 116.1113 requires common-interest communities to perform their duties and enforce the governing documents in good faith. It states, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." *Id*. However, Appellant makes an attenuated argument to conclude this imposed on the HOA or NAS a duty of candor. Setting aside the fact the Nevada Supreme Court has never agreed, the comments to the UCIOA express that Appellant's conclusion misses the mark.

To properly understand this obligation, it is important to first consider its genesis from the UCIOA, including that the comments are persuasive. *See SFR Invest. Pool 1 v. U.S. Bank*, 130 Nev. 742,744,334 P.3d 408,411 (2014). Appellant ignores the comment to make its own arguments that this duty includes a duty of candor. When the actual comment is given its due weight, it expresses that duty merely requires that associations operate in good faith based on industry standards, not a duty of candor. Comment 1 to Article 1, Section 113 states the obligation of good faith means "observance of two standards: 'honesty in fact', and observance of reasonable standards of fair dealing." UCIOA Art. I,§ 113. The comment then

specifies the standard was taken from Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code ("UCC"). Section 2-103(i)(b) of the UCC states that "good faith in the case of merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." In other words, the obligation of good faith pursuant to common-interest communities means associations must act reasonably and in the same manner as most reasonable associations act. In other words, it is a subjective test based on the industry. *See, e.g*. Dr. Alan D. Miller, Dr. Ronen Perry, Good Faith Performance 98 Iowa Law Review 690, 719 (2012). Appellant did not allege the industry standard is to disclose. Therefore, because state law did not require disclosure and no one in the industry was doing so at the time, the UCIOA comment cannot be read to create an extra-statutory duty and this Court should affirm dismissal.

The Court has further rejected similar claims based on alleged violations of NRS 116.1113 in numerous other unpublished decisions. *See, Cypress Manor Drive Tr. v. Foothills at MacDonald Ranch Master Assn*., 473 P.3d 1048 (Nev. 2020); *Santa Margarita St. Tr. v. Paseo Del Rey Homeowners Assn*., 473 P.3d 1048 (Nev. 2020); *LN Mgt. LLC Series 3732 v. Shadow Hills Master Assn*., 474 P.3d 333 (Nev. 2020); *Iridescent St. Tr. v. Montenegro Estates Landscape Maint. Assn.*, 472 P.3d 1208 n. 1 (Nev. 2020).

While Appellant may take the position that these multitudinous decisions are not formally published and are not technically binding precedent, they arise between the same parties or principles, in the same context, and are certainly persuasive authority pursuant to NRAP 36(c)(3). The law is no different in this case than it is in all the others decided in the same context by this Court, and the HOA and NAS are aware of no opinions, published or unpublished, that actually permit any of Appellant's theories of liability in this case and this Court should affirm dismissal.

3. This Court should affirm dismissal because Appellant cannot now assert that it inquired of NAS whether any parties made any payments on the HOA lien prior to foreclosure

Appellant's Opening Brief suggests that the HOA or NAS failed to respond to Appellant after Appellant inquired regarding possible tenders. Nowhere in Appellant's Complaint does it ever allege that Appellant actually inquired of NAS whether or not any party had made any payments on the HOA lien prior to foreclosure. Both the Complaint and an inappropriate declaration from Eddie Haddad state that it was Mr. Haddad's practice and procedure to inquire if prior payments had been made. AA Vol. II 285. This declaration was in response to the HOA's renewed Motion for Summary Judgment; however, the fact remains that there are no allegations in either the Complaint or in Haddad's declaration that Appellant actually asked NAS (or the HOA) about possible tenders in this present

case. *Id*.

The District Court here weighed the allegation of a policy and procedure against both deposition testimony of Iyad Haddad, River Glider's trustee, from federal case 2:16-cv-03009-RFB-CWH, taken in 2017, where he stated he never inquired from the HOA or HOA's agent prior to a foreclosure sale whether there was an attempt to pay the super priority portion of the liens prior to the sale, (AA Vol. II 178), the Declaration of Susan Moses from Nevada Association Services indicating that had NAS had not documented a call from Iyad Haddad around the time of the sale, and NAS Phone Notes for the Property. AA Vol. II 177-178.[7]

The District Court concluded there was an absence of competent evidence which would establish a phone call, or actual inquiry by River Glider on the alleged estimated dates of the alleged phone call, May 10 or May 11, 2012. AA Vol. II 313. Yet, River Glider argues the duty to disclose arose "**following Mr. Haddad's inquiry**" (emphasis in the original). Compare the Court Order at AA Vol. II 313, with Appellant's argument in its opening brief at 13 ("the information known to the HOA and the HOA Trustee should be disclosed to the Purchaser/ Appellant **following Mr. Haddad's Inquiry**, as set forth in the Declaration."). *See also*

[7] *See also* River Glider's Written Discovery Responses at AA Vol. II 215 – 235, NAS Phone Notes and Declaration of Susan Moses at AA Vol. II 237 -241, Deposition of Eddie Haddad from case 2:16-cv-03009 at AA Vol. II 243-249, and Trial Transcript of Eddie Haddad from case A707392 at AA Vol. II 251-255.

Opening Brief at 16 ("upon reasonable inquiry by the Purchaser/ Appellant, the HOA and the HOA Trustee had an absolute duty to disclose the Attempted Payment.").

Appellant's current attempts to frame the appeal as though Appellant inquired of NAS or the HOA whether there was a tender are especially troubling because Appellant's claims sound in fraud and such allegations are required to be pled with specificity, which they are not.

Under NRCP 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." These particularity requirements apply to all cases "sounding in fraud," where the party alleges a "unified course of fraudulent conduct." *Oaktree Capital Mgt., L.P. v. KPMG*, 963 F. Supp. 2d 1064, 1075 (D. Nev. 2013) (quoting *Safron Capital Corp. v. Leadis Tech., Inc*., 274 Fed.Appx. 540, 541 (9th Cir. 2008) (unpublished)). In order to plead with particularity, the pleading party must include "'the who, what, when, where, and how' of the misconduct alleged." *Id*. (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F .3d 1097, 1106 (9th Cir. 2003)).

Here, all of Appellant's claims certainly sound in fraud. Appellant directly brings a claim for misrepresentation, (AA Vol. I 008), and all remaining claims are based on the same conduct alleged from the claim for misrepresentation. AA Vol. I 012-014. Appellant alleges that NAS and the HOA conspired together to hide facts

from the purchasers at foreclosure. AA Vol. I 013. Therefore, the facts of the case must be pled with specificity including when and where Appellant inquired whether a tender had been made, who they spoke with, as well as NAS' response. Appellant never makes any such specific allegations, even in Mr. Haddad's declaration. Mr. Haddad does not state that he necessarily made an inquiry in this case, does not state when that inquiry occurred, and does not state whether or not NAS responded to the inquiry. Instead, Mr. Haddad states that it was his "practice and procedure . . . [to] attempt to ascertain whether anyone had attempted or did tender any payment regarding the [HOA] lien." AA Vol. II 285. The specificity required by the heightened fraud pleading standard would have been crucial to the HOA and NAS' response before the lower court, and since it is not pled at all, let alone with the required specificity, the Court should disregard any evidence of inquiry.

This Court has already explicitly rejected identical claims to Appellant's on multiple occasions. For example, in *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Community Assn*., 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition), the Court upheld the dismissal of claims identical to Appellant's claims brought under nearly identical facts. The Court in that case found that the purchaser's claims for misrepresentation and breach of NRS 116.1113 for failure to disclose a superpriority tender "fail because [the HOA] had no duty to proactively disclose whether a superpriority tender had been made." *Id*. (emphasis added). The

Court footnoted:

> Although 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**.

Id. (emphasis added). This Court has further ruled on these very issues in multiple cases. *See Saticoy Bay, LLC, Series 11339 Colinward v. Travata & Montage at Summerlin Ctr. Homeowners' Ass'n,* 474 P.3d 333 (Nev. 2020) (Unpublished Disposition); (Unpublished Disposition); *Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mountain Gate Homeowners' Ass'n,* 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Ct. Homeowners Ass'n, Inc.*, 473 P.3d 1046 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Cmty. Ass'n*, 473 P.3d 1045 (Nev. 2020) (Unpublished Disposition); *Saticoy Bay, LLC, Series 9157 Desirable v. Tapestry at Town Ctr. Homeowners Ass'n*, 480 P.3d 266 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 3237 Perching Bird v. Aliante Master Ass'n*, 480 P.3d 836 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n*, 484 P.3d 276 (Nev. 2021) (Unpublished Disposition); *Saticoy Bay LLC Series 6212 Lumber River v. Pecos-Park Sunflower Homeowners' Ass'n*, 495 P.3d 123 (Nev. 2021)

(Unpublished Disposition); *Saticoy Bay, LLC Series 6132 Peggotty v. Copperfield Homeowners Association et. al*, No. 82349, 498 P.3d 775 (Nev. 2021) (Unpublished Disposition).

Because all of Appellant's causes of action rely on its made-up duty to disclose, all Appellant's causes of action fail. Accordingly, this Court should affirm the District Court's order of dismissal.

4. River Glider's Alleged Expectation of a Superpriority Sale is Irrelevant and Unreasonable.

River Glider argues it had a reasonable expectation of a superpriority foreclosure when the sale was performed pursuant to NRS 116.31162 through 116.31168 and it relied on recitals in the foreclosure deed. Opening Brief at 17-18. In *Travata* 474 P.3d 333 (unpublished), this Court notes: "Relatedly, although appellant contends that it relied upon recitals in the foreclosure deed, the recitals made no representation one way or the other whether a superpriority tender had been made." Similarly, here, the HOA did not make a representation that it would be a superpriority sale.[8] River Glider asks the Court to believe the misconception that it was entitled to a superpriority sale. However, the HOA has no such duty to provide a superpriority sale. For a number of reasons, the foreclosure sale may be a

[8] *See* Opening Brief generally, River Glider only argues the recitals say pursuant to NRS 116 (which does not guarantee superpriority) and no other representation is alleged.

subpriority sale. The reality is that the HOA: a) had no obligation to disclose it was an HOA with a superpriority lien; b) had no obligation to disclose it was foreclosing on a superpriority lien; c) had no obligation to disclose the amount of the superpriority portion of the lien; d) had no obligation to disclose a tender of the superpriority lien.

a. The HOA did not have a duty to announce it is a Homeowners Association with a potential superpriority lien.

Not every Nevada Homeowners Association has a superpriority lien. *See MCM Capital Partners, L.L.C. v. Saticoy Bay L.L.C. Series 6684 Coronado Crest*, No. 2:15-CV-1154 JCM (GWF), 2018 WL 4113332, at *3 (D. Nev. Aug. 29, 2018) (finding limited-purpose associations may be exempt from many portions of NRS 116, including the superpriority portion, thus leaving them without a split lien and only a subpriority lien), *see also Bank of Am., N.A. v. Aspen Meadows*, No. 3:16-cv-00413-MMD-WGC, 2019 WL 2437453, at *3 (D. Nev. June 10, 2019) (finding the HOA "never had a superpriority lien on the Property"). Limited-purpose associations are potentially without a superpriority lien. *Id.* Nev. Rev. State § 116.1201 allows for the creation of limited-purpose associations. Under *MCM Capital Partners* a limited-purpose association that is exempt from the superpriority portion of NRS 116 (which is NRS 116.3116(2)) would not have a

superpriority portion to is lien. *Id*., at 4. NAC 116.090 defines limited-purpose associations. It states:

> **NAC 116.090 "Limited-purpose association" interpreted.**
>
> 1. An association is a limited-purpose association pursuant to subparagraph (1) of paragraph (a) of subsection 6 of NRS 116.1201 if:
>
> (a) The association has been created for the sole purpose of maintaining the common elements consisting of landscaping, public lighting or security walls, or trails, parks and open space;
>
> (b) **The declaration states** that the association has been created as a landscape maintenance association; and
>
> I **The declaration expressly prohibits**:
>
> (1) The association, and not a unit's owner, from enforcing a use restriction against a unit's owner;
>
> (2) The association from adopting any rules or regulations concerning the enforcement of a use restriction against a unit's owner; and
>
> (3) The imposition of a fine or any other penalty against a unit's owner for a violation of a use restriction.

(emphasis added). According to NAC 116.090, whether a Homeowners Association is also a limited-purpose association (allowed by NRS 116) is dependent on what its declaration/CC&Rs state. As *MCM Capital Partners* points out, a limited-purpose association can foreclosure, it just does so on what is only a subpriority lien. Both a Homeowners Association potentially with a superpriority portion of lien, and a limited-purpose association without a superpriority can foreclosure and neither are required to declare which they are in their foreclosure notices.

b. The HOA did not have an obligation to disclose it was foreclosing on a superpriority lien

As an HOA does not have to disclose if it is one capable of having a superpriority lien or is a limited-purpose association that is not capable of having a superpriority lien, there is similarly no requirement to state whether the total delinquency being foreclosed on contains a superpriority portion. *See* NRS 116.31162(1)I (2013) (stating that the total amount of the HOA lien "I[es] costs, fees and expenses incident to its enforcement"); *SFR Invs. Pool 1, L.L.C. v. U.S. Bank, N.A.*, 130 Nev. 742, 757 (2014) ("[I]t [i]s appropriate to state the total amount of the lien [in the requisite notices]."). The requirement under NRS 116 is to disclose the total delinquency all of which could be subpriority, and one reason for it being subpriority, may be that the HOA foreclosing never had a superpriority to begin with.

c. The HOA did not have an obligation to disclose the amount of the superpriority portion of the lien.

Similar to not having to disclose if there is a superpriority portion at all, an HOA does not have to provide the superpriority amount if there is one. Under NRS 116.3116(2) (at the time) the notice requirement was only for the total delinquency, not a breakdown of a superpriority portion of the lien. *See* NRS 116.31162(1)I (2013) (stating that the total amount of the HOA lien "I[es] costs, fees and expenses

incident to its enforcement"); *SFR Invs. Pool 1,* 130 Nev. at 757, 334 P.3d at 418 ("[I]t [i]s appropriate to state the total amount of the lien [in the requisite notices]."). The requirement under NRS 116 at the time was to disclose the total delinquency, all of which could be subpriority for various reasons, including that the HOA foreclosing never had a superpriority lien to begin with.

d. The HOA did not have an obligation to disclose a tender of the superpriority lien.

In *Noonan*, 438 P.3d 335 (unpublished), and *Travata,* 474 P.3d 333 (unpublished), 2020 WL 6129987 the Foreclosure Purchaser argued that the foreclosure agent had a duty to disclose a tender. This Court found no such duty exists, stating:

> *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**).

Therefore, the *Noonan* and *Travata* cases demonstrate that there was not a duty to disclose tender (make an announcement regarding superpriority) until the statute was amended to specify such a disclosure.

River Glider wants the Court to believe it had a reasonable expectation that the deed of trust would be extinguished by the HOA foreclosure sale. River Glider argues it "possessed a good faith belief that the HOA and/or the HOA Trustee's actions taken in the ordinary course of business had been followed, and that the

HOA Foreclosure Sale was fair and regular." Opening Brief at 18-19. What River Glider is implying in that statement is that an ordinary fair and regular sale should result in a superpriority sale. However, there is no basis for this to be the reasonable default expectation of HOA foreclosure purchasers or specifically River Glider's expectation at the time of this sale. HOA foreclosure purchasers are not paying fair market value; they don't know if the homeowners association is even capable of having a superpriority lien unless they understand limited-purpose associations and researched the homeowner's association's CC&Rs; they don't know if the total lien has a superpriority amount at all; if it does, they do not know what portion of it is superpriority; and they do not know if that portion has been tendered. Additionally, the public cannot know if a recorded servicer is actually representing a federal interest and there is a potential HERA protection of a federal interest. It simply is not a reasonable default expectation to assume the deed of trust is going to be extinguished, and the foreclosure sale prices reflected that it was not the default expectation. As explained below, under NRS 116.31164(3) an HOA cannot warranty an expectation that a superpriority lien will extinguish the deed of trust.

River Glider's argument that the lack of superpriority sale is evidence of "the HOA's failure to comply with their duties under NRS 116", is a stretch of this misconception that they believed they were entitled to a superpriority sale. It

ignores the reality of the period that is now common knowledge that some investors believed it was a good investment to pick up properties at HOA foreclosures for a few thousand dollars and rent them out until the Lender took action and to take the chance that it was a superpriority sale without actually knowing if it was. River Glider's strained argument starts that "[It] had no reason to question the recitals contained in the HOA Foreclosure Deed and recorded documents." AA Vol. I 177. What River Glider is arguing is that the representation of NRS 116 foreclosure automatically asserts that the expectation should be the deed of trust is going to be extinguished. As discussed at length above, that is not the reasonable interpretation of "conducted under NRS 116." As argued, NRS 116 allows for limited-purpose associations, and does not require the disclosures previously discussed. The notices were primarily for the homeowner that was in collections, not the Lender or the foreclosure purchaser, and therefore they dealt with the total delinquency and not the existence of superpriority.

5. HOA could only provide a Non-Warranty Deed.

In *A Oro, LLC v. Ditech Financial LLC*, 2019 WL 913129, 434 P.3d 929 (Nev. 2019) (unpublished), this Court noted, "that appellant has provided no legal support for the **unorthodox proposition** that the winning bidder at a foreclosure sale can bring a fraud claim against the auctioneer when the auctioneer's foreclosure notices have disclaimed any warranties as to the title being conveyed." *Id*. at n.2 (emphasis

added). In *A Oro*, this Court concluded that the district court correctly granted summary judgment for the respondent homeowners association on the appellant foreclosure purchaser's fraudulent nondisclosure claim. In upholding the district court decision, this Court determined ("among other reasons") that "there [was] no evidence that [the association] intended to induce appellant into placing the winning bid at the foreclosure sale, as [the association] was unaware of appellant's assumptions regarding the legal effect of the sale." *See id.* (emphasis added) (citing *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007)) (setting forth the elements of a fraudulent nondisclosure claim).

For various reasons discussed in section 3 above an HOA foreclosure could lead to a sub-priority sale. NRS 116 allows for super-priority sales but does not require super-priority sales. As this Court's opinion in *A ORO* points out, the assumption of a super-priority sale extinguishing the deed of trust, is not the default position, or the Court could have stated the HOA in *A ORO* should have known all the purchasers believed it was free and clear of the deed of trust because it was an NRS 116 sale, as River Glider alleges here. As in *A ORO*, there is no explanation here on how or why the HOA or its agent would have known that was River Glider's assumption. What the HOA's agent would have been aware of is that the law requires deeds without warranty. NRS 116.31164(3)(a).

It is not disputed by River Glider that the Foreclosure Deed specifically indicates that the Property was sold "without warranty expressed or implied" as required by NRS 116.31164(3)(a) as it existed at the time of the sale. *See* Nev. Rev. Stat. § 116.31164(3)(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;"). *See* AA Vol. I 121.

Under the weight of this Court's decisions in *Noonan, A Oro*, and now *Travata and Tripoly*, as well as the express provisions of NRS 116.31164(3)(a), River Glider is unable to assert as a matter of law that the HOA or its agent misled it by not disclosing superpriority status. There was no intent to induce reliance by the HOA. The HOA could not have been aware how River Glider 's representative at the sale would interpret the omission, especially given that they had no duty to provide potential purchasers this information. *See A Oro, Travata and Tripoly*.

River Glider's allegation amounts to an assertion that the HOA is obligated to pass superior title, and it is damaged for not receiving superior title. Bidding at an HOA foreclosure sale on properties often unseen by the Purchaser is a risky investment. Property interests at the sale transfer on a non-warranty Deed. *See* Nev. Rev. Stat. § 116.31164(3)(a) ("Make, execute and, after payment is made, deliver to the purchaser, or his successor or assign, **a deed without warranty** which conveys to the grantee all title of the unit's owner to the unit;"). This risk is often reflected

in a lower foreclosure sale price when compared to fair market value. The HOA had no obligation to pass superior title, when it foreclosed on its lien. *Id*. As the HOA lien can be considered split, the HOA had no obligation to foreclose on the superpriority portion. *See* NRS Chapter 116, generally and *See Berezovsky v. Moniz*, 869 F.3d 923, 925, 2017 U.S. App. LEXIS 16272, 2017 WL 3648519. River Glider should have been well aware that a subpriority sale was a very real possibility for a variety of reasons. The HOA was not under an obligation to check off the variety of reasons it could be a subpriority sale, and by statute could not warranty a superpriority sale that extinguished a first deed of trust.[9]

6. River Glider Admits It Was Aware of the Publicly Recorded Notices and in This Case the Payment was Actually Publicly Recorded in this case given that there were two Notices of Sale.

The body of persuasive authority against River Glider's argument in this appeal, has it and similar Purchasers grasping at straws to distinguish their case from that authority. Respondent is not admitting there are a set of circumstances where this Court should validate this argument by Purchasers. However, if such a set of circumstances exists, this case is not it. Given the undisputed facts that this was a homeowner payment not a rejected tender by the holder of the deed of trust, and

[9] *See MCM Capital Partners, Berezovsky, Noonan, Travata, and see* Nev. Rev. Stat. § 116.31164(3)(a).

given that there were two notices of sale, the publicly recorded notices actually demonstrate the applied payment through the reduction of the delinquency from the first notice of sale to the second notice of sale.

In this case, the amount of the delinquency indicated in the second notice of sale ***decreased*** from $3,452.55 to $3,346.53, *which is less than the amount indicated in the first notice of sale*. *See* AA Vol. I 083-084. The inescapable, unavoidable, undeniable conclusion is that the reduced delinquency amount indicated in the second notice of sale was because a payment or payments had been made by someone.

River Glider's trustee alleges he would not have bid at the sale had he known of a payment prior to the sale but also acknowledges he would have been aware of the notices. *See* Opening Brief at 19 and 18 respectively. This speculative statement that he would not have bid on its own did not create an issue of fact for trial for the reasons discussed above, specifically the HOA was not obliged to disclose tender or assess his beliefs. Further, the allegation appears to be false because he should have known of the payment here under the facts specific to this case where you have the two notices of sale. It is undisputed that both notices of sale were publicly recorded, and therefore actually reviewed by River Glider in this case by its own admission. Opening Brief at 19. To the extent River Glider argues there was no disclosure of the payment by the HOA or NAS, the recording of the two notices of sale, imparts

notice to the entire world, and has for more than 100 years in Nevada. *See First Nat'l Bank v. Meyers*, 40 Nev. 284, 293, 150 P. 308, 931, 161 P. 929, 931 (1916) (recording gives notice to the world). *See also, SFR Invs, Pool 1, LLC v. First Horizon Home Loans*, 134 Nev., Adv. Op. 4, 409 P.3d 891, 894 (2018) (observing that the purpose of Nevada's recording statutes is to "'impart notice to all persons of the contents thereof" and that "'subsequent purchasers and mortgagees shall be deemed to purchase and take with notice"').

Therefore, if River Glider claims it didn't have "notice" about the payment for the sequentially decreasing amounts in the notices of sale, it has to be because its' trustee didn't bother to look at the publicly recorded notices of sale. But its' trustee testified, "I personally do all the research on any and all properties that I purchased at the HOA Foreclosure Sales." Declaration of Haddad, AA Vol. II 290.

Whether or not River Glider's trustee looked at the notices, does not create any extra-statutory disclosure duties on the HOA or NAS. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 744, 405 P.3d 641, 645 (2017) ("the relevant statutory scheme curtails an HOA's ability to dictate the method, manner, time, place, and terms of its foreclosure sale, an HOA has little autonomy in taking extra-statutory efforts to increase the winning bid at the sale").

Accordingly, the speculative statement is irrelevant and/or false.

7. The Decision on the NRS 113 and Conspiracy Claims should Be Affirmed as NRS 113 Does Not Apply and Does Not Create a Duty for an HOA to Disclose a Pre-Foreclosure Payment, and the HOA and NAS did not do anything unlawful.

NRS 113 does not apply to a nonjudicial foreclosure under NRS 116, nor does NRS 113 require disclosure of pre-foreclosure payments. *See Saticoy Bay v. Silverstone Ranch Cmty. Ass'n*, No. 80039, 2020 Nev. Unpub. LEXIS 993, at *2 (Oct. 16, 2020) (NRS 113 requires disclosure of "defects" not "superpriority tenders"). As noted *ad nauseam* above, an HOA's duty in a nonjudicial foreclosure sale is to comply with NRS 116. NRS 116 does not incorporate or reference NRS 113, nor does NRS 113 incorporate or reference NRS 116. Injecting the requirements of NRS 113 makes no sense in a nonjudicial foreclosure sale context.

Additionally, even if NRS 113 applies, (which it does not) the claim is time-barred because NRS 113 sets forth a one or two year statute of limitation. *See* NRS 113.150(4): "[a]n action to enforce the provisions of this subsection must be commenced not later than 1 year after the purchaser discovers or reasonably should have discovered the defect or 2 years after the conveyance of the property to the purchaser, whichever occurs later."

In this case, based on the date of the conveyance, the nonjudicial foreclosure occurred on May 11, 2012. AA Vol. I 005. Thus, Plaintiff had two years, or until

May 11, 2014 to bring a claim. The Complaint was filed on August 20, 2020, more than eight years past the conveyance and more than six years past the expiration of the statute of limitation. AA Vol. I 001.

Alternatively, based on the discovery of the alleged defect (which is not a defect), Plaintiff alleges the disclosure of the alleged defect (a payment) occurred on August 24, 2017. AA Vol. I 008. Accordingly, the statute of limitation expired one year after the disclosure, on August 24, 2018. The complaint was filed on August 18, 2020, nearly two years too late.

The NRS 113 claim fails substantively or procedurally.

"Finally, because respondents did not do anything unlawful; appellant's civil conspiracy claim necessarily fails. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (providing that a civil conspiracy requires, among other things, a "concerted action, intend[ed] to accomplish an unlawful objective for the purpose of harming another")" *Bay v. Tripoly*, 2021 Nev. Unpub. LEXIS 222, *3, 482 P.3d 699.

CONCLUSION

The District Court was correct to find there was no inquiry by Appellant in this case and correct to rely on this Court's decision in *Noonan* and the series of related cases since that have bolstered that decision, to conclude the HOA and NAS

did not have a duty to announce. The HOA and NAS were correctly granted summary judgment, and the District Court should be affirmed.

DATED this 18th day of April, 2022.

LIPSON NEILSON P.C.

/s/ David Ochoa

DAVID T. OCHOA, Esq.
KALEB D. ANDERSON, Esq.
Attorneys for Respondent
Harbor Cove Homeowners Association

NEVADA ASSOCIATION SERVICES, INC.

/s/ Brandon E. Wood

BRANDON E. WOOD, Esq.
Attorney for Respondent
Nevada Association Services, Inc.

CERTIFICATE OF COMPLIANCE

1. The undersigned 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:

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

3. The undersigned 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 contains 8458 words.

4. Finally, the undersigned hereby certify that they have read this appellate brief, and to the best of their knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. The undersigned 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. The undersigned understand that they 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.

LIPSON NEILSON P.C.

/s/ David Ochoa

DAVID T. OCHOA, Esq.
KALEB D. ANDERSON, Esq.
Attorneys for Respondent
Harbor Cove Homeowners Association

NEVADA ASSOCIATION SERVICES, INC.

/s/ Brandon E. Wood

BRANDON E. WOOD, Esq.
Attorney for Respondent
Nevada Association Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2022, electronic service of the foregoing **RESPONDENTS, HARBOR COVE HOMEOWNERS ASSOCIATION, AND NEVADA ASSOCIATION SERVICES, INC.'S, ANSWERING BRIEF** was made pursuant to NRAP 25(d) to the following parties:

ROGER P. CROTEAU & ASSOCIATES, LTD
Roger P. Croteau, Esq.
2810 W. Charleston Blvd.., Suite 75
Las Vegas, NV 89102
Attorney for Appellant
River Glider Avenue Trust

NEVADA ASSOCIATION SERVICES, INC.
Brandon E. Wood, Esq.
6625 S. Valley View Blvd., Ste. 300
Las Vegas, NV 89118
Attorney for Respondent Nevada
Association Services, Inc

/s/ Juan Cerezo
An Employee of LIPSON NEILSON P.C.

Juan Cerezo

From: Brandon Wood <brandon@nas-inc.com>
Sent: Thursday, April 14, 2022 11:42 AM
To: David Ochoa; Juan Cerezo
Cc: Susan Moses
Subject: RE: Argument Section Harbor Cove FINAL

Thank you, David. You may use my electronic signature when filing.

Best,

Brandon E. Wood, Esq.

Nevada Association Services, Inc.
6625 S. Valley View Blvd. Suite 300
Las Vegas, NV 89118
702-804-8885 Office
702-804-8887 Fax

Our office hours are Monday – Thursday 9-5, Friday 9-4:30 and closed for lunch from 12-1 daily. There is a drop-box available for payments in front of our office during normal business hours and lunch.

From: David Ochoa <DOchoa@lipsonneilson.com>
Sent: Thursday, April 14, 2022 11:38 AM
To: Juan Cerezo <JCerezo@lipsonneilson.com>
Cc: Brandon Wood <brandon@nas-inc.com>; Susan Moses <susanm@nas-inc.com>
Subject: Argument Section Harbor Cove FINAL