IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST, A NEVADA TRUST, Appellant, vs. SUNRISE RIDGE MASTER HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION; AND NEVADA ASSOCIATION SERVICES, INC., A NEVADA CORPORATION, Respondents.	**Supreme Court Case No.: 83798** District Court Case No.: A790395

RESPONDENT SUNRISE RIDGE MASTER HOMEOWNERS ASSOCIATION'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Law firms that have appeared for Sunrise Ridge Master Homeowners Association ("Respondent"): Lipson Neilson P.C.

2. Parent corporations/entities: Respondent is a domestic nonprofit cooperative corporation without stock. Respondent's manager is Thoroughbred Management. No publicly held corporation owns 10% or more of the beneficial interest in Respondent and/or Thoroughbred Management.

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STATEMENT OF THE ISSUES

Issue: Whether the district court properly determined that, under the pre-2015 version of NRS 116, a homeowners association has no duty to disclose attempted tenders of the "super priority" portion of the association's lien?

Issue: Whether the district court properly determined that, under the pre-2015 version of NRS 116, a homeowner's association does not violate the duty of good faith set forth under NRS 116.1113 by not affirmatively disclosing the existence of attempted payments on the "super priority" portion of the association's lien?

Issue: Whether the district court properly granted dismissal of Appellant's First Amended Complaint under NRCP 12(b)(5) where the allegations therein, even if taken as true, did not set forth facts that would entitle Appellant to relief?

Issue: Whether the district court properly granted dismissal of Appellant's First Amended Complaint under NRCP 12(b)(5) where the same contained no allegations that 1) Appellant actually inquired of the HOA or its agent about payment on the HOA's lien, and 2) that Appellant was specifically advised in response that no person or entity had made or attempted such payment?

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I. SUMMARY OF THE ARGUMENT

The district court properly granted Sunrise Ridge's MTD and NAS's joinder for the following reasons:

1. Appellant failed to state a claim for misrepresentation because the HOA and/or NAS had no obligation under NRS 116 to affirmatively disclose BANA's attempted payment/tender on the HOA's lien, and the Complaint contains no allegations that Appellant specifically made inquiry regarding the same, thereby foreclosing any arguments that the HOA and/or NAS were required to provide the information upon inquiry. Even if *arguendo* Appellant were to have made inquiry, there is no evidence or allegation that the HOA and/or NAS replied in a manner that affirmatively misled Appellant (rather than simply declining to provide the requested information).

2. None of the allegations in Appellant's Complaint, when taken as true, demonstrate that the HOA and/or NAS acted in bad faith in violation of NRS 116.113, and NRS 116.1113 cannot serve as a basis to read in extra-statutory duties to the NRS 116 scheme.

3. Appellant's remaining claims for conspiracy, violation of NRS 113, and unjust enrichment fail because Appellant failed to state a claim for misrepresentation.

II. LEGAL ARGUMENT

A. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S CLAIM FOR MISREPRESENTATION BECAUSE NOTHING IN THE PLAIN TEXT OF NRS 116 IMPOSED UPON THE HOA AND/OR NAS A DUTY TO DISCLOSE BANA'S ATTEMPTED PAYMENT/TENDER

To establish a claim for misrepresentation, the plaintiff carries the burden of proving each of the following elements: (1) a false representation was made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Barmettler v. Reno Air, Inc*., 956 P.2d 1382, 1386, 114 Nev. 441, 447 (Nev.,1998).

The district court dismissed Appellant's misrepresentation claim on the grounds that the non-disclosure of BANA's attempted payment did not constitute a false representation because "[u]nder the version of NRS 116 in effect at the time of the Foreclosure Sale, neither Sunrise Ridge nor NAS had an affirmative duty to disclose to potential bidders the existence of payments or attempted payments on the HOA's lien." JA151. This interpretation of the law is completely true and accurate; there is no requirement in the plain text of the pre-2015 version of NRS 116 that imposed on HOAs a duty to disclose attempted payments on the super-priority portion of its lien. It is well-settled law that, when a statute is unambiguous, courts

interpret them based on their plain meaning. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141 (2015) ("In the absence of an ambiguity, we do not resort to other sources, such as legislative history, in ascertaining that statute's meaning."). Appellant did not allege in its Complaint that NRS 116 is ambiguous. Moreover, this very Court has recognized that the pre-2015 version of NRS 116 contained no requirement to disclose if tender of the super-priority portion of the lien has been made. See *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335, 2019 WL 1552690 at *3 (Nev. 2019) (unpublished disposition).

Appellant's Complaint does not contain any allegations that, if taken as true, would entitle it to relief under a claim for misrepresentation. Appellant's allegations that the HOA and NAS withheld information about BANA's attempted payment, even if taken as true, would not entitle Appellant to relief, as neither the HOA nor NAS had an obligation to disclose such information. *Noonan*, 2019 WL 1552690 at *3. The district court did note that, although there was no affirmative duty to disclose BANA's attempted payment, HOA and/or NAS could have made a misrepresentation if Appellant were "to have specifically inquired about whether payment was made on the HOA's lien, and in response be advised specifically that no such payments had been made." JA 152.

The Complaint contains no such allegations. Appellant's opening brief implies that Appellant might have made inquiry regarding whether a

tender/attempted payment had been made and was expressly informed that there was none. *See* Opening Brief, p. 12 (stating that the HOA "supplied false information…*when asked…*") (emphasis added). However, the First Amended Complaint contains no such allegations. Rather, all of Appellant's allegations presuppose a duty on the HOA/NAS to affirmatively disclose attempted payments/tenders. Even the declaration of Eddie Haddad attached to Appellant's First Amended Complaint fails to allege that he actually made inquiry as to this specific foreclosure sale, instead repeating the same tired statements about his "practice and procedure" in general. Such allegations fall grossly short of establishing any misrepresentation on the part of the HOA and/or NAS.

Because the plain text of NRS 116 as it existed at the time of the sale did not impose a duty to disclose attempted payments/tenders of the super-priority portion of the HOA lien, and there are no allegations as to inquiry being made here, Appellant cannot establish a false representation on the part of the HOA and/or NAS, and therefore the district court properly dismissed Appellant's claim for misrepresentation. Indeed, the district court's dismissal of this claim is in line with numerous unpublished decisions by the Nevada Supreme Court on the exact same issue. See *Saticoy Bay, Ltd. Liab. Co. v. Mountain Gate Homeowners' Ass'n*, 473 P.3d 1046, fn 2 (Nev. 2020) (Unpublished) ("Although appellant frames the issue as whether respondent had a duty to disclose 'after reasonable inquiry,' **appellant's**

complaint contains no allegations that such an inquiry was made in this case." Relatedly, although appellant contends that it relied upon the recitals in the foreclosure deed, the recitals made no representation one way or the other whether a superpriority tender had been made.) (emphasis added); see also *Saticoy Bay, LLC Series 6132 Peggotty v. Copperfield Homeowners Association et. al*, No. 82349, 2021 WL 5276629, at *1 (Nev. Nov. 10, 2021) (Unpublished); *Saticoy Bay LLC Series 10007 Liberty View v. S. Terrace Homeowners Ass'n,* 484 P.3d 276 (Nev. 2021) (Unpublished).

B. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH UNDER NRS 116.1113 BECAUSE THE HOA COMPLIED WITH ALL OF ITS OBLIGATIONS UNDER THE STATUTE IN GOOD FAITH

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." See NRS 116.1113 (emphasis added). The duties to which this good faith mandate applies are specifically set forth in NRS 116.3116 – 116.31168. Nothing in Appellant's Complaint alleges that the HOA or the HOA Trustee acted in bad faith in their performance of these duties. Rather, Appellant seeks to impermissibly apply this good faith requirement to a duty that is not spelled out in NRS 116.1113. Such an argument falls flat on its face. Because the misrepresentation claim fails as set forth above, so too must Appellant's claim for breach of the duty of good faith.

Although Appellant discusses NRS 116.1113 in the context of a contract, none of the allegations in its Complaint identified a contract in this case. Appellant argues *ad nauseam* in its Opening Brief why the Court should look to case law from Minnesota and Delaware in imposing a duty of candor, but even accepting this argument, it only goes to how the Court should apply NRS 116.1113 to the duties expressly enumerated in NRS 116; it does not provide a basis for creating an entirely new duty on the HOA and the HOA Trustee to disclose attempted payments of the super-priority portion of the lien to potential bidders. Again, this Court has previously recognized that the pre-2015 version of NRS 116 imposed no such requirement. See *Mann St. v. Elsinore Homeowners Ass'n*, 466 P.3d 540 (Nev. 2020) (unpublished) (stating that "[d]ismissal of appellant's NRS 116.1113 claim was also appropriate because respondent did not have a duty to proactively disclose whether a superpriority tender had been made."); see also *Noonan*, 438 P.3d 335. Because there are no allegations that the HOA and/or the HOA Trustee performed their duties set forth in NRS 116.3116 – 116.31168 in bad faith, there is no basis for Appellant's claim for breach of NRS 116.1113, and the district court properly dismissed the same.

Additionally, although Appellant argues that the HOA and/or HOA Trustee at a minimum had a duty to disclose attempted payments/tender "upon inquiry," there is no allegation in the Complaint that Appellant ever made such inquiry. The

declaration of Eddie Haddad attached to the First Amended Complaint alleges merely that he had a general practice and procedure of making such inquiry prior to attending NRS 116 sales, but even that declaration fails to assert that Mr. Haddad specifically made inquiry here, much less that he was specifically advised that there were no attempted payments on the HOA lien. *See* JA061. Nothing in any of the allegations in this case implicate the duty of candor espoused by Appellant.

Appellant's attempt to read in a duty to disclose through NRS 116.1108, while creative, was not argued before the district court, and is thus not properly before this Court. See *Lam v. Nhu Tran Found.,* 2021 Nev. App. Unpub. LEXIS 543, *7, 495 P.3d 529, 2021 WL 4317390 (stating that "[i]n this case, none of Lam's arguments were presented to the district court. Therefore, we need not consider them."). Out of an abundance of caution, the HOA offers that even if *arguendo* this argument was properly asserted in the district court proceedings, this provision of the statute does not provide a basis for relief against the HOA. NRS 116.1108 provides that supplemental general principles of law are applicable to NRS 116. Appellant latches onto the language in NRS 116.1108 that specifically references principles of misrepresentation as supporting an inference of a duty on the HOA to disclose attempted tenders. Appellant is overeager in its application of this provision, as all this does at most is indicate that common law claims are not precluded by NRS 116. Indeed, NRS 116.1108 does not incorporate common law principles "to the extent

inconsistent with [NRS 116]." See NRS 116.1108. Appellant's attempt to read into NRS 116 a requirement on the HOA and its agent to disclose attempted payments/tenders would violate this provision, as such would be inconsistent with NRS 116 as it existed at the time of the sale. This is confirmed by the fact that the Nevada legislature specifically revised NRS 116 in 2015 to require such a disclosure. As such, Appellant's arguments under NRS 116.1108 fail both procedurally and substantively.

Finally, Appellant dedicates substantial time to arguing that this Court should look to the UCIOA and the drafters' comments thereto in interpreting NRS 116.1113. However, it is well-settled law that, when a statute is unambiguous, courts interpret them based on their plain meaning. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141 (2015) ("In the absence of an ambiguity, we do not resort to other sources, such as legislative history, in ascertaining that statute's meaning."). Appellant did not allege in its Complaint or Opposition that NRS 116 is ambiguous. As such, it must be interpreted based on its plain meaning, and looking to other sources such as the UCIOA would be improper.

Thus, the district court properly dismissed Appellant's claim for Breach of NRS 116.1113, as the HOA's and HOA Trustee's obligation of good faith did not impose upon them a duty to disclose attempted payments/tenders on the super-priority portion of the lien.

C. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S REMAINING CAUSES OF ACTION

The district court held that "Because there was no misrepresentation – neither intentional nor negligent – Plaintiff's remaining causes of action necessarily fail to state claims upon which relief can be granted." JA152. This holding was correct and proper because all of Appellant's remaining causes of action are predicated on the assumption that the HOA's conduct violated its duties under NRS 116.

An actionable civil 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." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc*., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (quoting *Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993)). Appellant alleges that NAS was acting as the HOA's agent, and that the two entities agreed to withhold disclosing the attempted pre-sale payment of the super-priority portion of the HOA's lien. However, as set forth above, the HOA and NAS were not obligated to disclose this information. See *Noonan* at 335. Accordingly, the alleged "wrongful objective" was not unlawful, and the district court properly dismissed Appellant's claim for conspiracy on this basis.

Additionally, there can be no conspiracy between the HOA and NAS under the preclusive weight of the intra-corporate conspiracy doctrine, which stands for

the proposition that "agents 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." See *Collins v. Union Federal Sav. & Loan Ass'n,* 662 P.2d 610, 622, 99 Nev. 284, 303 (Nev. 1983). Therefore, to sustain a claim for conspiracy against agents and their corporation, a plaintiff must prove that one or more of the agents acted outside the scope of their employment "to render them a separate person for the purposes of conspiracy." See *Faulkner v. Arkansas Children's Hosp.*, 69 S.W.3d 903, 407, 347 Ark. 941, 962 (Ark. 2002). Appellant has not alleged that NAS acted outside of its scope as the HOA's agent. This further justifies the district court's dismissal of Appellant's conspiracy claim.

As to the claim for Violation of NRS 113, this Court has previously held that "NRS 113.130 requires a seller to disclose 'defect[s]', **not superpriority tenders**." *Mountain Gate*, 473 P.3d 1046, 2020 WL 6130913 at *2 (emphasis added). This Court has specifically considered arguments that NRS 113.130 and the Seller's Real Property Disclosure Form ("SRPDF") mandate disclosure by the HOA of the bank's attempted payment, and has found the same to be unpersuasive. *Id* at *2, fn 5 (stating "[n]or are we persuaded that the Seller's Real Property Disclosure Form would require disclosure of a superpriority tender.").

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Finally, to assert a claim for unjust enrichment, a plaintiff must assert In Nevada, to state a claim for unjust enrichment, a plaintiff must allege 1) a benefit conferred on the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof. *LeasePartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Given that the HOA had no obligation to affirmatively disclose the fact of any payments or attempted payments to potential purchasers such as Appellant, and the fact that Appellant does not allege to have specifically been advised by the HOA or NAS here regarding the existence of such payments, there was nothing inequitable about the HOA receiving and retaining the amounts it was paid for the Property at the foreclosure sale. As such, the district court properly dismissed Appellant's claim for Unjust Enrichment.

III. CONCLUSION

Based on the foregoing, the district court properly dismissed Appellant's First Amended Complaint. Respondent respectfully requests that this Honorable Court affirm the district court's order.

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V. CERTIFICATE OF COMPLIANCE

I hereby certify that this responding 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 Microsoft Word 2010 in 14-point font, Times New Roman Style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,451 words.

Finally, I hereby certify that I have read this appellate 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 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.

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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: April 28, 2022.

LIPSON NEILSON P.C.

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ROUTING STATEMENT PURSUANT TO NRAP 21(A)(1)

This Respondent Sunrise Ridge Master Homeowners Association's Answering Brief is appropriate for the Nevada Supreme Court to decide pursuant to NRAP 17 (a)(1) which states that the "[t]he Supreme Court shall hear and decide the following: (1) Except as provided in (b) of this Rule, proceedings invoking the original jurisdiction of the Supreme Court." The Supreme Court has original jurisdiction over this Answering Brief to NRS 41.670(4) which states that "if the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONDENT SUNRISE RIDGE MASTER HOMEOWNERS ASSOCIATION'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system on April 28, 2022. I certify that all participants in the case are registered with the CM/ECF or have consented to electronic service.

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