IN THE SUPREME COURT OF NEVADA

DAISY TRUST, A NEVADA TRUST Appellant, v. GREEN VALLEY SOUTH OWNERS ASSOCIATION NO. 1, A NEVADA NON-PROFIT CORPORATION; AND NEVADA ASSOCIATION SERVICES, A DOMESTIC CORPORATION Respondents.	Supreme Court No. 82611 Electronically Filed Oct 21 2021 12:37 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S REPLY BRIEF**

Counsel for Appellant:

Roger P. Croteau, Esq.
Nevada Bar No. 4958
Christopher L. Benner, Esq.
Nevada Bar No. 8963
ROGER P. CROTEAU & ASSOCIATES, LTD.
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Tel: (702) 254-7775
Fax: (702) 228-7719
Email: croteaulaw@croteaulaw.com

NRAP 26.1 DISCLOSURE

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

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

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

Dated this October 21, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
Christopher L. Benner, Esq.
Nevada Bar No. 8963
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Appellant

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Rules

II. LEGAL ARGUMENT

A. THE HOA AND HOA TRUSTEE WERE REQUIRED TO DISCLOSE THE ATTEMPTED PAYMENT UNDER NRS CHAPTER 116

In its Answering Brief, the HOA maintained, as it did at the district court, that the HOA had no duties outside those contained in NRS 116.31162 through NRS 116.31168. Answering Brief ("AB") at 6. In support of it argument, the HOA relies on *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev. 2019) (unpublished disposition). *See id*. at 7. However, the HOA's reliance on *Noonan* is misplaced, because it is factually distinguishable from this case.

First, while it is true the *Noonan* court stated, "Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose," *Noonan*, 438 P.3d at 335, certainly the HOA and the HOA Trustee were bound to tell the truth here when Appellant inquired whether a tender/payment had been attempted or made. *See* JA0473 (Declaration of Eddie Haddad indicating, "at all times relevant to this case, I would attempt to ascertain whether anyone had attempted to or did tender any payment regarding the homeowner association's lien. If I learned that a 'tender' had been attempted or made, I would not purchase the property …").

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

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

In its Answering Brief, the HOA also argues that Respondents had no duty of disclosure under the version of NRS 116.31164 in effect at the time of the HOA Foreclosure Sale, which is supported by the fact that the statute has since been amended to specifically require disclosure of a tender or payment of the superpriority portion of a homeowners' association lien. AB at 11-12. However, the HOA's argument misses the mark.

As discussed in the Opening Brief at length, the HOA and HOA Trustee had a duty of disclosure under the duty of good faith and fair dealing contained in NRS 116.1113. The Complaint adequately states claims for relief consistent with the HOA's and HOA Trustee's obligation of good faith, honesty in fact, reasonable standards of fair dealing, and candor pursuant to NRS 116.1113. The arguments and analysis presented at the time of the Motion for Summary Judgment illustrate that questions of relevant fact regarding the inquiry, and responses to same, remained.

Next, the HOA argues that NRS 116.1113 "does not impose extra-statutory duties on an HOA" (such as a pre-sale tender). AB at 13. In support of its argument, the HOA cites *PennyMac Corp. v. SFR Invs. Pool 1, LLC*, 425 P.3d 719 (Nev. 2018)

(unpublished disposition). *See id*. However, *PennyMac* does not support the HOA's argument, because the issue in *PennyMac* was whether the homeowners' association had a duty to re-mail the notices of sale after the trustee under the subject deed of trust was substituted and the substitution was recorded. *See PennyMac* at *6. The *PennyMac* Court held that the homeowners' association did not have a duty to "re-check the public records for potential new addresses between mailing and recording [the notice of sale]." *See id*. Here, however, it is clear that NRS 116.1113 required Respondents to disclose the Attempted Payment in response to an inquiry, as alleged by Appellant, and that requirement was not "extra-statutory."

To the extent the HOA argues NRS 116.1113 is not implicated in an HOA Foreclosure Sale, the HOA is incorrect. NRS 116.1113 is not only implicated but clearly governs the HOA's and HOA Trustee's duties and contracts when dealing with the performance of their duties in foreclosing a lien for delinquent assessments and with a Purchaser at such sale. NRS 116.1113 provides, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." In the actions of the HOA and the HOA Trustee leading up to and at the HOA Foreclosure Sale, the statute imposes a duty of good faith as further clarified by the Comments to Section 1-113 of the UCIOA regarding the HOA's performance in its enforcement of the provisions included in NRS Chapter 116 that

constitute the foreclosure sale and selling the Property to a Purchaser that will eventually be a member of the HOA.

As discussed in the Opening Brief, it is clear that the drafters of the UCIOA intended the definition of "good faith" to include two (2) standards: (1) honesty in fact, and (2) observance of reasonable standards of fair dealing to the Purchaser/Appellant. As other jurisdictions have addressed the good faith provision of the UCIOA, the "two standards" create an obligation of candor that has been adopted by other jurisdictions, as discussed in the Opening Brief. *See* Opening Brief at 25.

The duties of good faith and fair dealing go hand and hand with the duty of candor, especially upon reasonable inquiry by Appellant about a payment or the Attempted Payment. *See* JA0473 (Declaration of Eddie Haddad indicating, "at all times relevant to this case, I would attempt to ascertain whether anyone had attempted to or did tender any payment regarding the homeowner association's lien. If I learned that a 'tender' had been attempted or made, I would not purchase the property …").

In the present matter, UCIOA § 1-113 cmt (1982) explicitly imposes a duty of good faith, which includes the duty of candor, and this Court should rely upon the comment consistent with the case law provided in the Opening Brief. *See* Opening

Brief at 17-20. Simply put, the HOA and/or the HOA Trustee could have made a simple announcement that unequivocally stated that the Property was being sold subject to the Deed of Trust to all potential bidders present and/or interested in bidding on the Property at the time of the HOA Foreclosure Sale or even disclosed the Attempted Payment. But even if the foregoing is too much to mandate pursuant to NRS 116.1113 and NRS 116.1108, at a minimum, upon reasonable inquiry by the Purchaser/Appellant, the HOA and HOA Trustee had an absolute duty to disclose the Attempted Payment.

Finally, the HOA failed to address the argument that Appellant made in its Opening Brief that the very language of the HOA Foreclosure Deed demonstrates Respondent's lack of good faith. *See* Opening Brief at page 27. The HOA Foreclosure Deed states that the HOA Trustee complied with "[a]ll requirements of law." JA0084. That statement implies much more than mere compliance with notice requirements, even though those are mentioned. *See id*. The HOA Trustee's representation plainly means that it allegedly complied with "all requirements" of Nevada law, including the requirement of good faith and fair dealing found in NRS 116.1113, which is not true.

The HOA asserts that it is absolved of any wrongdoing because the HOA "Foreclosure Deed specifically set forth that the HOA provided no warranties as to

the title of the Property" AB at 14. However, as discussed above, the HOA failed to reconcile this argument with the other language of the HOA Foreclosure Deed proclaiming compliance with "[a]ll requirements of law," JA0084, which was not true. Thus, the district court erred in finding no duty and dismissing the Complaint

B. RECEIPT OF A DEED "WITHOUT WARRANTY" DOES NOT EXCUSE THE HOA'S MISREPRESENTATIONS

In its Answering Brief, the HOA argues that Appellant has no argument because Appellant acquired an interest in the Property via deed without warranty. *See* AB at 10. While Appellant is cognizant of NRS 116.31164(3)(a) and its language regarding conveyance via deed without warranty, the HOA's argument misses the point. If accepted as true, the HOA's position would emasculate NRS Chapter 116's mandate of good faith and render it completely meaningless and ineffective. Appellant's negligent/intentional misrepresentation claim is based in part on the fact that Appellant made reasonable inquiry about a tender/payment prior to the HOA Foreclosure Sale and the HOA and/or HOA Trustee failed to inform Appellant about the tender/Attempted Payment. Certainly, this allegation falls within NRS Chapter 116's requirements of good faith, honesty-in-fact, reasonable standards of fair dealing, and candor, whether or not the deed is one without warranty.

Moreover, as discussed in the Opening Brief, providing a deed without warranty does not relieve the HOA and HOA Trustee of their disclosure obligations under NRS Chapter 113.

Finally, the HOA argues that "the non-warranty deed … made no representations as to potential encumbrances to title …" AB at 5. However, the HOA again focuses on the document it provided to Appellant – the HOA Foreclosure Deed – as opposed to allegations in the Complaint about the HOA and HOA Trustee misrepresenting to Appellant about the Attempted Payment upon reasonable inquiry. Those are factually distinguishable issues and the district court erred by relying on the "deed without warranty" when dismissing Appellant's claims for relief.

C. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S MISREPRESENTATION CLAIMS

In its Answering Brief, the HOA argues that the district court did not err in dismissing Appellant's misrepresentation claims because (i) *Noonan*; (ii) Appellant received a deed without warranty following the HOA Foreclosure Sale;[1] (iii) Appellant did not identify a false representation by the HOA; (iv) Nevada law does not require the HOA to do anything not expressly stated in NRS 116.31162 through

[1] Because Appellant has already addressed the first and second arguments above, those arguments are not addressed herein but are incorporated by reference herein.

NRS 116.31168; and (v) this Court's holding in *A Oro, LLC v. Ditech Financial LLC*, 434 P.3d 929 (Nev. 2019) (unpublished disposition). Each of these arguments is incorrect. Moreover, the HOA's argument raises factual questions which are not properly disposed of on a motion to dismiss or motion for summary judgment.

1. APPELLANT CLEARLY PLED THE MATERIAL OMISSION OF FACT THAT SUPPORTS ITS MISREPRESENTATION CLAIMS

In its Opening Brief, the HOA argues that at no point did Appellant "allege a specific inquiry made to NAS or Green Valley prior to or during the foreclosure sale to which either provided false information or ignored a documented inquiry about any presale tender." AB at 10. However, the HOA acknowledges that this Court has previously held that an omission of a material fact can meet the element of a false representation. *See id*. (quoting *Nelson v. Heer*, 123 Nev. 217 (2007)). As discussed in the Opening Brief, and as acknowledged by the HOA in its Answering Brief, the *Nelson* Court provided that the omission of a material fact, such as the Lender's tender/Attempted Payment of the Super-Priority Lien Amount, is deemed to be a false representation which the HOA and HOA Trustee are bound by the mandates of NRS 116.1113 and NRS 113.130 to disclose to potential bidders, especially upon inquiry as Appellant contends occurred herein, and this duty is a good faith obligation to disclose upon reasonable inquiry from potential bidders at

the HOA Foreclosure Sale, and such intentional omission is equivalent to a false representation under the facts of this case. Here, Appellant alleged facts that satisfy the elements identified in *Nelson*. *See* JA0004-10 at ¶¶ 20-81. Furthermore, to the extent that the court questioned if an inquiry occurred, Appellant raised a relevant and material issue of fact, prohibiting dismissal.

2. THE HOA'S AND HOA TRUSTEE'S DUTIES ARE NOT LIMITED TO THOSE FOUND IN NRS 116.31162-31168

The HOA argues that it has no duties beyond those found in NRS 116.31162-31168. AB at 4-6. However, that assertion is patently incorrect. As argued in the Opening Brief, NRS 116.1108 specifically supplements the HOA's and HOA Trustee's duties with common law principles, including, but not limited to, "the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, ***misrepresentation***, duress, coercion, mistake, receivership, substantial performance …" Opening Brief at 21 (emphasis added).

NRS 116.1108 expressly allows Appellant's common law claim for misrepresentation, under the facts pled in this case. Therefore, it was error for the district court to find that Appellant's claims for misrepresentation were not proper.

3. *A ORO* DOES NOT SUPPORT DISMISSAL OF APPELLANT'S MISREPRESENTATION CLAIMS

In its Answering Brief, the HOA relies on the *A Oro* decision to support the HOA's argument that the district court properly dismissed Appellant's misrepresentation claims. However, *A Oro* is distinguishable.

In particular, the HOA relies on the language from *A Oro* stating, "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." AB at 8. The HOA's arguments are incorrect.

First, *A Oro*, like *Noonan*, is inapplicable, because there is no evidence that the winning bidder in *A Oro* asked the homeowners' association or its foreclosing trustee about a tender/attempted payment, like happened here. *See* JA0473.

Second, the HOA's reliance on *A Oro* for the proposition that the HOA and HOA Trustee had no duties of disclosure, because the HOA Foreclosure Deed was without warranty, is incorrect. The *A Oro* Court did not consider the arguments presented here about NRS 116.1113, NRS Chapter 113, and their relevant analysis as it applies to the HOA Foreclosure Deed. For example, the HOA Foreclosure Deed states that the HOA Trustee has complied with "[a]ll requirements of law. JA0084. However, as discussed in Appellant's Opening Brief, the foregoing statement in the

HOA Foreclosure Deed is not accurate, because the HOA and HOA Trustee did not comply with NRS 116.1113 and NRS Chapter 113. As such, the HOA's reliance on *A Oro* is misplaced and *A Oro* does not support the HOA's arguments here.

4. THE HOA'S ARGUMENTS HIGHLIGHT THE FACTUAL QUESTIONS THAT EXISTED TO PRECLUDE DISMISSAL

In its Answering Brief, the HOA argues that there are at least two factual questions under *A Oro* and *Nelson* in this case as it relates to Appellant's misrepresentation claims.

First, the HOA quotes *A Oro* in that there was "no evidence that [the association] intended to induce appellant into placing the winning bid at the foreclosure sale." AB at 8. This creates a factual question, because Appellant has stated that "at all times relevant to this case, I [Mr. Haddad, for Appellant] would attempt to ascertain whether anyone had attempted to or did tender any payment regarding the homeowner association's lien. If I learned that a 'tender' had been attempted or made, I would not purchase the property …" JA0473 Thus, whether Mr. Haddad made inquiry to the HOA and/or HOA Trustee about the Super-Priority Lien Amount, whether it had been satisfied, and whether the HOA and/or HOA Trustee understood that the inquiry was about the potential for a superpriority lien sale are all questions of relevant and material fact that may not be disposed of on a motion for summary judgment. *See* NRCP 56.

Second, the HOA argues that Appeallant's allegations were "insufficient to support a claim that Haddad had a '…justifiable reliance upon the information…'" so Appellant cannot satisfy the second *Nelson* element. AB at 10-11. However, as this Court has held previously, "[t]he issue of whether a party has met the elements of intentional misrepresentation is generally ***a question of fact***." *Blanchard v. Blanchard*, 108 Nev. 908, 911 (1992) (emphasis added). "Whether these elements are present in a given case is ordinarily a question of fact." *Epperson v. Roloff*, 102 Nev. 206, 211 (1986).

The HOA's argument highlights another reason why it was error for the district court to dismiss Appellant's misrepresentation claims.

D. NRS CHAPTER 113 ABSOLUTELY APPLIED TO THE HOA FORECLOSURE SALE, AND THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIM RELATED THERETO

In its Answering Brief, the HOA argues that the district court properly dismissed Appellant's claim for relief under NRS Chapter 113, because (i) the HOA was not a "seller," under NRS Chapter 113; (ii) NRS 113.130's disclosure requirements do not apply to a sale under NRS Chapter 116; and (iii) NRS 113.130's disclosure requirements only apply to physical defects and not a pre-sale tender/payment. AB at 14-17. Each of these arguments is incorrect.

1. THE HOA AND HOA TRUSTEE WERE A "SELLER" UNDER NRS CHAPTER 113

In its Answering Brief, the HOA argues, with no analysis, that it is not a "seller" as defined under NRS 113.130. AB at 16. As will be demonstrated below, the HOA is a "seller" under NRS Chapter 113.

NRS 113.100(5) states, "[a]s used in NRS 113.100 to 113.150, inclusive, unless the context otherwise requires … 'Seller' means a person who sells or intends to sell any residential property." In turn, NRS 113.130(5)(a) states, "[a]s used in this section … 'Seller' includes, without limitation, a client as defined in NRS 645H.060." Finally, NRS 645H.060 states:

…

…

> "Client" means:
>
> 1. A bank, mortgage broker, mortgage banker, mortgage servicer as that term is defined in NRS 645F.063, credit union, thrift company, savings and loan association or savings bank, or any subsidiary thereof that is authorized to transact business in this State;
>
> 2. A mortgage holding entity chartered by Congress; or
>
> 3. A federal, state or local governmental entity, for whom an asset management company provides asset management.

In its brief, the HOA asserts that it is not a "seller," under NRS 113.130, because the HOA was not selling residential property "but merely an entity foreclosing on a

lien." AB at 15-16. The HOA's absurd reading of the statutory language does not find any support in Nevada law. It is undisputed that the HOA, through the HOA Trustee, and by and through the HOA Foreclosure Sale, sold residential real property to Appellant. *See* JA0084 (Foreclosure Deed conveying the property to Appellant).

In *SFR Invs. Pool 1, LLC. v. U.S. Bank, N.A.*, this Court stated, "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." 130 Nev. 742, 758 (2014). This Court has also held, "[a] foreclosure sale generally terminates a party's legal title to the property. *Res. Grp., LLC v. Nev. Ass'n Servs.*, 437 P.3d 154, 158 (Nev. 2019) (citation omitted). Since a proper homeowners' association foreclosure extinguishes a deed of trust and terminates the owner's legal title to the property, then it follows logically that a homeowners' association foreclosure, like the HOA Foreclosure Sale here, is a sale of residential real property and the HOA had a duty of disclosure under NRS 113.130(1)(a).

Furthermore, NRS 113.130(4) undermines the HOA's argument, because that section requires certain disclosures by a trustee and/or beneficiary of a deed of trust to a purchaser of residential property, even though a trustee and beneficiary of a deed

of trust are excluded from making the disclosures required under Section 113.130(1), pursuant to NRS 113.130(2)(a).[2]

The Court should disregard the HOA proffered definition of "seller," because it does not make sense and ends with absurd results. The HOA was a "seller" under NRS Chapter 113.

2. NRS 113.130 DOES NOT EXCLUDE SALES UNDER NRS CHAPTER 116

In its Answering Brief, the HOA generically makes the argument that NRS 113.130 does not apply to a sale under NRS Chapter 116. AB at 16. However, the clear and unambiguous language of NRS Chapter 113 defeats the HOA's argument.

The plain language of NRS 113.130(2)(a) excludes sales under NRS Chapter 107 from NRS 113.130(1)'s disclosure requirements but NRS 113.130(2)(a) does ***not*** exclude sales under NRS Chapter 116. *See* NRS 113.130(2)(a) ("Subsection 1 does not apply to a sale or intended sale of residential property … (a) By foreclosure pursuant to chapter 107 of NRS.").

[2] Presumably the disclosure requirement in NRS 113.130(4) is post-foreclosure by a trustee and/or beneficiary of a deed of trust, but that does not change the analysis, because the HOA could have disclosed the Attempted Payment before conveying the Property to Appellant via HOA Foreclosure Deed, since the HOA was undoubtedly a "seller" under NRS Chapter 113. Such a disclosure would have avoided the need for this entire litigation.

According to the plain language of NRS 113.130(2)(a), only NRS Chapter 107 foreclosure sales are specifically excluded from NRS 113.130(1)'s disclosure requirements. *See* NRS 113.130(2)(a). This Court has repeatedly upheld and applied the maxim *expressio unius est exclusio alterius*. *Ex parte Arascada*, 44 Nev. 30, 35 (1920) ("***This a well-recognized rule of statutory construction and one based upon the very soundest of reasoning; for it is fair to assume that, when the legislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any***?") (emphasis added); *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 373 P.3d 66, 71 (Nev. 2016) ("where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, ***courts should infer that all omissions were intentional exclusions***.") (emphasis added) (citation omitted).

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

3. NRS 113.130(1)'S DISCLOSURE REQUIREMENT IS NOT LIMITED TO PHYSICAL DEFECTS ONLY

In its brief, the HOA argues, "[t]he bank's pre-sale tender does not fit into any of the disclosure categories contemplated by NRS 113." AB at 14. The HOA asserts that the term "defect" in NRS Chapter 113 only applies to "physical" defects. However, the HOA's argument finds no support in Nevada law.

The actual statutory definition of "defect" is much broader than the HOA's proposed narrow definition. NRS 113.100(1) defines "defect" as "a condition that materially affects the value or use of residential property in an adverse manner." This definition is broad and encompasses much more than physical defects. For example, NAC 113.150(1) requires the disclosure form "required pursuant to NRS 113.130" to include, in addition to the physical defects listed in NAC 113.150(1)(a)-(e), the following defects:

> Whether the property is subject to the rules or regulations of an association of homeowners and whether the seller is aware of any current litigation, mediation, arbitration or special assessments concerning the property or any common areas associated with the property; and
>
> Whether the seller is aware of ***any other conditions or aspects of the property which will affect its value or use in an adverse manner***.

NAC 113.150(g), (h) (emphasis added).

In addition, the actual SRPDF adopted by the NRED contains the disclosure of non-physical conditions that affect property value that specifically pertain to homeowners' associations. Specifically, Section 9, Common Interest Communities, disclosures (a) - (f), and Section 11 relate to disclosures related to homeowners' associations. *See* JA0017. Section 11 of the SRPDF relates directly to information known to the HOA and the HOA Trustee that materially affects the value of the Property defined as a "defect" in NRS 113.100(1). In this case, if the Super-Priority Lien Amount is paid, or if the Attempted Payment is accepted or rejected, it has a materially adverse effect on the overall value of the Property and, therefore, must be disclosed in the SRPDF by the HOA and the HOA Trustee. Section 9(c) - (e) of the SRPDF would provide notice of any payments made by Lender or others on the HOA Lien.

Section 11 of the SRPDF generally deals with the disclosure of the condition of the Property that would only be known by the HOA and the HOA Trustee. *See* JA0017. If the HOA and/or HOA Trustee fail to provide the SRPDF to the purchaser (Appellant) at the time of the HOA Foreclosure Sale, the Guide explains that the buyer may rescind the contract. JA0174.

Pursuant to NRS 113.130(1), the HOA and HOA Trustee are required to provide the information set forth in the SRPDF to Appellant at or before the HOA

Foreclosure Sale, but no later than the drop of the gavel. Whether the HOA was in physical possession of the Property, or the "defect" is physical, is irrelevant. Thus, the district court erred in holding that the HOA and HOA Trustee did not have any duties of disclosure under NRS Chapter 113. *See* JA0605.

Furthermore, the First Deed of Trust does impact the "value" of the Property, such that it is not a "condition" such that it must be disclosed pursuant to NRS Chapter 113 as a "Defect" as defined by NRS 113.100.

The impact of the First Deed of Trust on the Property is first noted in the complaint, wherein Saticoy sets forth that "the Loan secured by the Deed of Trust significantly exceeded the fair market value of the Property at the time of the HOA Foreclosure Sale." JA0005 Paragraph 31. Appellant contends, from the Complaint onwards, that the ongoing existence of the First Deed of Trust impacted the value and by extension the use, of the subject property; Appellant acknowledges that the similar properties were subject to voluminous litigation that has occurred over the last eight years seeking to define the rights and obligations of the various parties, and that the facts were not necessarily forthcoming from the HOA or HOA trustee regarding the history of the HOA's lien.

4. NRS CHAPTER 113'S DISCLOSURE REQUIREMENT IS IN ADDITION TO THE DUTIES CONTAINED IN NRS CHAPTER 116

In its Order, the district court held that the only duties the HOA owed to Appellant are found in NRS 116.3116-31168. JA0601-605. However, the district court is incorrect. There is no requirement under Nevada law that all duties that an HOA owes must be contained in NRS Chapter 116. That is like saying that all duties a deed of trust beneficiary or trustee owe are contained in NRS Chapter 107, but that is not the case, as NRS 113.130(4) contains disclosure requirements of those entities, ***even though they are exempt from disclosures under NRS 113.130(1)***. *See* NRS 113.130(2)(a).

If a deed of trust beneficiary and/or trustee, that are specifically excluded from disclosures under NRS 113.130(1), are still required to make disclosures under NRS 113.130(4), then a homeowners' association like the HOA cannot claim exemption from NRS Chapter 113's disclosure requirements when it is ***not*** exempted from providing disclosures. That result would be absurd and is not supported by law or logic.

E. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DISMISSING APPELLANT'S CONSPIRACY CLAIM

In its Answering Brief, the HOA takes the untenable position that because the HOA Trustee was acting on behalf of the HOA at the HOA Foreclosure Sale, there

could not have been a conspiracy as a matter of law. AB at 17-19. The HOA states, "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.'" *Id*. (citing *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284 (1983)). However, as discussed below, the HOA's argument is incorrect for multiple reasons.

First, the HOA's reliance on *Collins* is misguided, because in *Collins* the individuals at issue were officers of First Federal, the bank at issue. *Collins*, 99 Nev. at 303. Here, the HOA cannot argue that the HOA Trustee, ***a separate legal entity under Nevada law***, was a corporate officer or agent of the HOA in the way that *Collins* discusses or contemplates. *See U-Haul Co. of Nev. v. United States*, 2012 U.S. Dist. LEXIS 103261, at *4 (D. Nev. July 25, 2012) ("This limitation, known as the intracorporate conspiracy doctrine, prevents a finding of liability for conspiracy ***between co-employees*** without a showing that the employees were acting as individuals and for their individual advantage.") (emphasis added) (citing *Collins*). Thus, the HOA's reliance on *Collins* in regard to this argument is improper.

Second, there was a material question of fact in *Collins* about whether the officers were acting for their own self-interest. *Collins*, 99 Nev. at 303 ("Thus, one of the material issues of fact regarding Collins' civil conspiracy claim for relief is

whether Dwyer, Wholey and Small were acting as individuals for their individual advantage."). Here, there is no doubt that the HOA Trustee was acting for its own self-interest when it sold the Property, because the HOA Trustee stood to be paid the collection costs it charged the HOA, and Appellant alleged as much in its Complaint. *see* JA0006 at ¶ 35. Therefore, to the extent the district court relied on *Collins*, the court erred as a matter of law.

The HOA also argues that in order to succeed on its conspiracy claim, "Daisy Trust must show that Defendants, by acting in concert, ***intended*** to accomplish an unlawful objection for the purpose of harming Daisy Trust." AB at 17 (emphasis added). First, Appellant sufficiently pled its claim for relief for conspiracy, *see* JA0011, which the district court was required to accept as true at the motion to dismiss stage. *See Vacation Vill., supra*. Second, whether a party has the requisite state of mind to satisfy the "intent" element of civil conspiracy is a question of fact. *Collins*, 99 Nev. at 303 ("an action for civil conspiracy does include a 'state of mind' issue which is usually inappropriate for disposition by way of summary judgment …"). As such, the district court erred in dismissing this claim for relief.

III. CONCLUSION

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

Dated this October 21, 2021.
ROGER P. CROTEAU & ASSOCIATES, LTD.
/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
Christopher L. Benner, Esq.
Nevada Bar No. 8963
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Appellant

IV. ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

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

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

[a.] Proportionately spaced, has a typeface of 14 points or more, and contains 4,989 words; or

[b.] does not exceed 15 pages.

...

…

…

…

…

…

…

…

…

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this October 21, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
Christopher L. Benner, Esq.
Nevada Bar No. 8963
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Appellant

CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on October 21, 2021, I caused a copy of **Appellant's Reply Brief** to be filed and served electronically via the Court's E-Flex System to the following:

J. Willian Ebert Esq.,
Janeen V. Isaacson
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Attorneys for Defendant/Respondent
Green Valley South Owners Assoc., No. 1

Brandon Wood, Esq.
Nevada Association Services, Inc.
6625 S. Valley View Blvd., Suite 300
Las Vegas, Nevada 89118
Attorneys for Defendant/Respondent
Nevada Association Services, Inc.

/s/ Joe Koehle
An employee of ROGER P. CROTEAU
& ASSOCIATES, LTD.