IN THE SUPREME COURT OF NEVADA

SATICOY BAY LLC SERIES 6387 HAMILTON GROVE, A NEVADA LIMITED LIABILITY COMPANY Appellant, v. SUNRISE RIDGE MASTER HOMEOWNERS ASSOCAITION, A NEVADA NON-PROFIT CORPORATION; AND NEVADA ASSOCIATION SERVICES, INC., A NEVADA CORPORATION, Respondents.	Supreme Court Case No. 83669 Electronically Filed Mar 16 2022 02:29 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

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

1. Law firms that have appeared for Saticoy Bay LLC Series 6387 Hamilton Grove ("Appellant"): Roger P. Croteau & Associates, Ltd.

2. Parent corporations/entities: Appellant is a Nevada series limited liability company. Appellant's Manager is Bay Harbor Trust, with Iyad Haddad as the trustee of the Bay Harbor Trust. No publicly held corporation owns 10% or more of the beneficial interest in the Appellant and/or the Bay Harbor Trust.

Dated this March 16, 2022.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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II. JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The Order Granting Respondent Sunrise Ridge Master Homeowners Association (the "HOA") and Nevada Association Services, Inc., (the "HOA Trustee," collectively the "Respondents") Motion to Dismiss or Alternatively, Motion for Summary Judgment (the "MTD") is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The Order granting the Respondents Motion to Dismiss ("Order") was filed on September 6, 2021. JA206. An Errata was entered on September 13, 2021. JA214. The Notice of Entry of Order was filed on September 13, 2021. JA214. The Notice of Appeal was filed on September 16, 2021. JA219

(C) The appeal is from a final judgment.

III. NRAP 17 ROUTING STATEMENT

The instant matter should be retained by the Supreme Court of Nevada, because this appeal raises as a principal issue involving the common law and statutory interpretation of NRS Chapter 116. NRAP 17(a)(11). The issue presented in this appeal represents an important issue in the State of Nevada regarding the scope of the duty owed by the HOA and the HOA Trustee of good faith, honesty in

fact, observance of reasonable standards of fair dealing, and candor in the conduct and performance of a homeowners' association assessment lien foreclosure sale. Specifically, pursuant to common law and/or NRS Chapter 116, and specifically NRS 116.1113, what are the duties and obligations of a homeowners' association, and its agent, the association's foreclosure trustee, in disclosing a "tender" as defined in *Bank of America N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113 (Nev. 2018) to the bidding public at or before a homeowners' association's lien foreclosure sale under a factual scenario that acknowledges Appellant's inquiry.:

This matter also seeks to answer the question of whether the homeowners' association, and/or the homeowners' association's foreclosing trustee, as its agent, have an obligation pursuant to NRS 116.1113, NRS 116.1108, and common law to disclose a "tender" or attempted payment to the bidding public, including the Appellant, upon reasonable inquiry by the bidding parties and/or Appellant if such a tender of the superpriority lien amount had been attempted or in fact paid by any individual or entity prior to the homeowners' associations assessment lien foreclosure sale?

IV. STATEMENT OF ISSUES PRESENTED

Whether the district court erred by granting the HOA and HOA Trustee's MTD in light of the following:

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

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

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

V. STATEMENT OF THE CASE

On February 28, 2019, Appellant filed its Complaint. JA001. Appellant filed a First Amended Complaint on June 21, 2021. JA015. Appellant's First Amended Complaint asserted five (5) claims for relief against the HOA and HOA Trustee: (i) intentional, or alternatively negligent, misrepresentation; (ii) breach of the duty of good faith; (iii) conspiracy; (iv) Violation of NRs Chapter 113; and (v) unjust enrichment. *See id*. These claims are related to Appellant's purchase of real property commonly known as 6387 Hamilton Grove Avenue, Las Vegas, Nevada 89122 (APN 161-15-711-008) (the "Property") at a homeowners' association foreclosure conducted by the HOA Trustee on behalf of the HOA. JA002.

On July 6, 2021, the HOA filed its MTD. JA036. The HOA Trustee filed a joinder on July 8, 2021. JA087. On July 20, 2021, Appellant filed its Opposition to the MTD. JA090. On August 3, 2021, the HOA filed its reply in support of the MTD. JA117. On August 10, 2021, the district court heard oral argument on the MTD and granted the same. JA191.

VI. STATEMENT OF RELEVANT FACTS

1. Appellant is the record title holder of the Property, which Appellant acquired by Trustee's Deed Upon Sale recorded in the Clark County Recorder's office on July 14, 2014, pursuant to a homeowners' association lien foreclosure sale

conducted on July 11, 2014 (the "HOA Foreclosure Sale"), by the HOA Trustee on behalf of the HOA. JA016 at ¶ 3.

2. The HOA is a Nevada common interest community association or unit owners' association as defined in NRS 116.011. *Id*. at ¶ 5.

3. The HOA Trustee is a debt collection agency retained by the HOA as its agent to act as foreclosing trustee. *Id*. at ¶ 6.

4. Under Nevada law, homeowners' associations have the right to charge property owners residing within the community assessments to cover the homeowners' association's expenses for maintaining or improving the community, among other things. *Id*. at ¶ 9.

5. When the assessments are not paid, the homeowners' association may impose a lien against real property which it governs and thereafter foreclose on such lien. JA017 at ¶ 10.

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

association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2)(c). *Id*. at ¶ 11.

7. In Nevada, when a homeowners' association properly forecloses upon a lien containing a superpriority lien component, such foreclosure extinguishes a first deed of trust. *Id*. at ¶ 12.

8. On or about September 9, 2009, Salvador Partida Castillo and Veronica Delgado DePartida, husband and wife as joint tenants (the "Former Owners") purchased the Property. *Id*. at ¶ 13.

9. The Former Owner of the Property failed to pay to HOA all amounts due pursuant to HOA's governing documents. JA018 at ¶ 17.

10. Accordingly, on December 27, 2012, HOA Trustee, on behalf of HOA, recorded a Notice of Delinquent Assessment Lien ("NODAL"). The NODAL stated that the amount due to the HOA was $1,120.50 plus continuing assessments, interest, late charges, costs, and attorney's fees (the "HOA Lien"). *Id*. at ¶ 18.

11. On April 16, 2013, HOA Trustee, on behalf of the HOA, recorded a Notice of Default and Election to Sell ("NOD") against the Property. The NOD stated the amount due to the HOA was $1,708.38 as of April 12, 2013, plus

continuing assessments, late fees, interest and attorney's fees and costs. JA019 at ¶ 25.

12. Upon information and belief, after the NOD was recorded, Bank of America, N.A. ("BANA"), through counsel Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer") contacted the HOA Trustee and requested adequate proof of the superpriority amount of assessments by providing a breakdown of up to nine (9) months of common assessments in order for BANA to calculate the superpriority lien amount in an ostensible attempt to determine, and pay, the amount of the HOA's alleged lien that was entitled to superpriority over the Deed of Trust ("Super-Priority Lien Amount"). JA018 at ¶19.

13. By way of an Affidavit by Adam Kendis of Miles Bauer, Miles Bauer provided that they could not locate a response from the HOA and HOA Trustee to the September 26, 2013, Miles Bauer letter to the HOA, care of the HOA Trustee. Thus, Miles Bauer used a Statement of Account from Nevada Association Services, Inc., for a different property in the same HOA to determine a good faith payoff. *Id*. at ¶20-22.

14. On September 26, 2013, BANA, through Miles Bauer, provided a payment of $ 378.00 to the HOA Trustee, which included payment of up to nine months of delinquent assessments (the "Attempted Payment"). JA019 at ¶23.

15. The HOA Trustee, on behalf of the HOA, rejected BANA's Attempted Payment. *Id*. at ¶24.

16. On July 11, 2014, HOA Trustee then proceeded to conduct a non-judicial foreclosure sale on the Property and recorded the HOA Foreclosure Deed on July 14, 2014, which stated that the HOA Trustee sold the HOA's interest in the Property to Appellant for the highest bid amount of $22,100.00 (the "HOA Foreclosure Deed"). *Id*. at ¶27.

17. In none of the recorded documents, nor in any other notice recorded with the Clark County Recorder's Office, did the HOA and/or the HOA Trustee specify or disclose that any individual or entity, including but not limited to BANA, had attempted to pay any portion of the HOA Lien in advance of the HOA Foreclosure Sale. *Id*. at ¶ 30.

18. Neither HOA nor HOA Trustee informed or advised the bidders and potential bidders at the HOA Foreclosure Sale, either orally or in writing, that any individual or entity had attempted to pay the Super-Priority Lien Amount. JA020 at ¶ 31

19. Upon information and belief, the debt owed to BANA by the Former Owner of the Property, pursuant to 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. *Id*. at ¶ 32.

20. Upon information and belief, BANA alleges that its Attempted Payment of the Super-Priority Lien Amount served to satisfy and discharge the Super-Priority Lien Amount, thereby changing the priority of the HOA Lien vis a vis the Deed of Trust. *Id*. at ¶ 33.

21. Upon information and belief, Lender alleges that as a result of its Attempted Payment of the Super-Priority Lien Amount, Appellant acquired title to the Property subject to the Deed of Trust. *Id*. at ¶ 34.

22. Upon information and belief, if the bidders and potential bidders at the HOA Foreclosure Sale were aware that an individual or entity had attempted to pay the Super-Priority Lien Amount and/or by means of the Attempted Payment prior to the HOA Foreclosure Sale and that the Property was therefore ostensibly being sold subject to the Deed of Trust, the bidders and potential bidders would not have bid on the Property. *Id*. at ¶ 35.

23. Had the Property not been sold at the HOA Foreclosure Sale, HOA and HOA Trustee would not have received payment, interest, fees, collection costs and assessments related to the Property and these sums would have remained unpaid. *Id*. at ¶ 36.

24. HOA Trustee acted as an agent of HOA. *Id*. at ¶ 37.

25. The HOA is responsible for the actions and inactions of HOA Trustee pursuant to the doctrine of respondeat superior and agency. *Id*. at ¶ 38.

26. HOA and HOA Trustee conspired together to hide material information related to the Property, the HOA Lien, the Attempted Payment of the Super-Priority Lien Amount, the rejection of such payment or Attempted Payment, and the priority of the HOA Lien vis a vis the Deed of Trust, from the bidders and potential bidders at the HOA Foreclosure Sale. JA021 at ¶ 39.

27. The information related to any Attempted Payment or payments made by Lender, BANA, the homeowner or others to the Super-Priority Lien Amount was not recorded and would only be known by BANA, the HOA, and HOA Trustee. *Id*. at ¶ 40.

28. Upon information and belief, HOA and HOA Trustee conspired to withhold and hide the aforementioned information for their own economic gain and to the detriment of the bidders and potential bidders at the HOA Foreclosure Sale. *Id*. at ¶ 41.

29. BANA first disclosed the Attempted Payment by BANA/Lender to the HOA Trustee in the Complaint filed against Plaintiff and the HOA on March 3, 2016

("Discovery") in the United States District Court for the District of Nevada, Civil Action No. 2:16-cv-00467MMD-CWH (the "Case"). JA022 at ¶ 47.

30. In the Amended Complaint and in his Declaration, Mr. Haddad testified that it was his practice and procedure when he would attend NRS Chapter 116 sales at all times relevant to this case, to ask or attempt to ascertain from the homeowner association's foreclosure trustee, whether anyone had attempted to or did tender any payment regarding the homeowner association's delinquent assessment lien. JA021 at ¶ 42-45. JA112-113. If Mr. Haddad learned that a "tender" had either been attempted or made, he would not purchase the property offered in that delinquent assessment lien foreclosure sale. *See id*.

VII. STANDARD OF REVIEW

This Court reviews de novo an order granting a motion to dismiss for failure to state a claim, applying a rigorous standard, accepting the plaintiff's factual allegations as true and drawing every intendment in favor of the non-moving party. *Pack v. LaTourette*, 128 Nev. 264, 268 (2012). In asserting a claim in the complaint, the plaintiff only needs to state "a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a). A pleading is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. *Crucil v. Carson City*, 95 Nev. 583, 585 (1979). Based upon *Shoen v. SAC Holding Corp.*, 122 Nev.

621, 635 (2006), the Court must accept the nonmoving party's factual allegations and true and draw every fair factual inference from there.

Liberal pleading standards apply equally to declaratory relief and other civil claims. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846 (1993). "[A] complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle him to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-228 (2008).

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

…

VIII. SUMMARY OF ARGUMENT

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

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

2. NRS Chapter 116 required the HOA and HOA Trustee to disclose the Attempted Payment, and the HOA and HOA Trustee breached those duties.

IX. LEGAL ARGUMENT

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

The HOA asserts, and the trial court found, that Appellant's claim for intentional or negligent misrepresentation must be dismissed as a matter of law citing NRCP 12(b)(5). *See* JA225-226. However, this argument is incorrect. In *Nelson v. Heer*, the Court defined intentional misrepresentation as being established by demonstrating:

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

> misrepresentation or omission. Proximate cause limits liability to foreseeable consequences that are reasonably connected to both the defendant's misrepresentation or omission and the harm that the misrepresentation or omission created.

123 Nev. 217, 225 (2007). The *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 to disclose to potential bidders, and this duty is a good faith obligation to disclose upon reasonable inquiry from potential bidders at the HOA Foreclosure Sale, and such intentional omission is equivalent to a false representation under the facts of this case.

Here, Appellant alleged facts that satisfy the elements identified in *Nelson*. *See* JA001-6 and 15-21. Because the district court was bound under Nevada law to accept Appellant's factual assertions as true, *see Shoen, supra*, the district court erred in dismissing this claim for relief.

With regard to Appellant's claim of negligent misrepresentation, the HOA argued that it should be dismissed it for the same reason as the intentional misrepresentation – lack of duty. JA041-43. However, that argument is also incorrect, because Appellant adequately pled facts sufficient to support a claim for negligent misrepresentation. In, *Barmettler v. Reno Air, Inc.*, this Court defined the tort of negligent misrepresentation as follows:

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

114 Nev. 441, 449 (1998). Here, Appellant pled facts, that must be and was taken as true, sufficient to survive a motion to dismiss under NRCP 12(b)(5). Specifically, Appellant alleged that the HOA and HOA Trustee had a pecuniary interest in the outcome of the HOA Foreclosure Sale and that they supplied false information (or at least omitted information) when asked whether a tender/Attempted Payment had been made, upon which Appellant justifiably relied. JA022-25 at ¶¶ 52-68 JA033-34. Therefore, the district court erred in dismissing this claim for relief.

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

In the MTD, the HOA argued that there is no duty under NRS Chapter 116 to "affirmatively disclose payments or attempted payments on the HOA's lien." JA042. Further, the HOA argued that it had no duty to inform Appellant of the Attempted Payment, because Appellant was given a deed without warranty following the HOA Foreclosure Sale. *See id*. However, these arguments are incorrect under NRS Chapter 116.

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

The Complaint adequately states claims for relief consistent with the HOA's and HOA Trustee's obligation of good faith, honesty in fact, reasonable standards of fair dealing, and candor pursuant to NRS 116.1113. The HOA and HOA Trustee, argue that Appellant fails to cite to any provision within NRS Chapter 116 that contains an obligation or duty of good faith to the Purchaser/Appellant, thus alleging that NRS 116.1113 is not implicated. JA042 and 45. However, the HOA's argument fails.

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

The duties of good faith and fair dealing go hand and hand with the duty of candor. For example, the Restatement (Second) of Contracts, § 205, expressly provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." Restat. 2d of Contracts, § 205 (2nd 1981). Comment (d) to Section 205 further suggests: "fair dealing may require more than honesty." Accordingly, the duty of candor is an integral component of the duty of fair dealing. Though a contract interpretation, it has application in the HOA Foreclosure Sale. Nevada's HOA lien statute, NRS 116.3116, is modeled after the UCIOA, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008), which Nevada adopted in 1991, *see* NRS 116.001. The purpose of the UCIOA is "to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). *See Carrington Mortg. Holdings, LLC v. R Ventures VIII, LLC*, 419 P.3d 703, 705 (Nev. 2018) (unpublished disposition). In *Carrington*, this Court made clear that it would turn to case law from other jurisdictions to support its conclusions interpreting the UCIOA. *See id*.

Accordingly, this Court should follow the lead set by Minnesota in holding that the UCIOA imposed the duty of fair dealing which encompasses the duty of candor. For example, the Minnesota Appeals Court stated that, under the Minnesota Common Interest Ownership Act, which is likewise modeled after the UCIOA, good

faith "means observance of two standards: 'honesty in fact,' and observance of reasonable standards of fair dealing." *Horodenski v. Lyndale Green Townhome Ass'n, Inc.*, 804 N.W.2d 366, 373 (Minn. App. 2011) (quoting UCIOA, 1982, § 1-113 & cmt.); *see also Dean v. CMPJ Enters., LLC*, 2018 Minn. App. Unpub. LEXIS 642 at *5 (Minn. App. 2018). Turning to the UCIOA's comments, the UCIOA's drafters provided comment to the provision that was enacted in Nevada as NRS 116.1113:

> **SECTION 1-113. OBLIGATION OF GOOD FAITH**.
>
> Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.
>
> **Comment**
> This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. ***Good faith, as used in this Act, means observance of two standards: "honesty in fact," and observance of reasonable standards of fair dealing***. While the term is not defined, the term is derived from and used in the same manner as in 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.

(emphasis added). 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.

This Court should further follow the lead of Delaware in recognizing that the duty of fair dealing obviously includes the duty of candor. The Delaware courts have concluded that part of "fair dealing" is the obvious duty of candor. The concept is simple – the information known to the HOA and the HOA Trustee should be disclosed to the Purchaser/Appellant. Moreover, one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy. *Lank v. Steiner*, 224 A.2d 242, 244 (Del. Supr. 1966).

Delaware has long imposed this duty even upon persons who are not corporate officers or directors, but who nonetheless are privy to matters of interest or significance to their company. *See e.g. Weinberger v. Uop*, 457 A.2d 701 (Del. 1983); *Brophy v. Cities Service Co.*, 70 A.2d 5, 7 (Del. 1949). Part of fair dealing is the obvious duty of candor. *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977).

The duty of candor is one of the elementary principles of fair dealing. *See Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261 (Del. 1989); *see also Holten v. Std. Parking Corp.*, 98 F. Supp. 3d 444 (Conn. 2015). In *Osowski v. Howard*, 807 N.W.2d 33 (WI App. Ct. 2011), the Wisconsin Appeals Court noted that the duty of

fair dealing is a guarantee by each party that he or she "will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *See also Tang v. C.A.R.S. Prot. Plus, Inc.*, 734 N.W.2d 169 (Wis. Ct. App. 2007).

Moreover, the official comments by the drafters of the UCIOA provide important guidance in construing NRS 116.1113. *See Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166, 175 (D.C. Ct. App. 2014); *see e.g. Alvord Inv., LLC v. Zoning Bd. of Appeals*, 920 A.2d 1000 (Conn. 2007); *Cantonbury Heights Condominium Ass'n., Inc. v. Local Land Dev.*, LLC, 273 Conn. 724, 739-40 (2005); *W & D Acquisition, LLC v. First Union National Bank*, 262 Conn. 704, 712-13 (2003); *Platt v. Aspenwood Condo. Ass'n, Inc.*, 214 P.3d 1060, 1063-64 (Colo. App. 2009) (relying on drafters' comments to UCIOA for guidance in interpreting state statute modeled on UCIOA; "We accept the intent of the drafters of a uniform act as the [legislature's] intent when it adopts that uniform act.") (internal quotation marks omitted); *Hunt Club Condos., Inc. v. Mac-Gray Servs., Inc.*, 721 N.W.2d 117, 123-25 (Wis. Ct. App. 2006) (official and published comments are "valid indicator" of legislature's intent in enacting corresponding statute); *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons*

Morgantown, LLC, 230 W. Va. 589 (2013); *Will v. Mill Condo. Owners' Ass'n*, 176 Vt. 380 (2004) (turned to commentary to interpret state statute modeled on UCIOA).

2. RESPONDENTS FOCUS ON A LACK OF AN AFFIRMATIVE DUTY OBFUSCATES THE UNDERLYING MISREPRESENTATION AND LACK OF GOOD FAITH

Based upon the portrayal of the obligations set forth by the HOA and HOA Trustee, the district court held that the HOA and HOA Trustee did not have a duty of disclosure pursuant to *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev. 2019) (unpublished disposition), which compares the duties contained in the 2013 and 2017 versions of NRS 116.31162. JA225. However, the district court's reliance on *Noonan* is misplaced, because it is factually distinguishable from the facts of this case. While it is true the *Noonan* court stated, "Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose," *Noonan*, 438 P.3d at 335, certainly the HOA and the HOA Trustee were bound to tell the truth when Appellant inquired whether a tender payment had been attempted or made.

Further, the *Noonan* decision is based upon a factual determination of whether a material fact question had been asked and if it was answered or there was a material omission of fact. The *Noonan* court did not consider the arguments presented in this appeal about NRS 116.1113, NRS Chapter 113, and their relevant analysis. Thus, the HOA's, and district court's, reliance on *Noonan* is, and was, erroneous.

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 above cited case law. 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 116.113 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.

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

The relationship of the HOA Trustee as an agent for the HOA created a new contract at the HOA Foreclosure Sale for the sale of a "unit" to a "Purchaser" that as a result of its purchase shall become a member of the HOA. In the foreclosure

section of NRS 116.31162 to NRS 116.3117, the term Purchaser refers to a buyer at an HOA Foreclosure Sale in addition to direct sales and as such the obligation of good faith operates to encompass a successful bidder.

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

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

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

The HOA Foreclosure Sale was performed pursuant to NRS 116.31162 through 116.31168, and Appellant reasonably relied upon the recitals included in the HOA Foreclosure Deed that stated that the foreclosure sale was in compliance with all laws and with NRS Chapter 116. *See Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, 2017 Nev. App. Unpub. LEXIS 229 at *2 (Nev. App. Apr. 17, 2017)

(unpublished disposition) ("And because the recitals were conclusive evidence, the district court did not err in finding that no genuine issues of material fact remained regarding whether the foreclosure sale was proper and granting summary judgment in favor of SFR."). In this case, "Appellant had no reason to question the recitals contained in the HOA Foreclosure Deed and recorded documents. The foreclosure of the HOA Lien is presumably valid based upon the recitals in the HOA Foreclosure Deed. In *Nationstar Mortgage*, the Court explained the foreclosure procedure:

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

Nationstar, 2017 Nev. App. Unpub, Lexis 229 at *3-4. As such, there would have been no reason for Appellant to question the legitimacy of the HOA Foreclosure Sale based exclusively upon the recorded documents. At foreclosure sales conducted pursuant to NRS Chapter 116, bidders, potential bidders, and buyers do not have access to any more information than is recorded. Appellant's reliance on the recitations on the HOA Foreclosure Deed was therefore reasonable and foreseeable.

Under Nevada law, the HOA Foreclosure Sale and the resulting HOA Foreclosure Deed are both presumed valid. NRS 47.250(16)-(18) (stating that disputable presumptions exist "that the law has been obeyed" "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed."). Accordingly, the Appellant 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.

Here, Appellant was the Purchaser at the HOA Foreclosure Sale. The HOA and/or the HOA Trustee's actions leading up to and at the HOA Foreclosure Sale intentionally obstructed Appellant's opportunity to conduct its own due diligence regarding the Property, and ultimately affected Appellant's decision whether to actually submit a bid on the Property or not. Had Appellant known that it was purchasing the Property subject to the Deed of Trust, Appellant never would have submitted a bid in the first place, thus avoiding this entire controversy. Indeed, it was Appellant's practice to inquire as to this issue, by way f inquiry into payments. JA022-25 at ¶¶ 52-68 JA033-34. The 2015 Legislature did revise NRS Chapter 116

to codify what the case law has interpreted creating a bright line for the parties to rely upon by mandating that HOA/HOA Trustee record a satisfaction of the Super-Priority Lien Amount for the bidders to see. For example, the jurisdictions adopting the UCIOA have determined that candor is an additional requirement implicitly contained in the good faith mandate of NRS 116.1113.

Nonetheless, even prior to the amendments to NRS Chapter 116 in 2015, the HOA and the HOA Trustee were required to be truthful in their contracts and duties and to follow the law as set forth in NRS 116.1113. Because Appellant sufficiently pled that the HOA and HOA Trustee did not comply with their duties under NRS 116, presenting through his declaration his practice of inquiring as to payments, and through the Amended Complaint the refusal to respond, the district court erred by granting the MTD.

C. APPELLANT'S CLAIMS FOR CONSPIRACY AND BREACH OF GOOD FAITH DO NOT FAIL AS A MATTER OF LAW

The HOA's and HOA Trustee's arguments pertaining to both the conspiracy and breach of good faith simply refer back to the same argument regarding the lack of an affirmative duty to disclose the Attempted Tender. As set forth above, the lack of an affirmative duty to proactively disclose the Attempted Tender is not the legal theory set forth, but the failure to disclose in response to the inquiry of Appellant is the relevant approach. To the extent that there is a duty, the HOA violated such duty.

To the extent that there was a violation by the HOA and its agent regarding this sale, the two worked in unison to accomplish the purpose of conducting the HOA Sale, and thus conspired together.

X. CONCLUSION

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

Dated this March 16, 2022

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

[a.] This brief has been prepared in a proportionally spaced typeface using

Microsoft Office Word 365 in Times New Roman font size 14.

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

[a.] Proportionately spaced, has a typeface of 14 points or more, and contains 5,467 words; or

[b.] does not exceed 30 pages.

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

Dated March 16, 2022.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on March 16, 2022, I caused a copy of **Appellant's Opening Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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