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 May 17 2022 01:46 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S REPLY 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 May 17, 2022.

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A. INTRODUCTION

Respondent Sunrise Ridge Master Homeowners Association's ("HOA") Answering Brief ("HOA AB") and the Joinder of Nevada Association Services, Inc., (the "HOA Trustee") necessarily touch upon the same issues raised by Appellant; 1) the duty of the HOA Trustee and HOA; 2) the obligation in response to an inquiry by Appellant; and 3) the impact upon the Motions to Dismiss. Appellant will address these issues in the order in which they were raised by the Respondents, as they were raised in the Opening Brief of Appellant. The distinguishing factor that Appellant asks this Court to address is the implication of Appellant's practice and policy of inquiry, and the impossibility of determining additional information, either at the time of the HOA Sale or until disclosed by litigation, which the HOA Trustee and HOA now seek to use as a shield, allowing both to benefit from the uncertainty they both contributed to the processes they now present in response to Appellant's arguments.

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

The HOA Trustee and HOA maintain, as they did before the district court, that neither had any duties outside those contained in NRS 116.31162 through NRS 116.31168. HOA AB at 4. In support of it argument, the HOA Trustee relies on

Noonan v. Bayview Loan Serv'g, 438 P.3d 335 (Nev. 2019) (unpublished disposition). HOA AB at 4. However, the HOA Trustee and HOA's reliance on *Noonan* is misplaced, because it is factually distinguishable from this case.

First, it must be noted that the order in *Noonan* was based on the Court's review of an order granting summary judgment. *Noonan*, 438 P.3d at *1. In contrast, here, no discovery had been conducted when the district court dismissed the Complaint.

Second, 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* JA033-34 (Declaration of Eddie Haddad indicating, "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 …").

Third, 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 and its relevant analysis. Thus, the HOA and HOA Trustee's reliance on *Noonan* is, and was, erroneous.

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.

While the HOA and HOA Trustee contend that the duty of good faith and fair dealing are inapplicable because Appellant references Minnesota and Delaware corporate law, Appellant clearly states that Nevada should "follow the lead" of Delaware in recognizing that the duty of fair dealing includes the duty of candor. As previously set forth, 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). While the *Lank v. Steiner* case does not deal with the UCIOA, UCC, or ULSTA, it does address when one party has information hidden, and undiscoverable, from another. The *Lank* court looked to *Strong v. Repide*, 213 U.S. 419, 430, 29 S. Ct. 521, 525 (1909), which noted that a party who obtains agreement by means of concealing or omitting a material fact, has not obtained an agreement. While not directly pertaining to property transactions,

Appellant cites *Lank*, and by extension *Strong*, for the preposition that the relation of the parties can contribute to the basis that hidden information should be disclosed.

Stated differently, the analogy that Appellant makes is that this duty is imposed even upon persons who are not corporate officers or directors, but who nonetheless **are privy to matters of interest** or significance to their company. (Emphasis added) *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).

Likewise, 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). The HOA and HOA Trustee violates these "elementary principles" by their obfuscation of the tender by BANA, and thus Appellant was injured.

To the extent the HOA and HOA Trustee argue NRS 116.1113 is not implicated in an HOA Foreclosure Sale, they are incorrect. HOA AB at 7-8. 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.

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 towards

the lien. Appellant contends that it was the failure to respond to Appellant's inquiry, a material omission, that triggered the misrepresentation claims by Appellant. While the HOA thus seeks to guide the argument away from the "time and manner" elements of the sale, seeking the lower hurdle of "form and content" regarding compliance with the statute, a material omission goes towards the manner of the sale, and less to the form. *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012) and *Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 194 P.3d 1254 (2008). By making a material omission, the HOA Trustee, on behalf of the HOA, failed to comply "with all requirements of law."

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 Br. at 13-15. 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.

The HOA and the HOA Trustee also argue that due to amendment of NRS 116 in 2015, that the HOA Trustee could not have previously had a duty to disclose the Attempted Tender, and the amendment specifically excluded the duty. HOA AB at 7. Essentially, the HOA argues that since the legislature clarified that NRS 116.31164(6) required a disclosure, no duty previously existed. The HOA thus opens the door to the argument that this same amendment clarified the obligations of the HOA Trustee, and that such a duty did exist prior to the 2015, and was merely made explicit, instead of implicit. Appellant contends that the 2015 statutory amendments served to clarify a previous statute generally apply retroactively. *Fernandez v. Fernandez*, 126 Nev. 28, 35 n.6, 222 P.3d 1031, 1035 n.6 (Nev. 2010). The clarification that disclosure was required clarified the previously existing, implicit duty, of same, and is not redundant, but only explicitly states what Appellant contends was implicitly true previously. Indeed, this requirement also vitiates the HOA Trustee's contention that they were prohibited from providing such information; at no point does the HOA Trustee say they are suffering from a conflict between the amended NRS 116.31164(6) and the Fair Debt Collection Practices Act of 15 USC 1692(a)(6).

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

The HOA and HOA Trustee 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 10.

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* JA011. Pursuant to the allegations, The HOA and HOA Trustee had every reason to conspire together to omit the necessary information, including that of the involvement and actions of BANA. Here, Appellant sufficiently pled its claim for relief for conspiracy. As such, the district court erred in dismissing this claim for relief, and based upon the above, erred in dismissing the remaining claims.

III. 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 May 17, 2022

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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 1,966 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 May 17, 2022.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on May 17, 2022, 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:

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