IN THE SUPREME COURT OF NEVADA

RIVER GLIDER AVENUE TRUST Appellant, v. HARBOR COVER HOMEOWNERS ASSOCIATION; and NEVADA ASSOCIATION SERVICES, INC. Respondents	Supreme Court Case No. 83689 **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 River Glider Avenue Trust ("Appellant"): Roger P. Croteau & Associates, Ltd.

2. Parent corporations/entities: Appellant is a Nevada Trust. No publicly held corporation owns 10% or more of the beneficial interest in the Appellant.

Dated this May 18, 2022.

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A. RECEIPT OF A DEED "WITHOUT WARRANTY" DOES NOT PLACE THE APPELLANT ON A HEIGHTENED STANDARD OF NOTICE OR EXCUSE THE HOA AND HOA TRUSTEE'S MISREPRESENTATIONS

In Harbor Cove Homeowners Association ("HOA") and Nevada Association Service's ("HOA Trustee") Answering Brief ("HOA AB") the HOA argues that Appellant has no argument since it purchases a deed without warranty HOA AB at 28. 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. First, Appellant had no way of obtaining additional information from the knowledgeable parties, as set forth in the Opening Brief. Second, Appellant could not be expected to determine information that was clearly hidden by the HOA and HOA Trustee in an effort to maximize the return and likelihood of the HOA Sale. The HOA and the HOA Trustee attempt to stretch the "without warranty" language to vitiate Appellant's claims to the discovery rule.

The HOA and HOA Trustee cite to the "without warranty" language of the Foreclosure Deed as proof that Appellant was on notice from the day of sale of the risk. HOA AB at 30-32. As the HOA states, "there was no intent to induce reliance" by Appellant. HOA AB at 30. First, Mr. Haddad did set forth in the Declaration that he would inquire on behalf of the Appellant regarding multiple issues, including that

of the whether the sale would proceed, and the opening bid price, and determine if any payments had been made. AA285-286. The HOA\s contention that "without warranty" acts to place the burden on Appellant is a thin veiled acknowledgement that the HOA and HOA Trustee did, indeed omit critical information at the time of the sale. Ultimately, the best that the "without warranty" statement can substantiate is that Appellant should have expected a challenge, which was already evident by the litigation preceding the *SFR* decision. Indeed, multiple arguments were made against the interest of purchasers at HOA sales, the vast majority of which were addressed by *SFR Invs. Pool 1, LLC. v. U.S. Bank, N.A.*, 130 Nev. 742, 758 (Nev. 2014).

Likewise, the HOA and HOA Trustee argues that the "without warranty" language shields them from any liability. HOA AB at 30-33. If accepted as true, the HOA and HOA Trustee'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 by BANA. 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.

Additionally, the HOA argues that a review of the recoded documents, including the fact that there were two Notices of Sale, with one having a decreased value, disclosed the tender. HOA AB at 31-33. This is simply a case of hindsight being 20/20. The decrease in the amount due under the two notices of sale could have been due to borrower payments in the interim, or simply an accounting lading to a correction by the HOA or HOA Trustee. There was no way, except for inquiry of the HOA Trustee, to determine the involvement of BANA; the HOA Trustee cannot now claim that Appellant should have known the tender occurred, from an apparent reduction of the amount due, as emphasized by the HOA, despite there being multiple other possible reasons for such a reduction.

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 26. In support of the argument, the HOA and HOA Trustee relies on *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev. 2019) (unpublished

disposition). However, the HOA Trustee and HOA's reliance on *Noonan* and on *A Oro, LLC v. Ditech Financial LLC*, 434 P.3d 929 (Nev. 2019) (unpublished disposition) is misplaced, because both are factually distinguishable from this case.

1. *NOONAN* IS INAPPLICABLE.

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* AA 285 (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 and its relevant analysis in addition to this factual issue. Thus, the HOA and HOA Trustee's reliance on *Noonan* is, and was, erroneous.

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.

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 stated 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.

As set forth previously by Appellant, 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 as the HOA correctly points out in the HOA AB, 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.

2. APPELLANT HAD A REASONABLE EXPECTATION REGARDING THE INTEREST CONVEYED AT THE FORECLOSURE SALE.

The HOA raises several assumptions regarding Appellant's beliefs regarding the interest conveyed by the HOA and HOA Trustee. HOA AB at 22-25. First, as set forth by Appellant, the expectation that the sale incorporated the super priority interest was reasonable in light of the record, and the refusal of the HOA Trustee to acknowledge any other possibility. While the HOA and HOA Trustee set forth hypotheticals regarding the HOA being a "limited-purpose association" pursuant to NAC 116.090, the HOA and HOA Trustee do not address Appellant's claim, supported by the declaration of Susan Moses of the HOA Trustee, that the information would not have been produced, as the HOA Trustee had a policy of refusing to respond to just such inquiries as Appellant here set forth in his declaration. Compare AA240-1 to AA147-8. This refusal relates to Appellant's approach to the sale; whereas the HOA and HOA Trustee now argue that it should have made the Appellant hesitant, they HOA and HOA Trustee clearly had no issue conducting the sale. Though they may not have "intended" to cause Appellant to

place any reliance upon the recorded documents, and now argue that Appellant should have known that they were not presenting relevant information, it is too little too late. Appellant attended the sale, with the information presented in the record and which he could glean despite the HOA trustee's refusal to answer inquiries, and with the understanding of the obligations of the HOA and HOA Trustee pursuant to NRS 116, and purchased the interest in the Property. It was only latter, through litigation with the holder of the Deed of Trust, did Appellant become aware that the HOA and HOA Trustee withheld information regarding the tender. Thus, it is not Appellant's contention that the Appellant was entitle to a superpriority interest; Appellant was simply entitled to the information that would have allowed Appellant to determine what it was that the HOA was selling.

3. APPELLANT HAD A REASONABLE EXPECTATION REGARDING THE INTEREST CONVEYED AT THE FORECLOSURE SALE.

To the extent the HOA and HOA Trustee argues NRS 116.1113 has limited impact on Appellant's contentions as to the HOA Foreclosure Sale, they are incorrect. HOA AB at 12-15. NRS 116.1113 is not only directly 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," as set forth in the Foreclosure Deed. AA003 at ¶23.

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 11-16. 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 also argues 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 9-15. This follows the acknowledgement that the HOA did owe duties under NRS 116.113, but with the caveat that those duties are "limited." HOA AB at 13. Essentially, the HOA Trustee argues that since the legislature clarified that NRS 116.31164(6) required a disclosure, no duty previously existed. The HOA Trustee 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). This lack of complaint is telling, the HOA Trustee is eager to claim it was prevented from providing the information, but now when it is required, the hurdles are of no moment. While the conflict of laws issue is likely not ripe for decision at this time in this

matter, the HOA Trustee should not be able to use this conflict against the Appellant, forcing a no-win analysis of the issue upon Appellant or this Court.

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

In its Answering Brief, the HOA Trustee relies on the *A Oro* decision to support the argument that the district court properly dismissed Appellant's misrepresentation claims. HOA AB at 28. However, *A Oro* is distinguishable.

In particular, the HOA Trustee 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 28. The HOA Trustee'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* AA 147-148 and 285-286.

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 and their relevant analysis as it applies to the

HOA Foreclosure Deed. For example, the HOA Foreclosure Deed stated that the HOA Trustee has complied with "[a]ll requirements of law. AA005. 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.

C. THE DISTRICT COURT DID NOT ADDRESS THE STATUTE OF LIMITATION ARGUMENT RAISED BY THE HOA

In its Answering Brief, the HOA presents a statute of limitation argument that is not addressed by the district court in the Order of September 21, 2021. AA309-321. Furthermore, this argument was addressed by way of the Complaint, which set forth a discovery date of August 24, 2017, based upon the disclosure of the attempted payment in the Lender's First Supplemental Disclosure of Witnesses and documents as served on Appellant on August 24, 2017. AA008. While the HOA contends that the tender should have been obvious from the date of the sale, having spent the majority of the Answering Brief setting forth reasons why a disclosure did not occur and was not necessary, it disregards these arguments in its effort to set forth the Complaint as untimely. The district court made no factual finding regarding this issue, and it should not be addressed on appeal.

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 MSJ.

Dated this May 18, 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 3,190 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 18, 2022.

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In accordance with NRAP 25, I hereby certify that on May 18, 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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