IN THE SUPREME COURT OF NEVADA

DAISY TRUST, a Nevada trust, Appellant, vs. EL CAPITAN RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a domestic Nevada non-profit corporation, Respondent.	Supreme Court Case No. 83404 Consolidated with Supreme Court Case No. 84037 **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 Daisy 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 and/or the Bay Harbor Trust.

Dated this February 17, 2022.

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(A) Basis for the Supreme Court's Appellate Jurisdiction: The Order Granting Respondent El Capitan Ranch Landscape Maintenance Association's (the "HOA" or "Respondent") Motion for Summary Judgment (the "MSJ") is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The Notice of Entry of the Findings of Fact and Conclusions of Law was served on July 21, 2021. JA179-191. The Findings of Fact and Conclusions of Law was filed on July 20, 2021. JA181-191. The Notice of Appeal was filed on August 18, 2021. JA193.

(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.

IV. STATEMENT OF ISSUES PRESENTED

Whether the district court erred by granting the HOA's MSJ 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?

V. STATEMENT OF THE CASE

On February 19, 2019, Appellant filed its Complaint. JA001-12. Appellant's Complaint asserted three (3) claims for relief against the HOA and HOA Trustee: (i) intentional, or alternatively negligent, misrepresentation; (ii) breach of the duty of good faith; and (iii) conspiracy. *See id*. These claims are related to Appellant's purchase of real property commonly known as 8721 Country Pines Avenue, Las Vegas, Nevada 89129 (APN 138-08-611-076) (the "Property") at a homeowners' association foreclosure conducted by the HOA Trustee on behalf of the HOA. JA001.

On May 27, 2021, the HOA filed its MSJ. JA030. On June 10, 2021, Appellant filed its Opposition to the MSJ. JA107. On June 22, 2021, the HOA filed its reply in support of the MSJ. JA134. On June 29, 2021, the district court heard oral argument on the MSJ and granted the same. JA162.

This appeal was consolidated with the related matter on attorney fees, matter 84037 by way of Order of this Court on February 11, 2022.

VI. STATEMENT OF RELEVANT FACTS

1. Appellant is the record title holder of the Property, which Appellant acquired by Foreclosure Deed recorded in the Clark County Recorder's office on September 11, 2012, pursuant to a homeowners' association lien foreclosure sale

(the "HOA Foreclosure Sale"), by Alessi & Koenig, LLC, (the "HOA Trustee") on behalf of the HOA. JA002 at ¶ 4.

2. The HOA is a Nevada common interest community association or unit owners' association as defined in NRS 116.011. JA002 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. *Id*. 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 1991, the Nevada legislature adopted the Uniform Common Interest Ownership Act ("UCIOA"), codified as NRS Chapter 116.

8. The UCIOA provides that through recordation of the CC&Rs, the HOA has a perfected lien for any sums due the HOA and that "no further recordation of any claim of lien for assessments under this section is required." NRS 116.3116(5).

9. In Nevada, when a homeowners' association properly forecloses upon a lien containing a superpriority lien component, such foreclosure extinguishes a first deed of trust. JA003 at ¶ 12.

10. 13. On or about December 24, 1996, Patricia Butler, an unmarried woman (the "Former Owner") purchased the Property. *Id*. at ¶ 13.

11. The Former Owner of the Property failed to pay to HOA all amounts due pursuant to HOA's governing documents. *Id*. at ¶ 16.

12. Accordingly, on March 31, 2010, the 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 $643.00, plus continuing assessments, interest, late charges, costs, and attorney's fees (the "HOA Lien"). *Id*. at ¶ 17.

13. On June 16, 2010, the 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 $1,703.00 as of May 13, 2010, plus continuing assessments, late fees, interest and attorney's fees and costs. *Id*. at ¶ 18.

14. 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"). JA004 at ¶20.

15. On September 23, 2010, BANA, through Miles Bauer, provided a payment of $58.50 to the HOA Trustee, which included payment of up to nine months of delinquent assessments (the "Attempted Payment"). JA004 at ¶ 22.

16. The HOA Trustee, on behalf of the HOA, rejected BANA's Attempted Payment. JA004 at ¶ 23.

17. On August 2, 2012, the HOA Trustee, on behalf of the HOA, recorded a Notice of Sale against the Property ("NOS"). *Id*. at ¶ 24.

18. On September 5, 2012, HOA Trustee then proceeded to non-judicial foreclosure sale on the Property and recorded the HOA Foreclosure Deed on September 11, 2012, which stated that the HOA Trustee sold the HOA's interest in the Property to Appellant for the highest bid amount of $3,700.00 (the "HOA Foreclosure Deed"). *Id*. at ¶25.

19. 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. JA005 at ¶ 28.

20. 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. *Id*. ¶ 30.

21. 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 ¶ 31.

22. 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 ¶ 32.

23. Upon information and belief, BANA 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 ¶ 33.

24. 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 ¶ 34.

25. 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 ¶ 35.

26. HOA Trustee acted as an agent of HOA. JA006 at ¶ 36.

27. HOA is responsible for the actions and inactions of HOA Trustee pursuant to the doctrine of respondeat superior and agency. *Id*. at ¶ 37.

28. 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. *Id*. at ¶ 38.

29. The information related to any Attempted Payment or payments made by 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 ¶ 39.

30. 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 ¶ 43.

31. BANA first disclosed its Attempted Payment to the HOA Trustee in BANA's Second Supplemental Disclosures pursuant to NRCP 16.1 served on Appellant on February 22, 2016 ("Discovery") in the underlying matter (the "Case"). *Id*. at ¶ 44.

32. 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. JA132-3. 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

An order granting summary judgment is reviewed de novo. *Physicians Ins. Co. of Wis., Inc. v. Williams*, 279 P.3d 174, 175 (Nev. 2012); *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). "Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and 8 affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood*, 121 P.3d at 1031.

VIII. SUMMARY OF ARGUMENT

The district court erred when it granted the HOA's MSJ 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.

3. Appellant stated a viable claim for relief for conspiracy.

IX. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIMS, BECAUSE THE HOA HAD DUTIES UNDER NRS CHAPTER 116 TO DISCLOSE THE ATTEMPTED PAYMENT TO APPELLANT UPON INQUIRY

In the MSJ, the HOA argued that there is no duty under NRS Chapter 116 to "disclose that a third party attempted to make a partial payment." JA032. 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. JA035. However, these arguments are incorrect under NRS Chapter 116.

The Appellant 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. The HOA argues 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. JA043-45. 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).

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. ***Here***, ***Appellant relied upon the recital in the HOA Foreclosure Deed***.

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.

Specifically, the HOA Foreclosure Deed asserted that the HOA Trustee "***requirements of law*** … ***have been complied with all***" JA047. However, the HOA Trustee did not comply with all requirements of law. Unfortunately, the HOA and the HOA Trustee's lack of good faith and candor in conducting the HOA Foreclosure Sale was not immediately evident. It was concealed. It was only upon receipt of BANA's disclosure of the Attempted Payment in the Case, that Appellant discovered the facts giving rise to its Complaint in this matter.

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. JA133. 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 set forth factual issues regarding the HOA's failure to comply with their duties under NRS 116, the district court erred by granting the MSJ.

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

The HOA'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's MSJ.

Dated this February 17, 2022

ROGER P. CROTEAU & ASSOCIATES, LTD.

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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 4,433 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 February 17, 2022.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on February 17, 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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