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 REPLY BRIEF AND ANSWERING BRIEF**
EL CAPITAN RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a domestic Nevada non-profit corporation Appellant vs. DAISY TRUST, a Nevada trust, Respondent	

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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 ("Daisy"): Roger P. Croteau & Associates, Ltd.

2. Parent corporations/entities: Daisy 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 May 4, 2022.

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A. THE ACKNOWLEDGED INQUIRY BY APPELLANT REQUIRED A DISCLOSURE OF THE TENDER

In the Answering Brief the Respondent El Capitan Ranch Landscape Maintenance Association ("HOA") contends that there is no duty under NRS Chapter 116 to inform bidders and potential bidders at the HOA Foreclosure Sale' of an attempt to make a partial payment of the Association's lien. El Capitan Ranch Landscape Maintenance Association Answering Brief and Opening Brief ("AB") 8-12. Further, the district court agreed with the HOA that they had no duty to inform Daisy of the Attempted Payment, because Daisy was given a deed without warranty following the HOA Foreclosure Sale. JA169-172. However, these holdings are incorrect under NRS Chapter 116 in light of the Declaration. JA132-133.

Daisy adequately states and factually supports claims for relief consistent with the HOA's obligation of good faith, honesty in fact, reasonable standards of fair dealing, and candor pursuant to NRS 116.1113. The HOA contends that Daisy failed to cite to any provision within NRS Chapter 116 that contains an obligation or duty of good faith to the Purchaser/ Daisy, thus finding that NRS 116.1113 is not implicated. AB 8-12. In light of the district court acknowledging that Daisy provided a factual declaration that it had a clear policy of pursuing the information

regarding tender, this matter differs from the HOA's analysis, especially of the case law cited, and thus must be considered differently.

In the Answering Brief, the HOA contends that it 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. AB at 9. However, the HOA'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's agent, Alessi & Koenig, LLC, (the "HOA Trustee") were bound to tell the truth when Daisy, through Mr. Haddad, 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 and its relevant analysis. Thus, the HOA's, and district court's, reliance on *Noonan* is, and was, erroneous. The additional orders that the HOA cites are focused upon the lack of a proactive duty, likewise, the *Bermuda Beach* Order, and related matters which the HOA contends is factually similar

ignores Mr. Haddad's policies and procedures being judicially recognized, as was the case in this matter. *Saticoy Bay LLC Series 8320 Bermuda Beach v. South Shores Community Association*, No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020).

Conversely, the HOA Trustee could have disclosed that the Super-Priority Lien Amount had been satisfied prior to the HOA Foreclosure Sale by the Attempted Payment or at least provided information to the potential bidders regarding the HOA Trustee's acceptance of the Attempted Payment, but it did not. Neither the HOA nor the HOA Trustee did so. The HOA or the HOA Trustee could have provided notice to all potential bidders, and/or the public at large, in their actions leading up to the HOA Foreclosure Sale, such as including a phrase concerning the absence of any superpriority portion of the HOA Lien being foreclosed upon within any and/or all of the notices recorded against the Property and/or advertising the sale, or it could have announced that fact at the foreclosure sale, especially after reasonable inquiry by Daisy.

However, neither the HOA nor the HOA Trustee did so, as that would have had the effect of chilling bidding at the sale. At the time of the HOA Foreclosure Sale, only three parties knew of Lender's Attempted Payment – the HOA, the HOA Trustee, and Lender. Moreover, these same parties knew of Lender's subsequent attempt to satisfy the Super-Priority Lien Amount of the HOA Lien via the letter

from Miles Bauer to the HOA. JA004, ¶ 20-24. The Attempted Payment was sent directly to the HOA Trustee in response to its recording of the NOD, with the HOA Trustee rejecting the Attempted Payment. *See id*.

Arguably, the HOA and the HOA Trustee knew that the Attempted Payment may be deemed to have satisfied the HOA Lien, which was determined to extinguish any Super-Priority Lien Amount of the HOA Lien. The HOA and the HOA Trustee knew that fact and intentionally failed to disclose that material fact to the bidders at the HOA Foreclosure Sale and upon inquiry from Daisy. Frankly, the HOA and HOA Trustee knew or should have known that such an omission would drastically affect the financial outcome for the Daisy as the winning bidder at the HOA Foreclosure Sale. An intentional failure to disclose Lender's Attempted Payment had the effect of causing the Property to sell at the HOA Foreclosure Sale.

Therefore, Daisy has alleged that the HOA and the HOA Trustee conspired together to intentionally withhold information regarding Lender's Attempted Payment of the HOA Lien that effectively defrauded the public and/or potential bidders concerning the true economic consequence of the HOA Foreclosure Sale. If allowed to stand, that interpretation of NRS 116.1113 would serve to emasculate NRS Chapter 116's mandate of good faith and render it completely meaningless and ineffective. 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 fact that they make a sale "without warranty" does not give them the right to withhold information; while this appears to be an approach along the lines of *caveat emptor* it is more akin to obfuscating a known defect in order to obtain a larger purchase price, and then referencing a "as-is-where-is" provision to avoid liability. The HOA's arguments regarding a lack of duty and a lack of "warranty" fall flat when seen in the light of Daisy's acknowledged likelihood of inquiry, and this likelihood, when taken in context of this matter being decided as a motion for summary judgment, where factual issues were raised by the opposition which highlighted questions of relevant fact, shows that the district court erred.

The HOA Foreclosure Sale was performed pursuant to NRS 116.31162 through 116.31168, and Daisy 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."). The HOA, and HOA Trustee, cannot intentionally withhold information known only to the Lender, the HOA, and HOA Trustee that materially, adversely affects the purchaser (here Daisy) as defined under NRS Chapter 116 and NRS Chapter 113, as to the value and nature of the bifurcated lien status of the HOA Lien as it relates to the Deed of Trust. Of matters not specifically known to the HOA and HOA Trustee at the time of the HOA Foreclosure Sale that cannot be adduced by a public record review as occurs in NRS Chapter 107 foreclosure sales, Daisy would concede that the HOA is not liable. However, in the instant case, the HOA, and HOA Trustee are the actual parties with the information regarding the Attempted Payment and had an obligation to inform Daisy. This fact alone constitutes sufficient proof of the HOA, by and through its agent, the HOA Trustee, obligation and duty to disclose the Attempted Payment.

The HOA has a duty to disclose the Attempted Payment to a Purchaser, as defined in NRS 116.079, at an HOA Foreclosure Sale pursuant to NRS 116.1113 **upon inquiry.** At the time and place of the HOA Foreclosure Sale, the HOA, by and through its agent, the HOA Trustee, entered into a sale governed by a statute, NRS Chapter 116, by the function of the auction conducted by the HOA Trustee. Inherently, the material aspects of the factors affecting the lien priority of the secured

debt that are only known solely to the HOA, HOA Trustee, and the Lender are material to the HOA Lien being foreclosed upon and must be disclosed to the HOA Foreclosure Sale bidders. To infer otherwise, would destroy the statutory scheme of NRS Chapter 116 sales.

It is a common argument among all parties to the HOA litigation has been the low prices adduced at the HOA Foreclosure Sales for the real property sold. Typically, the low sales prices have been driven by the mountain of litigation that has occurred over the last eight years seeking to define the rights and obligations of the various parties. However, it is untenable to hold that the HOA does not have a duty to disclose information known only to the HOA and the HOA Trustee that materially affects the value that a willing buyer would be willing to pay for the property offered at auction that relates directly to the status and priority of the Deed of Trust. Essentially, the HOA argues that the HOA will sell to the highest cash bidder the real property without any way for the bidder to know if it will acquire the real property free and clear of the Deed of Trust or subject thereto, especially when the HOA and HOA Trustee know that a tender or attempted payment was made that affects the lien being foreclosed. Adopting the HOA's argument would effectively forever destroy the HOA Foreclosure Sale process under NRS 116.3116.

Based on the foregoing, it is evident that Daisy sufficiently pled a claim for relief for breach of duty of good faith, pursuant to NRS Chapter 116, and the district court erred as a matter of law in granting summary judgment.

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

The Court granted the HOA's argument that Daisy's claim for intentional or negligent misrepresentation must be dismissed as a matter of law citing NRCP 56(c). *See* JA168-69. However, the district court's conclusion 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 *Heer* 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, Daisy alleged facts that satisfy the elements identified in *Heer*, and through the Declaration addressed the factual challenges posed by the HOA See JA5-8, ¶¶ 28-44. In combination with the issues raised in the Declaration of Mr. Haddad, and as set forth in the briefing, these issues, despite the HOA's arguments, raised issues of relevant fact regarding the representations made, the duties, and the foundation of the resulting sale. JA132-3.

With regard to Daisy's claim for negligent misrepresentation, the district court also agreed with HOA's arguments and dismissed it for the same reason as the intentional misrepresentation – lack of duty. However, the district court also erred in dismissing this claim, because Daisy adequately pled and supported 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, Daisy set forth a Declaration which, based on the relevant statements and issues, was sufficient to survive a motion for summary judgment pursuant to NRCP 56. Specifically, Daisy 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 Daisy justifiably relied. JA006, ¶38. Therefore, the district court erred in dismissing this claim for relief.

Furthermore, this error also addresses the HOA's arguments regarding the dismissal because Daisy obtained a "foreclosure deed without warranty." AB at 16-19. The HOA contends that, because this means that a purchaser, such as Daisy, takes title "without warranty is presumed to take it with notice of all outstanding equities and interests." AB at 12. Essentially, the HOA argues that as it sold the Property "as-is, where-is" pursuant to the Foreclosure Deed, there can be no warranty of title. This is not the argument of Daisy. It is that Daisy made an affirmative inquiry, and that by failing to respond and disclose the Tender/Attempted Tender, the HOA affirmatively misrepresented the interest being sold, taking this

matter beyond the warranty argument which the HOA now seeks to forward in the Answering Brief.

C. DAISY'S CLAIM FOR CONSPIRACY DOES NOT FAIL AS A MATTER OF LAW

In its Order, the district court agreed with the HOA and held that Daisy's conspiracy claim fails as a matter of law, because there is no duty to disclose the Attempted Payment by BANA/Lender. JA173. However, the district court's conclusion is erroneous. As discussed above, the HOA and HOA Trustee did have duties of disclosure under NRS Chapter 116.

Moreover, this Court has recognized that co-conspirators, like the HOA and the HOA Trustee in this matter, are deemed to be each other's agents while acting in furtherance of the conspiracy. *Tricarichi v. Cooperative Rabobank, U.A.*, 440 P.3d 645, 653 (Nev. 2019) (observing in the context of a conspiracy claim for purposes of establishing personal jurisdiction, "co- conspirators are deemed to be each other's agents, the contacts that one co-conspirator made with a forum while acting in furtherance of the conspiracy may be attributed for jurisdictional purposes to the other co-conspirators."). Likewise, Daisy here contends in its pleadings and papers – at least under any fair reading of it under the applicable standard set forth in NRCP 56(c) – that the HOA and the HOA Trustee were co-conspirators of one another in failing or refusing to disclose the alleged tender/Attempted Payment to

Daisy, which the HOA and the HOA Trustee had a duty to disclose, as discussed herein.

The actions of one co-conspirator, those of the HOA Trustee, are properly attributable to the other co-conspirator, the HOA, and vice versa. *See id*. As the HOA and the HOA Trustee are separate legal entities which can form a conspiracy, as alleged here by Daisy. *See, e.g., Nanopierce Techs. Inc. v. Depository Trust and Clearing Corp.,* 168 P.3d 73, 85 n.49 (Nev. 2007). Based on the foregoing, the HOA and HOA Trustee had a duty to disclose the Attempted Payment to Daisy, and their failure to do so for their financial gain was a conspiracy under Nevada law that resulted in economic damages to Daisy. As such, the district court erred in dismissing this claim for relief.

D. THE DISTRICT COURT PROPERLY DENIED THE HOA'S REQUEST FOR ATTORNEY FEES

In its Order Denying Motion for Attorney's Fees and Costs, attached to the HOA's Appendix of Exhibits ("EX") at 086-088, the district court correctly found that Daisy's claims did not arise from the HOA's assessments or operations. EX087. This reasoning stemmed, in the most part, from an Order Affirming a similar issue in *REEC Enters. v. Savannah Falls Homeowners' Ass'n*, 481 P.3d 1258 (Nev. 2021)("*REEC*"). The analysis in *REEC*, as accepted by the district court, noted that, similar to this matter, wherein claims to Quiet Title, Declaratory Relief, and Slander

of Title were addressed, without an analysis of NRS 116, or the CC&R's or bylaws, and thus fees pursuant to NRS 116.4117 were not proper. *Id*. Indeed, this matter is simply a matter involving a homeowner's association; it does not, as set forth by the HOA, analyze NRS 116, the CC&Rs, or the bylaws.

Indeed, if the HOA's arguments are given credence, the matter cannot rely upon an interpretation of NRS 116, the CC&Rs, or the bylaws, as the claims made by Daisy all derive, ultimately, from the presentation of the subject property for the HOA Foreclosure Sale, and all activities which were performed prior to the HOA Foreclosure Sale. The allegations contained in Daisy's Complaint and Opposition to Motion for Summary Judgment relate primarily to the actions of the HOA Trustee, as an agent of the HOA, with the HOA being vicariously liable for the actions of the HOA Trustee, up to and including the HOA Foreclosure Sale JA001-12, JA107-133.

If the HOA's position is accepted, it becomes difficult to determine when, if ever, any claim against an HOA by anyone living within, relating to, or having dealings with, would not fall under some aspect of NRS 116, the CC&Rs, or the bylaws. Indeed, even when arguing that NRS 116 duties did not apply between Daisy and the HOA herein, the HOA still pursues attorney fees, claiming the involvement of NRS 116, and thus a basis. Finally, as acknowledged by *REEC* and the HOA, the

award of attorney's fees is within the district court's discretion, i.e. pursuant to NRS 116.4117(6), the "court may aware reasonable attorney's fees." See AB at 26.

Thus, based upon the analysis of *REEC*, and the discretion provided by NRS 116.4117(6), the district court correctly declined to award attorney fees to the HOA. Finally, as set forth above, as the district court erred in granting the HOA summary judgment, should the district court's granting of summary judgment be reversed, no basis would exist for an award of attorneys fees to the HOA, as it would no longer be a prevailing party pursuant to NRS 116.4117(6),

III. CONCLUSION

Based upon the foregoing, the district court committed reversible error in multiple ways. Daisy respectfully requests that this Honorable Court reverse the order granting the HOA's MSJ and affirm the order denying attorney fees.

Dated this May 4, 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 3,318 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 4, 2022.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on May 4, 2022, I caused a copy of **Appellant's Answering and Reply Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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