

1 ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
2 TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
3 ROGER P. CROTEAU & ASSOCIATES, LTD.
9120 West Post Road, Suite 100
4 Las Vegas, Nevada 89148
(702) 254-7775
5 (702) 228-7719 (facsimile)
croteaulaw@croteaulaw.com
6 *Attorney for Appellant*
VEGAS UNITED INVESTMENT
7 SERIES 105, INC.

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10 IN THE SUPREME COURT OF THE STATE OF NEVADA

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12 VEGAS UNITED INVESTMENT)
13 SERIES 105, INC., A NEVADA)
DOMESTIC CORPORATION,)
14)
Appellant,)
15)
vs.)
16)
17 CELTIC BANK CORPORATION,)
SUCCESSION-IN-INTEREST TO)
18 SILVER STATE BANK BY)
ACQUISITION OF ASSETS FROM)
19 THE FDIC AS RECEIVER FOR)
SILVER STATE BANK, A UTAH)
BANKING CORPORATION)
20 ORGANIZED AND IN GOOD)
STANDING WITH THE LAWS OF)
21 THE STATE OF UTAH,)
Respondent.)
22)

Supreme Court No. 74163

District Court Case No. A728233

23 **OPPOSITION TO MOTION TO DISMISS APPEAL**

24 COMES NOW, Appellant, VEGAS UNITED INVESTMENT SERIES 105,
25 INC. (*"Vegas United"*), by and through its attorneys, ROGER P. CROTEAU &
26 ASSOCIATES, LTD., and hereby presents its response to Respondent's Motion to
27 Dismiss Appeal. This Opposition is made and based upon the attached
28

1 memorandum or points and authorities, all papers and pleadings on file herein and
2 any oral argument that this Honorable Court might entertain in relation to the
3 Motion.

4 DATED this 27th day of June, 2019.

5 ROGER P. CROTEAU & ASSOCIATES, LTD.

6
7 /s/ Timothy E. Rhoda
8 ROGER P. CROTEAU, ESQ.
9 Nevada Bar No. 4958
10 TIMOTHY E. RHODA, ESQ.
11 Nevada Bar No. 7878
12 9120 West Post Road, Suite 100
13 Las Vegas, Nevada 89148
14 (702) 254-7775
15 *Attorney for Appellant*
16 **VEGAS UNITED INVESTMENT**
17 **SERIES 105, INC.**

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I.**

20 **STATEMENT OF FACTS**

21 The facts and procedural posture surrounding this matter have been more or
22 less accurately set forth in the instant Motion. At issue is commercial real
23 property commonly known as 181 Gibson Road, Henderson, Nevada (*the*
24 *"Property"*) that was the subject of an association foreclosure sale (*"HOA*
25 *Foreclosure Sale"*) dated March 21, 2014. Vegas United purchased the Property
26 at the HOA Foreclosure Sale for the sum of Thirty Thousand Dollars (\$30,000.00).
27 Plaintiff/ Respondent, Celtic Bank, claims to have possessed a secured interest in
28 the Property at that time.

29 Celtic Bank filed a Complaint for Judicial Foreclosure on November 25,
30 2015. In conjunction with its Answer, Vegas United filed a Counterclaim,
31 asserting that the security interest upon which the Plaintiff sought to foreclose was
32 extinguished as a result of the HOA Foreclosure Sale pursuant to Nevada law as

1 interpreted by this Court in the matter of *SFR Investments Pool I, LLC v. U.S.*
2 *Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75,
3 Sept. 18, 2014) and that the Plaintiff therefore lacked any valid basis upon which
4 to foreclose upon the Property. Specifically, Vegas United asserted that the
5 security interest which purportedly formed the basis for the judicial foreclosure
6 sale was extinguished by operation of law upon foreclosure of the super-priority
7 portion of the HOA lien.

8 The matter proceeded to trial and the district court found that the Plaintiff's
9 security interest was not extinguished by the HOA Foreclosure Sale. Vegas
10 United timely filed a Notice of Appeal on September 28, 2017, asserting that the
11 district court erred. Subsequent to the filing of the Notice of Appeal, Plaintiff
12 filed a Notice of Sheriff's Sale on October 12, 2017, scheduling a sheriff's sale to
13 take place on November 21, 2017. The sheriff's sale took place and Celtic Bank
14 acquired the Property via credit bid. Briefing of this appeal was subsequently
15 completed on February 20, 2019, when Vegas United filed its Reply Brief.

16 Celtic Bank has since apparently purported to sell the Property to an
17 unwitting third party. As a result, it asserts that this appeal has been rendered
18 moot. Nothing could be further from the truth. On the contrary, in the event that
19 Vegas United ultimately prevails in this appeal and the deed of trust upon which
20 Celtic Bank based its judicial foreclosure sale is deemed to have been previously
21 extinguished at the time of the HOA Foreclosure Sale at which Vegas United
22 purchased the Property, then the sheriff's sale and any and all subsequent transfers
23 of the Property will necessarily be void. The only thing that Celtic Bank has
24 accomplished by purporting to sell the Property to a third party during the
25 pendency of this appeal is to create liability for itself in the event that it does not
26 prevail.

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II.

LEGAL ARGUMENT

A. THE OUTCOME OF THIS APPEAL WILL DETERMINE THE
VALIDITY OF CELTIC BANK'S JUDICIAL FORECLOSURE SALE

Pursuant to underlying action, Celtic Bank sought to foreclose upon a deed of trust recorded against the Property. By way of its Counterclaim, Vegas United asserted that the subject deed of trust was extinguished as a matter of law at the time of the HOA Foreclosure Sale at which Vegas United purchased the Property. As a result, Vegas United asserted that there was no legitimate basis for a judicial foreclosure because no security interest any longer existed.

Celtic Bank was ultimately allowed to judicially foreclose upon the Property pursuant to the district court's judgment. At the subsequent sheriff's sale dated November 21, 2017, Celtic Bank purchased the Property via credit bid and purported to divest Vegas United of title. Subsequent to its purported purchase of the Property, Celtic Bank took possession of the Property.

As set forth above, in the event that Vegas United ultimately prevails in this appeal and Celtic Bank's security interest in the Property is deemed to have been extinguished at the time of the HOA Foreclosure Sale at which Vegas United purchased the Property, the subsequent sheriff's sale must necessarily be deemed to be void ab initio and title to the Property would be returned to Vegas United. Likewise, the subsequent attempted sale to Aaron David., LLC will likewise be void ab initio because Celtic Bank possessed no title to transfer.

B. THE FORECLOSURE OF A VOID AND INVALID SECURITY
INTEREST CANNOT EFFECT A VALID AND EFFECTIVE
CHANGE OF TITLE

Assuming that Vegas United prevails in this appeal and Celtic Bank's deed of trust is deemed to have been extinguished at the time of the HOA Foreclosure Sale, then the subsequent sheriff's sale necessarily must be deemed to have been

1 based upon a void, extinguished and non-existent security interest. Under such
2 circumstances, valid title could not have been conveyed to Celtic Bank nor any
3 other subsequent purchaser.

4 A void real estate transaction is one where the law deems that no transfer
5 actually occurred. An example of this is a deed from a party who does not own
6 the real property that is purported to be the subject of the deed. Such a transfer is
7 ineffective for any and all purposes. This is exactly the situation at hand if Celtic
8 Bank's deed of trust is deemed to have been extinguished – Celtic Bank never
9 obtained valid title and never possessed valid title to transfer.

10 An absolute nullity such as a void deed will not constitute color of title, and
11 the Statute of Limitations will not run in favor of a person under it. *Nesbitt v. De*
12 *Lamar's Nev. Gold Mining Co.*, 24 Nev. 273 (Nev. 1898)(Citations omitted).
13 Furthermore, a void deed will not connect a grantee with grantor's possession, nor
14 will it constitute the basis of an action. *Id.* There can be no valid correction or
15 confirmation of a void deed. 23 Am. Jur. 2d, Deeds, §287 (1965); 26 C.J.S.,
16 Deeds, §31 (1956). A void deed is invalid in law for any purpose whatsoever,
17 such as a deed to effectuate a prohibited transaction" 23 Am. Jur.2d, Deeds, §137.

18 A void deed cannot be the foundation of a good title and a bona fide
19 purchaser for value acquires no rights under it. *Marlenee v. Brown*, 21 Cal. 2d
20 668, 677 (Cal. 1943). A void deed cannot pass title even in favor of an innocent
21 purchaser or a bona fide encumbrancer for value. *First Interstate Bank v. First*
22 *Wyoming Bank*, 762 P.2d 379, 382 (Wyo. 1988).

23 When a sale is void, it is "ineffectual." *Deep v. Rose*, 234 Va. 631,
24 364 S.E.2d 228, 232, 4 Va. Law Rep. 1601 (Va. 1988). "No title,
25 legal or equitable, passes to the purchaser." *Id.*; see, e.g., *Gilroy v.*
26 *Ryberg*, 266 Neb. 617, 667 N.W.2d 544, 554 (Neb. 2003) (stating
27 "when a sale is void, 'no title, legal or equitable, passes to the sale
28 purchaser or subsequent grantees'" even if the property is bought by a
bona fide purchaser (quoting 1 Grant S. Nelson & Dale A. Whitman,
Real Estate Finance Law § 7.20 (3d ed. 1993) & citing 12 Thompson
on Real Property, supra, § 101.04(c)(2)(ii) at 403 (David A. Thomas
ed.1994)).

1 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS
2 116223, 11-12 (D. Nev. Aug. 31, 2015).

3 A void sale means that there was no sale and that legal title never passed to
4 the purported purchaser. Although "void," "voidable," and "invalid" are often
5 used interchangeably, the "general rule" is that defects and irregularities in a sale
6 render it merely voidable and not void. However, substantially defective sales
7 have been held to be void. *Cedano v. Aurora Loan Servs. (In re Cedano)*, 470
8 B.R. 522, 529-530 (B.A.P. 9th Cir. Apr. 9, 2012)(citations omitted). As this Court
9 has held, "the difference between a void and a voidable transaction is that the
10 former 'can never become valid,' and the latter 'can be made valid by subsequent
11 judicial decision.'" *LN Mgmt. LLC Series 5105 Portraits Place v. Green Tree*
12 *Loan Servicing LLC*, 2017 Nev. LEXIS 71 (Nev. Aug. 3, 2017).

13 It is difficult to conceive of a more substantially defective foreclosure sale
14 than one where the entire sale is based upon a void, extinguished, non-existent and
15 therefore unenforceable security instrument. Indeed, where a deed of trust has
16 been extinguished as a matter of law, "[g]iven that title to property is held by the
17 trustee under a deed of trust, it is difficult to accept the notion that one who no
18 longer has title could nonetheless convey effective title." *Dimock v. Emerald*
19 *Properties*, 81 Cal. App. 4th 868, 877 (Cal. App. 4th Dist. June 21, 2000). It is
20 clearly well established law that a void deed grants no rights to the grantee.

21 **C. IN THE EVENT THAT VEGAS UNITED PREVAILS IN THIS**
22 **APPEAL, IT WILL POSSESS A FIVE YEAR PERIOD FROM THE**
23 **DATE OF THE BANK'S SHERIFF'S SALE IN WHICH TO**
24 **RECOVER THE PROPERTY**

25 If Vegas United ultimately prevails in this appeal, then the sheriff's sale
26 dated November 21, 2017, which would have necessarily been based upon an
27 extinguished deed of trust, must be deemed void ab initio. In such event, Vegas
28 United will possess a five year period from the date of the sheriff's sale in which it

1 may recover its Property. See NRS 11.080. See also *Las Vegas Dev. Grp., LLC v.*
2 *Blaha*, 416 P.3d 233, 2018 Nev. LEXIS 30, 134 Nev. Adv. Rep. 33, 2018 WL
3 2090812.

4 **D. IN THE EVENT THAT VEGAS UNITED PREVAILS IN THIS**
5 **APPEAL AND THE SUBSEQUENT SALE OF THE PROPERTY IS**
6 **SOMEHOW DEEMED TO BE VALID, VEGAS UNITED WILL BE**
7 **ENTITLED TO RECOVER DAMAGES FROM CELTIC BANK**

8 The loss of a property right is generally irreparable. See *Dixon v. Thatcher*,
9 103 Nev. 414, 416 (1987). As discussed above, even a bona fide purchaser for
10 value may not obtain title by way of a void deed. Thus, in the event that Vegas
11 United ultimately prevails in this appeal, it should be entitled to recover ownership
12 of the Property. However, in the unlikely event that Vegas United does not
13 prevail, it will be entitled at the very least to recover monetary damages from
14 Celtic Bank.

15 **E. THE BANK'S RECKLESS PURPORTED SALE OF THE PROPERTY**
16 **DID NOTHING TO RENDER THE INSTANT APPEAL MOOT**

17 At the heart of this appeal is the critical question of whether Celtic Bank
18 possessed any security interest to judicially foreclose upon subsequent to the HOA
19 Foreclosure Sale. As discussed above, in the event that Vegas United prevails
20 and this Court agrees that the bank's deed of trust was extinguished at the time of
21 the HOA Foreclosure Sale, then no valid security interest existed at the time of the
22 district court's judgment or at the time of the subsequent sheriff's sale. Under
23 such circumstances, it was wholly improper for Vegas United to be divested of
24 ownership of the Property. Naturally, under such circumstances, Celtic Bank
25 acquired no title and possessed no title to purportedly sell.

26 The instant appeal is fully briefed and awaiting a decision. This Court's
27 ultimate determination of whether Celtic Bank's deed of trust was or was not
28 extinguished by the HOA Foreclosure Sale will dictate whether the subsequent

1 sheriff's sale and subsequent transfer of the Property were or were not valid. If the
2 sheriff's sale is deemed to have been void, then Vegas United should be entitled to
3 recover the Property. Alternatively, if the deed of trust is deemed to have been
4 extinguished and the subsequent transfer of the Property is somehow deemed to be
5 valid despite the lack of any valid title on the part of Celtic Bank, Vegas United
6 will be entitled to recover damages from Celtic Bank for the wrongful taking of its
7 Property. In either event, an adjudication of this appeal necessary and proper.

8 **III.**

9 **CONCLUSION**

10 The instant appeal hinges upon the force and effect of the HOA Foreclosure
11 Sale upon Celtic Bank's deed of trust. If the deed of trust was extinguished as a
12 matter of law as Vegas United asserts, then Celtic Bank's sheriff's sale and the
13 subsequent attempted sale to a presumably innocent third party were void. This
14 Court must determine whether the district court's determination that the deed of
15 trust was unaffected by the HOA Foreclosure Sale was or was not erroneous. The
16 appeal has not been rendered moot as the result of Celtic Bank's reckless
17 purported sale of the Property during the pendency of this appeal. The instant
18 Motion must be denied.

19 DATED this 27th day of June, 2019.

20 ROGER P. CROTEAU & ASSOCIATES, LTD.

21
22 /s/ Timothy E. Rhoda
23 ROGER P. CROTEAU, ESQ.
24 Nevada Bar No. 4958
25 TIMOTHY E. RHODA, ESQ.
26 Nevada Bar No. 7878
27 9120 West Post Road, Suite 100
28 Las Vegas, Nevada 89148
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Attorney for Appellant
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