IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74575

U.S. BANK N.A. N.D. a foreign Corporation

Plaintiff and Appellant

V.

RESOURCES GROUP LLC, a Nevada limited liability company

Defendant and Respondent

Appeal from a Judgment
Of the Eighth Judicial District Court, County of Clark
Hon. Timothy Williams

APPELLANT'S REPLY BRIEF

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LAW AND ARGUMENT

A. INTRODUCTION

Resources Group LLC raises several arguments in an attempt to counter U.S. Bank's arguments that (1) the failure to mail the Notice of Default rendered the sale statutorily void and/or voidable under *Shadow Wood*, (2) that the purchase price is and was obviously inadequate, (3) the insider relationship between Resources and Alessi & Koenig was unfair, (4) that there was chilled bidding because the bidding went *in reverse*, and (5) Resource's Group's Bankruptcy demonstrated that they were not bona fide purchasers. None of their counter-arguments are persuasive.

First, Resources Group mischaracterizes the evidence and claims that U.S. Bank placed the phrase "Mail to" behind U.S. Recordings and therefore U.S. Bank somehow convoluted the mailing provision of the Deed of Trust; and, on that basis, the Notice of Default was properly mailed. As outlined below, this mischaracterizes the evidence as the Deed of Trust set forth U.S. Bank's request for notice to its address in Fargo, South Dakota.

Second, Resources argues that the insider relationship between Mr. Haddad and Alessi & Koenig was not unfair. But as this Court is aware, anything impeaching the fairness of a sale, no matter how slight, should be sufficient to void a sale where the sale price is inadequate, as is the case here.

Finally, Resources rebuts arguments that U.S. Bank did not raise before the Court (e.g. judicial estoppel and the Mortgage Protection Clause); and argues that Resources was a good faith purchaser for value despite a record showing *both* an inappropriate insider relationship, and a Bankruptcy petition filed to resolve claims of creditors, which Respondent now disavows knowledge of.

As outlined below, Resources Group does not raise any arguments that merit affirmance of the trial court. Respectfully, the Trial Court should be reversed and judgment should be entered for U.S. Bank on its claims.

B. APPELLANT WAS NOT MAILED THE NOTICE OF DEFAULT

1. Respondent Mischaracterizes the Record

First, the finding by the Court that "a copy of the Notice of Default and Election to Sell was mailed by Alessi & Koenig, the agent for the HOA, to U.S. Bank at U.S. Recordings…." is simply not supported by the facts. [Appx Vol. 7 p. 1561] Second, the Court's finding that "at the time of the foreclosure in this case, there was no

requirements under Nevada law that a holder of a first deed of trust be mailed the Notice of Default unless that holder gave notice to the association of the existence of its secured interest at least 30 days prior to the recordation of the Notice of Default" is legal error. [Appx Vol. 7 pp. 1563-1564] *also SFR Invs. Pool 1, LLC v. The Bank of New York Mellon* 134 Nev. Adv. Op. 58 (2018). These both support this Court reversing the trial court.

The pertinent portion of the statute at the time, NRS §116.31168(1), provided: "[t]he provisions of NRS 107.090 apply to a foreclosure of an association's lien as if the deed of trust were being foreclosed." NRS §107.090(3) states clearly:

> "The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt request and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; and
>
> (b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust."

Respondent states in their Answering brief:

> "[sic] Respondent did not specify on its deed of trust which of the four addresses notices should go to, but U.S. Recordings was the only one of the four that invited mailing to by stating "Mail to". *Answering Brief* p. 6

This is factually incorrect. The Deed of Trust states in the upper left hand corner (in space reserved for recording data):

> "Return To (name and address):
> US Recordings
> 2925 Country Drive STE 201
> St. Paul, MN 55117"

At no point does U.S. Bank metaphorically beckon (as the Greek sirens of old) parties to send anything to U.S. Recording, except for the county recorder to return the recorded deed of trust. At no point is the phrase "mail to" used. Respondent is therefore misstating the evidence in repeatedly contending the Deed of Trust directive parties to "mail to" U.S. Recordings. Instead, the plain language of the Deed of Trust provides as follows:

> (c) "**16. NOTICE**. Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing."
> [Appx Vol 3 p. 690]

Respondent's argument is further undercut by the plain language of the Deed of Trust which clearly identifies U.S. Bank N.A. as the beneficiary of the Deed of Trust:

> "**2. CONVEYANCE**. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined on page 2) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains, conveys, and signs to

Trustee, intrust for the benefit of Lender, with power of sale, the following described property…"

This deems the lender the beneficiary under this Deed of Trust. Lender is again a defined term in this Deed of Trust:

> "LENDER:
> U.S. Bank National Association N.D.
> A national banking association organized under the laws of the United States
> 4326 17th Avenue SW
> Fargo, ND"
> (Appx Vol 3 p. 685)

Bryan Heifner testified at trial:

> Q. Okay. Let's go back to the first page. I want to take a look at a couple of the entities here that you listed under the deed of trust with a future advance clause. Would you be able to take a moment me and identify where U.S. Bank, who you are here representing today, where they are listed on this deed of trust for the Court and for all present?
>
> A. Yeah. It's near the bottom of the page under the bold title lender.
>
> Q. Okay. And so that is who you are here on behalf of today, U.S. Bank National Association, ND; correct?
>
> A. Yes.
>
> Q. There's an address below 4325[sic], 17th Avenue Southwest, Fargo, North Dakota, 58103. Do you see what I am talking about?"
>
> A. Yes.
>
> Q. Is that the address for U.S. Bank?

A. That would be one of the addresses for U.S. Bank. For this loan in question, that would be the address.

Q. So if I wanted to send correspondence to U.S. Bank I could sent it to this address?

A. Yes."

[Appx. Vol 7 pp. 1679-1680]

On this basis, both on the face of the Deed of Trust as well as U.S. Bank's testimony, the Notice of Default needed to be sent to Fargo, North Dakota. Thus, the Court's finding that the mailing of the Notice of Default by Alessi & Koenig to U.S. Recordings satisfied the HOA's obligations is simply not supported by the evidence. [Appx Vol. 7 p. 1561]. This is especially true when taken in context of further testimony:

Q. Okay. Let's go down to the next one where it says return to. Do you see what I'm talking about?

A. Yes

Q. Okay. Are you familiar with the entity U.S. Recordings?

A. I am not.

Q. Okay. Is U.S. recordings in any way affiliated with U.S. Bank?

A. Not to my knowledge.

Q. If I Sent mail to 2925 Country Drive, Suite 201 St. Paul, Minnesota 55117 would that reach U.S. Bank?

A. No.

Q. Okay. And so—and does U.S. Bank place their address in this deed of trust in order to get notice?

A. Yes.

[Appx. Vol 7 pp. 1681]

The recording of the Deed of Trust alone imparted notice to the HOA and Alessi and Koenig that U.S. Bank wished to receive notice in Fargo, South Dakota. NRS §111.320 provides:

> "Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof"

Moreover as this Court has previously noted, the recording statutes assuredly apply to HOA foreclosures in Nevada. *SFR Invs. Pool 1, LLC v. First Horizon Home Loans* 409 P.3d 891 (Nev. 2018). On this basis, the District Court erred in finding there was notice to U.S. Bank, in light of the plain language of the Deed of Trust as well as Nevada's recording statutes. U.S. Recordings, like "Prepared by: Southwest

Financial Services, LTD." was not a party, as delineated on the deed of trust, and the Notice of Default was required to be sent to U.S. Bank in Fargo, South Dakota.

2. The HOA and Alessi & Koenig were Required to Send U.S. Bank the Notice of Default

The Statute enacted at the time specifically stated that the Notice of Default was to be mailed to each entity whose interest was subordinate to the Deed of Trust. NRS §116.31168(1); *see also* NRS §107.090. Previously, the interpretation of the statute may have been open to dispute, however, the Court clarified this point in *SFR Investments Pool 1, LLC v. The Bank of New York Mellon*. 134 Nev. Adv. Op 58 (2018).

Justice Wallace filed a vigorous dissent in *Bourne Valley* stating that contrary to the majority holding, NRS §116.3116 *et seq.*'s incorporation of NRS §107.090 *required* that a Notice of Default be sent to a first mortgage:

> The statute requires the "person authorized to record the notice of default" (here, the HOA) to mail a copy of the notice of default to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed [*1164] of trust." A lender …… clearly has an "interest" in the soon-to-be foreclosed property since it has a recorded security interest in it. The lender's security interest is also "subordinate" to the HOA's lien by virtue of the HOA Statute's superpriority provision. This is the case even though the lender's security interest was recorded first, since the superpriority provision provides that an HOA lien "is . . . prior to all security interests." NEV. REV. STAT. § 116.3116(2)(c) (2005). Further, we must read the term "deed of trust" in section 107.090 to mean an HOA lien since section 116.31168 provides that "[t]he provisions of [section]

> 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed."
>
> *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1163-64 (9th Cir. 2016)(Wallace Dissenting)

This Court overwhelmingly affirmed this position in *SFR Invs. Pool 1 LLC v. The Bank of New York Mellon*. The Trial Court erred when it ruled that NRS §116.31163(2) was an "opt in" scheme and U.S. Bank was not required to receive the Notice of Default. *SFR Invs. Pool 1, LLC v. The Bank of New York Mellon* 134 Nev. Adv. Op. 58 (2018). As this Court has now stated:

> "NRS §116.31168 incorporated the notice requirements of NRS 107.090 and consequently required that notice be provided to all persons whose interests were subordinate to a homeowners' association superpriority lien, which is 'prior to a first deed of trust." *See SFR Invs Pool 1* 130 Nev. At 745, 334 P.3d at 411 (explaining the HOA lien has priority over the first security interest in the amount of 'unpaid dues and maintenance and nuisance-abatement charges"). In stating '[t]the provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed,' without any accompanying language to limit the incorporation, NRS 116.31168(1) manifested intent to have all notice provisions apply and that the parties requiring notice would be the same as those that would require notice in foreclosing on a deed of trust. Replacing the deed of trust with the homeowners' association superpriority lien within the language of NRS 107.090 then requires that the homeowners' association provide notice to the holder of the first security interest as a subordinate interest."

SFR Invs. Pool 1, LLC v. The Bank of New York Mellon 134 Nev. Adv. Op. 58 at 8. (2018)

On this basis, Resources Group's argument that U.S. Bank had to "opt in" to receive notice has been undercut by a subsequent opinion of this Court. *Answering Brief* pp. 7-12. U.S. Bank had a statutory right to receive notice at the address identified in its Deed of Trust.

The only question which remains to be resolved is the effect of a failure to follow the statutory mandates of a HOA foreclosure. U.S. Bank contends that this Court should rule that the sale is rendered void, and not voidable as contemplated under *Shadow Wood* for the reasons delineated *infra*.

C. FAILURE TO MAIL THE NOTICE OF DEFAULT RENDERS THE SALE VOID, NOT VOIDABLE

There are two scenarios in the context of attacking a foreclosure: the void and the voidable sale. *RJRN Holdings LCL v. JP Morgan Chase Bank N.A.* 2018 Nev. Unpub. LEXIS 635 (2018)(holding certain foreclosure defects render a foreclosure sale void and therefore there is no bona fide purchaser status); *2713 Rue Toulouse Trust v. Bank of Am. N.A.* 2018 Nev. Unpub LEXIS 659 (2018)(same). It is U.S. Bank's position that if a HOA foreclosure fails to follow the actual foreclosure statute that enables its foreclosure powers, this sale is not voidable under *Shadow Wood* but it is void. This is a critical difference because a voidable sale must be run

through the *Shadow Wood* analysis with showings of an inadequate purchase price, fraud, unfairness, or oppression, and the effects on a bona fide purchaser. A void sale must be run through none of these calculations and legally the sale simply did not happen. There is precedent for this.

Generally, a "substantially defective" sale is held void, as opposed to voidable; a substantial defect is the type of defect that runs contrary to a statutory provision which is regarded as mandatory. *Little v. CFS Service Corp* 188 Cal.App. 1354 (Cal App. 1987). If the Court adopts U.S. Bank's contention *supra* that the HOA did not follow the statute because it did not mail the Notice of Default to every entity or individual with an interest in the Subject Property, then the sale is void. The mailing requirement is statutorily mandated and cannot be sidestepped. On this basis, the sale should have been held void.

This reasoning has been adopted in other jurisdictions and makes pragmatic sense. A purchaser at a foreclosure sale will almost never be able to validate whether notice is compliant with statute. If Notice is not sent, this Court simply should not rubber stamp a sale if the purchaser simply arrives and decries "how could I have known that?" This would discourage compliance with Nevada law; hence a sale that

does not comply with Nevada Statutes should be held void. Other jurisdictions have taken a similar approach.

In Delaware, the Delaware Supreme Court invoked constitutional due process principles to declare that a Foreclosure Sale without the statutorily required notices to junior lien holders is void and of no force and effect. *Gelof v. First Nat'l Bank* 373 A.2d 206 (Del. 1977)[1]. In fact, Delaware goes as far as to state that even *subsequent* notice does not cure the prior notice defects in their foreclosure process and anything prior to actual notice should be considered void. *Brown v. Federal Nat'l Mortg. Asso.* 359 A.2d 661 (Del. 1976).

The same holds true in Kansas. In *Alliance* a senior mortgage argued that notice by publication was sufficient for a junior mortgage to satisfy basic due process principals and that therefore a foreclosure sale should not be set aside. *Alliance Mortg Co. v. Pastine* 136 P.3d 457 (Kan. 2006). The Kansas Supreme Court ultimately ruled that junior mortgages were constitutionally entitled to all statutorily

[1] "We were advised at oral argument that, under the prevailing practice, a lienholder is not given notice of foreclosure proceedings involving the encumbered property. Even though such an interest is not at issue here, we say for the guidance of the Bar that a lien of record clearly appears to be a significant property interest and that the holder thereof is entitled to [sic] rpior notice of foreclosure proceedings." *Gelof v. First Nat'l Bank*, 373 A.2d 206, 208 n.3. (Del. 1977)

required notices under their own foreclosure statute. *Id.* Additionally, and most importantly, if statutory notices were not provided then this rendered a foreclosure sale void, not voidable. *Id.* ("We also think it plain that the correct remedy for the denial of Beneficial's statutory and due process notice of the sheriff's sale was not a revived right of redemption but set-aside of the sale, provision of adequate notice, and a new sale with all parties and the public free to participate or not participate as they see fit."). Even the *Alliance* court noted in concept the difference between void and voidable sales and noted that lack of notice renders the sale void. *Id.* at 465 (Noting that purchase price was irrelevant in the context of lack of statutorily required notice and that such sales were void).

The same holds true in Pennsylvania. In *Hess* a tax sale was held void for failure to strictly comply with the notice Requirements and to property notice several interested parties. *Hess v. Westerwick* 366 Pa. 90 (1950).

The instant sale should be voided for its failure to comply with the statutory requirements for providing notice. This is a common sense approach and will assure that HOAs properly notice all interested parties compliant with both the plain language and spirit of Nevada law.

/…/…/

D. THE FORECLOSURE SALE IS FURTHER VOIDABLE UNDER *SHADOW WOOD*.

1. Unfairness is Present in this Sale

Even if this Court does not adopt the analysis *supra* that the sale is void due to lack of statutory notice, even under the voidable analysis this sale should be unwound. This Court has stated in dicta that what has occurred here, specifically that a Deed of Trust beneficiary did not receive notice, is unfair. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641 at FN 11 (Nev. 2017). U.S. Bank did not receive all the statutorily required notices. This is undisputed and unfair.

The Court has further noted that "collusion between the winning bidder and the entity selling the property" is an additional grounds to unwind a sale. *Nationstar Mortg LLC v. Saticoy Bay LLC 2227 Shadow Canyon* 405 P.3d 641 at FN 11.

U.S. Bank contends that the District Court misapplied the sliding scale analysis under *Shadow Canyon*. "Where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorizing the granting of relief sought." *Id.* (citing *Golden v. Tomiyasu* 79 Nev. 503 (1963)). The relationship between Alessi & Koenig and Haddad as well as the lack of notice

certainly is more than "very slight additional evidence" impeaching the fairness of this sale, especially at 11% of Fair Market Value.[2]

2. Resources Group is Not a Bona Fide Purchaser

Again, even the more than slight circumstances which impeach the credibility of this sale are present in the relationship between Mr. Kerbow and Mr. Haddad.

Q. Okay. Looks like this deed of trust or this trustee's deed upon sale was signed by Mr. Ryan Kerbow. Do you see that name at the bottom?

A. Yes.

Q. Okay. Do you know Mr. Kerbow outside of just his capacity as an individual processing HOA foreclosures?

A. No.

Q. Mr. Kerbow ever done legal work for you?

A. Yes.

Mr. Haddad and Mr. Kerbow had an attorney-client relationship, which necessarily gives rise to a fiduciary duty flowing from Mr. Kerbow to Mr. Haddad. *Stalk v. Mushkin* 125 Nev. 21 (2009). Analyzing Mr. Haddad's testimony further

[2] As stated in its opening brief, U.S. Bank continues to contend that "Fair Market Value" was only evidenced by the Holmes expert opinion consistent with *Unruh v. Streight* and it was an error on relevancy grounds to admit the Brunson opinion into evidence as it was inconsistent with Unruh. 96 Nev. 684 (1980)

demonstrates that this fiduciary relationship arose at the exact same time as the sale in question:

> Q. So you would retain Mr. Kerbow as your personal attorney at different points in time?
>
> A. A couple of times.
>
> Q. A couple of times?
>
> A. Yeah.
>
> Q. Do you remember the approximate time frame that this was done?
>
> A. I would say right around this time, maybe.

Again, this is at a minimum "slightly unfair" and given the Sale Price and this Court's opinion in *Shadow Canyon* the sale should have been unwound.

3. U.S. Bank inaction was directly Caused by the Lack of Notice

Finally, Respondent claims that "Appellants had numerous options to avoid foreclosure on its first deed of trust which it did not utilize." *Answering Brief* p. 19. The Respondents then go on to opine as to all the things that U.S. Bank *could have* done to avoid this issue. What is not addressed is that U.S. Bank had policies and procedures in place to pay superior liens in their entirety and would have paid the lien if it had been properly notified of the foreclosure sale.

Q. Let me ask you this. Are you familiar with U.S. Bank's policies and procedures in regard to superior liens?

A. Yes.

Q. If U.S. Bank had received a notice from a homeowners association regarding a homeowner's association foreclosure, can you explain to the Court and all the parties here what US Bank would have done?

A. Yes. I actually worked in our collection department in 2011. I was trained then specifically on states such as Nevada in what to do if we were notified of a lien by the actual borrower.

US Bank received notice or notified of that would request contact information, payoff information, or would pay the lien off if we received the notice of default in order to protect our interest in states where we would need to do so.

Q. So US Bank's policies and procedures is if they had received the notice of default, they would have paid off the lien; correct?

A. Yes.

Appx. Vol 7 pp. 1684-1685

It was clear from U.S. Bank's testimony that if U.S. Bank had received the Notice of Default, as was their right under Nevada law, it would have appropriately addressed and dealt with the HOA Super Lien. Yet due to the failure to property notice U.S. Bank, no action took place. This is simply not the fault of U.S. Bank, but instead was caused by a failure to follow statutory procedures.

IV.
CONCLUSION

For the above enumerated reasons the Trial Court should be reversed and judgment should be entered for U.S. Bank. The failure to provide U.S. Bank with the Notice of Default rendered the sale void for failure to follow the statute. Even assuming *arguendo* that the sale is not void for failure to follow the statute, U.S. Bank had demonstrated sufficient facts to have the sale unwound as voidable under *Shadow Wood*.

Dated this 8th Day of August, 2018

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Font Times New Roman
2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7) because the brief contains 4,246 words which is compliant with NRAP 32(a)(7)(A)(ii).
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. Further I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters of the record to 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 sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th Day of August 2018 **McCARTHY HOLTHUS LLP**

/s/ Thomas N. Beckom, Esq

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