MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for defendant/respondent Resources Group, LLC

SUPREME COURT

STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION, Appellant, vs. RESOURCES GROUP, LLC, Respondent.	No. 74575

RESPONDENT'S PETITION FOR REHEARING

Michael F. Bohn, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 Fax

Attorney for defendant/respondent,
Wild Calla Street Trust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Nevada cases

Federal and other cases

STATUTES AND RULES:

Treatises

RESPONDENT'S PETITION FOR REHEARING

Pursuant to NRAP 40(b)(1), Resources Group (hereinafter "plaintiff") petitions the court for rehearing of it's order vacating and remanding the judgment of the district court, filed on July 3, 2019, on the grounds that the court has "overlooked or misapprehended a material fact in the record or a material question of law in the case."

NRAP 40(a)(2) provides in part:

> **Contents.** The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present....

ARGUMENT

A. The finding of bona fide purchaser is supported by substantial evidence

Counsel for plaintiff respectfully submits that rehearing should be granted because this court has misapplied the standards regarding findings of fact and conclusions of law regarding the purchaser's status as bona fide purchaser.

The district court's findings were based on substantial evidence pursuant to the standard delineated in Weddell v.H20 Inc., 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conslusion. See Weddell, 128 Nev. At 94, 271 P.3d at 748.

This court has repeatedly held that it will not disturb a lower court's findings of fact if supported by substantial evidence. Ransdell v. Clark County 124 Nev. 847, 192 P.3d 756 (2008); Salaiscooper v. Eighth Judicial District Court 117 Nev. 892, 34 P.3d 509 (2001); S.O.C. Inc. V. Mirage Casino Hotel 117 Nev. 403, 23 P.3d 243 (2001).

Morever, this court will not substitute its view on findings made by the district court when such findings are based on substantial evidence. Jackson v. Groendndyke 132 Nev. Adv. Op. 25, 369 P.3d 362 (2016) Fox v. First Western Savings 86 Nev. 469, 470 P.2d 424 (1970); Langir v. Arden 82 Nev 28, 409 P.2d 891 (1966).

Whether a party is put on inquiry notice is a question of fact. Winn v. Sunrise Hospital & Medical Center 128 Nev. 246, 252-53, 277 P.3d 458, 462-63 (2012). See also In re Weisman 5 F.3d 417, 421 (9th Cir. 1993), where the court stated regarding if there was notice to a purchaser pursuant to California Civil Code section 19:

> Whether the circumstances are sufficient to require inquiry as to another's interest in property for purposes of section 19, is a question of fact, even where there is no dispute over the historical facts.

The district court specifically found that the purchaser is a bona fide purchaser.

Conclusion of Law number 20 states:

Defendant and Counterclaimant's predecessor, 4254 Rollingstone

> Avenue Trust, was a bona fide purchaser for value, at the HOA foreclosure sale, without notice, actual or constructive or inquiry, of any defects in the sale or any pre-sale dispute as to title. There is nothing in law or equity that should prevent Defendant and Counterclaimant Rgll as trustee for the Bourne Valley Court Trust dated 5/4/2012 from having clear and unencumbered title to the subject property.

Such a finding is a question of fact, which this court is not to disturb if the finding is based on substantial evidence. This conclusion of law is directly supported by finding of fact number 13 which finds:

> Prior to the sale, Mr. Haddad had no information about the property other than what was contained in the recorded documents, including no information as to any dispute as to title. He received no information from the HOA or its trustee about the property prior to sale, other than it was going to be sold at public auction.

It is respectfully submitted that these findings by the district court are supported by substantial evidence, and should not be reversed by this court.

B. The finding that the purchaser was not on inquiry notice is supported by substantial evidence

It is respectfully submitted that this court erred in finding that the purchaser was on inquiry notice. The district court made a contrary finding, which was supported by substantial evidence.

The order of reversal from this court states in part beginning on page 13:

/ / /

/ / /

> ...While Haddad may not have had actual notice that Alessi & Koenig failed to give U.S. Bank proper notice of default, this does not mean he did not have inquiry notice, given his sophistication; the fact that the sale had been continued and neither the homeowner nor U.S. Bank nor any other bidders appeared at the rescheduled sale; the allegations respecting his close relationship with Alessi & Koenig; and his acknowledgment in the bankruptcy that followed the sale that title to this property was contested.....**Whether diligent inquiry by Haddad would have revealed the notice defect, or the other deficiencies alleged, are questions of fact for the district court to resolve**.

None of the facts or issues recited in this court's decision regarding the foreclosure sale are sufficient to put a purchaser on notice. Moreover, the issue of fact regarding what a diligent inquiry by Haddad would have revealed has already been determined by the district court, and that finding is supported by substantial evidence.

The number of issues this court sets forth in it's decision as factors putting the purchaser on notice, the court fails to give any explanation as to how any of these matters are "irregularities" which would put a purchaser on notice. If these factors are sufficient to put a purchaser on inquiry notice, the effect of the holding will be that there will never be another bona fide purchaser because each of the items cited by the court occur frequently. This effectively undermines the meaning and the purpose of the bona fide purchaser doctrine, which is to protect purchasers.

Foreclosure sales are continued all the time, and the continuances and notice

requirements for continuances are contained in both NRS 116.31164(5)(b) and NRS 107.082.

In HOA foreclosure sales, it is quite common for sales to be continued. HOA's are required to treat the homeowner with good faith pursuant to NRS 116.1113. It is common for a homeowner to request a continuance to make payment or for the HOA to approve a payment plan.

In this case, finding of fact number 14 notes that the homeowner made a payment of $414.00 in December, 2011, after the original sale date and before the actual sale date. The fact that a sale is or was continued is a non-issue and should not be a factor in determining bona fide purchaser status.

The fact that neither the bank or the homeowner attended the sale is meaningless. Of all the hundreds or thousands of cases this court has reviewed, there has not been one opinion, published or unpublished, where the sale was attended by the homeowner or the bank.

Moreover, before the court issued it's opinion in SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 334 P.3d 408 (2014), nobody knew what they were buying or what the effect of the sale was. It was common for sales to be sparsely attended.

As noted by the district court in Bourne Valley Court Trust v. Wells Fargo

Bank, N.A. 80 F. Supp.3d 1131 (D. Nev. 2015); reversed on other grounds, 832 F.3d 1154 (9th Circ. 2016):

> The commercial reasonableness here must be assessed as of the time the sale occurred. Wells Fargo's argument that the HOA foreclosure sale was commercially unreasonable due to the discrepancy between the sale price and the assessed value of the property ignores the practical reality that confronted the purchaser at the sale. Before the Nevada Supreme Court issued SFR Investments, purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit. Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure extinguishes a first deed of trust on the property. SFR Investments, 334 P.3d at 412. Thus, a purchaser at an HOA foreclosure sale risked purchasing merely a possessory interest in the property subject to the first deed of trust. This risk is illustrated by the fact that title insurance companies refused to issue title insurance policies on titles received from foreclosures of HOA super priority liens absent a court order quieting title. (Mot. to Remand to State Court (Doc. # 6), Decl. of Ron Bloecker.) Given these risks, a large discrepancy between the purchase price a buyer would be willing to pay and the assessed value of the property is to be expected.

Stating that the homeowner and bank did not attend a sale, when there is no evidence that they ever do, again undermines the bona fide undermines the doctrine and its application in real estate transactions.

The relationship between Haddad and Alessi & Koenig was found by the district court to have no effect on the sale. The district court specifically found the purchaser " received no information from the HOA or its trustee about the property prior to sale, other than it was going to be sold at public auction."

The bankruptcy that followed and the dispute as to title is also irrelevant to inquiry notice. In Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Adv. Op 5, 366 P.3d 1105 (2016), this court noted:

> That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title.

It is respectfully submitted that the fact the sale was continued, that the bank and homeowner did not attend, that Haddad had used Alessi & Koenig as his attorney in some matters, and a subsequent bankruptcy are not sufficient to put a purchaser on inquiry notice. It is also not sufficient to find that the purchaser was not a bona fide purchaser. The district court already made findings, which were supported by substantial evidence, and should not be disturbed by this court.

A decision such as the one issued in this case will only undermine the bona fide purchaser doctrine and make bidders at foreclosure sales wary of bidding, which will depress the amounts bid at sale. The dissent in the case of Rosenberg v. Schmidt 727 P2d 778 (Alaska 1986) aptly noted:

> The majority correctly notes that where, as here, a defect in the foreclosure sale makes it merely voidable, the sale to a BFP will completely bar the debtor's ability to set aside the sale. G. Nelson & D. Whitman, Real Estate Finance Law § 7.20 (2d ed. 1985); Annot., 73 A.L.R. 612, 638 ("It seems well settled that mere defects or irregularities in foreclosure proceedings do not affect the title acquired by a bona fide

purchaser at the sale thereunder.") **This makes perfect sense, as grave consequences would result if the rule were otherwise. For example, if innocent purchasers at foreclosure sales had to face the risk that debtors could easily set aside the sales, then it takes little imagination to realize that participation at foreclosure sales would be significantly and unacceptably chilled.** As the court stated in In re Alsop, 14 B.R. 982, 987 (Bankr. Alaska 1981), aff'd 22 B.R. 1017 (D. Alaska 1982):

> The specter of this uncertainty of title will severely inhibit participation at the foreclosure sale by anyone other than the original creditor, thus depressing bid prices to the general detriment of debtors. [This] would further reduce the willingness of creditors to lend on the security of a deed of trust, to the general detriment of borrowers.

Id. (Citation omitted.)

Furthermore, the innocent purchaser, having absolutely nothing to do with the legal relationship between the trustee and the debtor, should not be forced to bear any loss caused to the debtor by the trustee's failure to diligently protect the debtor's interests. (emphasis added)

C. An inquiry would not have revealed any issues because the only inquiry could be done through the public records

The district court has already conducted trial and made the finding that the purchaser was not only not on inquiry notice, but that his research would have revealed nothing. The court found that the purchaser "without notice, actual or constructive or inquiry, of any defects in the sale or any pre-sale dispute as to title." These findings are supported by substantial evidence and should not be disturbed by this court.

The concept of bona fide purchaser has more application in voluntary sales in

which title is transferred by deed. In such a case, a purchaser takes subject to any matters which are recorded against the property.

In foreclosure cases, however, the traditional bona fide purchaser doctrine rarely comes into play because all interests on the property which are junior to the lien being foreclosed upon are extinguished. This is even more so with an HOA foreclosure because it is senior to all other liens other than prior existing debts and taxes are extinguished by the foreclosure.

This court has frequently cited the treatise 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* §7:21 (6th ed. 2014). Section 7.21 of this treatise explains who is a bona fide purchaser in a foreclosure context:

> If the defective sale is only voidable, who is a bona fide purchaser? A mortgagee purchaser should rarely, if ever, qualify as a bona fide purchaser, because the mortgagee or its attorney normally manages the power of sale foreclosure and should be responsible for defects. The result should be the same when a deed of trust is foreclosed. Although the trustee, rather than the lender, normally is in charge of the proceedings, the court probably will treat the trustee as the lender's agent for purposes of determining BFP status. **If the sale purchaser paid value and is unrelated to the mortgagee, he should take free of voidable defects if : (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are such that a person attending the sale and exercising reasonable care would be unaware of the defects....**
> (emphasis added, footnotes omitted)

The district courts findings mirror with these standards. The purchaser only had the public records to research, and he had no information as to any dispute as to the title, because the mailing of notices, the addresses to where they are sent are not matters of public record. Moreover, collection agents are bound by the privacy restrictions of both state and federal collections law.

D. The burden of proof is on the appellant, and all presumptions run in favor of the purchaser as the record title holder.

The case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91, 405 P.3d 641 (2017) clarified that the bank has the burden to show that the sale should be set aside in light of the purchaser's status as record title holder, and there is a presumption in favor of the record title holder.

Not only are the findings of the district court which are supported by substantial evidence, the presumption of validity is in favor of the purchaser.

It is respectfully submitted that this court should consider these presumptions in considering this petition.

E. Appellant US Bank received notice through it's agent US Recordings

Although the district court incorrectly found that U.S. Bank was not entitled to statutory notice, it did nonetheless find that it was sent the notice of default and the notice of sale.

The district court found that US Bank received notice of default through service on US Recordings. Finding of fact number 6 states:

> On April 5, 2011, 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 US Recordings, 2925 Country Drive, Ste 201, ST. Paul, MN 55117.

Mail to US Recordings is sufficient notice to U.S. Bank because US Records is the agent of U.S. Bank authorized to receive mail on it's behalf. This fact is clear because the deed of trust requests that a copy of the deed of trust be mailed to US Records. The simple fact that US Records was authorized to receive the deed of trust through the mail is sufficient to make a finding that US Records is the agent for U.S. Bank in regards to the deed of trust. It is inconceivable that the bank would have mail sent to anyone other than it's agent.

Moreover, the finding of agency is implied in finding of fact number 6, where the court stated 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 US Recordings..."

This court has repeatedly held that specific findings may be implied from the record. Allen v. Webb 87 Nev. 261, 485 P.2d 677 (1971).

In this court noted that it will imply findings when supported by the evidence, stating:

> This court has previously held that in the absence of express findings it will imply findings where the evidence clearly supports the judgment. This court has held that notice to corporations is done through agents. See In Re Amerco Derivative Litigation 127 Nev. 196, 252 P.3d 681 (2011); and Strohecker v. Mutual Building & Loan Association of Las Vegas, 55 Nev. 350, 34 P.2d 1076 (1934), where this court stated:
>
> > The general rule applicable to a case of this character is stated in 14 A. C. J. p. 482, § 2350, as follows: "**A corporation can acquire knowledge or receive notice only through its officers and agents, and hence the rule holding a principal, in case of a natural person, bound by notice to his agent is particularly applicable to corporations**, the general rule being that the corporation is affected with constructive knowledge, regardless of its actual knowledge, of all the material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, **and the corporation is charged with such knowledge even though the officer or agent does not in fact communicate his knowledge to the corporation**." (emphasis added)

The district court made the finding that U.S. Bank received notice by mailing of the notice to US Recordings. Implied in this finding is that US Recordings is the agent of U.S. Bank, authorized to receive mail.

It is respectfully submitted that this court should consider these issues on rehearing.

F. The testimony of U.S. Bank's witness cannot be verified and is otherwise irrelevant

The witness for U.S. Bank testified that U.S. Bank did not receive the

foreclosure notices. This cannot be verified and is contrary to the case law involving foreclosures.

This court has recognized that a nonjudicial foreclosure agent's only duty is to mail the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS 107.080(3)). The fact that the witness testified that U.S. Bank did not receive notices is therefore irrelevant.

The witness for U.S. Bank also testified that had the bank received notices, it would have requested a statement and paid off the lien. This again is self serving, and is contrary to the position taken by U.S. Bank in the case of SFR Investments Pool 1 v. U.S. Bank, N.A. 130 Nev. 742, 334 P.3d 408 (2014). In that case, this court set forth U.S. Bank's position, which was NOT to pay the HOA liens.:

> U.S. Bank maintains that NRS 116.3116(2) merely creates a payment priority as between the HOA and the beneficiary of the first deed of trust. If so, then the dues and maintenance and nuisance-abatement piece of the HOA lien does not acquire superpriority status until the beneficiary of the first deed of trust forecloses, at which point, to obtain clear, insurable title, the foreclosure-sale buyer would have to pay off that piece of the HOA lien.

The testimony of the witness at trial is contrary to the position taken by U.S. Bank in the SFR decision. This court should not attach any credibility to this self serving testimony, especially when the district court has already found in favor of the purchaser.

CONCLUSION

The holdings of this case regarding bona fide purchaser and inquiry notice are contrary to the findings of the district court, which are supported by substantial evidence. The findings are also supported by presumptions in favor of the purchaser as the record title holder. The decision in this case as written undermines the doctrine of bona fide purchaser and will have effects on subsequent litigation involving foreclosure sales of both trust deeds and HOA liens.

Any inquiry would not have revealed any issues because only inquiry could be done through a review of the public records, which has no record of who was sent notice or the address where the notice was sent.

The notice was properly sent to the agent of U.S. Bank, and the testimony of it's witness that it did not receive the notice is contrary to Nevada law and should be disregarded.

/ / /

/ / /

It is therefore respectfully requested that this court reconsider it's decision in this case.

DATED this 22nd day of July, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for respondent Resources Group, LLC

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-stile requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 3,990 words.

3. 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. 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 22nd day of July, 2019

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for Resources Group, LLC

CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 22nd day of July, 2019, a copy of the foregoing **RESPONDENT'S PETITION FOR REHEARING** was served electronically through the Court's electronic filing system to the following individuals:

Kristin A. Schuler-Hintz, Esq.
McCarthy Holthus LLP
9510 W. Sahara Ave., Suite 200
Las Vegas, NV 89117

/s/ /*Marc Sameroff /*
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.