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SUPREME COURT

STATE OF NEVADA

RESOURCES GROUP, LLC,

Appellant,

vs.

U.S. BANK, NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION,

Respondent.

No. 84992

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant 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. Resources Group, LLC is a Nevada limited-liability company.

2. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting plaintiff's motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting plaintiff's motion for summary judgment was filed on June 8, 2022. Notice of entry of the order granting plaintiff's motion for summary judgment was served and filed on June 9, 2022.

(C) Defendant filed its notice of appeal on July 5, 2022.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the

cases retained by the Supreme Court. Counsel for defendant/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the deed of trust that identified U.S. Bank National Association ND (hereinafter "plaintiff") as Lender was extinguished by the HOA foreclosure sale conducted by Alessi & Koenig, LLC (hereinafter "Alessi") on behalf of Glenview West Townhomes Association (hereinafter "HOA").

2. Whether Alessi's mailing of the notice of default to US Recordings at 2925 Country Drive STE 201, St. Paul, MN 55117 entitled plaintiff to equitable relief against Resources Group, LLC (hereinafter "Resources Group").

3. Whether plaintiff proved that some element of fraud, unfairness or oppression accounts for or brought about the purchase price paid by Rolling Stone Dr Trust at the HOA foreclosure sale.

4. Whether plaintiff was entitled to equitable relief from the conclusive foreclosure deed.

5. Whether Resources Group is protected as the transferee of a bona fide purchaser from plaintiff's unrecorded claims and objections.

6. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

/ / /

STATEMENT OF THE CASE

On August 30, 2012, plaintiff filed its complaint asserting one cause of action: judicial foreclosure of the deed of trust recorded on March 26, 2009 as Instrument No. 20090326-0003737. (JA1, pgs. APP000001-APP000035)

On November 16, 2012, plaintiff filed its amendment to complaint to replace the fictitious name of Doe 1 with "any and all persons unknown, claiming to be the personal representatives of George R. Edwards' estate, or duly appointed, qualified, and acting executor in the will of the estate of George R. Edwards." (JA 1, pgs. APP0000036-APP000038)

On April 11, 2013, plaintiff filed its second amendment to complaint that added Resources Group and the HOA as parties and alleged that the HOA "has interest in the subject property or some part of it by reason of a Notice of Delinquent Assessment Lien, which interest is subsequent to and subject to that of Plaintiff." (JA 1, pgs. APP000039-APP000047)

On July 16, 2014, Resources Group filed an answer and counterclaim that requested "a determination from this court, pursuant to NRS 40.010 that the Resources Group, LLC, as trustee of the Bourne Valley Court Trust, is the rightful owner of the property and that the counterdefendant has no right, title, interest or

claim to the subject property." (JA 1, pgs. APP000062-APP000069)

On February 20, 2015, plaintiff filed an answer to counterclaim.(JA 1, pgs. APP000093-APP000097)

On January 20, 2017, plaintiff filed a first amended answer to the counterclaim. (JA 6, pgs. APP001263-APP001267)

On October 2, 2017 and October 3, 2017, a bench trial was held before the Honorable Judge Timothy C. Williams. (JA 6, pg. APP001374 to JA 8, pg. APP001765)

On October 31, 2017, the district court entered findings of fact and conclusions of law and final judgment pursuant to Nev. R. Civ. P. 54(b) that quieted title to the Property in Resources Group and forever enjoined plaintiff "from asserting any estate, title, right, interest, or claim to the subject property adverse to" Resources Group. (JA 8, pgs. APP001766-APP001775)

On November 1, 2017, Resources Group filed written notice of entry of the findings of fact and conclusions of law and final judgment pursuant to Nev. R. Civ. P. 54(b). (JA 8, pgs. APP001776-APP001788)

On November 22, 2017, plaintiff filed a notice of appeal. (JA 8, pgs. APP001789-APP001790)

On July 3, 2019, this court issued its published opinion in U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. 199, 444 P.3d 442 (2019), which vacated the partial judgment entered in favor of Resources Group and remanded the case "for further proceedings consistent with this opinion."

On remand, plaintiff filed a motion for summary judgment (JA 8, pg. APP001940 to JA 9, pg. APP001962) that included a section identified as "UNDISPUTED FACTS." (Part 8, pgs. APP001945-APP001948) However, many of the sentences in that section of plaintiff's motion were not supported by admissible evidence and were contradicted by the testimony in the reporter's transcript of bench trial attached as Exhibit 6 to the motion (JA 9, pg. APP001984 to JA 10, pg. APP002227) and Exhibit 7 to the motion.(JA 10, pgs. APP002228-APP002378)

Resources Group filed an opposition to plaintiff's motion for summary judgment on March 31, 2022. (JA 11, pgs. APP002494-APP002571)

Plaintiff filed a reply in support of its motion for summary judgment on April 7, 2022. (JA 11, pg. APP002574 to JA 12, pg. APP002599)

On June 8, 2022, the court entered an order granting plaintiff's motion for summary judgment. (JA 12, pgs. APP002674-APP002681)

Paragraph 12 at page 3 of the order (JA 12, pg. APP002676) states that "US Bank did not receive alternative, adequate notice of the HOA Sale," but paragraph 12 does not identify any evidence in the record on appeal that proves this statement is true.

Plaintiff mailed and filed a notice of entry of order to Resources Group on June 8, 2022. (JA 12, pgs. APP002682-APP002691)

Resources Group filed its notice of appeal on July 5,2022. (JA 12, pgs. APP002692-APP002693)

The parties filed a stipulation and order for Rule 54(b) Certification on November 15, 2022. (JA 12, pgs. APP002694-APP002701)

STATEMENT OF FACTS

Resources Group is the owner of the real property commonly known as 4254 Rolling Stone Drive, Las Vegas, Nevada (hereinafter "Property"). Resources Group acquired title to the Property from 4524 Rolling Stone Dr Trust by a grant, bargain, sale deed recorded with the Clark County Recorder on May 29, 2012. (JA 11, pgs. APP002520-APP002522)

4524 Rolling Stone Dr Trust obtained title to the Property by entering and paying the high bid of $5,331.00 at a public auction held on January 25, 2012. *See*

copy of foreclosure deed at JA 11, pgs. APP002520-APP002522.

The foreclosure deed arose from a delinquency in assessments due from the George R. Edwards Trust (hereinafter "former owner") to the HOA pursuant to NRS Chapter 116.

Plaintiff is the Lender identified in a deed of trust that was recorded as an encumbrance against the Property on March 26, 2009. A copy of the deed of trust is JA 11, pgs. APP002527-APP002534. The legal description attached as Exhibit "A" to the deed of trust expressly provided that plaintiff's interest in the property was "subject to" the covenants, conditions and restrictions recorded in Book 1845 as Instrument 1804064 on December 12, 1983.

On December 20, 2010, Alessi mailed a notice of delinquent assessment (lien) for $2,330.00 to the former owner. (JA 11, pgs. APP002536-APP002537)

On January 4, 2011, Alessi recorded the notice of delinquent assessment (lien) against the Property. *See* copy of recorded notice at JA 11, pg. APP002539.

On March 29, 2011, Alessi recorded a notice of default and election to sell under homeowners association lien for $3,800.00 against the Property. *See* copy of recorded notice at JA 11, pg. APP002551.

On April 5, 2011, Alessi mailed copies of the notice of default to the former

owner, US Recordings at "2925 Country Drive Ste. 201, St. Paul, MN 55117," Robert Hazell, Republic Services and Law Office of AJ Kun, Ltd. *See* proof of mailing at JA 11, pgs. APP002549-APP002553.

On October 13, 2011, Alessi recorded a notice of trustee's sale for $5,370.00 against the Property. *See* copy of recorded notice at JA 11, pg. APP002557.

On October 26, 2011, Alessi mailed copies of the notice of trustee's sale to the former owner, Law Offices of Les Zieve, Southwest Financial Services Ltd., **U.S. Bank National Association ND, 4325 17th Avenue SW, Fargo, ND 58103**, U.S. Bank Trust Company, National, 111 SW Fifth Ave, Portland, OR 97204, and the Ombudsmans Office. (emphasis added) *See* proof of mailing at JA 11, pgs. APP002560-APP002563.

SUMMARY OF THE ARGUMENT

The deed of trust that identified plaintiff as Lender was extinguished by the foreclosure sale held on January 25, 2012.

Alessi's mailing of the notice of default to US Recordings at 2925 Country Drive STE 201, St. Paul, MN 55117 did not entitle plaintiff to equitable relief against Resources Group.

Plaintiff did not prove that any element of fraud, unfairness, or oppression

accounts for or brought about the purchase price paid by Rolling Stone Dr Trust at the HOA foreclosure sale.

The district court improperly granted plaintiff equitable relief from the conclusive foreclosure deed.

As the transferee of a bona fide purchaser, Resources Group is protected from plaintiff's unrecorded claims and objections.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. The deed of trust that identified plaintiff as Lender was extinguished by the foreclosure sale held on January 25, 2012.

NRS 116.3116(2) provides in part that the HOA's assessment lien is "prior to all security interests described in paragraph (b) 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 . . . ." (emphasis added)

The first deed of trust that identified plaintiff as the "LENDER" falls squarely within the language of paragraph NRS 116.3116(2)(b).

In the present case, the notice of delinquent assessment (lien) stated that the notice was recorded "[i]n accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions, and Restrictions (CC&Rs). . .." (JA 11, pg. APP002539)

When the deed of trust was recorded on March 26, 2009, NRS 116.3116(5) stated:

> Recording of the declaration constitutes record notice and perfection of the lien. No recordation of any claim of lien for assessment under this section is required.

As recognized by this court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 756, 334 P.3d 408, 418 (2014), and in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev. 28, 33, 388 P.3d 970, 975 (2017), both the CC&Rs and the statute enacted in 1991 provided plaintiff with notice that the deed of trust was subordinate to the HOA's superpriority lien rights.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this court stated that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of

which will extinguish a first deed of trust." 130 Nev. at 758, 334 P.3d at 419.

Each notice recorded and served by the HOA and Alessi stated "the total amount of the lien" as approved by this court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 at 418.

The record on appeal does not contain any recorded notice stating that the superpriority portion of the assessment lien was paid prior to the public auction held on January 25, 2012.

Because the high bid of $5,331.00 made by 4524 Rolling Stone Drive Trust to purchase the Property was equal to the full amount of the unpaid debt of $5,331.00 stated in the foreclosure deed, the HOA necessarily foreclosed its entire lien.

Based upon the information disclosed in every recorded document, and the holding in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the nonjudicial foreclosure of the HOA's super priority lien extinguished the "first security interest" held by plaintiff on January 25, 2012.

2. Alessi's mailing of the notice of default to US Recordings at 2925 Country Drive STE 201, St. Paul, MN 55117 did not entitle plaintiff to equitable relief against Resources Group.

At page 3 of its motion for summary judgment (JA8, pg. APP001942), plaintiff misstated the holding in U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 205, 444 P.3d at 448, by omitting the requirement that plaintiff

prove "that Alessi & Koenig did not substantially comply with NRS 116.31168 and NRS 107.090(3)." This court also described Nationstar Mortgage, LLC v. Sahara Sunrise Homeowners Ass'n, No. 2:15-cv-01597-MMD-NJK, 2019 WL 1233705, at *3 (D. Nev. Mar. 14, 2019), as "holding that the foreclosure agent's failure to send a required party the notice of default rendered the foreclosure sale void when the **evidence demonstrated that the holder of the first deed of trust would have tendered the amount of the superpriority default had it received proper notice**." (emphasis added)

Noticeably absent from plaintiff's motion is any evidence that proves that plaintiff ever tendered the superpriority amount of an assessment lien for an HOA sale held on or before January 25, 2012.

Plaintiff also did not produce any new evidence regarding the relationship between U.S. Recordings and plaintiff, but plaintiff instead relied on the testimony already presented by Bryan Heifner (JA 9, pgs. APP002003-APP002048) at the trial held on October 2, 2017.

Plaintiff also did not discuss Mr. Heifner's admission at trial that he was not familiar with who US Recordings was:

Q. Okay. **Are you familiar with** the entity US Recordings?

A. **I am not**.

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

A. **Not to my knowledge**.

(*See* JA 9, pg. APP002025, ll. 8-13)

When the word "familiar" is used as an adjective, merriam-webster.com defines the word "familiar" to mean "frequently seen or experienced: easily recognized" or "having personal or intimate knowledge."

As quoted at pages 6 and 7 of Resources Group's opposition (JA 11, pgs. APP002499-APP002500), NRS 50.025(1)(a) expressly provides that "[a] witness **may not testify** to a matter unless . . .[e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . ." (Emphasis added)

Because he admitted that he was not "familiar" with US Recordings, Mr. Heifner did not have the requisite personal knowledge to provide any testimony regarding the relationship between plaintiff and US Recordings.

Plaintiff also quoted this court's statement from U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 201, 444 P.3d at 446, that "U.S. Bank established through uncontroverted testimony at trial that it was not

affiliated with the 'return to' entity and did not receive the notice of default." (JA8, pg. APP001951, ll. 15-16)

As stated at page 5 of Resources Group's opposition (JA 11, pg. APP002498, ll. 23-25), the "notice/prejudice rule" does not require that plaintiff be "affiliated with" U.S. Recordings – the "notice/prejudice" rule only requires that the plaintiff have received "notice from some other source."

Moreover, to accept Mr. Heifner's testimony as proof that US Recordings had no relationship with plaintiff, this Court must assume that Mr. Heifner had personal knowledge of every company that interacted with plaintiff in the normal course of plaintiff's business.

On the other hand, Mr. Heifner testified at trial that he was a "litigation analyst" for plaintiff and that "I prepare for testimonies at any depositions, litigations, trials" and that "I also appear at mediations and settlement conferences as well." (JA 9, pgs. APP002003, l. 23 - APP002004, l. 2) Plaintiff did not present any evidence proving that a "litigation analyst" like Mr. Heifner would have personal knowledge of the day to day business dealings between plaintiff and US Recordings. Mr. Heifner was therefore not qualified to provide "uncontroverted testimony" regarding the business relationship between plaintiff and US Recordings.

Furthermore, as stated at page 7 of Resource Group's opposition to plaintiff's motion for summary judgment (JA 11, pg. APP002500, ll. 15-17), "[d]uring the trial, and in its motion for summary judgment, plaintiff did not introduce any evidence that explained why the name and address of 'US Recordings' would appear on the deed of trust held by plaintiff if 'US Recordings' had no relationship with plaintiff regarding the deed of trust ."

Instead of providing an explanation for why the name and address of US Recordings appeared on the deed of trust, plaintiff quoted from this court's opinion in U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 205, 444 P.3d at 447-448, that "Alessi & Koenig did not comply with the statutory requirement that it serve U.S. Bank with the notice of default. . . ." (JA 8, pg. APP001942, ll. 11-12)

Plaintiff, however, did not address in any way this court's next sentence that required the district court to make the following three findings of fact on remand: "Alessi & Koenig did not substantially comply with NRS 116.31168 and NRS 107.090(3), **that U.S. Bank did not receive timely notice by alternative means, and that U.S. Bank suffered prejudice as a result**. . . ." U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 205, 444 P.3d at 448

(emphasis added)

Plaintiff also did not provide any new evidence on the critical issue of "prejudice." Plaintiff instead argued that this court's statement in U.S. Bank, National Association ND v. Resources Group, LLC that "Alessi & Koenig's failure to mail U.S. Bank the notice of default at the address given for it in the recorded deed of trust violated NRS 116.31168 and NRS 107.090(3)" fully resolved the notice issue (JA 8, pg. 1949, ll. 13-19) and that Resources Group was required to prove that "US Recordings is an agent for US Bank with respect to accepting the notice of default." (JA 8, pg. APP001949, l. 26)

The district court adopted plaintiff's argument in paragraph 3 of its conclusions of law. (JA 12, pg. APP002678)

On the other hand, the "notice/prejudice rule" discussed in section II(B) of this court's opinion in U.S. Bank, National Association ND v. Resources Group, LLC does not require proof that US Recordings was "an agent for US Bank with respect to accepting the notice of default."

This court instead stated:

> **Absent notice from some other source**, failing to mail the statutorily required notice of default deprives the property owner of the minimum grace period the Legislature has mandated to give the deed of trust holder (or the homeowner) time to cure, compromise, or contest the default. (emphasis added)

135 Nev. at 204, 444 P.3d at 447.

Plaintiff also stated that "[t]here is no evidence that US Recordings and US Bank entered into a contract or agreement permitting US Recordings to control US Bank's performance" (JA 8, pg. APP001950, ll. 24-25) and that "[t]here is nothing in the record to support a finding that US Recordings is an agent for US Bank." (JA 8, pg. APP001951, ll. 4-5)

The district court adopted these arguments in paragraph 3 of its conclusions of law. (JA 12, pg. APP002678)

Again, Nevada law does not require any such evidence. As quoted above, Nevada law only requires that plaintiff have received notice of the default "from some other source."

Following remand to the district court, Resources Group served a second set of interrogatories upon plaintiff that sought to discover the relationship between plaintiff and "US Recordings," whether plaintiff had ever tendered payment for an HOA assessment lien prior to January 2012, and whether plaintiff or plaintiff's representative had ever attended a foreclosure sale between March 2009 and January 2012.

On March 5, 2020, plaintiff provided evasive answers to these interrogatories

(JA 8, pgs. APP001876-APP001881), and plaintiff inaccurately described US Recordings as "a mortgage broker." (JA 8, pg. APP001879, l. 19)

Plaintiff also refused to identify "the person most knowledgeable for U.S. Bank who can testify regarding the nature of the business relationship between US Recordings and You from March 2009 until January 2012." (JA 8, pg. APP001879, ll. 20-26)

Plaintiff also refused to describe "the duties and obligations of US Recordings regarding the receipt of any correspondence, notices, or any other type of communications through the United States Mail involving any deed of trust in which You are named as lender." (JA 8, pg. APP001880, ll. 11-19)

Plaintiff also refused to "[i]dentify by property address all properties in which You received a notice of default from a Homeowners Association in which You requested payoff information and paid the lien off." (JA 8, pg. APP001880, l. 20-29)

Plaintiff also refused to "identify by date and property address for each foreclosure sale conducted in Clark County which was attended by You or Your representative between March 2009 and January 2012." (JA 8, pg. APP001881, ll. 1-9)

On March 5, 2020, plaintiff also provided evasive responses to Resource

Group's second set of requests for production of documents. (JA 8, pgs. APP001883-1889)

For example, in response to Request No. 28, plaintiff refused to "provide a copy of your policies and procedures which were in effect from March 2009 through January 2012, for handling homeowners association liens on properties located in the state of Nevada in which a notice of default has been recorded by the Association." (JA 8, pgs. APP001887, l. 23-APP001888, l. 4)

In response to Request No. 30 and Request No. 34, plaintiff again inaccurately described US Recordings as "a mortgage broker." (JA 8, pg. APP001888, ll. 18-19; JA 8, pg. APP001889, ll. 18-19)

On November 30, 2020, Resources Group filed a motion to compel plaintiff to provide appropriate responses to Resources Group's second set of interrogatories and Resource Group's second set of requests for production of documents. (JA 8, pgs. APP001835- APP001905)

In its opposition to Resources Group's motion to compel (JA 8, pgs. APP001906-APP001917), plaintiff again attempted to evade discovery regarding the exact issues for which this court had remanded the case to the district court.

However, plaintiff made this critical admission at page 7 of its opposition:

> US Bank had no written policies in place for the specified time period. **Any notice received on a loan would be reviewed on an individual basis**, including review by local legal counsel. However, **there are no written policies from the specified time period to produce.**

(JA 8, pg. APP001912, ll. 26-28)

This judicial admission directly contradicts the following trial testimony by Mr. Heifner:

> Q. Let me ask you this. Are you familiar with **US Bank's policies and procedures in regards to superior liens**?
>
> A. Yes.
>
> Q. If US Bank had received a notice from a homeowners association regarding a homeowners 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.
>
> And 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.** (emphasis added)

(JA 9, pgs. APP002028, l. 10 to APP002029, l. 1)

The contradiction between the admission made at page 7 of plaintiff's opposition to Resources Group's motion to compel and the trial testimony by Mr. Heifner created the following issues of fact that can only be resolved at trial:

(1) How could Mr. Heifner testify regarding plaintiff's "policies and procedures in regards to superior liens" when plaintiff's opposition to Resources

Group's motion to compel admits that "[a]ny notice received on a loan would be reviewed on an individual basis" and "there are no written policies from the specified time period to produce"?

(2) Because plaintiff refused to prove that plaintiff actually paid off any HOA lien in order to protect plaintiff's subordinate deed of trust during the time period from January 4, 2011 (when Alessi recorded the HOA's notice of lien) and January 25, 2012 (when Alessi sold the Property), how could plaintiff prove that it was prejudiced even if plaintiff did not receive the notice of default "by some other source"?

Because Mr. Heifner did not testify at trial that plaintiff paid every assessment lien for which plaintiff received a notice of default, plaintiff did not prove that Nevada is a state where plaintiff "would request contact information, payoff information, or would pay the lien off if we received the notice of default."

With respect to this issue, at page 11 of its opposition (JA 8, pg. APP001916, l. 15), in response to Interrogatory 32 that asked plaintiff to identify all properties in which US Bank received a notice of default from a Homeowners Association where plaintiff requested payoff information and paid the lien, plaintiff admitted: "There is not a database that maintains or tracks this type of information." (JA 8, pg.

APP001916, ll. 2-3)

This admission is critical because it proves that plaintiff did not have any policy or practice of requesting payoff information and paying an HOA assessment lien even where plaintiff received a copy of the notice of default filed by the HOA.

Despite this lack of any evidence in the record, paragraph 6 of the district court's conclusions of law (JA 12, pg. APP002678) found:

> 6. Had U.S. Bank received notice of default, it would have paid the lien off and this establishes the lack of notice and prejudice needed to void the HOA Sale.

The district court did not cite any evidence that supports this conclusion because the record on appeal does not include any such evidence.

In paragraph 12 of the district court's conclusions of law (JA 12, pg. APP002679), the district court cited Bank of America v. SFR Investments Pool 1, LLC, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018), as authority that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." In that case, however, the sale was found to be "void" because the lender actually tendered the amount of the superpriority lien and cured the default prior to the sale. In the present case, plaintiff did not attempt to tender payment for any amount to Alessi.

In U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 207, 444 P.3d at 449, this court stated that "the fact the sale had been continued and neither the homeowner nor U.S. Bank nor any other bidders appeared at the rescheduled sale" presented a question of fact to be considered by the trial court in deciding "[w]hether diligent inquiry by Haddad would have revealed the notice defect, or the other deficiencies alleged."

At page 11 of its opposition, however, plaintiff admitted that it did not have a database that "maintains or tracks" the "date and property address for each foreclosure sale conducted in Clark County which was attended by You or Your representative between March 2009 and January 2012." (JA 8, pg. APP001916, ll. 22-26) Consequently, the record on appeal does not contain any evidence that would support a conclusion that plaintiff did not attend the HOA foreclosure sale because Alessi mailed the notice of default to US Recordings instead of directly to defendant.

Plaintiff also did not prove that during the relevant time period, either homeowners or lenders like plaintiff attended HOA foreclosure sales on a regular basis.

NRS 116.31164(1) expressly provided that "[t]he association or other person conducting the sale may from time to time postpone the sale by such advertisement

and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale." Consequently, the postponement of the foreclosure sale to January 25, 2012 was not something that could trigger a duty on 4254 Rollingstone Dr Trust to investigate the notices provided by Alessi for the sale.

In section I of its published opinion, this court also stated:

> Alessi & Koenig's records **suggest** it mailed the notice of sale, as distinguished from the notice of default, to U.S. Bank at the address specified for it in the deed of trust, but U.S. Bank's **files** do not show that it received either the notice of default or the notice of sale. (emphasis added)

135 Nev. at 200, 444 P.3d at 444.

First, Nevada law does not require that plaintiff "have received the notice of sale." Id. As noted at page 10 of Resource Group's opposition (JA 11, pg. APP002503, ll. 13-18), when applying NRS 107.080(3) in the context of the nonjudicial foreclosure of a deed of trust, this Court stated that "[m]ailing of the notices is all that the statute requires" and that "actual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 580, 555 P.2d 483, 484 (1976). In Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971), this Court stated that "[t]he statute does not require proof that the notice be received."

Second, Alessi's records do not "suggest" that Alessi mailed the notice of trustee's sale to U.S. Bank at the address specified for it in the deed of trust.

Alessi's records **prove** that Alessi mailed a copy of the notice of trustee's sale to "U.S. Bank National Association ND, 4325 17th Avenue, SW, Fargo, ND 58103" on October 26, 2011. (JA 11, pgs. APP002560-APP002563)

Third, at lines 4 to 6 on page 13 of its motion (JA 8, pg. APP001952, ll. 4-6), plaintiff stated that "[t]here is no declaration of mailing of service, no evidence of receipt, no copies of stamped envelopes, and ***no testimony that the HOA NOS was actually mailed***." (emphasis by plaintiff)

This false statement by plaintiff is directly contradicted by Exhibit J to Resource Group's opposition. (JA 11, pgs. APP002558-APP002563)

The certified mail receipt for Item 7011 0470 0001 1871 2482 addressed to U.S. Bank National Association ND, 4325 17th Avenue, SW, Fargo, ND 58103on the page identified as "USB0083" (JA 11, pg. APP002562) contains an official stamp by the U.S. Postal Service, which proves that the notice was deposited in the U.S. mail.

David Alessi also testified at trial that the page marked as "USB0081" identified the addresses to which Alessi mailed copies of the notice of trustee's sale.

(JA 9, pg. APP002098, 11. 3-22) The page marked as "USB0081" (JA 11, pg. APP002560) includes the address for U.S. Bank National Association ND, 4325 17th Avenue, SW, Fargo, ND 58103.

At page 13 of its motion (JA 8, pg. APP001951, ll. 7-9), plaintiff cited Mr. Heifner's testimony at trial that included the statements "I've actually read all the notes in the account" and that "all of our documents received are scanned into our document retrieval system." (JA 9, pg. APP002030, ll. 11-22)

Plaintiff also cited Mr. Heifner's affirmative response to the following question:

> Q. Okay. Now, you said that you reviewed all of the documents that your bank has concerning this loan, correct?
>
> A. Yes.

(JA 9, pg. APP002033, ll. 17-20)

Plaintiff also cited Mr. Heifner's affirmative response to the following question:

> Q. Okay. Mr. Heifner, if you would, I want to ask you some questions about the notice of sale in this case. You told us – you told the Court earlier that you had reviewed US Bank's complete file in this matter, correct?
>
> A. Yes.

(JA 9, pg. APP002036, ll. 19-24)

On the other hand, plaintiff also cited the following testimony by Mr. Heifner:

> Q. Is it your testimony that you have no record of ever receiving the notice of sale?
>
> A. I – **prior to the sale or around the time of the sale there are no records**. I mean, **they even searched** after the sale had taken place to see if we received it, and there was still no – **no record of receiving that at our addresses** that we would receive those documents at. (emphasis added)

(JA 9, pgs. APP002036, l. 25 - APP002037, l. 7)

In Wood v. Safeway, 121 Nev. 724, 729,121 P.3d 1026, 1029 (2005), this court stated that "when reviewing a motion for summary judgment, **the evidence, and any reasonable inferences drawn from it**, must be viewed in a light most favorable to the nonmoving party." (*citing* Lipps v. Southern Nevada Paving, 116 Nev. 497, 498, 998 P.2d 1183, 1184 (2000)(*citing* Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985)) (emphasis added)

Mr. Heifner's testimony that "**they** even searched" (emphasis added) proves that Mr. Heifner did not personally search "US Bank's complete file in this matter," but that he instead relied on a search made by an unidentified "they." This testimony supports the inference that Mr. Heifner did not have personal knowledge of "US Bank's complete file," but only of the records provided to him by the unidentified "they." NRS 50.025(1)(a) expressly provides that Mr. Heifner was not competent to testify regarding the results of a search that he did not personally make.

The evidence in the present case also supports the inference that even where a written notice is timely mailed to the address for plaintiff identified on page 1 of the deed of trust (*see, e.g.*, the notice of trustee's sale at JA 11, pgs. APP002559-APP002563), plaintiff's computer records are so incomplete and so unreliable that plaintiff cannot locate the properly mailed notice in its records. Consequently, the absence of a copy of the notice of default in plaintiff's computer records is not probative of any relevant fact upon which the district court could make a finding of fact.

As noted above, this court remanded the case for the district court to make specific findings "that U.S. Bank did not receive timely notice by alternative means, and that U.S. Bank suffered prejudice as a result." Plaintiff did not present any evidence in support of its motion for summary judgment upon which the district court could make those findings.

3. Plaintiff did not prove that any element of fraud, oppression, or unfairness accounts for or brought about the purchase price paid by 4254 Rolling Stone Dr Trust.

At the bottom of page 12 of its motion (JA 8, pg. APP001951), plaintiff quoted from 58 Am. Jur. 2nd Notice § 38 (2012), that a presumption that a properly mailed notice has been received "may not be given a conclusive effect without violating the

Due Process Clause of the 14th Amendment."

On the other hand, this court held in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev. 28, 31, 388 P.3d 970, 973 (2017), "the Legislature's mere enactment of NRS 116.3116 does not implicate due process absent some additional showing the state compelled the HOA to foreclose on its lien."

The record on appeal does not contain any evidence proving that the State of Nevada participated in or compelled the HOA to foreclose on its lien in the present case.

At the bottom of page 14 of its motion (JA 8, pg. APP001953), plaintiff quoted the discussion of the California rule found in U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 205-206, 444 P.3d at 448.

This language quoted by plaintiff, however, does not take into account the element of causation that plaintiff is required to prove under the California rule. In Golden v. Tomiyasu, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963), this court stated that "inadequacy of price, however gross, is not in itself sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression **as accounts for an brings about** the inadequacy

of price." (emphasis added)

In Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. 740, 405 P.3d 641 (2017), immediately following the portion of the opinion in Golden v. Tomiyasu that is quoted by this court in Shadow Canyon, this court stated in Shadow Canyon:

> Thus, we continue to endorse *Golden*'s approach to evaluating the validity of foreclosure sales: **mere inadequacy of price is not in itself sufficient** to set aside the foreclosure sale, but it should be considered together with any alleged irregularities in the sales process **to determine whether the sale was affected by fraud, unfairness, or oppression.**[11] See *id.*[12] However, it necessarily follows that if the district court closely scrutinizes the circumstances of the sale **and finds no evidence that the sale was affected by fraud, unfairness, or oppression**, **then the sale cannot be set aside**, regardless of the inadequacy of price. *See id.* at 515-16, 387 P.2d at 995 (overruling the lower court's decision to set aside the sale upon concluding there was no evidence of fraud, unfairness, or oppression). (emphasis added)

133 Nev. at 749-750, 405 P.3d at 648-649.

In footnote 11 of the Shadow Canyon opinion, this court identified a non-exhaustive list of "irregularities that **may** rise to the level of fraud, unfairness, or oppression." (emphasis added)

Plaintiff, on the other hand, cited footnote 11 from Shadow Canyon as authority that ""[f]ailure to send statutorily required notices **is a specific example** of an irregularity that rises to the level of fraud, oppression, or unfairness **sufficient to set an HOA sale aside**." (JA 8, pg. APP001955, ll. 15-16)(emphasis added)

In Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975), this court stated that a party must support a "contention of fraud by clear and convincing proof" of five elements:

> A false representation made by the defendant, knowledge or belief on the part of the defendant that the representation is false — or, that he has not a sufficient basis of information to make it, an intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation, justifiable reliance upon the representation on the part of the plaintiff in taking action or refraining from it, and damage to the plaintiff, resulting from such reliance, are the elements of intentional misrepresentation. Prosser, Law of Torts, 685 (4th ed. 1971).

This court also stated:

> The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and **when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it**, and would have done the same thing without it for other reasons, **his loss is not attributed to the defendant**." Prosser, supra, at 714. (emphasis added)

91 Nev. at 600, 540 P.2d at 118.

In the present case, plaintiff did not prove that the HOA or Alessi made a "false representation" that they knew or believed to be false upon which plaintiff relied and that "accounts for or brought about" the high bid made by 4254 Rolling Stone Dr. Trust.

In addition, plaintiff did not even attempt to prove that plaintiff's unrecorded claim that it did not receive a copy of the notice of default from U.S. Recordings was made known to 4524 Rolling Stone Dr. Trust or any other person who attended the

public auction held on January 25, 2012. How then could this unrecorded and unknown claim "account[ ] for or [have] brought about" the high bid of $5,331.00 entered by 4524 Rolling Stone Dr.Trust at the public auction?

In paragraph 19 at page 8 of its motion (JA 8, pg. APP001947) and at page 15 of its motion (JA 8, pg. APP001954), plaintiff stated that the $5,331.00 sale price was only 11% of fair market value of $48,000.00 value assigned to the Property in the summary appraisal report prepared on January 19, 2015. (*See* trial testimony by George Petersen Holmes at JA 10, pg. APP002241, ll. 15, and summary appraisal report at JA 10, pgs. APP002408-APP002422)

In Shadow Wood, this court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

132 Nev. at 65, 366 P.3d at 1115.

The $5,331.00 paid by 4524 Rolling Stone Dr.Trust satisfies this standard.

The cover letter to the summary appraisal report (JA 10, pg. APP002408 states:

> This appraisal is subject to the assumptions and limiting conditions listed elsewhere in this report. Enclosed please find information pertinent to the subject property and the local market. This report is

invalid without all of the included forms, addendums, and exhibits.

The second page of the report (JA 10, pg. APP002410) states:

> The appraiser made an exterior only inspection which involves the use of an extraordinary assumption that no adverse conditions exist that may affect the livability, soundness, or structural integrity, and all subject data used from assessor records and MLS, which if found to be false, could affect the appraisers opinion of value and conclusions .

Because plaintiff did not prove that the "extraordinary assumption" used by its appraiser is true, the retrospective appraisal report was not competent evidence of the fair market value of the Property on the date of the HOA foreclosure sale.

4. The district court improperly granted plaintiff equitable relief from the conclusive foreclosure deed.

NRS 116.31166(1)(a) states that the recitals in the foreclosure deed are "conclusive proof of the matters recited." NRS 116.31166(2) in turn states that a deed that contains the recitals listed in NRS 116.31166(1) is "conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added).

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 57, 366 P.3d 1105, 1110-1111 (2016), this court discussed the effect that a conclusive recital of default could have even where no default existed, and in order to avoid what it perceived to be a "breathtakingly broad"

reading, this court held that "courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166."

This court also stated that the "Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." 132 Nev. at 57, 366 P.3d at 1112.

This court also stated that "[w]hen sitting in equity…courts must consider the entirety of the circumstances that bear upon the equities." 132 Nev. at 63, 366 P.3d at 1114 (citations omitted).

This court also cited several cases where courts refused to grant equitable relief where the rights of innocent third persons are affected:

> This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief. Smith v. United States, 373 F.2d 419, 424 (4th Cir.1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *see also* In re Vlasek, 325 F.3d 955, 963 (7th Cir.2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); Riganti v. McElhinney, 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (Ct.App.1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.").

132 Nev. at 64, 366 P.3d at 1115.

Although Bank of America v. SFR Investments Pool 1, LLC, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018), states that the bona fide purchaser doctrine does not

protect the purchaser from a "void" sale, that sale was found to be void because the lender actually tendered the amount of the superpriority lien and cured the default prior to the sale. In the present case, on the other hand, plaintiff did not attempt to tender payment for any amount to Alessi.

Because 4524 Rolling Stone Dr.Trust was an "innocent party" and had absolutely no responsibility for the alleged defect in mailing upon which plaintiff bases its claim for equitable relief, plaintiff was not entitled to equitable relief from the conclusive foreclosure deed.

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court held that a bona fide purchaser is protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption:

> Thus, as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale. (Homestead Savings v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. Homestead v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].)

As a result, even if plaintiff could prove that Alessi's error in mailing prevented plaintiff from tendering the superpriority amount of the lien, the district

court had no jurisdiction to grant plaintiff equitable relief against Resources Group from the foreclosure sale that extinguished the deed of trust.

5. As the transferee of a bona fide purchaser, Resources Group is protected from plaintiff's unrecorded claims and objections.

As noted above, at the time of the public auction held on January 25, 2012, plaintiff was publicly identified as the "Lender" in the recorded deed of trust.

Mr. Haddad's constructive notice of the subordinate deed of trust did not prevent 4524 Rolling Stone Dr. Trust from being a bona fide purchaser because the HOA was foreclosing a prior lien that would extinguish the subordinate deed of trust.

Under Nevada law, an unrecorded interest in real property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tai-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill.

> 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

In Shadow Wood, this court stated:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and **without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him**, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that **the bona fide purchaser of a legal title is not affected by any latent equity** founded either on a trust, [e]ncumbrance, or otherwise, **of which he has no notice, actual or constructive."**). (emphasis added)

132 Nev. at 64-65, 366 P.3d at 1115.

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 discussed whether 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.

In Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 499, 471 P.d 666, 669 (1970), this court stated that a duty of inquiry arose because "[a]t the time appellant's judgment lien attached on May 26, 1964, the two IRS liens were already of record giving it constructive notice."

In the present case, every document recorded as of the date of the HOA foreclosure sale showed that Alessi had timely recorded the notice of delinquent assessment (lien) (JA 10, pg. APP002539), notice of default (JA 10, pg. APP002551), and notice of trustee's sale (JA 10, pg. APP002557) and that the deed of trust was subordinate to the HOA lien being foreclosed.

Furthermore, even if 4254 Rolling Stone Dr. Trust had a duty of inquiry, Nevada limits that inquiry to a review of the recorded documents. In Adavan Management, Inc. v. Mountain Falls Acquisition Corp., 124 Nev. 770,778-779, 191 P.3d 1189, 1195 (2008), this Court defined the limits of inquiry notice as follows:

> The county recorder maintains recorded deeds, including those transferring water rights. **By statute, a county recorder is required to keep indices of all deeds arranged by the names of the grantors and**

> **grantees.** A prospective purchaser of land may search those indices to ensure that the person attempting to sell the property has clear title to it. **To search the indices, the prospective purchaser would first search the grantee index for the purported owner's name to ascertain when and from whom the purported owner received the property.** Using that name, **the purchaser would check the grantee index for the names of each previous owner**, thus establishing the "chain of title." **The purchaser must then search the grantor index,** starting with the first owner in the chain of title, to see whether he or she transferred or encumbered the property during the time between his or her acquisition of the property and its transfer to the next person in the chain of title. Whether or not a purchaser of real property performs this search, **he or she is charged with constructive notice of, and takes ownership of the property subject to, any interest such a title search would reveal**. (emphasis added)

As of the date of the foreclosure sale, absolutely no recorded document disclosed plaintiff's unrecorded claim that it did not receive the notice of default that was mailed to US Recordings at the address stated on the deed of trust.

In Shadow Wood, this court stated that the purchaser at an HOA sale is entitled to rely on the recorded notices as proof that the HOA provided all required notices:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.*, 334 P.3d at 412–13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, **as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary,** the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser**.** (emphasis added)

132 Nev. at 65, 366 P.3d at 1116.

In the present case, Alessi timely mailed a copy of the notice of default to US Recordings at 2925 Country Drive, Ste. 201, St. Paul, MN 55117 (APP002550), and no person or entity advised the HOA, Alessi, or the persons who attended the public

auction that plaintiff had not received the notice of default.

Mr. Haddad stated in paragraph 8 of his affidavit (JA 11, pg. 2570, ¶8):

> 8. Prior to and at the time of the foreclosure sale, there is no way for myself or any other potential bidder at that foreclosure sale to research if the notices were sent to the proper parties at the proper address. I, and other potential bidders are forced to rely only on the professional foreclosure agent to have obtained a trustee's sale guarantee issued by a local title and escrow company and to serve the notices upon the parties who are entitled to notice.

Plaintiff did not present any contrary evidence.

Furthermore, even if Mr. Haddad had made inquiry of Alessi and reviewed its records before the sale, Mr. Haddad could only have discovered that Alessi mailed the notice of default to US Recordings at the address stated in the deed of trust and that US Recordings was a company that provided "Post-closing workflow and audits" and "Final documents tracking" to its customers. (JA 8, pg. APP001891)

Mr. Haddad would also have discovered that on October 26, 2011, Alessi mailed the notice of trustee's sale by certified mail to the exact address at 4325 17th Avenue, SW, Fargo, ND 58103 listed for plaintiff at page 1 of the deed of trust.

Mr. Haddad would also have discovered that even though **more than 90 days passed** between October 26, 2011 and January 25, 2022, plaintiff did not advise Alessi, Mr. Haddad, or any other persons who appeared at the HOA foreclosure sale that plaintiff had not received the notice of default mailed to US Recordings.

Plaintiff also did not file legal action to prevent the public auction from taking place on January 25, 2023.

In Shadow Wood, this court stated:

> Consideration of harm to potentially innocent third parties is **especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party**, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS 40.060. *Cf.* Barkley's Appeal. Bentley's Estate, 2 Monag. 274, 277 (Pa.1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks **without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day**."). (emphasis added)

132 Nev. at 64, n. 7, 366 P.3d at 1115, n. 7.

This court thereby recognized that a lender must actively protect its interest in the property before an HOA foreclosure sale and not wait until after a property is sold to raise its objections.

In the present case, plaintiff allowed the Property to be sold to 4254 Rolling Stone Dr Trust without objection and without notice of plaintiff's unrecorded claim that the notice of default should have been mailed to plaintiff at 4325 17th Avenue, SW, Fargo, ND 58103. Neither law nor equity permits plaintiff's hidden objections to change the legal effect of the sale to the detriment of the innocent purchaser.

In U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 207, 444 P.3d at 449, this court stated that "Haddad's trial testimony also

established that he had extensive real estate and foreclosure sale experience, attending 'five [foreclosure] sales a week, 52 weeks a year.'"

On the other hand, Mr. Haddad did not testify that he had that amount of experience on January 25, 2012. Mr. Haddad made the quoted statement to explain why he had no specific recollection **on October 2, 2017** of the sale held more than five years earlier on January 25, 2012. (JA 9, pg. APP002142, ll. 8-17)

This court also stated that "this does not mean he did not have inquiry notice." As discussed above, however, Nevada law requires that something appear in the public record to trigger inquiry notice. Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 499, 471 P.d 666, 669 (1970). In the present case, no recorded document mentioned plaintiff's hidden objection that it had not received a copy of the notice of default.

The court also does not explain how a person of Mr. Haddad's "sophistication" would have any reason to investigate the addresses to which the notice of default was mailed when nothing appeared in the public record to trigger that inquiry.

As noted at page 22 above, NRS 116.31164(1) expressly authorized the sale to be postponed "without further advertisement or notice," so the postponement of the sale gave Mr. Haddad no reason to investigate the addresses to which the notice

of default was mailed.

Because plaintiff did not prove that U.S. Bank ever attended an HOA foreclosure sale during the relevant time period, U.S. Bank's failure to attend the sale could not have given Mr. Haddad any reason to investigate the addresses to which the notice of default was mailed.

Plaintiff also did not prove that Mr. Haddad was the only potential buyer that attended the continued sale; plaintiff only proved that 4254 Rolling Stone Dr Trust entered the only bid.

The "allegations respecting his close relationship with Alessi & Koenig" are not admissible evidence because "[a]rguments of counsel are not evidence and do not establish the facts of the case." Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993).

Mr. Haddad testified that he hired Alessi & Koenig to file quiet title actions only where the real property "happened to be free and clear." (JA 9, pgs. APP002144, l. 22-APPP002145, l. 12) Because no lender was involved in any of these lawsuits, it is impossible for these lawsuits to have provided Mr. Haddad with knowledge or experience regarding the circumstances under which an HOA foreclosure sale would not extinguish a subordinate deed of trust.

Paragraph 10 of Mr. Haddad's affidavit (JA 11, pg. APP002571) states:

> 10. At no time prior to the foreclosure sale did I receive any information from the HOA or the foreclosure agent about the property or the foreclosure sale.

Plaintiff did not produce any contrary evidence.

This court also referred to "his acknowledgment in the bankruptcy that followed the sale that title to the property was contested." 135 Nev. at 207, 444 P.3d at 449. On the other hand, the bankruptcy schedules filed by Bourne Valley Court Trust on June 13, 2012 (five months after the HOA foreclosure sale) did not identify any notice issue as a reason why each lender contested the extinguishment of its deed of trust. (JA 11, pgs. APP002442-APP002471)

Similarly, the motion to value collateral filed by Bourne Valley Court Trust was not based on any alleged notice issues with the HOA foreclosure sales. (JA 11, pgs. APP002475-APP002493)

Consequently, plaintiff's unrecorded claims and objections did not affect in any way the protection provided to Resources Group as the transferee of a bona fide purchaser. 5 Miller & Starr, Cal. Real Est. § 11:58 (3d ed.)

CONCLUSION

By reason of the foregoing, Resources Group respectfully requests that this

court reverse the order granting plaintiff's motion for summary judgment and remand this case to the district court with instructions to hold a trial to determine the three factual issues identified by this court in U.S. Bank, National Association ND v. Resources Group, LLC, 135 Nev. at 201, 444 P.3d at 446.

DATED this 21st day of March, 2023.

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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)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X9 14 point Times New Roman.

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) it is proportionately spaced and has a typeface of 14 points and

contains 10,457 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 21st day of March, 2023.

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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 21st day of March, 2023, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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