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SUPREME COURT

STATE OF NEVADA

RESOURCES GROUP, LLC, Appellant, vs U.S. BANK NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION, Respondent	**Case No.** 84992 **RESPONDENT'S ANSWERING BRIEF**

APPELLANT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent, US Bank National Association ND, A National Association ("U.S. Bank"), is a wholly owned subsidiary of U.S. Bancorp. U.S. Bancorp is a publicly traded company. No publicly held company other than U.S. Bancorp owns 10% or more of Plaintiff's stock.

In district court, at the time of hearing giving rise to this appeal, U.S. Bank was represented by Kristin Schuler-Hintz, Esq. and Shane P. Gale, Esq., of the law firm of McCarthy & Holthus, LLP. Throughout the district court case, U.S. Bank was also represented by Grace M. Kim, Esq., Sherry A. Moore, Esq., Priscilla L. Baker, Esq., and Thomas N. Beckom, Esq.

DATED: April 20, 2023

/s/ Shane P. Gale

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STATUTES AND RULES

NEVADA STATUTES AND RULES:

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I. RESPONDENT'S ANSWERING BRIEF

Respondent, U.S. Bank National Association ND, National Association (hereinafter "US Bank"), files this Answering Brief pursuant to this Court's Order, dated March 27, 2022. Appellant, Resources Group, LLC (hereinafter "Resources"), filed its Opening Brief on March 21, 2023 and Joint Appendix on March 22, 2023.

However, Volume Nine (9) of the Joint Appendix represents to include APP001957-APP002204. However, pages bates stamped APP002071 through APP2204 are excluded. On that basis, US Bank submits a supplement to Appendix Nine, containing the missing pages of US Bank's motion for summary judgment, in order to rectify the error.

II. STATEMENT OF THE ISSUES

1. Whether the failure of Alessi & Koenig ("A&K"), foreclosure trustee Glenview West Townhomes Homeowners' Association (the "HOA Lien"), to serve US Bank with the Notice of Delinquent Assessment Lien (the "Lien") and Notice of Default and Election to Sell Under Homeowners Association Lien (the "HOA NOD"), renders the HOA's foreclosure sale void with respect to US Bank's Deed of Trust.
2. Whether, assuming that the HOA's foreclosure is not void with respect to US Bank's Deed of Trust, the HOA sale is voidable in light of the Property being purchased by Resources for 11% of its fair market value,

and because a) A&K failed to serve US Bank with the Lien and HOA NOD and b) the insider relationship between Eddie Haddad and A&K are either fraudulent, oppressive and unfair, and thus, the HOA foreclosure should be set aside under the *Shadow Canyon* (infra) analysis.

3. Whether, assuming the HOA's foreclosure sale is not void but is voidable under *Shadow Canyon* (*infra*), Resources is a bona fide purchaser of the Property.

III. STATEMENT OF THE CASE

US Bank generally agrees with Resources' Statement of the Case, contained in Resources' Opening Brief, with the exception of its inclusion of legal argument and legal conclusion throughout. Specifically, Resources' *Opening Brief* at page 4:10-17 and page 5:1-6. Resources' is a party to this action, and is not in a position to determine admissibility of evidence and testimony.

IV. FACTS OF THE CASE

1. This action concerns real property commonly known as 4254 Rollingstone Drive, Las Vegas, NV 89103 (APN: 163-24-111-021) (the "Property"). *Joint Appendix Vol. 1*, at APP000002 and APP000024.
2. The Property sits within the Glenview West Townhomes Homeowners' Association (the "HOA") and is subject to the CC&R's of the HOA. *Joint Appendix Vol. 1*, at APP000181-196.

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3. On or about March 3, 2009, George R. Edwards (hereinafter "Edwards") executed a deed of trust, recorded in the in Property records on March 26, 2009 as instrument number 200903260003747 (the "Deed of Trust"), in favor of U.S. Bank National Association, ND ("US Bank"). *Joint Appendix Vol. 9*, at APP001964-1972.
4. As indicated on page one of the Deed of Trust, US Bank's mailing address is "U.S. Bank National Association, ND…, 4325 17th Avenue SW, Fargo, ND 58103." *Joint Appendix Vol. 9*, at APP001964.
5. As indicated on page one of the Deed of Trust, the mailing address for US Bank's trustee is "US Bank Trust Company, National Association…, 111 SW Fifth Avenue, Portland, OR 97204." *Joint Appendix Vol. 9*, at APP001964.
6. Beneficial interest in the Deed of Trust has never been assigned, and US Bank remains the present beneficiary of the Deed of Trust.
7. Due to Edwards' failure to pay monthly HOA assessments, the HOA retained the law office of Alessi & Koenig ("A&K") to collect amounts past due. *Joint Appendix Vol. 9*, at APP001977.
8. Due to Edwards' failure to pay monthly HOA assessments, the HOA retained the law office of Alessi & Koenig ("A&K") to collect amounts past due. *Joint Appendix Vol. 9*, at APP001977.

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9. On or about November 3, 2010, A&K sent a collection letter to Edwards, at the Property address, stating that the amount due and owing as of December 3, 2010 was $1,855.00. *Joint Appendix Vol. 9*, at APP001977.

10. On or about January 4, 2011, A&K recorded a Notice of Delinquent Assessment Lien in the Property records as instrument number 201101040005412 (the "HOA Lien"), indicating that the amount due and owing to the HOA was $2,330.00. *Joint Appendix Vol. 9*, at APP001979.

11. On or about March 29, 2011, A&K recorded a Notice of Default and Election to See Under Homeowners Association Lien in the Property records as instrument number 201103290002690 (the "HOA NOD"). *Joint Appendix Vol. 9*, at APP001981.

12. On or about October 13, 2011, A&K recorded a Notice of Trustee's Sale in the Property records as instrument number 201110130001535 (the "HOA NOS"). *Joint Appendix Vol. 9*, at APP001983.

13. David Alessi, A&K's NRCP 30(b)(6) designee, testified that at no point was the HOA Lien nor the HOA NOD mailed to US Bank's address. *Joint Appendix Supplement to Volume 9*, at APP002086:1-5, 13-17; APP002094:7-13; APP002095:5-14.

14. Had US Bank received of the HOA sale, it would have paid the superpriority lien. *Joint Appendix Vol. 9*, at APP002028:14-25; APP002029:1-5; APP002030:6-10; APP002037:14-18.

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15. On or about January 25, 2012, the Property was sold to 4254 Rollingstone Drive Trust for $5,331.00 (the "HOA Sale"). *Joint Appendix Vol. 10 Part 2*, at APP002380.

16. No one other than Eddie Haddad placed a bid on the Property. *Joint Appendix Supplement to Volume 9*, at APP002177:3-8, 14-16; and *Joint Appendix Vol. 10 Part 2*, at APP002394, page 51:18-20.

17. After the sale, and on or about January 31, 2012, A&K filed a Trustee's Deed Upon Sale, signed by Ryan Kerbow, Esq, in the Property records as instrument number 20120123100001704 (the "HOA TDUS"). *Joint Appendix Vol. 10 Part 2, at APP002405*.

18. Ryan Kerbow, Esq., an attorney employed by A&K, was the attorney responsible for this HOA foreclosure sale. *Joint Appendix Supplement to Volume 9*, at APP002102:3-12.

19. The declaration of value attached to the HOA TDUS states that the value of the Property as $5,331.00 – the same price for which the Property sold at the HOA Sale. *Joint Appendix Vol. 10 Part 2*, at APP002405-2406.

20. Expert testimony indicates that the Property's fair market value at the time of the HOA Sale was $48,000.00. *Joint Appendix Vol. 10 Part 1*, at APP002241:1-18; *Joint Appendix Vol. 10 Part* 2, at APP002408-2422.

21. Eddie Haddad, Resources' principal, testified in different actions that he was aware that mortgagees tendered nine months of assessments before

NRS Chapter 116 lien sales, and that title litigation would be necessary. *Joint Appendix Vol. 10 Part 2*, at APP002424-2433; APP002435-2441.

22. Eddie Haddad testified in this action that he was aware that litigation would be necessary in order to obtain clear title to the Property. *Joint Appendix Supplement to Volume 9*, at APP002176:10-23; *Joint Appendix Vol. 10 Part 2*, at APP2386 page 19:12-15.

23. Eddie Haddad also testified that he was aware of US Bank's DOT prior to bidding at the HOA Sale. *Joint Appendix Supplement to Volume 9*, at APP002159:16-25; *Joint Appendix Vol. 10 Part 2*, at APP2386 page 19:12-15.

24. Eddie Haddad also testified that Ryan Kerbow, Esq. (the same Ryan Kerbow, Esq. that was employed by A&K at the time of this HOA Sale) represented him in quiet title actions during the same period of time. *Joint Appendix Supplement to Volume 9*, at APP002143:21-25, APP002144; *Joint Appendix Vol. 10 Part 2*, at APP002393 page 48, APP002394 page 49.

25. A&K paid the HOA TDUS transfer tax for Resources. *Joint Appendix Vol. 10 Part 2*, at APP002394 page 52:18-20.

26. Ryan Kerbow, Esq. was an attorney employed by A&K. *Joint Appendix Supplement to Volume 9*, at APP002079:22-25, APP002080:1-4.

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27. David Alessi, partner and corporate representative of A&K, testified that it was relatively routine for A&K to represent a foreclosure sale Property's purchaser when A&K also acted as foreclosure trustee. *Joint Appendix Supplement to Volume 9*, at APP002082:9-11.

28. David Alessi also testifies that it was generally known that HOA foreclosure sales were tantamount to "inheriting what seems to be never ending lawsuits," and that such an outcome was "common sense." *Joint Appendix Supplement to Volume 9*, at APP002077:15-25.

29. David Alessi testified that homeowners' association foreclosure sale purchased closely monitored the outcome of related legal proceedings. *Joint Appendix Supplement to Volume 9*, at APP002113:4-12.

30. Eddie Haddad testified in a bankruptcy regarding this Property that he believed the Property to be encumbered by a deed of trust that required treatment within the bankruptcy case. *Joint Appendix Vol. 10*, at APP002443-2493, 2450 (listing US Bank's DOT as a secured claim).

V. SUMMARY OF ARGUMENT

Resources' Answering Brief misses the mark. Paramount, the district court found and ordered that Glenview West Townhomes Homeowners' Association (the "HOA") foreclosure sale of the Property, conducted by Alessi & Koenig ("A&K"), was void because A&K failed to serve the Notice of Default and Election to Sell Under Homeowners Association Lien (the "HOA NOD"), and US Bank was

prejudiced as a result. Resources' Opening Brief fails to address the issue of whether the sale is void. Instead Resources argues only that the HOA sale was not *voidable* on equitable grounds. Regardless of Resources' failure to address the "void" issue in any respect, the HOA Sale is, nonetheless, void under the facts of this case.

Even if this Court were to decide that the HOA Sale is not void, it is nonetheless voidable. First, the Property sold for approximately 11% of its fair market value. Such a low price is palpable and great. As such, very slight evidence of fraud, oppression or unfairness need exist in order to grant the relief sought by US Bank. And such unfairness or oppression exists because A&K failed to serve US Bank with the HOA NOD. Nor is there any evidence in the record that supports a finding that US Bank received "actual notice" of the HOA foreclosure by some other source.

In conjunction, Resources is not a bona fide purchaser. Given the uncertainty of what exactly one was purchasing at a homeowners' association foreclosure sale is 2012, Resources and its principal, Eddie Haddad, are imputed inquiry notice and were thus required to investigate the HOA Sale and whether it complied with NRS 116.3116, *et. seq.* This, together with Eddie Haddad's real estate sophistication, close relationship with A&K, the HOA's foreclosure trustee, and his acknowledgment in a bankruptcy proceeding that title to the Property was contested, defeats any such finding that Resources is a bona fide purchaser.

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Additionally, much of Resources' Opening Brief is rife with irrelevant argument, red herrings, and matters that were not raised at the district court's hearing on US Bank's Motion for Summary Judgment. First, a homeowners' association foreclosure sale does not extinguish a lender's deed of trust unless foreclosure of its lien is "proper." *SFR Investments Pool 1, LLC v. U.S. Bank*, at 758 (infra). And a "proper" foreclosure is one that complies with NRS 116.3116, *et. seq.* and NRS 117.090. Since A&K failed to serve US Bank with the HOA NOD, the HOA Sale was not "proper." Therefore, the HOA Sale is open to attack and the HOA Sale does not benefit from any presumption it foreclosed US Bank's DOT as a matter of law. Nor is the TDUS conclusive where actual evidence the contrary of the recitals therein exists.

Second, Resources' insistence that US Recordings is an agent of US Bank wholly lacks evidentiary support. As the party asserting the existence of an agency relationship, it is Resources' burden to provide that such a relationship exists between US Bank and US Recordings. Furthermore, there is no evidence to suggest that US Recordings would have, was required to, or did send any notices related to the HOA Sale to US Bank. Resources arguments on this point belies the evidence and NRCP 56 standard of review.

Third, Resources bemoaning discovery is not for this Court to consider. It is well established law that arguments that could have been, but were not, raised with the discovery commissioner cannot later be raised on appeal. Following the April

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27, 2021 Discovery Commissioner's Report and Recommendation, Resources made no further discovery efforts. Thus, its attempt to raise additional discovery matters now is a case of "too little, too late."

Finally, Resources once again, much like its Petition for Rehearing in Nevada Supreme Court case 74575, treats the appeal process as merely another attempt to argue the case anew, and raises arguments that are made for the first time on appeal. It is well settled that arguments raised for the first time on appeal are improper, and absent very limited exceptions, must be ignored. Nonetheless, the legal bases for these newly raised arguments are without legal merit.

VI. ARGUMENT

A. RESOURCES APPEAL FAILS TO ADDRESS THE DISTRICT COURT'S CONCLUSION THAT THE HOA SALE WAS *VOID* AS TO US BANK'S DEED OF TRUST.

The Order granting US Bank's motion for summary judgment, which Resources appeals, concluded that the HOA Sale was void as to US Bank's DOT. *Joint Appendix Vol. 12*, at APP002682-2691. Resources' Opening Brief, and thereby this appeal, is devoid of any argument addressing the district court's conclusion that "the HOA Sale is deemed void…" *Id*., at APP002689. The Opening argues only that the sale cannot be set aside on equitable grounds. *Opening Brief*, at 1; 10:22 ("…did not entitle plaintiff to equitable relief"."); 27:21 ("Plaintiff did not prove any element of fraud, oppression or unfairness…"; 32:12 ("The district court improperly granted plaintiff equitable relief…"); 35:4 (Discussing bona fide

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purchaser.). Resources' failure to address both the void and voidable nature of the HOA Sale, leaves one nonplussed, and more importantly, dooms Resources' appeal.

"When a district court provides alternative bases to support its ultimate ruling, and an appellant fails to challenge the validity of each alternative basis on appeal, this court will generally deem that failure a waiver of each such challenge and thus affirm the district court's judgment." *Hung v. Berhad*, 138 Nev. Adv. Op. 50, 513 P.3d 1285, 1286 (Nev.App., June 30, 2022). The issue considered by the Court of Appeals of Nevada, in *Hung*, was how the Court will treat an appeal "when the appellant only properly challenges a district court's order on a singular issue, even though the outcome of that order rests on multiple alternative grounds." *Id*. The Court's well-reasoned and thorough analysis lead to the only reasonable conclusion possible:

> We clarify the basic appellate principle that when a district court provides independent alternative grounds to support its ultimate ruling on an issue, an appellant must properly challenge all those independent alternative grounds. Otherwise, affirmance is warranted on the unchallenged grounds.

Id., at 1289.

Such is the case here. The issues before the district court were, primarily, twofold: 1) whether the HOA Sale was void, and 2) if the HOA Sale was not void, whether it was voidable. The district court concluded, for reasons stated herein, that the HOA Sale was void, not merely voidable. And Resources fails to address this conclusion in its Opening Brief. Accordingly, pursuant to *Hung*, the district court's Order granting US Bank's Motion for Summary Judgment should be affirmed. Any

attempt by Resources' to argue to the contrary should be deemed a waiver. *Hung*, at 1287 ("And when appellants fail to challenge the alternative grounds in their opening brief, even if they later do so in the reply brief, the failure to raise those issues in the opening brief results in waiver.")

B. THE HOA SALE IS VOID BECAUSE US BANK DID NOT RECEIVE THE HOA NOD AND WAS PREJUICED AS A RESULT.

a. US BANK DID NOT HAVE ACTUAL KNOWLEDGE OF THE HOA SALE.

Despite Resources waiver of any argument to the contrary, the district court correctly concluded that the HOA Sale is void. This is case benefits from an earlier appeal – *U.S. Bank, National Association ND v. Resources Group, LLC* (infra) – which provides the relevant standard when reviewing whether a homeowners' association foreclosure sale is void with respect to a lender's first deed of trust. The inquiry is twofold. First, a court must determine whether the statutorily required notices were sent to the aggrieved deed of trust beneficiary. Second, a court requires whether that same lender was prejudiced as a result of said statutory shortcoming. *U.S. Bank, National Association ND v. Resources Group, LLC*, 135 Nev. 199, 203, 444 P.3d 442, 447 (2019).

As to the first prong of the inquiry, it cannot be disputed that US Bank did not receive the HOA NOD. Evidence and testimony presented during trial confirm that A&K did not mail the notice of default to US Bank, at its "last known address."

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Joint Appendix Supplement to Volume 9, at APP002086:1-5, 13-17; APP002094:7-13; APP002095:5-14.

> U.S. Bank's deed of trust provided Alessi & Koenig with a "known address" to which to send the notice of default, but Alessi & Koenig did not follow the instructions the deed of trust gave. Instead, Alessi & Koenig mailed the notice of default to a "return to" name and address appearing at the top left of the deed of trust opposite the recorder's stamp. 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.
> …
> 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).

U.S. Bank (*supra*), at 202-203.

A secondary consideration is whether US Bank had ***actual notice*** of the HOA Sale by some other means or from some other source. *U.S. Bank*, at 205. Resource Group argues that whether notice is received, is irrelevant. *Opening Brief*, at 23:15-28. But actual notice is necessary where the statutory requirements have not been met. *Hankins v. Administrator of Veterans Affairs*, 92 Nev. 578, 555 P.2d 483, (Nev., 1976). *U.S. Bank*, too, requires actual notice. *U.S. Bank* (supra), at 204 ("…the party complaining about the defective notice came by ***actual notice*** of the foreclosure proceedings before the sale occurred;" "…the district court properly found that Schleining had ***actual knowledge*** of the default and the pending foreclosure sale…;" "[t]he district court made no finding on ***actual notice***…") (emphasis added).

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Resources also cites *Hankins* in its Opening Brief (*Opening Brief*, at 23:23-25) but fails to acknowledge critical language in that decision. "Actual notice is not necessary ***as long as the statutory requirements are met***." *Hankins*, at 555 (emphasis added). In this case, the "statutory requirements" were not met. *U.S. Bank* (*supra*), at 202-203. As is made clear by the record, A&K failed to serve US Bank with the HOA NOD. . *Joint Appendix Supplement to Volume 9*, at APP002086:1-5, 13-17; APP002094:7-13; APP002095:5-14. Clearly, actual knowledge is required because A&K failed in executing its statutorily required duty. A&K never served US Bank with the HOA NOD. *Id*. This fact is obvious.

But no evidence of actual notice exists. The best Resources can muster is arguing that A&K allegedly mailed the HOA NOS to US Bank. *Opening Brief*, at 24:1-28, 25:1-4. In turn, Resources presumes that it is entitled to a presumption of receipt. It is not.

> Where a notice has been properly mailed, its receipt will be presumed, in the absence of evidence to the contrary. However, the presumption may not be given a conclusive effect without violating the Due Process Clause of the 14th Amendment. This presumption is rebuttable and may be overcome by evidence that the notice was never received.

58 AM. JUR. 2nd Notice §38 (2012); NRS 47.250(13) ("All other presumptions are disputable. The following are of that kind…that a letter duly directed and mailed was received in the regular court of the mail.") Here, we have uncontroverted testimony that the HOA NOS was not mailed to US Bank. *Joint Appendix Vol. 9*, at APP002030:11-22; APP002033:17-20; APP002036:19-25; APP002037:1-18.

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Additionally, the documentation that Resources relies upon for its alleged "proof of receipt" is nothing more than a copy of the unrecorded HOA NOS and an attached lists of addresses. *Opening Brief*, at 24:15-24; *Joint Appendix*, at APP002558-2560. Resources argues that the "official stamp by the U.S. Postal Service…proves that the notice was deposited into the U.S. mail." *Opening Brief*, at 24:21-24. But Resources is incompetent to testify, nor does it offer any evidence, as to whether 1) said stamp is "official," and 2) the effect of such a stamp. Resources provides no foundation for making such a statement. NRS 47.070; NRS 50.025.

Furthermore, if the HOA NOS was mailed to US Bank via certified mail, as Resources implores, a return receipt card from US Bank should exist in A&K's files. NRS 107.090(3) (2009) (requiring mailing of the notices of default and sale to holders of subordinate interests by registered or certified mail, return receipt requested.) But it does not. It is well established that NRS 116.31168 fully incorporated the mandatory notice provisions of NRS 107.090. NRS 116.31168(1) (2012); *SFR Invs. Pool 1, LLC v. Bank of N. Y. Mellon*, 134 Nev. 483, 489, 422 P.3d 1248, 1253 (2018). The Nevada Legislature thus thought that requiring actual notice was an important aspect of a proper homeowners' association lien foreclosure. Here, no receipt card exists. This fact further degrades Resources' position with respect to actual knowledge.

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And all of this is on top of US Bank's testimony that it has no record receiving the HOA NOS. When contrasted against US Bank's testimony that it searched its entire system, prior to and after the sale, and still found no such document, any presumption of receipt is overcome *Joint Appendix Vol. 9*, at APP002030:11-22; APP002033:17-20; APP002036:19-25; APP002037:1-18. Based on the forgoing, US Bank did not ***actual notice*** of the HOA Sale.

Resources arguments to the contrary belies the evidence of the case. Much like its opposition to US Bank's motion for summary judgment (*Joint Appendix Vol. 11*, at APP002494-2518), Resources offers merely speculation and conjecture in place of the actual record before this Court. *Opening Brief*, at 20:15-20, 26:18-28, 28:1-12. And such an attempt is directly contrary to Nevada's summary standard.

While ***reasonable inferences***…must be viewed in a light most favorable to the nonmoving party (*Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026 (2005) (emphasis added), a scintilla of evidence, or evidence that is merely colorable, or not significantly probative does not present a genuine issue of material fact. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir., 2000). Mere disagreement or a bald assertion that a genuine issue of material fact exists does not preclude summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir., 1989). The "nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation and conjecture. As this court has made

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abundantly clear, [w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Wood v. Safeway*, 121 Nev. 724, 121 P.3d 1026, 1030-1031 (2005). In this case, Resources cannot point to "specific facts" supporting actual knowledge. And the reason it cannot is clear – no such facts exist.

Finally, Resources may argue that US Bank's testimony in this case is contrary to that in others, and should be discredited. In support, Resources will likely cite to *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev., 2014) where U.S. Bank, N.A. maintained "that NRS 116.3116(2) merely creates a payment priority as between the HOA and the beneficiary of the first deed of trust." Resources' reliance on *SFR Invs. Pool 1, LLC* would be improper. First, nothing in that case states that US Bank took a position of not paying HOA liens. Second, no part of *SFR Invs. Pool 1, LLC* discusses the effect of payment of a HOA lien, or whether U.S. Bank attempted to pay. Accordingly, Resources' reliance would be far-fetched and cannot be reasonably gleaned from the *SFR Invs. Pool 1* decision. Accordingly, Resource Group's arguments on this point should be ignored.

b. US BANK WAS PREJUDICED AS A RESULT OF NOT HAVING RECEIVED NOTICE OF THE HOA SALE.

Having established A&K failed in its statutory duty to serve US Bank with the HOA NOD, and there being no evidence of actual notice from some other

source, the inquiry then turns to whether US Bank was prejudiced as a result. A notice defect alone is not sufficient to void a foreclosure sale. *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 134 Nev. 352, 354-355, 420 P.3d 1032, 1035 (Nev., 2018).

Here, US Bank was clearly prejudiced as a result of not having received notice.

> Q: And if US Bank had received a notice of default for a homeowners association to that address, your company's policies and procedures were pay that lien off in full?
> A: Yes.

Joint Appendix Vol. 9, at APP002030:6-10; see also *Joint Appendix Vol. 9*, at APP002028:14-25; APP002029:1; APP002037:14-18.

> At trial, U.S. Bank's collection officer testified that it was the bank's practice, on receiving a Nevada notice of default, to request payoff information and "pay the lien off ... to protect our interest." The loan secured by the U.S. Bank deed of trust included a future advances clause and this witness testified that, had U.S. Bank received notice of default, it would have paid the lien off and charged its borrower. He also denied receiving notice from any other source of the homeowner/borrower's default or the notice of sale that followed.[3] This testimony, if credited, establishes the lack of notice and prejudice needed to void the sale.

U.S. Bank (supra), at 204. This stands in sharp contrast to other similarly situated cases. See *Schleining v. Cap One, Inc*., 130 Nev. 323, 326, 326 P3d 4, 6 (Nev., 2014) ("Schleining… testified that, upon learning of the pending trustee's sale, he made no effort to contact Cap One to attempt to prevent or delay the sale."); *Golden v. Tomiyasu*, 79 Nev. 503, 517-518, 387 P.2d 989, 996 (Nev., 1963) (Alleged inadequacies in the notice of trustee's sale, and the sale itself and did not concern

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the notice of default); *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 750, 405 P.3d 641, 649 (Nev., 2017) (Alleged inadequacies did not relate to failure to send notice.); West *Sunset 2050 Trust v. Nationstar Mortgage, LLC*, 134 Nev. 352, 354, 420 P.3d 1032, 1035 (Nev., 2018) ("Nationstar's failure to allege prejudice resulting from defective notice dooms its claim that the defective notice invalidates the HOA sale.").

Not mailing the HOA NOD to US Bank prejudiced it in that US Bank did not receive the statutorily guaranteed notice period to address the HOA Lien. NRS 116.31162(1)(c) and (3). As testified to by US Bank's corporate representative, US Bank would have paid the superpriority portion of the HOA's lien had it received the HOA NOD. *Joint Appendix Vol. 9*, at APP002030:6-10; see also *Joint Appendix Vol. 9*, at APP002028:14-25; APP002029:1; APP002037:14-18. And it is undisputed that A&K did not send the HOA NOD to US Bank. *Joint Appendix Vol. 9*, at APP002030:11-22; APP002033:17-20; APP002036:19-25; APP002037:1-18. Nor is there evidence that US Bank had actual knowledge of the HOA Sale.

Pursuant to the Nevada Supreme Court's decision following the first appeal of this case, "had U.S. Bank received notice of default, it would have paid the lien off and charged its borrower…[and t]his testimony…establishes the lack of notice and prejudice needed to void the sale." *US Bank* (supra), at 204. See also, *U.S. Bank, N.A., Trustee for Banc of America Funding Corporation Mortgage Pass-Through Certificates, Series 2005-F v. White Horse Estates Homeowners*

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Association, 987 F.3d 858, 865, *citing U.S. Bank* (Prejudice requires evidence that U.S. Bank, N.A., as Trustee provided evidence that it would have bid at the sale or paid the lien.)

Resources admits where a lender would have paid or tendered the superiority lien balance but did not receive notice of a homeowners' association foreclosure sale, that said sale is void with respect to the aggrieved lender. *Opening Brief*, 11:3-12. Since US Bank would have paid the lien had it received notice of the HOA Sale, US Bank was prejudiced and the HOA Sale is therefore void as to US Bank's DOT.

C. THE HOA SALE SHOULD BE SET ASIDE UNDER SHADOW CANYON.

> Even if the sale was not void, it was voidable, because the low sale price, notice deficiencies, and other irregularities establish that the sale was affected by some element of fraud, unfairness, or oppression. Under these cases, 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. *Shadow Canyon*, 133 Nev. at 749, 405 P.3d at 648. Though not determinative, the price/fair-market-value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale. ***The relationship is hydraulic: where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought***. *Id*.

U.S. Bank (supra), at 205-206 (internal citations and quotations omitted) (emphasis added).

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a. THE PRICE RESOURCES PAID FOR THE PROPERTY WAS INADEQUATE.

The HOA sold the Property to Resources at the foreclosure sale for the grossly inadequate sum of $5,331.00. *Joint Appendix Vol. 10 Part 2*, at APP002380. It appears Resources admits this fact, as it does not raise the issue in its Opening Brief beyond arguing that $5,331.00 was "valuable consideration." *Opening Brief*, at 31:5-28. Nonetheless, due to Resources' propensity to raise untimely arguments, US Bank addresses it, out of an abundance of caution.

At the time of the HOA Sale, the Property had a fair market value of $48,000.00. *Joint Appendix Vol. 10 Part 1*, at APP002241:1-18; *Joint Appendix Vol. 10 Part 2*, at APP002408-2422. Resources thus purchased the Property for 11% of fair market value. Accordingly, this price inadequacy is "palpable and great." *Shadow Canyon* (supra), at 749; See also *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 60, 366 P.3d. 1105, 1112 (Nev., 2016) (recognizing Restatement definition of gross inadequacy as a sale price for less than 20% of fair market value.); *U.S. Bank* (surpra), at 206 ("While the district court did not determine what the property's fair market value was, the record evidence suggests that the $5,331 bid price fell somewhere between 10% and 15% of its ***fair market value***.") (emphasis added).

This Court should reject any argument that fair market value is the incorrect measure. This Court has already recognized fair market value as the measure by which to determine price inadequacy. "*Golden* recognized that the price/***fair***

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market value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale." *Shadow Canyon* (supra), at 749. The Restatement approach, cited in *Shadow Canyon* and *Shadow Wood* defines fair market value as:

> The standard by which "gross inadequacy" is measured is the fair market value of the real estate. For this purpose the latter means, ***not the fair "forced sale" value of the real estate***, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate.

Restatement (Third) of Property (Mortgages) § 8.3 cmt. b (1997) (emphasis added).

Since the HOA sold the property for a grossly inadequate price, this Court need only find "very slight additional evidence of unfairness or irregularity" in order to set the HOA Sale aside." *U.S. Bank*, (supra) at 205-206.

b. UNFAIRNESS AND OTHER IRREGULARITIES IN THE SALE, IN CONJUNCTION WITH THE GROSSLY INADEQUATE SALE PRICE, REQUIRES SETTING THE HOA SALE ASIDE TO THE EXTENT IT PURPORTS TO EXTINGUISH US BANK'S DOT.

As a preliminary matter, it is important to correctly identify when fraud, oppression, or unfairness has a material impact on a homeowners' association foreclosure sale. Resources states that fraud, oppression or unfairness must "account for an[d] bring about the inadequacy of price." *Opening Brief*, at 28:27-29:1; citing *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (Nev., 1963). But in the 40 years since *Golden* was decided, that standard has changed.

This Court has more recently stated that, at least in the context of homeowners' association foreclosure sales, the sale need only be "affected by some element of fraud, unfairness, or oppression." *U.S. Bank* (supra), at 205; *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017), *White Horse Estates (*supra*),* at 863. "Affect" is to bring about or produce a material influence or alteration. "*Affect." Merriam-Webster.com. 2023. www.meriam-webster.com/dictionary/affect*, (April 14, 2023). Finally, the standard is fraud, oppression, ***or*** unfairness. Resources appears to argue that all are necessary. *Opening Brief*, at 30:1-28;

There are several instances of oppression and unfairness that affected the HOA Sale. The first and most obvious is A&K's failure to serve US Bank with the HOA NOD. Again, A&K admitted in its deposition and at trial that the HOA NOD was not sent to US Bank. *Joint Appendix Supplement to Volume 9*, at APP002086:1-5, 13-17; APP002094:7-13; APP002095:5-14. "The grossly inadequate price, combined with the problems with the notice of default—even assuming U.S. Bank received the notice of sale—presents a classic claim for equitable relief under *Shadow Canyon*, *Shadow Wood,* and *Golden*." *U.S. Bank* (supra), at 449. Failure 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. *Shadow Canyon* (supra), at 749 fn.11. Additionally,

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"collusion between the winning bidder and the entity selling the property" is grounds to set an HOA foreclosure sale aside. *Id*.

The relationship between Resources, its principal, Eddie Haddad, and A&K is clearly unsettling. "Also concerning, but not addressed by the district court, was the evidence U.S. Bank offered respecting Haddad's attorney-client relationship with one of the lawyers at Alessi & Koenig." *U.S Bank* (supra), at 449. Mr. Alessi testified that it was not unusual for Alessi & Koenig to represent a purchaser when Alessi & Koenig was acting as the trustee. *Appendix Supplement to Volume 9*, at APP002082:9-11. Eddie Haddad testified that attorneys from Alessi & Koenig did legal work for him and specifically quiet title work involving HOA foreclosures. *Joint Appendix Supplement to Volume 9*, at APP002143:21-25, APP002144; *Joint Appendix Vol. 10 Part 2*, at APP002393 page 48, APP002394 page 49. Mr. Alessi testified it was generally known that his sales were tantamount to "inheriting what seems to be never ending lawsuits" and that this knowledge was "common sense." *Joint Appendix Supplement to Volume 9*, at APP002077:15-25. The evidence clearly supports a conclusion that Resource Group was related to A&K. And having a relationship with the party responsible for sale of the property is more egregious than a relationship with the mortgagee.

> *Byers v. Surget*, 19 How. 303, was a case of sheriff's sale at a very grossly inadequate price, and the purchaser was an attorney in the case. Mr. Justice Daniel, delivering the opinion of this court, after giving a history of the transaction, said: "Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil polity, under what code of law or ethics, a transaction

> like that disclosed by the record in this case, can be excused, or even palliated.

Graffam v. Burgess, 117 U.S. 180, 193 (1886). An insider relationship, such as that between Resource Group and Alessi & Koeng, was ruled, in Texas, to be unfairness sufficient to justify setting aside a sale. *Kauffman & Runge v. Morriss*, 60 Tex. 119, 1883 WL 9276 (1883).

If this Court were to conduct a conflict of interest analysis regarding Mr. Kerbow, the attorney who represented both Mr. Haddad and the HOA, it would analyze three factors: 1) the scope of the former representation, (2) whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation. *Waid v. Eighth Judicial District Court ex. rel. County of Clark*, 121 Nev. 605, 611, 119 P.3d 1219, 1223 (Nev., 2005). Accordingly, it is both reasonable and appropriate for this court to make an inference that confidential information was shared between the prior (the HOA) and current client (Eddie Haddad).

Here, the representation of the HOA and Eddie Haddad was very closely related – on one hand, HOA foreclosure sales, and on the other, quiet title actions following those sales. It is completely reasonable for this court to infer that confidential information given to the HOA would be shared with Mr. Haddad, who is one of the most, if not the most, prolific purchasers of HOA foreclosure sale

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properties in the entire state of Nevada. On this basis, the HOA Sale should be set aside as a matter of law, or to be fraudulent, unfair, or oppressive.

The evidence of oppression and unfairness in this case affected the HOA Sale. And US Bank need only present "very slight" evidence of such given the grossly inadequate HOA Sale price. *U.S. Bank* (supra), at 205-206. A&K's failure to serve US Bank with the HOA NOD affected the sale in that, had US Bank received the HOA NOD or actual notice of the HOA Sale, US Bank would have paid the HOA's Lien. Accordingly, the HOA Sale would not have occurred. This Court appears to agree, having previously stated that "***the grossly inadequate price, combined with the problems with the notice of default—even assuming U.S. Bank received the notice of sale—presents a classic claim for equitable relief under Shadow Canyon, Shadow Wood, and Golden***." *U.S. Bank*, at 206. (emphasis added). For the reasons above, A&K's failure to serve US Bank with the HOA NOA and its improper relationship with Eddie Haddad renders the HOA Sale voidable.

c. RESOURCES IS NOT A BONA FIDE PURCHASER.

The record establishes that Resources is not a bona fide purchaser. But, as the district court concluded, the HOA Sale is void with respect to US Bank's DOT. *Joint Appendix Vol. 12*, at APP002682-2691. And "a party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." *Bank of America v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121

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(Nev., 2018). This point cannot be stressed enough because Resources waived any argument contrary the district court's conclusion because Resources fails to address the "void" ruling in its Opening Brief.

The purpose of the bona fide purchaser doctrine is to protect innocent third parties against harm. To qualify, Resources must show that it purchased the property "(i) for value; and (ii) w*ithout notice of a competing or superior interest in the same property*." *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 247 (Nev., 1979) (emphasis added). Furthermore, Resource has the burden to show that it lacked notice. *Hewitt v. Glaser Lane & Livestock Co*., 97 Nev. 207, 208, 626 P.2d 268, 268-269 (Nev., 1981). 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." In *Blevins v. Boyd*, this court stated,

> ***a party may not qualify as a bona fide purchaser if the party is under a duty of inquiry*** prior to the payment of consideration and transfer of legal title. ***This duty arises when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation*** that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence ***whether he does or does not make the investigation***.

Blevins v. Boyd, 623 F.Supp. 863, 866, 1985 U.S. Dist. LEXIS 13380, **7 (D. Nev.. 1985); citing *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246 (1979); *Allison*

Steel Mfg. Co. v. Bentonite, Inc., 86 Nev. 494, 498, 471 P.2d 666, 668 (1970) (emphasis added).

Resources cannot meet its burden. The facts are that Resources took minimal to discover the circumstances surrounding the HOA lien. *Joint Appendix Vol. 11*, APP002570:20-27. Resources makes it a business practice to avoid inquiring beyond the property records. *Joint Appendix Supplement to Vol. 9*, at APP002183:18-25; APP002184:1-12 (Eddie Haddad admitting that he only searches the property records.)

> Even assuming the issue were whether SFR had notice not only of the fact of a competing interest but also of the legal possibility that the DOT might survive the CHOA foreclosure sale, SFR was not an innocent purchaser in that regard. The law was not clear at the time of the sale that the CHOA sale would extinguish the DOT, ***and a reasonable purchaser therefore would have perceived a serious risk that it would not***.

Nationstar Mortgage, LLC v. SFR Invs. Pool 1, LLC, 184 F. Supp. 3d 853, 860, 2016 U.S. Dist. LEXIS 57964, at **15 (D. Nev., 2016) (emphasis added). It is well established that a homeowners' association foreclosure sale does not extinguish a first deed of trust as a matter of law. *U.S. Bank, N.A. as Trustee for Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates Series 2006-BC4 v. Thunder Properties, Inc.*, 503 P.3d 299, 307, 138 Nev. Adv. Op. 3, at 12 (Nev. 2022). For this reason, an HOA purchaser must take necessary precautions to inquire as to the adequacy of the related notices and investigate other shortcomings that may affect a homeowners association's foreclosure sale. Resources and Eddie Haddad refused to investigate is at its own

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peril. However, "a reasonable purchaser…would have perceived a serious risk that" the sale did not extinguish a first deed of trust. *Nationstar Mortgage, LLC* (supra), at 860. Resources' choice to avoid conducting any meaningful due diligence destroys any presumption, and certainly an affirmative finding, that Resources is a bona fide purchaser for value.

Moreover, a foreclosure sale purchaser has constructive knowledge of a deed of trust and its holder's interest if the deed of trust or an assignment is recorded. *Fed. Nat'l. Mortg. Ass'n. v. SFR Invs. Pool I, LLC*, 2:14-cv-040246-JAD-PAL, 2015 U.S. Dist. LEXIS 133254 *10 (D. Nev., Sept. 28, 2015) ("The 2011 recording of Fannie Mae's assignment of the deed of trust put the purchaser on constructive notice of Fannie Mae's interest and prevents the purchaser from claiming BFP status in this case.") In this case, US Bank's deed of trust has been on record since 2009. In addition to inquiry notice, Resource Group had actual notice of US Bank's "competing interest." A finding that Resources is a bona fide purchaser flies directly in the face of the doctrine's purpose of protecting innocent purchasers, and is inconsistent with Nevada HOA law.

Eddie Haddad's real estate experience is relevant as to Resources' bona fide purchaser status. *See, e.g. Yates v. West End Fin. Corp.*, 25 Cal. App. 4th 511, 523 (1994) (buyer's experience relevant in assessing *bona fide* purchaser claim); *Countrywide Home Loans, Inc. v. United States*, No. CV F 02 6405 AWI SMS, 2007 WL 87827, *12 (E.D. Cal. Jan. 9, 2007) (extensive real estate experience a

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factor against the buyer's claims to *bona fide* purchaser status). Any assertion by Resources to the contrary is in direct contrast to the law.

Eddie Haddad is the principal of Resource and other HOA investor entities such as Saticoy Bay, LLC. He admits to attending HOA sales "five days a week, 52 weeks a year." *Joint Appendix Supplement to Vol. 9*, at APP002142:8-13; APP002171:17-22; APP002173:7-12. He is not a passive investor nor an individual purchasing one or two properties. *Id*., at APP002160:9-18 (Eddie Haddad admitting to numerous properties purchased at Chapter 116 foreclosure sales.) Much of Nevada's NRS Chapter 116 case law, as it relates to HOA liens, is the direct result of Mr. Haddad's real estate purchases. And he was fully aware of the need to litigation the Property following the HOA Sale. *Id*., at APP002176:10-23; *Joint Appendix Vol. 10 Part 2*, at APP002386 page 19:12-15; *Id.*, at APP002432:3-6 and *Id*., at APP002440:21-25. And the need for litigation was necessitated by the fact that he knew the Property was encumbered by US Bank's DOT. *Joint Appendix Supplement to Vol. 9*, at APP002159:16-21; *Appendix Vol. 10 Part 2*, at APP002386 page 19:12-15. Additionally, Resources filed a bankruptcy petition to protect itself from creditors it claims to have had no knowledge of their interest in the Property. *Joint Appendix Vol. 11*, at APP002443-2493.

This is not unique testimony of Mr. Haddad. He testified in a different action he was aware that mortgagees tendered nine months of assessment before purchasing properties at foreclosure sales. *Joint Appendix Vol. 10 Part 2*, at

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APP002431-2432. Mr. Haddad believes these superpriority tenders extinguish a superpriority lien, testifying the holder of "First Deed of Trust has a right to protect themselves by tendering a payment equivalent to nine months." *Id.*, at APP002429-2430. Further, he testified in a different action that, at the time of the sale that he understood banks continued to defend their deeds of trust after foreclosure. *Id.*, at APP002440:15–25. When asked whether Saticoy "purchase[d] the property with the understanding that there would be ensuing litigation over the property," Saticoy's representative responded, "Absolutely." *Id.*

Additionally, after the HOA Sale Resources acknowledged US Bank's DOT in bankruptcy court. Resources made a judicial admissions that US Bank's DOT survived the HOA Sale. While Resources did list US Bank's DOT as "disputed," Resources schedules listed the US Bank DOT as a secured debt, and "strip off" motion admitted that US Bank's DOT remained attached to the Property. *Joint Appendix Vol. 11*, at APP002443-2493. Such a statement is a judicial admission.

"Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (Nev., 2011). In *Reyburn*, this Court relied upon a Seventh Circuit Appellate Court case, *Keller v. U.S.*, which clarified between a judicial admission and an evidentiary admission. *Keller* clarified that

> Judicial admissions are *formal concessions in the pleadings*, or stipulations by a party or its counsel, that are binding upon the party making them. They

> may not be controverted at trial or on appeal. Indeed, they are not evidence at all but rather have the effect of withdrawing a fact from contention.

Keller v. U.S., 58 F.3d 1194, 1198 fn. 8 (7th Cir., 1995) (emphasis added) (internal citations omitted). Resources' bankruptcy petitions and schedules are pleadings and therefore judicial admissions that "may not be controverted at trial or on appeal." *Id*.

Lastly, whether a homeowners' association foreclosure sale could foreclose a lender's purchase money lien/first deed of trust, like US Bank's DOT, was not decided until *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev 742, 334 P.3d 408 (Nev., 2014). Prior to that,

> …the Nevada real estate community [did] not operate as if HOA foreclosures extinguish first mortgages recorded before the HOA delinquency arises." Investors like SFR bought residences at HOA foreclosure sales for roughly the amount of the HOA's liens, which were "tiny fractions of [the residences'] fair market value. As *Bayview* observed, if investors believed that HOA foreclosures extinguished first mortgages, the homes would have instead sold for amounts significantly closer to their fair market value.

White Horse Estates (supra), citing *Bayview Loan Serv., LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1226 (D. Nev. 2013). Resources' Opening Brief states that Eddie Haddad did not have significant real estate experience at the time of the HOA Sale. *Opening Brief*, at 41:1-9. But that is untrue. At trial, Eddie Haddad stated that he was a real estate broker, owned Great Bridge Properties, and had been in that position for ***twenty (20) years*** as of 2017. *Joint Appendix Supplement to Vol. 9*, at APP002139:7-15; see also *Id*., at APP002149:10-11 ("…even if I showed up to the auction and didn't know what I was doing…"); APP002160:9-18 (Eddie

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Haddad admitting to numerous properties purchased at Chapter 116 foreclosure sales.)

Thus we have a situation where Mr. Haddad, having much real estate experience, with knowledge of US Bank's recorded DOT and of the HOA CC&R's mortgage savings clause, purchased the Property at the HOA Sale during a time when he knew litigation would be necessary to obtain clear title and the Nevada real estate community operated "as if HOA foreclosures [did not] extinguish first mortgages recorded before the HOA delinquency arises." *Bayview* (supra), at 1226. And purchasers regularly discussed the outcome of current litigation regarding homeowners' association foreclosure sale. *Joint Appendix Supplement to Volume 9*, at APP002113. Eddie Haddad was aware of the state of the law in 2012. And after the HOA Sale, Resources ran to bankruptcy court where it admitted the Property was encumbered by US Bank's DOT. *Joint Appendix Vol. 11*, at APP002443-2493.

It is under these facts that Resources asserts that it is entitled to bona fide purchaser status. In totality, this does not paint a picture of one acting in "good faith," as is required of Resources before wrapping itself in the "cloak" of the bona fide purchaser doctrine. *Berge* (supra), at 186, 188 ("…a party claiming title to the land by a subsequent conveyance must show that the purchase was made in good faith, for a valuable consideration; and that the conveyance of the legal title was received before notice of any equities of the prior grantee.). Accordingly, Resources is not a bona fide purchaser.

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D. US RECORDINGS IS NOT AN AGENT OF US BANK.

There are no facts in the record to support a finding that US Recordings in an agent for US Bank with respect to the HOA NOD. "An agency relationship is formed when one who hires another retains a contractual right to control the other's manner of performance." *Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev. 811, 815, 839 P.2d 599, 602 (Nev., 1992). Despite this, Resources continues to press that such a relationship exists between US Bank and US Recordings. *Opening Brief*, at 11:13-14:18.

"The representations, declarations and admissions of an agent, made within the actual or apparent authority while acting on behalf of his principal, are binding upon the principal." 3 C.J.S. Agency §397a. "In order to bind a principal by his agent's representations, such representations must have been made within the scope of the agent's actual or apparent authority." 3 C.J.S. Agency §398. This rule is stated inversely by the Nevada Supreme Court, dating as far back as 1920, where in the employment context, the court held; "The knowledge acquired by the officers or agents of the corporation, ***while not acting*** for the corporation, but while acting for themselves, ***is not imputable*** to the corporation." *Keyworth v. Nevada Packard Mines Co.*, 43 Nev. 428, 439, 186 P. 1110, 1113 (Nev., 1920) (emphasis added).

Mr. Heifner testified that he did not know who US Recordings was, that US Recordings was not affiliated with US Bank, and that any mail sent to US Recordings would not reach US Bank. *Joint Appendix Vol. 9*, at APP002025:8-17;

APP002026:1-4. Additionally, Mr. Heifner testified that US Bank inserts its preferred address for receipt of notice within the Deed of Trust; and that address is 4325 17th Ave. SW, Fargo, North Dakota, 58103. *Id*., at APP002025:18-20. Further, US Bank's understanding was that the recorded DOT gave record notice U.S. Bank was to receive notice at the stated address. *Id*., at APP002026:5-15.

There is no evidence that US Recordings and US Bank entered into a contract or agreement permitting US Recordings to control US Bank's performance. Nor is the mere fact that its name appears on the "return to" address imply that US Recordings has apparent authority to accept notice on behalf of US Bank. The plain and explicit language in the deed of trust directed all recordings or notices be directed to US Bank at the address reflected on page one of the deed of trust. *Id*., at APP001964.

There is nothing in the record to support a finding that US Recordings is an agent for US Bank. As the party asserting the existence of an agency relationship, it is Resources' burden to bear. *Trump v. Eighth Judicial Dist. Court of the State of Nev. In and For County of Clark*, 109 Nev. 687, 695, 857 P.2d 740, 745 (fn. 3) (Nev., 1993); *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 299, 183 P.3d 895, 902 (Nev., 2008) (abrogated on other grounds). Resources has not carried that burden. Therefore, any knowledge acquired by [US Recordings], ***while not acting*** for [US Bank], but while acting for themselves, ***is not*** **imputable** to [US Bank]." *Keyworth*, at 439.

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E. THE DISCOVERY DISPUTES ASSERTED BY RESOURCES ARE BEYOND THIS COURT'S REVIEW.

Resources spends an inordinate portion of its Opening Brief bemoaning discovery. *Opening Brief*, at 16:18-12:15. But Resources ignores this Court's holding that "neither this court nor the district court will consider new arguments raised in objection to a discovery commissioner's report and recommendation that could have been raised before the discovery commissioner but were not." *Valley Health System, LLC v. Eight Judicial Dist. Court of State ex rel. County of Clark*, 127 Nev. 167, 173, 252 P.3d 676, 680 (Nev., 2011).

The discovery commissioner's report and recommendation found that US Bank supplemented its discovery responses, and recommended that "if the supplemental responses are insufficient, counsel are to conduct another EDCR 2.34 conference." *Joint Appendix Vol. 8*, at APP001926. Resources never took further action. Thus, not only did Resources ignore the discovery commissioner, its Opening Brief violates EDCR 2.34(d), "frustrates the purpose of having discovery commissioners," is a waste of "judicial resources," and the cuts against the entirety of EDCR 2.34's purpose. *Valley Health System* (supra), at 172-173. It cannot now come into this Court and raise arguments that were never brought in accordance with EDCR 2.34, and at the direction of the discovery commissioner.

On a related note, Resources complaint regarding the sufficiency of the district court's findings of fact and conclusions of law is a non-starter. *Opening Brief*, at 21:13-15 (as an example). Yet another red herring in Resources "throw it

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all against the wall and see what sticks" approach. "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. The court should, however, state on the record the reasons for granting or denying a motion." NRCP 52(a)(3). The Ninth Circuit has addressed the sufficiency of findings and conclusions, following trial (where findings and conclusions are required), stating that:

> …the district court's findings to be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision.

Colchester v. Lazaro, 16 F.4th 712, 727 (9th Cir., 2021). "[FRCP 52(a)] does not require the district court "to base its findings on each and every fact presented at trial." *Id*. Based on NRCP 52 and *Colchester*, Resources' complaints on this point must ignored. The reasons support supporting US Bank's motion for summary judgment have been clearly stated in the record.

F. RESOURCE GROUP'S ARGUMENTS THAT THE HOA TDUS IS CONCLUSIVE AND EXTINGUISHED US BANK'S DOT WERE NOT RAISED TO THE DISTRICT COURT AND ARE INOPPOSITE TO PRESENT NEVADA LAW.

The Court must disregard Resource Group's arguments that the HOA Sale extinguished US Bank's DOT as a matter of law (*Opening Brief*, at 8:18) and that the HOA TDUS recitals are conclusive (*Id*., at 32:12). These points were not raised at to the district court and are not germane to jurisdiction. It is well established in Nevada that "[a] point not urged in the trial court, unless it goes to the jurisdiction

of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (Nev., 1981).

Nonetheless, US Bank points out the following. First, homeowners' association foreclosure sales do not extinguish first deeds of trust as a matter of law. In fact, the opposite is true. As Resources admits, the foreclosure sale must be "proper." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 758 (Nev., 2014). And a proper foreclosure is one that complies with NRS 116.3116 et. seq. and NRS 107.090 (2012). As stated above, it is well established that NRS 116.31168 fully incorporated the mandatory notice provisions of NRS 107.090. NRS 116.31168(1) (2012). *SFR Invs. Pool 1, LLC v. Bank of N. Y. Mellon*, 134 Nev. 483, 489 (2018). Moreover, this Court held that a homeowners' association foreclosure sale "may or may not extinguish a lien" such as US Bank's DOT – the sale, alone, does not even trigger the declaratory relief statute of limitations. ("Because an HOA foreclosure sale may or may not extinguish a lien, such a sale does not, without more, trigger the limitations period.") *Thunder Properties, Inc*. (supra), at 307. Thus, even if this Court were to consider Resources' untimely argument that the HOA Sale extinguished US Bank's DOT as a matter of law, Resources is incorrect.

Second, the HOA TDUS recitals are not conclusive, per se. Resources, again, acknowledges this. *Opening Brief*, at 32:22-33:14. See also *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 60 (Nev., 2016) ("…the Legislature,

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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."); *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing, LLC*, 136 Nev. 728, 731, 478 P.3d 376, 379 (Nev., 2020) ("…a court's authority to look beyond a foreclosure deed in a quiet title action is an inherent equitable power…"). It then goes on to argue that this Court's equitable authority is irrelevant because US Bank did not pay the superiority (*Opening Brief*, at 34:7-12), or that this Court should ignore its own precedent to adopt the position of California (*Opening Brief*, at 34:13-25).

Resources is either reaching or ignoring the facts of this case. US Bank was never granted an opportunity to pay the superpriority because it never had notice of the HOA Sale. *Joint Appendix Supplement to Volume 9*, at APP002086:1-5, 13-17; APP002094:7-13; APP002095:5-14. This point was addressed more fully, above. Furthermore, Resources ignores the district court's conclusion that the HOA Sale was void. *Joint Appendix Vol. 12*, at APP002682-2691. There is no requirement that a court weigh the equities when a sale is void. *Green Tree Servicing, LLC* (supra), at 731 ("…a valid tender cures a default *by operation of law* - that is, without regard to equitable considerations.") (internal quotations omitted); *U.S. Bank* (supra), at 205 ("A void sale, in contrast to a voidable sale, defeats the competing title of even a bona fide purchaser for value."); *BANA* v. *SFR Investments Pool 1, LLC* (supra), at 612, citing *Deep v. Rose,* 234 Va. 631, 637,

364 S.E.2d 228, 232 (Va., 1988) ("when defect renders a sale wholly void, no title, legal or equitable, passes to the purchaser") (internal quotations omitted).

And on top of the foregoing, this Court has already addressed any argument regarding any conclusive effect of the HOA TDUS:

> Resources Group does not argue that NRS 116.31166, respecting HOA deed recitals, affects the analysis. The recitals NRS 116.31166 establishes as conclusive do not include recitals respecting service of the notices of default and of sale. And, given Alessi & Koenig's failure to mail the notice of default to U.S. Bank, conclusory recitals attesting to proper notice of default would fail in any event. We are unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect.

U.S. Bank (supra), at 205 (fn. 4) (internal citations and quotations omitted).

Accordingly, even if this Court were permitted to consider Resource Group's new arguments, they have no merit.

VII. CONCLUSION

The district court correctly granted US Bank' motion for summary judgment. First, the sale is void due to A&K's failure to send the notice of default to US Bank, at the address provided on the first page of the deed of trust. Nor is there any evidence that US Bank received ***actual notice*** of the sale from some other source. Resources offers nothing more than speculation and conjecture as a poor substitute for the facts of the case. As a result of A&K's noncompliance with NRS 116.3116 et. seq. and NRS 107.090, US Bank was prejudiced because it would have paid the HOA's Lien. Moreover, Resources fails to address the district court's conclusion

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that the HOA Sale was void. As such, it has forfeited that argument and the district court's order was appropriate.

Even if the HOA Sale was not void, it is voidable. It is largely uncontested that the HOA Sale price was low, and that the disparity between the sale price and the Property's fair market value is palpable and great. Thus, only slight evidence of fraud, oppression, or unfairness affecting the sale need exist. By A&K's own testimony, the HOA's foreclosure was not proper. It failed to serve US Bank with the HOA NOD. Even if US Bank received the HOA NOS, which it did not, nonservice of the HOA NOD creates a classic case for relief under *Shadow Canyon* (supra). Moreover, the insider relationship between Eddie Haddad, Resources' principal, and A&K is sufficient to set trustee sales aside. Even the United States Supreme Court has opined that such a relationship cannot be tolerated.

The bona fide purchaser doctrine does not save Resources' claim of title to the Property. Resources bid on the Property with knowledge of US Bank's recorded DOT and of the HOA CC&R's mortgage savings clause, during a time when Eddie Haddad knew litigation would be necessary to obtain clear title and the Nevada real estate community operated as if HOA foreclosures did not extinguish first mortgages recorded before the HOA delinquency arises. And after the HOA Sale, Resources ran to bankruptcy court where it admitted the Property was encumbered by US Bank's DOT. Such is a judicial admission. Resources had acknowledge knowledge of US Bank's interest in the Property and avoided making

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any inquiry into the properness of the sale, and it lacked "good faith," which is a necessary element of a bona fide purchaser. But this Court not reach the bona fide purchaser inquiry because the HOA Sale is void.

Resources continues to opine that US Recordings is an agent of US Bank, but there exists no evidence to supports such a finding. Nor is there any basis for this Court to address discovery. First, US Bank supplemented its responses. Second, Resources failed to comply with EDCR 2.34, so it is barred from raising any issues here. Finally, several of Resources' Opening Brief arguments were not raised to the district court. Thus, they are waived before this Court. But even if this Court were to consider them, they are entirely without merit.

For all of the reasons argued herein, the district court's order granting US Bank's motion for summary judgment was proper. US Bank respectfully requests that this Court affirm that judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6). This brief has been prepared in proportionally spaced typeface, using Microsoft Word 2000, in 14-point Times New Roman font.

I further certify that this brief complies with the type-volume requirements of NRAP 40(b)(3). Excluding the parts of this brief that are exempt from NRAP 32(a)(7)(C), it is proportionally spaced and contains 10,647 words.

I further certify that I have read this brief, and, to the best of my knowledge, information and belief, it is not frivolous nor interposed for any improper purpose.

I further certify that this brief complies with the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1) that requires very assertion in the brief, regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is found.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25(b) and (c), I certify that I am an employee of the law office of McCarthy & Holthus, LLP, and that on April 20, 2023, a copy of the forgoing **RESPONDENT'S ANSWERING BRIEF** was served electronically, through the Court's e-filing system, to the following person(s):

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