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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 REPLY 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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SUMMARY OF THE ARGUMENT

Many of the facts set forth at pages 2 to 7 of Respondent's Answering Brief are inaccurate.

Genuine issues of material fact exist regarding plaintiff's claim that the notice of trustee's sale was not mailed to plaintiff before the sale.

Plaintiff did not produce any admissible evidence that proves that plaintiff was prejudiced because Alessi mailed the notice of default to US Recordings and not to plaintiff's address in the deed of trust.

Plaintiff did not prove the element of causation required by the California rule.

The evidence proves that 4524 Rolling Stone Dr. Trust did not have notice of any facts that would require 4524 Rolling Stone Dr. Trust to investigate unrecorded records and discover plaintiff's unrecorded claim that defendant did not receive the notice of default and the notice of trustee's sale.

The pleadings filed by plaintiff contain a judicial admission that prevents the court from relying on Mr. Heifner's testimony at trial that plaintiff was prejudiced by Alessi mailing the notice of default to US Recordings.

Resources Group timely raised the issues of extinguishment and the conclusive foreclosure deed in its opposition to plaintiff's motion.

ARGUMENT

1. Many of the facts set forth at pages 2 to 7 of Respondent's Answering Brief are inaccurate.

In paragraph 18 at lines 13-14 on page 5 of its Brief, plaintiff cites JA9, pg. APP002102:3-12 as evidence that "Ryan Kerbow, Esq., an attorney employed by A&K, was the attorney responsible for this HOA foreclosure sale."

David Alessi, however, did not use the words "attorney responsible for this HOA foreclosure sale," but instead testified that "when we're getting ready to set a property for sale, there's a three review process that happens" (JA 9, pg. APP002101, ll. 16-18), that "we would have a licensed Nevada attorney review the file" (JA 9, pg. APP002101, ll. 23-24), and that Mr. Kerbow's signature on the notice of sale led Mr. Alessi to believe that Mr. Kerbow reviewed the file in this case. (JA 9, pg. APP002102, ll. 3-12)

In paragraph 24 at lines 13-15 on page 6 of its Brief, plaintiff cites JA9, pg. APP002143:21-25, JA9, pg. APP0002144, JA10, pg. APP002393 (pg. 48) and JA10, pg. APP002394 (pg. 49), as evidence that Eddie Haddad testified that Ryan Kerbow, Esq. "represented him in quiet title actions during the same period of time."

On the other hand, Mr. Haddad clearly stated that the only cases for which he retained Ryan Kerbow, Esq. to file a quiet title action involved "**a free and clear**

property, let's say, **where there would be no deed of trust** that would be extinguished before I can get title insurance." (JA 9, pg. APP002144, ll. 3-13) (emphasis added)

In paragraph 27 at lines 1-5 on page 7 of its Brief, plaintiff cites JA9, pg. APP002802:9-11, as evidence that David Alessi "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." Mr. Alessi, however, did not use the words "relatively routine."

In paragraph 29 at lines 10-11 on page 7 of its Brief, plaintiff cites JA9, pg. APP002113:4-12, as proof that "David Alessi testified that homeowners' association foreclosure sale purchases closely monitored the outcome of related legal proceedings." Mr. Alessi, however, did not use the words "closely monitored." Mr. Alessi instead testified that he recalled overhearing investors talking about district court rulings "a couple of times." JA9, pg. APP002113:20-22.

Mr. Alessi also testified:

> I don't recall Mr. Haddad specifically being involved in any of those conversations. I don't recall him not being involved in those conversations.

JA9, pg. APP002113:9-12

In paragraph 30 at lines 14-17 on page 7 of its Brief, plaintiff cites JA10, pgs. APP002443-2493, 2450, as proof that "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." The cited pages, however, do not include any "testimony" by Eddie Haddad.

The cited pages are instead bankruptcy schedules filed by Bourne Valley Court Trust on June 13, 2012 (more than 4 months after the HOA foreclosure sale held on January 25, 2012)(JA10, pgs. APP002443-2471), a [proposed] bankruptcy order filed on November 7, 2012 (JA10, pgs. APP002472-2474), and a motion to value collateral filed on November 7, 2012 (JA10, pgs. APP002475-2493).

Furthermore, the specific page at JA10, pg. APP002450, clearly identified the "First Mortgage" claimed by "Southwest Financial Services" against the Property as a "Disputed" claim.

2. Genuine issues of material fact exist regarding plaintiff's claim that the notice of trustee's sale was not mailed to plaintiff before the sale.

At lines 1-2 at page 8 of its Brief, plaintiff states that "Resources' Opening Brief fails to address the issue of whether the sale is void."

At lines 17-20 at page 10 of its Brief, plaintiff also states that "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."

On the other hand, the present appeal in Nevada Supreme Court Case No. 84992 is not the first appeal in the present case. In Nevada Supreme Court Case No. 74575, this Court rejected plaintiff's argument that the HOA foreclosure sale was void simply because the Notice of Default was not mailed to U.S. Bank at its North Dakota address. *See* pp. 14-16 of Appellant's Opening Brief, filed on April 5, 2018, and pp. 10-13 of Appellant's Reply Brief, filed on August 9, 2018, in Nevada Supreme Court Case No. 74575.

Instead, as quoted at pages 14 and 15 of Appellant's Opening Brief, this Court remanded the case to 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. 199, 205, 444 P.3d 442, 447 (2019)(hereinafter "Resources Group") (emphasis added)

In Collins v. Union Federal Savings & Loan Ass'n, 99 Nev. 284, 662 P.2d 610, 623, n. 12 (1983), this Court stated:

> Where an appellate court in deciding an appeal states a principle or rule of law, necessary to the decision, **the principle or rule becomes the law of the case and must be adhered to on all issues in which the facts are substantially the same throughout the case's subsequent progress both in the lower court and on subsequent appeals**. LoBue v. State ex rel. Dep't of Highways, 92 Nev. 529, 554 P.2d 258 (1976). (emphasis added)

Applying this principle to the present case, Resources Group correctly argued at pages 4 to 13 of its opposition to plaintiff's motion for summary judgment (JA11, pgs. APP002497-APP002506) and at pages 10 to 27 of its Opening Brief that plaintiff has failed to produce admissible evidence upon which the district court could decide the second and third issues identified by this Court in Resources Group as a matter of law.

At page 11 of its Brief, plaintiff quotes from Hung v. Genting Berhad,138 Nev. Adv. Op. 50, 513 P.3d 1285, 1289 (Ct. App. 2022), but Resources Group clearly challenged the district court's finding of fact that "US Bank did not receive alternative, adequate notice of the HOA Sale" (JA12, pg. APP002676, ¶12) at pages 4 to 13 of its opposition to plaintiff's motion for summary judgment (JA11, pgs. APP002497-APP002506) and at pages 10 to 27 of Appellant's Opening Brief.

At page 12 of its Brief, plaintiff omits the second requirement in Resources Group that plaintiff prove that "U.S. Bank did not receive timely notice by alternative means." *See* pg. 12, ll. 16-20 of Opening Brief.

Plaintiff also states that "it cannot be disputed that US Bank did not receive the HOA NOD." *See* pg. 12, ll. 21-22 of Opening Brief.

On the other hand, the record on appeal contains substantial evidence that proves plaintiff's statement is false.

In particular, as set forth at page 7 of Resource Group's opposition (JA 11, pg. APP002500, ll. 18-26), Mr. Heifner contradicted his earlier testimony when he testified as follows:

> Q. And on this document, the direction is to return to US Recordings, correct?
>
> A. US Recordings is who recorded it. So the recording was requested by US Recordings. Doesn't say that they received it after it was recorded.
>
> Q. Well, but the upper left-hand corner it says return to name and address. You see that?
>
> A. Correct. But the closing company or whoever was handling that, I would say was Southwest Financial Services would have had it, I'm assuming, recorded using the recording company who requested the recording and then **we would have received the document to hold an own after that in our system.**
>
> **Q. Are you telling me that US Recordings would have sent it to US Bank?**
>
> **A. Yes.** (emphasis added)

(JA6, pg. APP001426, ll. 4-19)

This testimony proves that US Recordings had a relationship with plaintiff where US Recordings would mail recorded documents related to the Edwards deed of trust to plaintiff.

Mr. Heifner's testimony at trial also proved that Mr. Heifner did not have personal knowledge of the contents of plaintiff's records because Mr. Heifner stated that "**We've** searched our records." (JA6, pg. APP001417, l. 14)(emphasis added)

In addition, Mr. Heifner testified:

> 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)

(JA6, pgs. APP001423, l. 25 to APP001424, l. 7)(emphasis added)

Mr. Heifner did not identify the names of the persons who made the search upon which he based his testimony, and plaintiff did not produce any testimony by these unidentified persons at trial.

As stated at pages 6 and 7 of Resource Group's opposition to plaintiff's motion for summary judgment (JA11, pgs. APP002499, l. 26 to APP002500, l. 4), this testimony proves that Mr. Heifner did not have the personal knowledge required by NRS 50.025(1)(a) for Mr. Heifner to provide any testimony proving that US Recordings did not forward a copy of the notice of default to plaintiff after US Recordings received it.

At page 13 of its Brief, plaintiff quotes this Court's statement in Resources

Group 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," but the "notice/prejudice rule" does not require that US Recordings be "affiliated with" plaintiff in order for US Recordings to forward copies of the notice of default to plaintiff.

This Court's description of Mr. Heifner's testimony as "uncontroverted" also does not address any of the objections to Mr. Heifner's testimony raised by Resource Group in its subsequently filed opposition to plaintiff's motion for summary judgment. *See* JA11, pgs. APP002500, ll. 5-27.

At page 14 of its Brief, plaintiff quotes from 58 Am. Jur. 2nd Notice § 38 (2012) that a presumption of receipt "may be overcome by evidence that the notice was never received." In the present case, however, plaintiff did not produce any admissible evidence proving that plaintiff did not receive the notice of trustee's sale that was mailed to "U.S. Bank National Association ND, 4325 17th Avenue SW, Fargo, ND 58103," by Alessi & Koenig (hereinafter "Alessi") on October 26, 2011.

Plaintiff nevertheless claims:

> 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.

See Answering Brief at page 14, ll. 22-24.

The cited pages, however, are only portions of the trial testimony provided by Bryan Heifner on October 2, 2017. As noted above, Mr. Heifner's testimony is not based on personal knowledge.

Furthermore, the testimony at APP002030:11-22 responds to the question "[a]nd then you did not receive or you can find no record in US Bank's systems of ever receiving **a notice of default** on this property at all?" (emphasis added) The testimony does not mention the notice of trustee's sale that was mailed to plaintiff on October 26, 2011.

The testimony at APP002033:17-20 is Mr. Heifner's affirmative response of "Yes" to the question "[n]ow, you said that you reviewed all of the documents that your bank has concerning this loan, correct?"

However, this testimony is contradicted by Mr. Heifner's testimony quoted at page 26 of Appellant's Opening Brief that "prior to the sale or around the time of the sale there are no records." (JA9, pg. APP002037, ll. 2-3)

The testimony at APP002036:19-25 is Mr. Heifner's affirmative response of "Yes" to the question "[y]ou told us – you told the Court earlier that you had reviewed US Bank's complete file in this matter, correct?"

On the other hand, if Mr. Heifner had **personally** reviewed "US Bank's **complete** file in this matter" (emphasis added), why did he testify that "**We've** searched our records" (JA6, pg. APP001417, l. 14)(emphasis added) and "**they** even searched after the sale had taken place to see if we received it."(JA6, APP001424, l1. 3-5)(emphasis added)

At the top of page 15 of its Brief, plaintiff states that "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 list of addresses. *Opening Brief*, at 24:15-24; *Joint Appendix*, at APP002558-2560."

Plaintiff, however, does not mention the next two sentences at the bottom of page 24 and top of page 25 of Appellant's Opening Brief, which state:

> 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 15 of its Brief, plaintiff states that "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." Plaintiff, however, does not cite any evidence (such as testimony by Alessi or any discovery responses) that proves either that statement or the statement at line 22 on page 15 of its Brief: "Here, no receipt card exists."

3. Plaintiff did not produce any admissible evidence that proves that plaintiff was prejudiced because Alessi mailed the notice of default to US Recordings and not to plaintiff's address in the deed of trust.

At line 6 on page 18 of its Brief, plaintiff states that "US Bank was clearly prejudiced as a result of not having received notice."

At lines 8-10 at page 18 of its Brief, plaintiff quotes Mr. Heifner's affirmative response to the question:

> 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?

See JA9, pg. APP002030:6-10.

Plaintiff also cites the testimony by Mr. Heifner that "I actually worked in our collection department **in 2011**" and that "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**." JA9, pg. APP002028:18-21 (emphasis added)

Plaintiff also cites the testimony at JA9, pg. APP002037:14-18, which includes the following testimony by Mr. Heifner:

> Q. But it's your testimony that if you had received the notice of sale prior to the actual sale date that it was the policy of the company to find out what the payoff amount was and pay it off, correct?
> A. It would be our policy to pay it off, yes.

Plaintiff also cites this same testimony at lines 10 to 17 at page 19 of its Brief.

On the other hand, on March 31, 2021, at page7 of its opposition to defendant Resource Group LLC's motion to compel (JA8, pg. APP001912, ll. 26-29), plaintiff stated:

> 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. (emphasis added)

The time period specified in Resources Group's Request for Production No. 28(JA8, pg. APP001912, l. 20) covers the time period when all of the notices in the present case were mailed by Alessi. *See* JA12, pgs. APP002616-APP002620, APP002626-2630.

At page 31 of its Brief, plaintiff quotes from Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Company, Inc., 127 Nev. 332, 343,255 P.3d 268, 276 (2011), where this Court stated:

> "Judicial admissions are defined as **deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge**." Smith v. Pavlovich, 394 Ill.App.3d 458, 333 Ill.Dec. 446, 914 N.E.2d 1258, 1267 (2009).

At pages 31 and 32 of its Brief, plaintiff also quotes from Keller v. U.S., 58 F.3d 1194, 1198, n. 8 (7th Cir. 1995) that judicial admissions "are not evidence at all but rather have the effect of withdrawing a fact from contention."

Plaintiff's judicial admission therefore withdrew from contention plaintiff's

argument that Mr. Heifner's testimony proved "[i]t would be our policy to pay it off."

Plaintiff's interpretation of Mr. Heifner's testimony is also disproved by plaintiff's failure to identify a single HOA foreclosure sale where plaintiff had "received a notice of default from a Homeowners Association" and then "requested payoff information and paid the lien off." *See* Interrogatory No. 32 and Response to Interrogatory No. 32 at lines 20-29 at JA8, pg. APP001880.

Furthermore, plaintiff's added statement in its Response to Interrogatory No. 32 made on January 25, 2021 that "[t]here is not a database that maintains or tracks this type of information" (lines 20-21 at JA8, pg. APP001909) does not excuse plaintiff's failure to identify a single example prior to January 25, 2012 where plaintiff tendered the superpriority portion of an HOA assessment lien prior to an HOA foreclosure sale.

At lines 18 to 22 at page 19 of its Brief, plaintiff quotes from this Court's opinion in Resources Group, but plaintiff omits the words "if credited" that refer to the trial testimony provided by Mr. Heifner. 135 Nev. at 204, 444 P.3d at 447. As noted above, Mr. Heifner's trial testimony cannot be "credited" because it is directly contradicted by plaintiff's judicial admission that "[a]ny notice received on a loan would be reviewed on an individual basis, including review by local legal counsel"

and that "there are no written policies from the specified time period to produce." (JA8, pg. APP001912, ll. 26-29)

At lines 5 to 7 at page 20 of its Brief, plaintiff states that by quoting this Court's description in Resources Group of the unpublished order in 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), Resources Group "admits" that a sale is "void with respect to an aggrieved lender" where the "lender would have paid or tendered the superpriority lien balance but did not receive notice of a homeowner's foreclosure sale."

Plaintiff, however, does not address the balance of page 11 and all of page 12 of Appellant's Opening Brief where Resources Group raised plaintiff's failure to prove that plaintiff had ever tendered the superpriority portion of an assessment lien for an HOA sale held on or before January 25, 2012 and Mr. Heifner's admission at trial that he did not have the requisite "personal knowledge" to provide any testimony regarding "the relationship between plaintiff and US Recordings." *See* pg. 11, l. 15 to pg. 12, l. 25 of Appellant's Opening Brief.

At lines 8-9 at page 20 of its Brief, plaintiff states "[s]ince US Bank would have paid the lien had it received notice of the HOA Sale," but plaintiff does not

identify any admissible evidence that proves this statement is true.

4. Plaintiff did not prove the element of causation required by the California rule.

At pages 20 to 23 of its Brief, plaintiff states that because the sale price of $5,331.00 was "11% of fair market value" (Answering Brief, pg. 21, l. 13), "this Court need only find 'very slight additional evidence of unfairness or irregularity' in order to set the HOA Sale aside." (Answering Brief, pg. 22, ll. 12-14)

The language quoted by plaintiff, however, is not the ruling by this Court in the Resources Group case, but is instead this Court's description of U.S. Bank's "fallback position." Resources Group, 135 Nev. at 205-206, 444 P.3d at 448.

At line 24 at page 22 of its Brief, plaintiff states that the standard adopted by this Court in Golden v. Tomiyasu, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963), "has changed."

As quoted at page 29, ll. 9-16, of Appellant's Opening Brief, however, this Court stated in Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. 740, 749, 405 P.3d 641, 648 (2017)(hereinafter "Shadow Canyon"), that "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." (emphasis added)

At page 23 of its Brief, plaintiff quotes a definition of the word "affect" as meaning "to bring about or produce a material influence of alteration."

Requiring that plaintiff prove that "**the sale** was affected" by "fraud, unfairness, or oppression" matches the traditional statement of the Golden rule that requires "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." 79 Nev. at 514, 387 P.2d at 995.

At lines 11-14 at page 23 of its Brief, plaintiff states that "[t]here are several instances of oppression and unfairness that **affected** the HOA Sale" and that "[t]he first and most obvious is A&K's failure to serve US Bank with the HOA NOD." (emphasis added)

Plaintiff, however, does not even begin to explain how plaintiff's hidden objection regarding the address to which Alessi mailed the notice of default (that was never made known to the HOA, Alessi, or any person who attended the public auction) could have "affected" the HOA sale.

At line 22 at page 23 of its Brief, plaintiff omits the word "may" from the language used by this Court in footnote 11 of the Shadow Canyon opinion.

At lines 3-4 at page 24 of its Brief, plaintiff states that "[t]he relationship between Resources, its principal, Eddie Haddad, and A&K is clearly unsettling."

On the other hand, as stated at lines 20-23 at page 42 of Appellant's Opening Brief, the "relationship" between these parties was limited to Mr. Haddad hiring Alessi & Koening to file quiet title actions only where the real property "happened to be free and clear." (JA 9, pgs. APP002144, l. 22 - APP002145, l. 12)

At lines 7-9 at page 24 of its Brief, plaintiff states that "it was not unusual for Alessi & Koenig to represent a purchaser when Alessi & Koenig was acting as the trustee," but Mr. Alessi did not identify how many times "[o]ur office has represented purchasers post sale." (JA 9, pg. APP002082, ll. 10-11)

At lines 10-12 at page 24 of its Brief, plaintiff states that "Eddie Haddad testified that attorneys from Alessi & Koenig did legal work for him and specifically quiet title work involving HOA foreclosures." Plaintiff, however, does not mention that in the transcript pages cited by plaintiff, Mr. Haddad testified that Ryan Kerbow only represented him a "[c]ouple of times" (JA 9, pg. APP002144, ll. 14-18) on cases that involved "a free and clear property" and "where there was no deed of trust that would be extinguished before I can get title insurance." (JA 9, pg. APP002143 to pg. APP002144, l. 6)

Because Mr. Kerbow only represented Mr. Haddad a "[c]ouple of times" on cases that did not involve a subordinate lender like plaintiff, it is impossible for those cases to have imparted Mr. Haddad with any information regarding the HOA foreclosure sale in the present case. In addition, paragraph 11 of Mr. Haddad's affidavit states: "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." (JA 11, pg. APP002571, ¶11)

At lines 17-18 at page 24 of its Brief, plaintiff quotes the description in Graffam and Burgess, 117 U.S. 180, 193 (1886), of a "sheriff's sale at a very grossly inadequate price, and the purchaser was an attorney in the case." In the present case, neither Mr. Haddad nor Resources Group was "an attorney in the case" giving rise to a sheriff's sale.

At page 25 of its Brief, plaintiff cites Kauffman & Runge v. Morris, 60 Tex. 119, 1883 WL 9276 (1883), but in that case, there was "a private understanding" between the purchaser and Holmes that the purchase "should be for their joint benefit and to be afterwards divided between them." Id. at **2. Plaintiff has not proved that any such "private understanding" existed between Resources Group and Alessi & Koenig in the present case.

At page 25 of its Brief, plaintiff cites the three (3) factors considered by the court in Waid v. Eighth Judicial District Court, 121 Nev. 605, 119 P.3d 1219 (2005), to determine whether counsel was disqualified from representing the defendants. Without producing any admissible evidence that proves Ryan Kerbow actually shared any information regarding the HOA foreclosure sale with Mr. Haddad, plaintiff states that "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)."

On the other hand, "[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). In addition, paragraph 11 of Mr. Haddad's affidavit proves that he did not " receive any information from the HOA **or the foreclosure agent** about the property or the foreclosure sale." (JA 11, pg. APP002571, ¶11) (emphasis added) Mr. Haddad's reference to "the foreclosure agent" would necessarily include Ryan Kerbow.

At lines 6-7 at page 26 of its Brief, plaintiff states that "A&K's failure to serve US Bank with the HOA NOD affected the sale," but because plaintiff did not make its unrecorded claim known to Alessi, to Mr. Haddad, or to any other person who

attended the HOA foreclosure sale held on January 25, 2012, it is impossible for that claim to have caused any person attending the sale to have declined to bid or reduce the amount of its bid.

Plaintiff argues, however, that the sale would not have taken place because "had US Bank received the HOA NOD or actual notice of the HOA Sale, US Bank would have paid the HOA's Lien." Plaintiff, however, cites no admissible evidence that proves this statement is true.

5. The evidence proves that 4524 Rolling Stone Dr. Trust did not have notice of any facts that would require 4524 Rolling Stone Dr. Trust to investigate unrecorded records and discover plaintiff's unrecorded claim that defendant did not receive the notice of default and the notice of trustee's sale.

At page 26 of its Brief, plaintiff cites Bank of America v. SFR Investments Pool 1, LLC, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018), but in that case, the lender actually tendered nine months of assessments and cured the default as to the superpriority lien prior to the sale.

At the top of page 27 of its Brief, plaintiff again states that "Resources fails to address the 'void' ruling in its Opening Brief." As stated at page 6 above, Resources Group properly discussed plaintiff's failure to prove the three facts for which the case was remanded. Resources Group,135 Nev. at 205, 444 P.3d at 447.

At page 27 of its Brief, plaintiff quotes from Blevins v. Boyd, 623 F. Supp.

863, 866 (D. Nev. 1985), but plaintiff does not identify any facts in the present case "which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights."

Plaintiff also cites Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 498, 471 P.2d 666, 668 (1970), but plaintiff does not identify any recorded document in the present case like "the two IRS liens [that] were already of record giving it constructive notice." 86 Nev. at 499, 471 P.2d at 669.

This Court also stated that "[h]ad appellant purchased the Henderson land at the Sheriff's sale after instead of before the IRS tax liens were released, a different result would prevail." 86 Nev. at 500, 471 P.2d at 670.

In the present case, plaintiff's objections regarding service of the the notice of default and the notice of trustee's sale did not appear in any recorded document. Consequently, neither Mr. Haddad nor 4524 Rolling Stone Dr. Trust had any duty to investigate those objections.

At page 28 of its Brief, plaintiff states:

> 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.)

As stated at page 38 of Appellant's Opening Brief, Mr. Haddad made the exact review of public records required by Nevada law. *See* Adaven Management, Inc. v. Mountain Falls Acquisition Corp., 124 Nev. 770,778-779, 191 P.3d 1189, 1195 (2008).

At pages 28 and 29 of its Brief, plaintiff quotes from Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 184 F. Supp. 3d 853, 860 (D. Nev. 2016), that "[t]he law was not clear at the time of the sale that the CHOA sale would extinguish the DOT," but this statement is directly contradicted by this Court's statement in K&P Homes v. Christiana Trust, 133 Nev. 364, 368, 398 P.3d 292, 295 (2017), that SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 334 P.3d 408 (2014), "did not create new law or overrule existing precedent; rather, that decision declared what NRS 116.3116 has required since the statute's inception."

At page 29 of its Brief, plaintiff quotes from the unpublished order in Fed. Nat'l Mortgage Ass'n v. SFR Investments Pool 1, LLC, 2:14-cv-040246-JAD-PAL, 2015 U.S. Dist. LEXIS 133254 (D. Nev. Sept. 28, 2015), that "[t]he 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**." (emphasis added)

In the present case, Fannie Mae held no recorded interest in the deed of trust, and every recorded document showed that plaintiff's deed of trust was subordinate to the HOA's superpriority lien.

At page 29 of its Brief, plaintiff states that "Mr. Haddad's real estate experience is relevant as to Resources' bona fide purchaser status."

Unlike the present case, however, in Estate of Yates (Baker v. West End Financial Corporation, Inc.), 25 Cal. App. 4th 511, 523, 32 Cal. Rptr. 53 (1994), the court discussed specific conversations that the Norman Diamond had with the purchaser of the trustee's deed, Jack Werdowatz, that supported the court's conclusion "that Diamond had notice of an irregularity in the sale and of the estate's interest in the property."

Similarly, in Countrywide Home Loans, Inc. v.. United States, No. CV F 02 6405 AWI SMS, 2007 WL 87827, *12 (E.D. Cal. Jan. 9, 2007), the district court stated that "Boyajian knew that a mistake had been made regarding the Property's title and Countrywide's interest in the property" and that Boyajian did not "attempt to do anything to ascertain which inconsistent filing was the mistake."

Plaintiff did not prove that Mr. Haddad had any similar information regarding the sale held in the present case.

At page 30 of its Brief, plaintiff quotes Mr. Haddad's trial testimony about attending "five days a week, 52 weeks a year," but that testimony was provided on October 2, 2017 to explain why Mr. Haddad had no specific recollection of the sale held on January 25, 2012. (JA9, pg. APP002142, ll. 8-17)

At lines 19-21 at page 30 of its Brief, plaintiff refers to the bankruptcy petition filed by Bourne Valley Court Trust on June 13, 2012 (JA 11, pgs. APP002443-APP002471) and incorrectly states that "**Resources** filed a bankruptcy petition to protect itself **from creditors it claims to have had no knowledge of** their interest in the Property." (emphasis added) Plaintiff does not identify any such creditors.

At line 22 at page 30 to line 9 at page 31 of its Brief, plaintiff describes deposition testimony provided by Mr. Haddad on April 28, 2016 (JA10, pg. APP002424) regarding a foreclosure sale where "nine months of assessments were tendered by the Deed of Trust holder" (JA10, pg. APP002431, ll. 21-24) and on May 18, 2016 (JA10, pg. APP002435) regarding a foreclosure sale held on March 14, 2014 by a different HOA and a different foreclosure agent than Alessi.

At lines 11-12 at page 31 of its Brief, plaintiff states that "Resources made a judicial admission that US Bank's DOT survived the HOA Sale." As noted above, however, the bankruptcy petition was filed by Bourne Valley Court Trust and not by

Resources Group (JA 11, pgs. APP002443-APP002471) and the deed of trust was identified as "disputed." (JA 11, pg. APP002450)

Plaintiff also states that the "strip off" motion "admitted that US Bank's DOT remained attached to the Property," but plaintiff does not identify any specific language in the fifty (50) pages cited by plaintiff that contains any "judicial admission" made by Resources Group.

At lines 21-22 at page 32 of its Brief, plaintiff states that Mr. Haddad was a real estate broker and owned Great Bridge Properties "for **twenty (20) years** as of 2017," but plaintiff does not explain how Mr. Haddad's 15 years of experience as a real estate broker could have given Mr. Haddad any reason to search for plaintiff's unrecorded claim that it had not received copies of the notice of default and notice of trustee's sale for the sale held on January 25, 2012.

At lines 14-15 at page 33 of its Brief, plaintiff states that "Resources ran to bankruptcy court where it admitted the Property was encumbered by US Bank's DOT. Joint Appendix Vol. 11, at APP002443-2493." As proved above, the bankruptcy petition was filed by Bourne Valley Court Trust (JA 11, pgs. APP002443-APP002471) and the deed of trust in the present case was scheduled as "disputed." (JA 11, pg. APP002450)

6. The notice prejudice rule does not require that US Recordings be an agent of plaintiff for US Recordings to have provided plaintiff with notice of the notice of default.

At lines 2-3 at page 34 of its Brief, plaintiff states that "[t]here 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."

At lines 7-8 at page 34 of its Brief, plaintiff states that "Resources continues to press that such a relationship exists between US Bank and US Recordings. *Opening Brief*, at 11:13-14:18."

The cited portion of Appellant's Opening Brief, however, does not include the words "agent" or "agency." The cited portion states that "the 'notice/prejudice' rule only requires that the plaintiff have received 'notice from some other source.'" (Appellant's Opening Brief, pg. 13, ll. 7-9)

At page 15, ll. 18-28, of Appellant's Opening Brief, Resources Group also states that this Court's opinion in Resources Group does not require proof that US Recordings was "an agent for US Bank with respect to accepting the notice of default."

At page 35, ll. 7-8 of its Brief, plaintiff states 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," but this Court's opinion in

Resources Group does not require any such evidence.

7. The pleadings filed by plaintiff contain a judicial admission that prevents the court from relying on Mr. Heifner's testimony at trial that plaintiff was prejudiced by Alessi mailing the notice of default to US Recordings.

At page 36 of its Brief, plaintiff cites Valley Health System, LLC v. Eighth Judicial District Court, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011), as authority that this court will not 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." (emphasis added)

On the other hand, Appellant's Opening Brief does not raise any new argument in objection to the order on discovery commissioner's report and recommendations, filed on May 14, 2021 (JA 8, pgs. APP001922-APP001929)

Appellant instead simply explained the context in which plaintiff made the judicial admissions at JA8, pg. APP001912, ll. 26-28, and JA8, pg. APP001916, ll. 2-3) which prove that the trial testimony by Mr. Heifner (JA9, pgs. APP002028, l. 10 to APP002029, l. 1) upon which plaintiff based its motion for summary judgment is false and untrue.

8. Resources Group timely raised the issues of extinguishment and the conclusive foreclosure deed in its opposition to plaintiff's motion.

At lines 20-24 at page 37 of its Brief, plaintiff states that this court cannot

consider the heading at line 18 of page 8 of Appellant's Opening Brief, or the heading at line 12 at page 32 of Appellant's Opening Brief because "[t]hese points were not raised at the district court and are not germane to jurisdiction."

On the other hand, Resource Group's argument regarding extinguishment of plaintiff's deed of trust was raised at line 24 at page 18 to line1 at page 19 of Resource Group's opposition. (JA 11, pg. 2511:24 to pg. 2512:1)

Resource Group's argument regarding the "conclusive" language in NRS 116.31166(1) and NRS 116.31166(2) is included at lines 13 to 18 at page 19 of its opposition. (JA 11, pg. APP002512:13-18)

At lines 17-18 at page 39 of its Brief, plaintiff states that "[t]here is no requirement that a court weigh the equities when a sale is void," but the law of real property recognizes that defects in notice only make a sale voidable and not void. 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law,* Section 7:21, pgs. 956-957 (6th ed. 2014).

/ / /

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 June, 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 X6 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 6,961 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 June, 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 June, 2023,

a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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