Nos. A155837 and A157245

In the Court of Appeal of the State of California,
First Appellate District, Division One.

COUNTY OF SONOMA,
Plaintiff and Respondent,

vs.

JAMES QUAIL,
Defendant

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF BAY AREA RECEIVERSHIP GROUP IN SUPPORT OF PLAINTIFF AND RESPONDENT; AMICUS BRIEF

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TO THE HONORABLE JIM HUMES, PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEALS STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE, STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to California Rule of Court 8.520 (f) Bay Area Receivership Group "BARG", is a company that specializes in Health and Safety Receiverships under California Health and Safety Code § 17980.7, as well as California Code of Civil Procedure § 564 et seq. BARG President Gerard F. Keena II has been appointed by numerous courts as a Health and Safety Receiver throughout California.

Cities and Counties throughout California Petition California Courts to appoint Gerard F. Keena II over longstanding nuisance properties that endanger the health and safety of the surrounding communities. While this is the first Amicus Brief filed by BARG, BARG is intimately familiar with the importance of lien stripping, and super-priority receivership certificates.

BARG believes its brief will aid the Courts legal analysis of super-priority and lien-stripping in a real-world context, as well as by citing to additional authorities not briefed by either Appellant or Respondent.

Pursuant to California Rule of Court 8.520(f)(4), the undersigned counsel has fully authored the brief, with no counsel for a party authoring this brief in whole or in part. Likewise, no person other than the amicus curiae, its members and its counsel made any monetary contribution to the preparation and submission of this brief.

For all of the reasons above, BARG respectfully requests that this Court grant its application, and accept the enclosed brief for filing and consideration.

EXPLANATION AND REQUEST FOR LATE FILING OF AMICUS BRIEF TO JIM HUMES PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT, DIVISION ONE.

The reason this amicus brief was not filed within the timeframe outlined by California Rule of Court 8.200, is that Bay Area Receivership Group "BARG" was not aware of this appeal until February 3, 2020. Upon learning of the Appeal, BARG immediately contacted the First Appellate District to obtain the Briefs in this case, which it received that same day. While reviewing the briefs BARG determined it was important to file an Amicus Brief clarifying the importance of super-priority, and lien-stripping to protect the health and safety of communities. Additionally, BARG believes it is necessary to clarify that abuse of discretion, is the standard of review to be used in receivership cases. Finally, BARG believed it was necessary to explain what a lender like U.S. Bank could have done to avoid the dire situation this Property presented, and what it could do in future cases.

Dated: February 27, 2020

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

INTRODUCTION

Receivership is a remedy that dates back to Old English Chancery Courts as a way to protect property. The Receivership remedy is now found in all sorts of forums including bankruptcy, prison regulation, and others as a way to bring something that is out of control back into compliance. Health and Safety Receiverships under California Health and Safety Code § 17980.7 are no different. Health and Safety Receiverships are a remedy utilized to bring nuisance properties that endanger public health and safety into compliance.

California Health and Safety Code § 17980.7 was enacted as urgency legislation in 1988 to provide enforcement agencies with a way to address substandard properties that substantially endanger public health and safety. SB 2799. Thereafter, it appears the first caselaw citation to the California Health and Safety Code § 17980.7 was as a footnote in a 1993 case. (*City and County of San Francisco v. Daley* (1993) 16 Cal. App. 4th 734, 742.)

The remedy began to grow from there and in 2005 the first decision upholding an enforcement agencies' right to recover its attorney's fees and enforcement costs in a California Health and Safety Code § 17980.7 was decided. (*City and County of San Francisco v. Jen* (2005) 135 Cal. App. 4th 305, 312.)

As the Health and Safety receivership remedy began to be utilized by more and more cities and counties a California Health and Safety Code § 17980.7 case made its

way to the California Supreme Court in 2008. In the California Supreme Court Case it was held that a Receiver could take extreme measures to abate nuisance conditions including demolishing property. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal. 4th 905, 913.)

Around the time *Gonzalez* was decided the mortgage meltdown occurred. This resulted in numerous homes being abandoned as a result of irresponsible lending practices by financial institutions, such as U.S. Bank. A few years later on June 4, 2012 the Fourth Appellate District stated, "A court may require one or more parties to pay for receiver fees where the property subject to the receivership is inadequate to compensate the receiver and/or where other equitable circumstances support imposing fees on a party." (*City of Chula Vista v. Gutierrez* (2012) 207 Cal. App. 4th 681, 686.) Nevertheless, in that particular case the Court held that the lender Wachovia Mortgage was not responsible for the Receiver's fees. *Id.* at 687.

A few months after *Chula Vista* was decided the Legislature enacted the Homeowner Bill of Rights on January 1, 2013. The Homeowner Bill of Rights was comprehensive legislation designed to combat the mortgage crisis that was caused by the irresponsible lending practices of financial institutions, such as U.S. Bank. AB 2314 was the specific legislation enacted to address the problem of abandoned properties that blighted cities and counties. AB 2314 enacted California Civil Code § 2929.3, which authorizes a City to issue $1,000 per day fines on blighted properties in foreclosure. Additionally, the Homeowner Bill of Rights added California Health and Safety Code § 17980.7(c)(15), which authorizes a Receiver to impose any unrecovered costs of the

Receivership upon a Property Owner. AB 2314 shows clear legislative intent to combat the blight caused by the mortgage crisis and ensure Receivers are paid.

In 2014, the Fourth Appellate District decided two important issues related to the powers of a Health and Safety Receiver. The two issues decided by the Fourth Appellate District were (1) whether the automatic stay of a bankruptcy could stop a City from appointing a Health and Safety Receiver and (2) whether a Health and Safety Receiver could sell a Property free and clear of existing liens.

In deciding those two issues the Fourth Appellate District held in favor of empowering health and safety Receivers. The Courts did this first by finding that a Cities Police Power pursuant to 11 U.S.C. 362(b)(4) supersedes the automatic stay of bankruptcy. (*City of Riverside v. Horspool* (2014) 223 Cal. App. 4th 670, 682.) Additionally, the court held that a Health and Safety Receiver could sell a property free and clear of existing liens. *Id.* at 684. The *Horspool* decision further supports the importance placed on ensuring health and safety receivers have the tools necessary to abate dangerous property conditions.

Thereafter, in 2019, the specific issue of whether a Health and Safety Receiver could obtain super-priority over other lien holders was decided by the Second Appellate District. Super-Priority is a tool necessary for Health and Safety Receivers to pay for the important task of abating dangerous properties, because the majority of properties that substantially endanger public health and safety are underwater. The Second Appellate District held in favor of the Receiver and upheld the trial courts grant of a super-priority

receivership certificate. (*City of Sierra Madre v. SunTrust Mortgage, Inc.* (2019) 32 Cal. App. 5th 648, 661.)

As a final showing of legislative intent supporting enforcement agencies and Receivers the California Legislature enacted AB 957, on October 8, 2019. This legislation eases the burdensome noticing requirements of California Health and Safety Code § 17980.7(c) by only requiring mailing and posting 3-days prior to the filing of a petition. Prior to the passage of AB 957 enforcement agencies had to personally serve all parties with a recorded interest 3-days prior to the filing of the Petition. AB 957 shows a legislative intent supporting enforcement agencies and Receivers in these nuisance property cases. Conversely, it shows a lack of legislative concern for parties with recorded interests on nuisance properties that allow dangerous conditions to linger for years without action, as U.S. Bank did here.

A) THE STANDARD OF REVIEW IN A RECEIVERSHIP CASE IS ABUSE OF DISCRETION NOT A DE NOVO REVIEW AS ARGUED BY U.S. BANK.

As far back as 1944 the United States Supreme Court reviewed receivership decisions under an abuse of discretion standard. (*Crites Inc. v. Prudential Ins. Co.,* (1944) 322 U.S. 408, 418.) The California Supreme Court in 2008 reviewed a Health and Safety Receiver's decision to demolish a property under an abuse of discretion standard. (*City of Santa Monica v.* Gonzalez (2008) 42. Cal. 4th 905, 933.)

Thereafter in 2014, the Fourth Appellate District decided the exact issue of lien stripping in a health and safety receivership using an abuse of discretion standard. (*City*

of Riverside v. Horspool (2014) 223 Cal. App. 4th 670, 683.) Finally, in 2019, the Second Appellate District used an abuse of discretion standard to determine the issue of super-priority in a Health and Safety Receivership Case. (*City of Sierra Madre v. SunTrust Mortgage* (2019) 32 Cal. App. 5th 648, 656.)

Since, the United States Supreme Court, California Supreme Court, and two recent California Appellate Decisions involving a receiver were decided using an abuse of discretion standard an abuse of discretion standard **must** be used here. Therefore, U.S. Banks' citation to a footnote in a non-receivership case is unpersuasive and an abuse of discretion standard **must** be used to determine if the trial courts decision to strip U.S. Bank's lien was proper.

B. THE IMPORTANCE OF PROTECTING THE PUBLIC FROM DANGEROUS CONDITIONS SUPERSEDES THE PRINCIPLE OF FIRST IN, TIME FIRST IN RIGHT

U.S. Bank properly cites California Code of Civil Procedure §§568.5 and 701.150. Additionally, the issue of lien priority in California is typically decided by the principal of first in, time first in right. (*Bear Creek Master Assn. v. Southern California Investors, Inc*. (2018) 28 Cal. App. 5th 809, 817.) However, a California Health and Safety Code § 17980.7 is anything but a typical case.

As seen in the recent Ghostship fire, which claimed the lives of **thirty-six** people, cities failing to address dangerous building conditions can have deadly consequences. Furthermore, as discussed in the introduction the remedy to address substantially dangerous building conditions are California Health and Safety Code § 17980.7 receiverships. These receiverships overcome the automatic stay of bankruptcy. (*City of*

Riverside v. Horspool (2014) 223 Cal. App. 4th 670, 682,) and specifically allow lien stripping. *Id.* at 684. Furthermore, a Court can issue super-priority liens to ensure a Health and Safety Receiver is paid. *(City of Sierra Madre v. SunTrust Mortgage, Inc.,* (2019) 32 Cal. App. 5th 648, 661). Additionally, in 2012 the California Legislature wanted to ensure Receiver's would be paid and enacted California Health and Safety Code § 17980.7(c)(15), as a way to protect Health and Safety Receivers. It is worth noting the enactment of California Health and Safety Code § 17980.7(c)(15) was part of the Homeowner Bill of Rights that was enacted to address the irresponsible actions of lenders such as U.S. Bank.

In its Brief U.S. Bank requests an explanation as to why neither the Trial Court or Receiver provide any meaningful response to why First in Time, First in Right does not apply. Then U.S. Bank, misstates the law by saying the California Health and Safety Code § 17980.7 and California Code of Civil Procedure § 568.5 prevent a Receiver from selling Property and cannot use the sale process to pay junior claims.

First, the entire purpose California Code of Civil Procedure § 568.5 is to allow a Receiver to sell Property and it states the following, "*A receiver may, pursuant to an order of the court, sell real or personal property in the receiver's possession upon the notice and in the manner prescribed by Article 6 (commencing with § 701.510) of Chapter 3 of Division 2 of Title 9. The sale is not final until confirmed by the court*." Furthermore, California Health and Safety Code § 17980.7(h) empowers a receiver to use California Code of Civil Procedure § 568. Additionally, the California Supreme Court has specifically authorized California Health and Safety Code § 17980.7 receivers to sell

Property as well as take any other actions the trial court may authorize. (*City of Santa Monica v. Gonzalez*, (2008) 43 Cal. 4th 905, 930.) Therefore, it is without question a health and safety Receiver has the authority to sell a Property in their charge.

As as it relates to the issue of lien stripping not one, but two recent appellate cases specifically authorized a Health and Safety Receiver to sell receivership property without fully protecting the senior lien holder's interest. One of these cases specifically authorized lien stripping. (*City of Riverside v. Horspool,* (2014) 223 Cal. App. 4th 670, 684) The other case specifically allows a Health and Safety Receiver to have super-priority over a lender. (*City of Sierra Madre v. SunTrust Mortgage, Inc*. (2019) 32 Cal. App. 5th 648, 661.) Furthermore, the California Supreme Court authorizes a Receiver to take any action a trial court authorizes. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal. 4th 905, 930.) In short, if two recent appellate cases directly on point and a California Supreme Court providing receivers broad discretion in these types of cases is not enough of an explanation for U.S. Bank then perhaps an argument by analogy will suffice.

It is well known that the automatic stay of bankruptcy codified at 11 U.S.C. 362 prevents creditors from collecting from debtors that have filed for bankruptcy. However, as with everything in the law there are exceptions. One of those exceptions is the State's Police Power codified at 11 U.S.C. 362(b)(4). The Police Power exception allows a government agency using a proper exercise of its police power to supersede the automatic stay. A simple explanation of the Police Power is as follows. If a debtor files for bankruptcy, he cannot then go **100 mph** in a school zone and then tell the Officer that pulls him over that the automatic stay takes the officers' authority to give a speeding

ticket away. The reason for this is simple, the life and safety of children supersedes any interest the bankruptcy statute has for protecting a debtors' finances.

The case at issue is no different. It is undisputed that the Property in this case had substantial code violations, which endangered public health and safety. Therefore, the County of Sonoma sought the appointment of a Receiver using the Health and Safety Code, which was a proper exercise of its police power. It is worth noting Appellate Courts have specifically authorized Health and Safety Receivers to supersede the automatic stay. (*City of Riverside v. Horspool* (2014) 223 Cal. App. 4th 670, 682.)

To clarify the use of the Police Power in superseding the automatic stay what is called the Public Purpose test has been used. The public purpose test requires the reviewing court to determine whether the governments seeks to effectuate public policy or adjudicate private rights. (*Pac. Gas & Elec. Co. v. Lynch (In re Pac. Gas & Elec. Co.)*, 263 B.R. 306, 318 (Bankr. N.D. Cal. 2001). In the case at issue, the Property was indisputably a pubic nuisance that endangered public health and safety and needed to be abated. Therefore, the public purpose of appointing a Receiver was to abate the nuisance, not adjudicate private rights. As a result, while the first in, time first in right principal regarding lien priority typically applies to property sales in California, these cases are different. The reason they are different is that under the circumstances of these case, the public purpose of ensuring the nuisance is abated supersedes typical lien priority rules.

Therefore, the answer to U.S. Bank's question about why lien stripping should be used in this case, is that the lives of innocent people are more important than a bank's lien priority.

C. U.S. BANK COULD HAVE PREVENTED THE RECEIVERSHIP BY TAKING RESPONSIBILITY FOR THE PROPERTY AFTER RECEIVING NOTICE OF THE HEALTH AND SAFETY CONDITIONS

Near the end of its brief, U.S. Bank claims to be an innocent bystander that could not do anything to prevent the Receivership. However, this could not be further from the truth. It is without question that appointing a Receiver is a drastic remedy. (*City and County of San Francisco v. Daley* (1993) 16 Cal. App. 4th 734, 744) However, that is why appointing a Receiver is such a difficult process and it is even more difficult in the context of a California Health and Safety Code § 17980.7 receivership.

What differentiates the appointment of a California Health and Safety Code § 17980.7 receiver from other receivership appointments is the detailed pre-petition notice requirements that must be followed. The specific statutory notice requirements that must be followed to appoint a California Health and Safety Code § 17980.7 receiver are codified at California Health and Safety Code §§ 17980.6 and 17980.7(c). California Health and Safety Code § 17980.6 requires that the enforcement agency post and mail a list of violations to each affected residential unit and provide a reasonable time to abate the violations. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal. 4th 905, 920.) Once the time in the California Health and Safety Code § 17980.6 Notice expires the enforcement agency must then provide three days notice to all parties with a recorded interest before filing the receivership Petition. (See California Health and Safety Code § 17980.7(c). *Id* at 921.) Thereafter, the enforcement agency Petitions a court to appoint a Receiver at a

noticed motion hearing. (*City of Crescent City v. Reddy*, (2017) 9 Cal. App. 5th 458, 464-465.)

There is no argument that U.S. Bank did not receive the pre-petition notices informing it that the Property it held an interest in was a substantial danger to public safety. Furthermore, U.S. Bank does not assert that it did not receive notice of the appointment hearing.

Therefore, U.S. Bank was fully on notice of the deplorable conditions at the Property, but it chose to do nothing despite having the authority to inspect the Property using California Civil Code § 2929.5. Or alternatively doing the legal work to appoint its own Receiver to take control of the Property using California Code of Civil Procedure § 564(b)(2).

However, as lenders always do in these cases despite receiving countless notices, U.S. Bank sat idly by and did nothing, while a property it held an interest in endangered public health and safety. Instead, of doing something to protect the lives of innocent people U.S. Bank decided it was up to the County to fight for its citizens, which the County did. Therefore, U.S. Bank as all lenders do let the enforcement agency and Receiver do all the cleanup work for them. Then after doing nothing and actually endangering lives demands a payout.

However, the appointment of Mark Adams as Receiver would not have been necessary if U.S. Bank acted responsibly and addressed the issues at the Property before the County got involved. Unfortunately, U.S. Bank chose to ignore the health and safety

dangers at the Property it had an interest in. As a result, U.S. Bank's argument that it was an innocent bystander that could do nothing to abate the issues at the property is a farce.

CONCLUSION

Despite U.S. Bank's assertion to the contrary, the decisions of a trial court in a receivership case are subject to an abuse of discretion review. Furthermore, while first in, time first in right is how lien priority usually works, health and safety receivership cases are a different animal. When the extreme circumstances presented by a property that is placed into health and safety receivership arise the public policy of protecting innocent bystanders justify lien stripping and issuing super-priority certificates.

Finally, if U.S. Bank or any other lender wanted to avoid lien stripping, or having a receiver take priority over their Deeds of Trust the solution is simple. U.S. Bank and other lenders could take responsibility for the Properties themselves. However, U.S. Bank and other lenders cannot be on notice of threats to health and safety on Property they have an interest in then sit idly by while the enforcement agency and Receiver address those issues and expect a payout for allowing threats to public health and safety that they could easily fix linger.

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CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 2,969 words, exclusive of matters that may be omitted under California Rules of Court 8.520(c)(3).

February 27, 2020

____/s/_____Ryan C. Griffith
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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 2001 Milvia Street, Berkeley, California 94704. On February 14, 2020 I served the following document(s)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF BAY AREA RECEIVERSHIP GROUP IN SUPPORT OF PLAINTIFF AND RESPONDENT; AMICUS BRIEF

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Bay Area Receivership Group's processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 27, 2020, at Berkeley, California.

____/s/_____Ryan C. Griffith
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