IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV - 7 2011

REBUILD AMERICA, INC., a Florida corporation;
REO AMERICA, INCORPORATED, a Florida corporation;
Defendants Below, Petitioners

vs.) NO.11-0592

MARK E. DAVIS and TAMMY L. DAVIS; Plaintiffs below,
Respondents
and
MIKE RUTHERFORD, Sheriff of Kanawha County;
VERA MCCORMICK, Clerk of the County Commission of
Kanawha County; and HUNTINGTON NATIONAL BANK,
Defendants Below, Respondents

PETITIONERS' SUPPLEMENTAL BRIEF

The Petitioner supplements its petition to address a bankruptcy issue in further detail and to discuss legal authority cited in the brief filed by Respondent Huntington National Bank.

I. The Bankruptcy Issue.

Petitioners and Respondent Huntington National Bank have filed competing legal memoranda on the issue whether the Kanawha County Sheriff violated the automatic stay of bankruptcy when it mailed and published a notice of the sale of the tax lien against Respondent Davises' real property. In May 2006, the Sheriff of Kanawha County first published notice of the November 17, 2006 sale. In June 2006 the Davises filed a bankruptcy petition. While the Davises were in bankruptcy and while the automatic stay of bankruptcy was in effect, the Sheriff complied with W.Va. Code §11A-3-2 by mailing and publishing a second notice of the auction of the tax lien against the Davises' real property. On November 14, 2006, after the automatic

stay ended, the Sheriff conducted the auction of the tax lien. The issue is whether the notice that the Sheriff mailed and published while the automatic stay was in place was a violation of the bankruptcy stay.

II. Petitioner's Argument.

Citing numerous cases, Petitioners argued in their Petition that under prevailing bankruptcy law, if a creditor has already commenced procedures to conduct a public sale before a bankruptcy case is filed, the creditor may take actions, including mailing and publishing notice of the sale, after the bankruptcy case is filed, if these actions are necessary to preserve the sale process. *See Petition,* section B.i., pages 14-20. In this case, if the Sheriff had not mailed and published the notice as required under W.Va. §11A-3-2, then the tax lien sale would have been out of compliance with state law and the proceeding would be ended until the following year. Under those circumstances, prevailing bankruptcy law authorizes the creditor to continue to give notices to preserve the sanctity of the sale process, as long as the sale itself does not occur while the automatic stay is in effect.

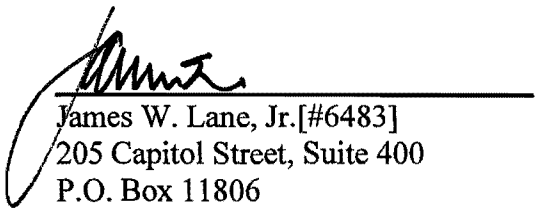
III. Respondent Huntington National Bank's Legal Authority In Support of its Argument Do Not Contradicth Petitioner's Argument.

Respondent Huntington National Bank, N.A., in its brief, addressed Petitioner's argument by stating that "[t]he facts of the present case show that the proceedings, including publication of the sale notices, which are a prerequisite to the actual sale, occurred in violation of the automatic stay." *See Respondent Huntington's Brief,* page 12. For support, the Respondent's brief cites cases, all of which are identified below. In all of these cases the creditor first scheduled a sale and first began the process of giving notice of the sale after the debtor had filed for bankruptcy. In In re Demp, 23 B.R. 239, 239 (Bankr. E.D.Pa. 1982), a bank obtained a judgment against Ms. Demp. Then Ms. Demp filed her bankruptcy petition. "[A] few weeks later", the bank

began the process of enforcing its judgment by directing the county sheriff to post Ms. Demp's property for a sheriff's sale. Id., at 240. The procedure to sell Ms. Demp's property to satisfy the bank's claim was commenced after the bankruptcy filing. In In re Franklin Mortgage & Investment Co., Inc., 143 B.R. 295, 303 (Bankr. D.C. 1992), a creditor sued Franklin Mortgage in state court seeking an order from the state court authorizing a foreclosure sale on real property of Franklin Mortgage. Id. at 297-98. Franklin Mortgage filed its bankruptcy petition in federal court at 9:03 a.m. January 6, 1992, and counsel for Franklin Mortgage notified the court and the creditor at the state court hearing on January 6 1992 of the bankruptcy filing. Subsequently, the state court issued a Final Judgment of Foreclosure and set the sale date for March 2, 1992. After the bankruptcy was filed, the foreclosure sale date was set, and notices of the sale were mailed and published. Id. at 298. In In re Ring, 178 B.R. 570 574-75 (Bankr. S.D. Ga. 1995), the Rings filed their bankruptcy case on October 27, 1993. The holder of the first priority mortgage lien against the Rings real property filed a motion for relief from the bankruptcy stay so that it could commence a foreclosure sale. The bankruptcy trustee objected to the relief, and the property remained property of the estate pending a hearing scheduled for March 1, 1994. Id. at 573. However, on February 2, 1994, the creditor began advertising the property for foreclosure even though it had not been granted relief from stay. Id. at 573.

These cases hold that a creditor cannot initiate a foreclosure sale or creditor's sale while the automatic stay is in effect. The cases do not conflict with the cases cityed by Petitioner which hold that if the sale process is already underway at the time the debtor files bankruptcy, then the creditor may continue to mail and publish notices of a sale in order to preserve the validity of the sale, notwithstanding the fact that the debtor was in bankruptcy and protected by the automatic stay.

Respectfully submitted,
Rebuild America, Inc. and
REO America Inc.,
By Counsel



James W. Lane, Jr.[#6483]
205 Capitol Street, Suite 400
P.O. Box 11806
Charleston, WV 25339
(304) 342-0081

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CERTIFICATE OF SERVICE

I, **JAMES W. LANE, JR.**, counsel for Rebuild America, Inc. and REO America, Inc., do hereby certify that service of the foregoing **PETITIONERS' SUPPLEMENTAL BRIEF** was made by mailing a true copy thereof on this 7TH day of November, 2011, by regular U.S. Mail, with postage prepaid, to the following:

Mark E. Davis
51 Woodbridge Drive
Charleston, WV 25311
Pro Se

Tammy L. Davis
51 Woodbridge Drive
Charleston, WV 25311
Pro Se

Marc J. Slotnick, Esq.
Kanawha County Attorney
Kanawha County Commissions
P. O. Box 3627
Charleston, WV 25336
Counsel for Mike Rutherford, Sheriff of Kanawha County and Vera McCormick, Clerk of the Kanawha County Commission

Herschel H. Rose, III, Esq.
Steven R. Broadwater, Esq
P. O. Box 3502
Charleston, West Virginia 25335

Christopher S. Smith, Esq.
Hoyer, Hoyer & Smith, PLLC
22 Capitol Street
Charleston, WV 25301
Counsel for Huntington Bank

Phillip B. Hereford, Esq.
Hereford & Riccardi, PLLC
405 Capitol Street
Charleston, WV 25301
Counsel for Huntington Bank

James W. Lane, Jr.