

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0292

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GLACIER BANK dba First Security Bank  
of Missoula, a Division of Glacier Bank, a  
Montana Corporation

Plaintiff and Appellee,

v.

SCOTT G. COONEY,

Defendant and Appellant.

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**APPELLANT’S OPENING BRIEF**

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On Appeal from the Montana Fourth Judicial District Court, Missoula County  
Cause No. DV-32-2019-668, The Honorable Jason T. Marks, Presiding

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## **ISSUES PRESENTED**

- 1. Whether the District Court erred in granting First Security Bank's motion for summary judgment when First Security Bank failed to provide sufficient notice prior to the disposition of the Komatsu.**
- 2. Whether the District Court erred in granting First Security Bank's motion for summary judgment when disposition of the Komatsu was not commercially reasonable.**

## **STATEMENT OF THE CASE**

*Glacier Bank v. Scott G. Cooney et al.* is a secured transactions suit concerning First Security Bank's disposition of collateral and Scott G. Cooney's liability for the deficiency to satisfy the secured obligation. This appeal is from the District Court's Order Granting Plaintiff's Motion for Summary Judgment (Case Register Document Doc. 35).

## **STATEMENT OF THE FACTS**

This case involves a secured transaction where First Security Bank, as the secured party, did not provide sufficient notification prior to the disposition of collateral to Scott G. Cooney, the debtor, and then proceeded to sell the collateral in a commercially unreasonable manner. A factual and procedural background is summarized as follows.

On June 27, 2016, Glacier Bank dba First Security Bank of Missoula (“FSB”) executed a promissory note with Scott G. Cooney (“Mr. Cooney”) in the principal amount of \$253,010.41. Doc. 21, Ex. 1. The same day, FSB executed a commercial security agreement with Mr. Cooney wherein Mr. Cooney granted FSB a security interest in collateral to include “All inventory, Chattel Paper, Accounts, Equipment and General Intangibles” to secure Mr. Cooney’s payment on the promissory note (“Security Agreement 1”). Doc. 21, Ex. 2, 1. FSB executed a second commercial security agreement with Mr. Cooney as the Borrower and Mr. Cooney’s business, Rocky Rail Services, LLC, as the Grantor to further secure Mr. Cooney’s promissory note obligation (“Security Agreement 2”). Doc. 21, Ex. 6. In Security Agreement 2, Mr. Cooney granted FSB a security interest in collateral that included a “2000 Komatsu PC400 LC-6 (Serial Number A84072) (“Komatsu”).” *Id.* In both security agreements, FSB is the lender and secured party. *Id.* At 1 and 6. The District Court found that Mr. Cooney stopped making payments on the promissory note in December of 2018, when Mr. Cooney owed a principal balance of \$234,956.24. Doc. 19, Altemus Aff. ¶¶ 6 and 9.

On July 8, 2019, FSB filed its Complaint against Mr. Cooney alleging breach of contract and unjust enrichment and sought judicial foreclosure of the collateral and a deficiency judgment against Mr. Cooney individually, together with continuing interest, costs, and attorney fees. Doc. 1.

On or about August 19, 2019, Mr. Cooney signed a voluntary repossession agreement covering the Komatsu—collateral secured under Security Agreement 2. Doc. 19, Altemus Aff., ¶ 10; Doc. 27, Ex. 4. Mr. Cooney did not waive his right to notice of the disposition of the Komatsu. *Id.*; *See also* Doc. 35, 21 (the District Court finding the repossession agreement did not waive Mr. Cooney’s right to notice).

On September 3, 2019, FSB, through counsel, sent Mr. Cooney a letter (“Notice Letter”) informing him that FSB accepted the voluntary repossession of Mr. Cooney’s Komatsu and FSB “will attempt to sell the [Komatsu] at a public sale on or after September 13, 2019.” Doc. 26, Cooney Aff., ¶¶ 4-5; Doc. 26, Ex 1. Mr. Cooney believed, based upon FSB’s September 3, 2019, letter, that FSB would sell the Komatsu through a public sale. Doc. 26, Cooney Aff., ¶ 6. FSB instead sold the Komatsu through a private sale in November of 2021. Doc 19, Altemus Aff., ¶¶ 12-13. FSB did not notify Mr. Cooney that FSB chose to dispose of the Komatsu through a private sale instead of a public sale. Doc. 26, Cooney Aff., ¶¶ 4-8. Only after Ms. Altemus had accepted a bid to sell the Komatsu for \$50,000, through a private sale, did she notify Mr. Cooney that the private sale had occurred. Doc. 26, Cooney Aff., ¶¶ 7-10; Doc. 26, Ex. 2.

On December 4, 2019, FSB filed its First Amended Complaint and included McCann Holdings, LLC and George D. Lewis as Parties bringing an additional

claim, declaratory judgment, alleging that McCann Holdings, LLC and George D. Lewis were interfering with FSB's rights as a secured party to take possession of the Komatsu and requested judicial decree of the Parties rights under Mont. Code Ann. § 30-9A-609. Doc. 12, Complaint, ¶¶ 51–55.

On July 14, 2022, FSB filed for summary judgment against Mr. Cooney and Rocky Rail Services, LLC arguing the Mr. Cooney defaulted on the promissory note and FSB was entitled to the deficiency after the sale of the collateral securing the loan. Doc. 22. Mr. Cooney responded and, pertinent to this appeal, placed FSB's compliance with Mont. Code Ann. § 30-9A-626 at issue, argued FSB did not provide commercially reasonable notice of the sale of the Komatsu, and FSB is barred from recovering a deficiency judgment due to its failure to notify Mr. Cooney or Rocky Rail Services, LLC, of the sale of the Komatsu. Doc. 25.

On March 21, 2023, the District Court held a status hearing. Doc. 30. The District Court inquired about Mr. Cooney's Answer to the Amended Complaint since one had not been filed. Without objection from FSB, Mr. Cooney requested to file an amended answer within a week of the status hearing and the Court permitted him to do so. Doc. 30. On March 28, 2023, Mr. Cooney filed his Amended Answer, Affirmative Defenses, and Demand for Jury Trial wherein he expressly placed FSB's compliance with the collection, enforcement, disposition, or acceptance of the collateral at issue pursuant to Mont. Code Ann. § 30-9A-626,

raised the affirmative defense that FSB failed to provide Mr. Cooney with commercially reasonable notice of the sale of the collateral, and demanded a jury trial. Doc. 31, Affirmative Defenses, 11.

On April 3, 2023, the District Court Ordered supplement briefing for the specific issues as follows:

The Court ORDERS the parties to submit simultaneous supplemental briefing, due Monday, April 24, 2023. The briefs should address this narrow issue: Was Mont. Code Ann. § 30-9A-613(1)(A)(iii) satisfied? Assuming it was not, what impact, if any, does deficient notification before disposition of collateral have on Mr. Cooney's indebtedness?

The Court requests that the parties provide additional briefing on the specific issue of whether the Notice Letter satisfied the UCC content requirements set forth in Mont. Code Ann. § 30-9A-613(1), taking subsections (a), (b), and (c) into account, as well as the Montana Supreme Court's holding in *Devers*. Then, assuming the Notice Letter was deficient, the Court requests that the parties brief their positions on how deficient notice affects Mr. Cooney's indebtedness, if at all.

Doc. 32, Order Requesting Supplemental Briefing, 2 and 5.

The Parties filed their respective supplemental briefs on April 24, 2023. On April 28, 2023, the District Court granted FSB's motion for summary judgment in all respects. Doc. 35. On May 26, 2023, Mr. Cooney timely appealed the District Court's summary judgment order to this honorable Court. Doc. 43.

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## **STANDARD OF REVIEW FOR THE ISSUES PRESENTED**

### **Issues 1 and 2: Standard of Review:**

“We review a district court’s summary judgment ruling de novo, applying the criteria of M. R. Civ. P. 56.” *Christman v. Clause*, 2019 MT 132, ¶ 10, 396 Mont. 142, 147, 443 P.3d 472, 475 (citing *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604; *Yorlum Props., Ltd. v. Lincoln County*, 2013 MT 298, ¶ 12, 372 Mont. 159, 311 P.3d 748). “Whether a party is entitled to judgment on the facts is a conclusion of law that this Court reviews for correctness.” *Christman*, ¶ 10 (citing *Hutzenbiler v. RJC Inv., Inc.*, 2019 MT 80, ¶ 7, 395 Mont. 250, 439 P.3d 378; *Yorlum Props., Ltd.*, ¶ 12). “Summary judgment is appropriate only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Christman*, ¶ 10 (citing Mont. R. Civ. P. 56(c)(3); *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶ 12, 325 Mont. 365, 106 P.3d 548. “The evidence, as well as all justifiable inferences drawn from it, must be viewed in a light most favorable to the non-moving party.” *Christman*, ¶ 10 (citing *Svaldi*, ¶ 12).

## **SUMMARY OF THE ARGUMENT**

When the District Court issued its *Order Granting Plaintiff’s Motion for Summary Judgment*, it incorrectly resolved material disputed facts when it concluded that FSB’s Notice Letter to Mr. Cooney satisfied the requirements of

Mont. Code Ann. §§ 30-9A-611 and 613 and concluded that the sale of the Komatsu tractor was commercially reasonable.

Mont. Code Ann. § 30-9A-613(1)(a) states,

the contents of a notification of disposition are sufficient if the notification: (i) describes the debtor and secured party; (ii) describes the collateral that is the subject of the intended disposition; (iii) states the method of the intended disposition; (iv) states the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and (v) states the time and place of the public disposition or the time after which any other disposition is to be made.

*Id.*

The Notice Letter provided by FSB for the disposition of the Komatsu is insufficient under Mont. Code Ann. § 30-9A-613(1)(a) for three (3) reasons. First, it incorrectly stated that the Komatsu would be sold at a public sale, rather than the private sale that FSB ultimately conducted. Second, the Notice Letter did not inform Mr. Cooney of the date after which the Komatsu would be sold through a private sale. Third, the Notice Letter failed to inform Mr. Cooney that he was entitled to an accounting of the unpaid indebtedness. The first two failures not only fall short of the notice requirements under Montana law, but also breach the notice term of the security agreements. Doc 21, Ex. 2, 5 and 10 subheading “Sell the Collateral.”

Mont. Code Ann. § 30-9A-613(1)(b) expressly states “[w]hether the contents of a notification that lacks any of the information set forth in subsection (1) are

nevertheless sufficient *is a question of fact.*” *Id.* (emphasis added). The three (3) insufficiencies outlined above are material disputed facts that cannot be adjudicated at summary judgment. Indeed, FSB’s Notice Letter contained seriously misleading information about the disposition of the collateral and omitted necessary statutorily prescribed information. The determination of the sufficiency of FSB’s notification must be made by the jury at trial. Thus, the District Court erred when it resolved these material disputed facts against Mr. Cooney and determined FSB provided commercial reasonable notice about the disposition of the collateral.

The District Court also erred in concluding that the sale of the Komatsu was commercially reasonable. FSB failed to meet its burden of establishing that the sale was commercially reasonable. FSB offered no evidence that its chosen method for disposing of the Komatsu, or any other collateral, was made “in the usual manner on any recognized market” and failed to establish the Komatsu sales price of \$50,000.00 was the “price current in any recognized market at the time of the disposition.” Mont. Code Ann. § 30-9A-627(2)(a)-(b). Further, Glacier Bank failed to establish that the private sale complied with “reasonable commercial practices among dealers in the type of property that was subject of the disposition.” *Id.* at § 627(2)(c). Thus, material questions of fact exist that require resolution by jury trial.

## ARGUMENT

### **1. The District Court Erred in Granting FSB’s Motion for Summary Judgment because FSB did not Provide Mr. Cooney with Commercially Reasonable Notice Prior to the Disposition of the Komatsu.**

The District Court erred in granting FSB’s motion for summary judgment because FSB did not provide Mr. Cooney with commercially reasonable notice prior to the disposition of the Komatsu. In Montana, “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.”<sup>1</sup> Mont. Code Ann. § 30-9A-610(2). “The secured party bears the burden of proving the commercial reasonableness of the sale, including the commercial reasonableness of the notification.” *First Nat. Bank of Lewistown v. Mork*, 257 Mont. 495, 498, 850 P.2d 954, 956 (1993). A secured party’s “[f]ailure to give reasonable notice precludes the secured party from recovering a deficiency judgment.” *Id*; *See also Christman*, ¶ 19 (citing *Bank of Sheridan v. Devers*, 217 Mont. 173, 177, 702 P.2d 1388, 1390 (1985)) (holding “where a creditor failed to provide a debtor with adequate notice, the creditor was precluded from recovering any deficiency judgment from the debtor.”); *Wippert v. Blackfeet Tribe of Blackfeet Indian Rsrv.*, 215 Mont. 85, 90, 695 P.2d 461, 465

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<sup>1</sup> “[V]oluntary repossession of the collateral does not waive the debtor's right to notice of resale of the collateral.” *Christman*, ¶ 16 (citing Mont. Code Ann. § 30-9A-602).

(1985) (holding, “[t]he failure of respondent to provide the notice required precludes the issuance of a deficiency judgment in this case.” *Id.*).

Additionally, “[w]hether the contents of a notification that lacks any of the information set forth in subsection (1) are nevertheless sufficient is a question of fact.” Mont. Code Ann § 30-9A-613(1)(b). When “there are no questions of fact with regards to the adequacy of or failure to give notice, a court may properly determine the adequacy of a particular notice as a matter of law.” *Christman*, ¶ 17. Put another way, where there are questions of fact about the adequacy of or failure to give notice prior to the disposition of collateral, the trier of fact must determine the adequacy of a particular notice at trial.

**A. FSB Breached the Notice Terms of the Security Agreement and Violated Mont. Code Ann. §§ 30-9A-611 and 613.**

FSB breached the notice terms of the security agreements and violated Mont. Code Ann. §§ 30-9A-611 and 613. Mont. Code Ann. § 30-9A-613 details the contents and form of the notification that FSB was statutorily instructed to provide to Mr. Cooney prior to the sale of the Komatsu. Mont. Code Ann. § 30-9A-613 states, in relevant part:

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(a) The contents of a notification of disposition are sufficient if the notification:

(i) describes the debtor and the secured party;

- (ii) describes the collateral that is the subject of the intended disposition;
  - (iii) states the method of intended disposition;
  - (iv) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
  - (v) states the time and place of a public disposition or the time after which any other disposition is to be made.
- (b) Whether the contents of a notification that lacks any of the information set forth in subsection (1) are nevertheless sufficient is a question of fact.
- (c) The contents of a notification providing substantially the information specified in subsection (1) are sufficient, even if the notification includes:
- (i) information not specified by that subsection; or
  - (ii) minor errors that are not seriously misleading.

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Mont. Code Ann. § 30-9A-613(1)(a)-(c).

Similar to the requirements of Mont Code Ann. § 30-9A-613, the security agreements with FSB required the secured party to provide Mr. Cooney and Rocky Rail Services, LLC, with notice prior to the sale of the Komatsu. Doc 21, Ex. 2, 5 and 10 subheading “Sell the Collateral.” Specifically, the security agreements state, in pertinent part,

Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, *Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made.* However, no notice need be provided to any person who, after Event of Default

occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition.

*Id.* (emphasis added).

Both the security agreements and Mont. Code Ann. § 30-9A-613 required FSB to provide Mr. Cooney with notice that informed him whether the Komatsu would be sold at a public or private sale, as well as the time and place of any public sale or the date after which a private sale would occur. To do otherwise, renders the notice commercially unreasonable. Mont. Code Ann. §§ 30-9A-603 and 610(2); *See also First Nat. Bank of Lewistown*, 257 Mont. At 498. Here, the Notice Letter that FSB provided to Mr. Cooney failed to meet the requirements of either Montana law, or the security agreements. It is undisputed that on September 3, 2019, Glacier Bank provided Mr. Cooney with the following notification about the sale of the Komatsu,

Scott Cooney c/o David B. Cotner  
COTNER LAW, PLLC  
2700 Radio Way, Missoula, MT 59808

Re: First Security Bank v, Scott Cooney et al., Loan #3506161481045

Dear Mr. Cooney and Mr. Cotner:

This firm represents First Security Bank of Missoula with respect to the matter referenced above. First Security Bank of Missoula has accepted the voluntary repossession of Mr. Cooney's 2000 Komatsu PC400 LC-6, serial number A84072, pursuant to the terms of the Security Agreement executed by Mr. Cooney because of his failure to

make payments due under his promissory note. ***You are hereby notified that First Security Bank of Missoula will attempt to sell the said merchandise at a public sale on or after September 13, 2019.***

Should the proceeds of said sale not be sufficient to pay all such amounts due to the Bank, Mr. Cooney will remain liable for any deficiency balance. Mr. Cooney will be obligated to pay all costs of the suit to collect the deficiency, including reasonable attorney's fees.

Under the Uniform Commercial Code, Mr. Cooney has the right to redeem the merchandise prior to the Bank's disposing of the merchandise by making full payment of his obligation to First Security Bank of Missoula together with any and all costs included. The net payoff as of today's date is \$243,617.77 (per diem is \$32.19), not including costs.

The amount of debt owed by Mr. Cooney is set out above. Unless Mr. Cooney disputes the validity of the debt, or any portion of it, on or before September 13, 2019, the debt will be assumed to be valid. If you notify the undersigned in writing on or before September 13, 2019, the undersigned will obtain and mail to you verification. First Security Bank and this firm are attempting to collect a debt, and any information obtained will be used for that purpose.

Sincerely,

Datsopoulos, MacDonald & Lind, PC.

Doc. 26, Ex. 1 (emphasis added).

Despite FSB providing Mr. Cooney with this Notice Letter stating that the Komatsu would be sold at a *public sale* on or after September 13, 2019, FSB ultimately decided to forgo a public sale and sold the Komatsu in a private sale in November of 2021. Doc. 35, Order, p. 16-17; Doc. 19, Altemus Aff., ¶ 12.

As a preliminary matter, FSB has presented no credible evidence that it provided either Mr. Cooney or Rocky Rail Services, LLC with additional notice once FSB decided to dispose of the Komatsu through a private sale rather than a public one described in the September 3, 2019, Notice Letter. Nor has FSB presented evidence that it provided Mr. Cooney with notice of a date after which that private sale would occur—as required by Mont. Code Ann § 30-9A-613 and the security agreements. To the contrary, the Affidavit of Mr. Cooney and Ms. Altemus’s email to Mr. Cooney show that Mr. Cooney was only informed of FSB’s private sale of the Komatsu sometime after FSB accepted a bid for its private purchase. Doc. 26, Cooney Aff., ¶¶ 5-9.

**i. FSB Never Notified Mr. Cooney that It Intended to Dispose of the Komatsu through a Private Sale.**

FSB never notified Mr. Cooney that it intended to dispose of the Komatsu through a private sale. The District Court correctly found that the September 2019 Notice Letter stated that the Komatsu would be sold at a public sale. The District Court nevertheless found that FSB met the requirements of Mont. Code Ann. § 30-9A-613 because at the time FSB sent the Notice Letter to Mr. Cooney, FSB *intended* to conduct a public sale. Doc. 35, Order, p. 16. However, the District Court’s reasoning undermines the purpose of Mont. Code Ann. § 30-9A-613, to provide the debtor with notice of future sales of the collateral and the options to avoid the loss of the collateral. *Id.*; *Devers*, 217 Mont. 173, 176–77.

Once FSB changed its intended method of disposition from public sale to private sale Montana law required FSB to provide subsequent notice that stated the correct intended method of disposition. Mr. Cooney’s position is supported by the *Devers* Court where it found, “[i]n order for the manner of disposition of the collateral to have been commercially reasonable and fair to debtor, notice of these subsequent sales should also have been provided.” *Devers*, 217 Mont. at 177. The notice requirements of Mont. Code. Ann. § 30-9A-613 are not excessively burdensome and can reasonably be accomplished with a single paragraph of text. Further, Mont. Code. Ann. § 30-9A-613 provides a form, that if followed correctly, provides sufficient notice. The record clearly establishes that FSB did not conduct the public sale described in their Notice Letter and did not provide Mr. Cooney with notice of their intention to conduct a private sale of the Komatsu. Ultimately, FSB bears the burden of proving that the sale of the Komatsu was commercially reasonable. *Devers*, 217 Mont. 173 at 176. That includes not only price and method of sale, but also notice to the debtor. *Id.* Undisputed evidence shows that FSB’s Notice Letter is insufficient because it did not provide the information required under Mont. Code Ann. § 30-9A-613(1)(a)(iii) raising material disputed facts that must be determined by the trier of fact.

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**ii. FSB did not Notify Mr. Cooney of a Time After which any Other Disposition of the Komatsu was to be Made.**

FSB did not notify Mr. Cooney of a time after which any other disposition of the Komatsu was to be made as required under Mont. Code Ann. § 30-9A-613(1)(a)(v). The District Court incorrectly found that because FSB's Notice Letter informed Mr. Cooney that it would dispose of the Komatsu at a public sale on or after September 3, 2019, FSB satisfied the requirements of Mont. Code Ann. 30-9A-613 (1)(a)(v) which requires the secured party to "state[] the time and place of a public disposition or the time after which any other disposition is to be made." *Id.*; Doc. 35, Order, p. 19. As FSB's Notice Letter explicitly stated that it would dispose of the Komatsu at a public sale, it does not follow that FSB provided Mr. Cooney with the "time after which any other disposition is to be made." Mont. Code Ann. 30-9A-613(1)(a)(v). FSB's Notice Letter makes no mention of an intention of selling the Komatsu through a private sale. Therefore, for a second reason, FSB's Notice Letter is insufficient, and material disputed facts exist.

**iii. FSB did not provide Mr. Cooney with Notice that he was Entitled to an Accounting of the Unpaid Indebtedness and did not State the Charge, if any, for an Accounting.**

FSB did not provide Mr. Cooney with notice that he was entitled to an accounting of the unpaid indebtedness and did not state the charge, if any, for an accounting as required under Mont. Code Ann. 30-9A-613(1)(a)(iv). The District Court erred in concluding that FSB's Notice Letter met the requirements of Mont.

Code Ann. 30-9A-613(1)(a)(iv), which requires that the notice “state[] that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting...” *Id.* In this case the District Court expressly found “...that the Notice [l]etter was devoid of any such statements.” Doc. 35, Order, p. 18.

Despite this fact, the District Court found that FSB satisfied the requirements of Mont. Code Ann. 30-9A-613(1)(a)(iv) because the court found “Mr. Cooney had acknowledged the amount of the debt via the Repo Agreement, which showed Mr. Cooney’s loan balance totaled \$234,956.25 as of August 19, 2019” and “the Notice Letter also stated that ‘the net payoff as of today’s date is \$243,617.77 (per diem \$32.19), not including costs.’” Doc. 35, Order, p. 18.

Mont. Code Ann. 30-9A-102(1)(d) defines an Accounting to mean:

- (d) "Accounting", except as used in "accounting for", means a record:
  - (i) authenticated by a secured party;
  - (ii) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and
  - (iii) identifying the components of the obligations in reasonable detail.

*Id.*

Neither the Voluntary Repossession agreement, nor the Notice Letter, satisfy the requirements for an “accounting” under Article 9A. Neither document includes the aggregate unpaid secured obligations. The Voluntary Repossession Agreement

simply lists the loan balance and while the Notice Letter lists a “net payoff” amount, it expressly states that the amount listed does not include costs. Doc 27. Errata to Altemus Affidavit, Ex. 4, p.1; Doc. 26, Affidavit of Scott Cooney, Ex. 1, p 1. Additionally, neither document identifies the components of the obligation in reasonable detail, as required by Mont. Code Ann. 30-9A-102(1)(d)(iii). Neither document identifies how much of the obligation is principle, interest, or fees; and the Notice Letter indicates that there are additional undescribed costs not listed in the balance. Because the Notice Letter neither informed Mr. Cooney that he was entitled to an accounting of the unpaid indebtedness, nor contained the same information as an accounting, it did not satisfy the requirements of Mont. Code Ann. § 30-9A-613(1)(a)(iv). Thus, for a third and final reason, material disputed facts exist as to the sufficiency of FSB’s notice of disposition.

The District Court erred when it granted summary judgment in favor of FSB because material facts exist as to whether the contents and form of FSB’s notification before its disposition of the collateral complied with the requirements of the security agreements or Montana law. Accordingly, Mr. Cooney respectfully requests the Court to reverse the District Court’s Order on Summary Judgment in favor of FSB and remand the matter back to the District Court.

**B. *Devers Controls.***

This case is analogous to *Bank of Sheridan v. Devers*, 217 Mont. 173, 177

(1985) where the Court held the bank's notice was deficient which barred the bank from obtaining a deficiency judgment. In *Devers*, Devers executed two promissory notes to the bank of Sheridan. *Id.* at 174. The notes were secured by Devers' farm machinery, equipment and livestock. *Id.* Devers subsequently defaulted on the notes. *Id.* The bank repossessed the collateral and sold it at various sales over a period of time. *Id.* The written notice provided by the bank to Devers for the first sale contained the wrong date and failed to state that sealed bids were to be submitted. *Id.* at 176. The bank failed to provide Devers with notice of the subsequent sales of collateral. Once the bank completed the sale of all the collateral, they sought a deficiency judgment against Devers for the amounts remaining under the promissory notes. *Id.* at 175.

Similar to *Devers*, FSB failed to provide Mr. Cooney with the statutorily required notice of the sale of the Komatsu. FSB provided Mr. Cooney with notice of their intention to sell the Komatsu on September 3<sup>rd</sup> of 2019. Doc. 26, Affidavit of Scott Cooney, Ex. 1, p.1. As discussed above, the Notice Letter did not inform Mr. Cooney that the Komatsu would be sold in a private sale, it did not provide him with a date after which the private sale would occur, and did not notify him that he was entitled to an accounting of the unpaid indebtedness. Additionally, the sale of the Komatsu did not occur until sometime in November of 2021, more than two years after the September 3<sup>rd</sup> 2019, Notice Letter.

In *Devers*, the Supreme Court of Montana recognized that notice of the sale of collateral does more than simply keep the debtor informed, but provides them with options with regard to the collateral stating:

[f]inally, Bank failed to provide Devers with notice of any sale held subsequent to November 24, 1982. In order for the manner of disposition of the collateral to have been commercially reasonable and fair to debtor, notice of these subsequent sales should also have been provided. As time passed, Devers might have found himself in a more stable position and thus able to purchase some of his own equipment.

*Devers*, 217 Mont. 173, 176–77.

Similarly, as over two years passed between the September 3, 2019, Notice Letter that stated the Komatsu would be sold via public sale and the November 2021 private sale of the same—if sufficiently informed—Mr. Cooney may have endeavored to purchase the Komatsu or funded repairs that Ms. Altemus’s Affidavit alleges were suggested by the potential buyers to increase the sales price. Doc 19, Altemus Aff. ¶ 12. But FSB failed to comply with Mont. Code Ann. § 30-9A-613 and deprived Mr. Cooney of taking reasoned action. *Devers* is still good law and its reasoning is sound. The District Court erred when it found *Devers* is distinguishable from the present case. *Devers* and similar cases since have signaled to secured parties for almost thirty years that the Montana Supreme Court requires secured party’s to strictly comply with the notice requirements under Article 9 and now 9A. See *Christman*, ¶¶ 16–17 and 19 (citing *Devers*, 217 Mont. 173, 177)

(where a creditor failed to provide a debtor with adequate notice, the creditor was precluded from recovering any deficiency judgment from the debtor).

**C. The District Court erred in Concluding the Notice Letter was not Seriously Misleading.**

The District Court erred in concluding that the Notice Letter was not seriously misleading. FSB's only notification to Mr. Cooney stated that FSB intended to dispose of the Komatsu through a public auction rather than a private sale. This incorrect information is seriously misleading. A public auction would allow Mr. Cooney the opportunity to attend and bid upon the Komatsu, while a private sale would not. Additionally, Mont. Code Ann. § 30-9A-613(1)(a)(v) requires a secured party to provide the debtor with the time and place of a public sale. By informing Mr. Cooney that FSB intended to dispose of the collateral through a public sale, FSB misled Mr. Cooney into believing that FSB would proceed with a public sale. FSB never corrected this information with a subsequent notice. Mont. Code Ann. § 30-9A-613(1)(a)(v) requires FSB to notify Mr. Cooney about the time and place of the public disposition. By informing Mr. Cooney that the Komatsu would be sold at a public sale, FSB misled Mr. Cooney into believing that he would be provided with the time and place of the sale before it occurred. *Id.* Sophisticated lenders and secured parties like FSB are not permitted to provide notification to their debtor's that are seriously misleading. Mont. Code Ann. § 30-9A-613.

## **2. FSB's Disposition of the Komatsu was not Commercially Reasonable.**

FSB's disposition of the Komatsu was not commercially reasonable. When, an "action aris[es] from a transaction, other than a consumer transaction, in which the amount of a deficiency ... is in issue," and the debtor has placed the secured party's compliance with the provisions of this part of the UCC in issue, "the secured party has the burden of establishing that the ... disposition ... was conducted in accordance with this part." *Colonial Pac. Leasing Corp. v. Gallatin Asphalt, Inc.*, No. CV 10-15-BUCSO, 2011 WL 13086564, at \*3 (D. Mont. Apr. 28, 2011) (quoting Mont. Code Ann. § 30-9A-626). "The burden of proving that the sale of repossessed collateral is commercially reasonable rests on the seller." *Id.* at \*4 (quoting *Auto Credit, Inc., v. Long*, 971 P.2d 1237, 1239 (Mont. 1998) (citations omitted)). "The reasonableness of a sale is to be determined on a case-by-case basis, and should take into consideration the totality of the circumstances." *Id.* (citations omitted). Mont. Code Ann. § 30-9A-627 states, in pertinent part,

\*\*\*

- (2) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
- (a) in the usual manner on any recognized market;
  - (b) at the price current in any recognized market at the time of the disposition; or

(c) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

\*\*\*

*Id.*

Here, FSB offered only a legal conclusion that “the method of sale and price received were commercially reasonable.” Doc, 19, Altemus Aff., ¶ 14. FSB offered no evidence that its chosen method for disposing of the Komatsu, or any other collateral, was made “in the usual manner on any recognized market” and failed to establish the Komatsu sales price of \$50,000.00 was the “price current in any recognized market at the time of the disposition.” Mont. Code Ann. § 30-9A-627(2)(a)-(b). Further, FSB failed to establish that the private sale complied with “reasonable commercial practices among dealers in the type of property that was subject of the disposition.” *Id.* at § 627(2)(c).

FSB offered no third-party documents or affidavits to corroborate its own self-serving testimony from its collections officer employee. Doc. 19, Altemus Aff., ¶ 2. FSB offered no evidence that Ms. Altemus is qualified to opine on what is commercially reasonable within the UCC or that she is an expert in heavy equipment sales and appraisals. Further, FSB offered no evidence about how the private sale was conducted or how bids were solicited through its unnamed

“excavation and equipment industry professional.” *Id.* at ¶ 12. The only additional information FSB provides is the assertion from Ms. Altemus that:

FSB received three bids from Great Falls, Victor and Missoula. All parties referred to the need for extensive repairs and likelihood of yet unknown repairs, including:

- a. repairing 4 cracks in the boom;
- b. replacing the bottom end of the shear as it was worn down approximately 2 inches;
- c. replacing seals in all hydraulic cylinders; and
- d. repair of wrinkled up belly pans on the undercarriage exposing evidence of many oil leaks.

*Id.*

However, the above quoted assertion is merely an inadmissible hearsay statement from Ms. Altemus asserting what other individuals allegedly stated. Such statements cannot be relied upon at summary judgment. *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 39, 344 Mont. 278, 292, 187 P.3d 639, 649. (“Affidavits made without personal knowledge and based on hearsay evidence should not be considered in a motion for summary judgment.”).

Additionally, FSB’s disposition of the Komatsu was not commercially reasonable because it failed to provide Mr. Cooney with commercially reasonable notice of the disposition of the Komatsu. *Supra*, Section 1. A. “The secured party bears the burden of proving the commercial reasonableness of the sale, including the commercial reasonableness of the notification.” *First Nat. Bank of Lewistown*, 257 Mont. at 498.

For the reasons stated above, material disputed facts exist about the commercial reasonableness of the sale of the Komatsu and FSB is not entitled to judgment as a matter of law. The District Court erred in granting FSB's motion for summary judgment.

### **CONCLUSION**

The District Court erred in granting FSB's motion for summary judgment as genuine issues of material fact exist. FSB failed to provide statutorily or contractually sufficient notice to Mr. Cooney or Rocky Rail Services, LLC, prior to selling the Komatsu through a private sale. The only notice provided by FSB stated the wrong method of disposition, failed to state the date after which any private sale would occur, and failed to state that Mr. Cooney was entitled to an accounting of the unpaid indebtedness. Mont. Code Ann. §30-9A-613(1)(b) makes clear that "[w]hether the contents of a notification that lacks any of the information set forth in subsection (1) are nevertheless sufficient is a question of fact." *Id.* As the Notice Letter lacked the required information, a determination of sufficiency of the notice should be reserved for the jury at trial.

Additionally, the FSB failed to meet its burden of establishing that the sale of the Komatsu was commercially reasonable. These factual issues preclude the granting of summary judgment in FSB's favor against either Mr. Cooney or Rocky Rail Services, LLC. Accordingly, Mr. Cooney respectfully requests that this court

## CERTIFICATE OF SERVICE

I, Tyson Allen McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-05-2023:

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