IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS TRUSTEE ON BEHALF OF THE HOLDERS OF THE HARBORVIEW MORTGAGE LOAN TRUST MORTGAGE LOAN PASS-THROUGH CERTIFICATES, SERIES 2006-12,
Appellant,

vs.

TIM RADECKI
Respondent,

Supreme Court No. 71405

District Court Case No. A-13-676574-C

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Jim Crockett, District Judge
District Court Case No. A-13-676574-C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Appellant Wells Fargo Bank, N.A., as Trustee, on Behalf of the Holders of the Harborview Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-12 ("Wells Fargo"), is a wholly-owned subsidiary of Wells Fargo & Company. Berkshire Hathaway Inc. is a publicly held corporation that owns 10% or more of Wells Fargo & Company's common stock. There is no other person or entity that owns more than 10% of Wells Fargo & Company's common stock.

McCarthy & Holthus filed this judicial foreclosure lawsuit on behalf of Wells Fargo and obtained a judgment on a motion for summary judgment. Respondent, Tim Radecki, subsequently moved to intervene in the case as a plaintiff-in-intervention. Sylvia Semper and Anthony Kaye of Ballard Spahr LLP substituted as counsel on appellant's behalf before the district court. Ms. Semper and Mr. Kaye also appear on appellant's behalf in this Court.

Dated: December 21, 2017.

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I. SUMMARY OF REPLY POSITION

Through this judicial foreclosure action, Wells Fargo sought and obtained a judgment identifying the priority of the interests in the Property and permitting Wells Fargo to foreclose upon the first-position Deed of Trust securing a loan of more than $190,000. Failing to appear and defaulting in the judicial foreclosure action, the Cambridge Heights community association ("Cambridge") ignored and evaded the judicial process and raced to sell the Property (due, in large part, to Cambridge's belief that the foreclosure would not extinguish Wells Fargo's Deed of Trust and NAS's desire to maximize its recovery of fees). Nevertheless, following a bench trial, the district court entered judgment in favor of Respondent Tim Radecki.

The district court erred by (i) failing to apply the sliding scale analysis set forth in *Golden*, particularly in light of the decision in *Nationstar Mort., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (2017), (ii) misinterpreting the statutory requirements under NRS Chapter 116, (iii) requiring Wells Fargo to affirmatively prove that Mr. Radecki engaged in or benefited from established fraud, oppression or unfairness, (iv) finding that Cambridge transferred a fee simple interest despite the plain language of the foreclosure deed, and (v) finding that the HOA sale did not constitute an involuntary fraudulent transfer under the Uniform Fraudulent Transfer Act.

First, the HOA sale should be set aside. Mr. Radecki paid only $4,000 for the Property, which is approximately 7% of the taxable value of the Property (which is generally less than the fair market value of the property). As such, the HOA sale was for a grossly inadequate price. Therefore, Wells Fargo need only submit very slight evidence of unfairness, fraud or oppression to invalidate the sale.

NAS's conduct of the sale was fraught with unfairness and irregularities. NAS conducted the sale after this Court's entry of default against Cambridge and a mere four days before this Court conducted a hearing and granted Wells Fargo's motion for summary judgment. NAS, aware of the lis pendens and operating under the belief that the Deed of Trust would remain on the Property, proceeded with the sale under circumstances that would chill bidding and for the sole purpose to increase and recover additional and unnecessary fees.

NAS and Cambridge sought to minimize the amount it recovered at the HOA sale. As a matter of its own policy and convenience, NAS sought nothing more than the amount owed to Cambridge plus NAS's own fees and collection costs. Knowing that it would be unable to recoup its fees through this judicial foreclosure proceeding, NAS failed to advise Cambridge of the judicial action while encouraging Cambridge to proceed with the sale. NAS made no attempt to maximize the purchase price of the Property at the sale, instead seeking to obtain

just enough to cover Cambridge's assessments and NAS's additional and unnecessary fees and expenses.

Put simply, under the belief that Wells Fargo's Deed of Trust was senior and in an attempt to increase and recover additional and unnecessary fees, NAS and Cambridge ignored these judicial proceedings, defaulted in this case, and raced to sell the Property.

NAS also failed to comply with the applicable statutory scheme. NAS prematurely recorded its Notice of Delinquent Assessment Lien with less than six months of assessments due. Thus, at the outset, the sale violated the provisions of NRS Chapter 116.

Mr. Radecki does not dispute any of these findings. Rather, Mr. Radecki argues that Wells Fargo must establish that he (not NAS and/or Cambridge) caused or knew of unfairness, oppression or fraud in the HOA sale process. That is not the standard set forth in *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), or in the most recent decision by the Nevada Supreme Court in *Nationstar Mort., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (2017) ("*Shadow Canyon*").

In *Shadow Canyon*, the Nevada Supreme Court followed the sliding scale analysis set forth in *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963). Thus, in light of the sale price of less than 7% of the taxable value of the Property, Wells

Fargo need only establish very slight evidence of unfairness, oppression or fraud. As discussed in Wells Fargo's Opening Brief, there is sufficient evidence to show that the HOA sale was unfairly conducted which resulted in the grossly inadequate sale price.

Second, Mr. Radecki is not a bona fide purchaser. Mr. Radecki admitted at trial that there had to be problems with the HOA sale because the price he paid was so low, and he believed the price would have been higher if he were obtaining clear title. In addition to title issues, Mr. Radecki was specifically aware of Wells Fargo's Deed of Trust and had constructive notice of the pending judicial foreclosure. In fact, Mr. Radecki expressly noted the existence of the Deed of Trust, and the potential title issues, in a subsequent lease agreement.

Third, under the express language of the foreclosure deed, Cambridge conveyed only its lien interest to Mr. Radecki.

Lastly, the HOA foreclosure sale should be invalidated as an involuntary fraudulent transfer.

A. The Conduct of Cambridge and NAS Evidence Unfairness and Oppression.

Mr. Radecki does not challenge (or even address) any of the facts established in Wells Fargo's Opening Brief. Rather, Mr. Radecki argues that there are no facts to show any unfair, fraudulent, or oppressive conduct on the part of Mr. Radecki (as opposed to NAS and Cambridge). Resp. Answ. Br., p. 8. That is

not the standard under *Shadow Wood* or *Shadow Canyon*.

In consideration of the grossly inadequate sale price, the Court should invalidate the sale due to evidence of unfairness and oppression and the existence of irregularities in the foreclosure process that resulted in the low price. "[E]ven a slight irregularity in the foreclosure process coupled with a sale price that is substantially below fair market value may justify or even compel the invalidation of the sale." *Id.* An extremely small price renders a sale inherently suspect and "where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989, 995 (1963) (emphasis added). This approach was re-affirmed by this Court in *Shadow Canyon*. 133 Nev. Adv. Op. 91, at 14.

Following the sliding scale in *Golden*, the federal district court in *Zyzzx2 v. Dixon*, noted that, when the price is unreasonably low, "courts in equity may invalidate a sale upon a showing of **any slight defect** in the sale." 2016 U.S. Dist. LEXIS 39467, at *12 (D. Nev. March 25, 2016) (emphasis added). Citing several other courts, including the United States Supreme Court, the federal district court determined that, when the price is inadequate, even the slightest irregularities or unfairness justify setting aside a sale. *Id.* at *12 (quoting *Ballentyne v. Smith*, 205 U.S. 285, 290 (1907)).

In the present case, in addition to the grossly inadequate purchase price, the actions of Cambridge and of NAS in the conduct of the HOA sale evidence unfairness, oppression, or fraud, that -- by Mr. Radecki's own admission[1] -- directly impacted the sales price.

NAS and Cambridge intentionally evaded the judicial process and went forward with the HOA sale despite defaulting in this judicial foreclosure proceeding and despite the recorded lis pendens on the Property. Rather than enter an appearance in the judicial foreclosure, where it could easily have asserted a claim based on its lien, Cambridge conducted its sale four days before the hearing on Wells Fargo's motion for summary judgment. NAS failed to inform Cambridge of the existence of the lawsuit, that the district court had defaulted Cambridge, that a lis pendens had been recorded against the Property, and that Wells Fargo had obtained summary judgment against Cambridge. (AA2 367, 370-372, 395-398; AA3 524, 531, 533, 585.)

Instead of participating in these proceedings, NAS encouraged Cambridge to proceed with the wholly unnecessary non-judicial foreclosure process in order to charge and recoup additional fees; something it would not have been able to do had

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[1] Mr. Radecki testified, "I knew there was a risk because of the price I was paying for the property. (AA2 445). He also testified that "I knew there something to that effect [that Wells Fargo's lien may have continued to encumber the property], and that's why the price was what it was." (AA2 456.)

Cambridge participated in the judicial foreclosure. (AA3 524, 531, 533, 585; AA2 367, 396-398.)

NAS took these actions, in large part, because it believed that Wells Fargo's Deed of Trust was senior to Cambridge's lien. In fact, NAS advised Cambridge (and routinely advised other HOAs) that a judicial foreclosure could eliminate Cambridge's assessment lien. (AA2 419, 468-469; AA3 493-494, 672.) NAS and Cambridge (and even Mr. Radecki) believed that Wells Fargo's Deed of Trust would remain on the Property following the HOA's foreclosure sale. This alone directly impacted the sale price.

In addition, NAS operated under the mistaken belief that it was entitled to all of its fees and expenses from the proceeds of the HOA sale regardless of the various priorities and interests in the Property. (AA2 379; AA3 488, 492-493.) NAS believed that it could pay its fees and expenses first. That mistaken belief drove NAS to aggressively encourage Cambridge to pursue the HOA sale over participation in the judicial foreclosure.

NAS was also aware that it would lose its opportunity to conduct the HOA sale and recoup its fees and costs if it did not rush to complete the foreclosure before October 1, 2013. Mr. Yergensen admitted that he was aware of the 2013 amendments to NRS Chapter 116 that prevented an HOA from conducting a

foreclosure after a lender records a notice of default.[2] (AA3 484-485.) Mr. Yergensen understood that this amendment was intended to prevent an HOA from foreclosing while the lender pursued its foreclosure. (*Id*.) Thus, NAS knew the August sale was its last chance to conduct the foreclosure and collect its fees from the proceeds.

Neither Cambridge nor NAS had any incentive to maximize the sales price (or resolve the lien issues in the judicial foreclosure proceeding) because both believed that the Property would be sold subject to the Deed of Trust, and, as long as the price equaled or exceeded the lien amount, they would both recoup the amounts owed to them. Thus, NAS sought to obtain only the minimal amount sufficient to cover Cambridge's past due assessments and its own increased fees and expenses. NAS testified that it preferred to sell properties for no more than the amount necessary to cover the HOA charges and NAS's own fees and expenses in order to avoid dealing with excess proceeds. (AA3 485-487; 495-496.)

In other words, NAS believed that it could complete the non-judicial foreclosure, recover its fees and costs through an HOA sale at a minimal price, and have no impact on Wells Fargo's Deed of Trust. NAS understood that it could not have obtained this result if Cambridge participated in the judicial foreclosure. Had

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[2] Although the 2013 amendments became effective on October 1, 2013, NAS knew about the legislative prohibition (A.B. 273 approved June 12, 2013) at the time of the HOA sale in August 2013.

this matter been determined in this judicial foreclosure proceeding, NAS would not have been able to recover its fees and costs (and its fees would have been substantially less), Cambridge would have received only the super-priority portion of its lien (the same amount to which it was entitled under the HOA sale – *see Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. Adv. Rep. 35, 2016 Nev. LEXIS 364, at *14 (2016), and the Property would have been sold at auction for close to fair market value.

In addition to this unfair conduct, NAS's foreclosure was flawed from the outset for failure to comply with NRS 116.3116, which provides that the "period of priority of the lien ***must not be less than the 6 months*** immediately preceding the institution of an action to enforce the lien." NRS 116.3116(2)(c)(2011 version)(emphasis added). NAS commenced its foreclosure when it recorded the NODAL on July 25, 2012. (AA2 392; AA3 508.) At that time, Ms. Munar's account had been delinquent for only 5 months and she owed less than 6 months' worth of $35 assessments. (AA2 376-378, 392; AA3 571 (listing the number of delinquent periods as five and establishing the dates of delinquency as "3/01/2012-7/30/2012").) This further infects the validity of all subsequent notices. By filing a premature notice of delinquent assessment lien, NAS ensured both the notice of default and election to sell and the sale itself were untimely.

Cambridge and NAS raced to sell the Property in order to recover the

increased fees and expenses that could not have been recovered had Cambridge participated in the judicial foreclosure. As Mr. Radecki admitted, the sale price reflects everyone's understanding that the Property remained encumbered by Wells Fargo's Deed of Trust and other risks associated with the sale. Indeed, the understanding by third party investors and by NAS that secured lenders may have the potential to foreclose drove the low sale price at the HOA sale.

The purpose of NRS Chapter 116 is not effectuated by permitting an end run around a judicial foreclosure; NRS Chapter 116 is designed to make non-foreclosing lenders pay the HOA dues. Here, lender was foreclosing and would have arranged payment of the priority piece and then become liable for dues on a monthly basis.

B. Mr. Radecki is Not a Bona Fide Purchaser.

The district court erred by requiring Wells Fargo to prove that Mr. Radecki engaged in or benefitted from established fraud, oppression or unfairness. That is not the correct legal standard. A bona fide purchaser has the burden to prove that it purchased a property for value and **without notice of a competing or superior interest** in the same property. *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 247 (1979) (emphasis added).

At trial, Mr. Radecki did not establish any facts to show that he is a bona fide purchaser. Mr. Radecki had knowledge of Well Fargo's competing interest

and of the possibility that Wells Fargo's Deed of Trust continued to encumber the Property.

First, Wells Fargo recorded its lis pendens more than six months prior to the HOA sale, putting Mr. Radecki on constructive notice of Wells Fargo's interest in the Property, and the pending judicial foreclosure action. (AA3 607-610.) *See Nationstar Mortgage, LLC v. SFR Invs. Pool 1*, LLC, 2016 U.S. Dist. LEXIS 57964, at *15 (D. Nev., April 29, 2016) (purchaser at an HOA sale was not a BFP because it had constructive notice of the deed of trust at the time of the HOA sale and was aware that litigation was likely).

Second, Mr. Radecki testified that he was aware of the legal and title issues surrounding HOA foreclosure sales and knew that he would not acquire clear title to the Property. (AA2 441, 448-449.) At the time he purchased the Property at issue, Mr. Radecki believed, "I did not have the title to that property." (AA3 454.) Mr. Radecki testified that he "knew that there was something to th[e] effect [of a deed of trust encumbering the property] and that is why the price was what it was. (AA3 456.) Mr. Radecki further testified, "I knew there was a risk because of the price that I was paying for the property." (AA3 445).

In addition, the lease agreement between Mr. Radecki and his tenants indicates that Mr. Radecki understood he purchased the Property subject to the Deed of Trust. Specifically, the parties stipulated at trial that the lease stated

Mr. Radecki purchased the Property at an HOA foreclosure and there may be lien and pending litigation issues still to be resolved. (AA3 459-461, 637). The evidence clearly shows that Mr. Radecki purchased the Property with knowledge of the competing and potentially superior interest and with notice of the defects in the sale process.

Mr. Radecki is not a good faith purchaser and cannot reasonably claim he believed he was acquiring clear title to the Property.

C. The Foreclosure Deed Does Not Transfer Ownership of the Property.

Mr. Radecki does not dispute that the language of the foreclosure deed in this case does not satisfy NRS 116.31164. It conveys Cambridge's interest in the Property, rather than Ms. Munar's ownership interest:

> Nevada Association Services, Inc. as agent for Cambridge Heights, a planned community does hereby grant and convey, but without warranty express or implied, to: Tim Radecki (herein called Grantee)…all its right, title and interest in and to [the Property].

(AA3 542-544) (emphasis added).

Cambridge did not have an ownership interest in the Property at any point in the foreclosure process. Cambridge merely held a lien against the Property, whereas Ms. Munar continued owning the Property.

Notably, in order to avoid Wells Fargo's fraudulent transfer claim, Mr. Radecki argues that it did not receive Ms. Munar's interest in the Property, but rather a transfer from Cambridge. As the foreclosure deed makes clear, this

transfer was of only a lien interest and was not the interest of the unit owner. The mere transfer of the HOA's lien to Mr. Radecki did not extinguish the Deed of Trust.

D. The HOA Sale is a Voidable Fraudulent Transfer.

Again, Mr. Radecki does not dispute the facts set forth in Wells Fargo's Opening Brief to support its claim that the HOA sale was an avoidable fraudulent transfer. Rather, Mr. Radecki argues, without citing any supporting evidence, that the Property was not an "asset" and that the transfer was not made by the debtor. Mr. Radecki's arguments are contrary to the language and intent of the UFTA.

First, Mr. Radecki argues that the Property is not an "asset" within the meaning of the UFTA. NRS 112.150(2)(a) defines the term "asset" to exclude "[p]roperty to the extent it is encumbered by a valid lien." The purpose of this carve-out is to prevent a creditor from unwinding a transfer of property that is fully encumbered by a second creditor's lien. In this scenario, due to the presence of the second creditor's lien, the first creditor would not have been able to execute against the property even if it had not been transferred. Since the transfer has no meaningful effect on the first creditor's rights, the UFTA does not permit the first creditor to avoid the transfer. *See* Uniform Fraudulent Transfers Act § 1 cmt. 2 ("The laws protecting valid liens against impairment by levying creditors…are limitations on the rights and remedies of unsecured creditors, and it is therefore

appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.").

This was not the case here. Prior to the transfer in this case (*i.e.*, the HOA sale) Wells Fargo would have been entitled to foreclose against the Property. Therefore, Wells Fargo can sue to avoid the HOA sale, since the HOA sale prevented Wells Fargo from executing against the Property, even during the pending judicial foreclosure proceeding. *See Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 892 (7th Cir. 1988) ("Fraudulent conveyance law protects creditors from last-minute diminutions of the pool of assets in which they have interests."). The Court is not required to consider Wells Fargo's own deed of trust in deciding whether the Property was "encumbered by a valid lien." And in any event, the result of the HOA sale (at least under Mr. Radecki's argument) was that the deed of trust was extinguished. Therefore, the Property was not encumbered for purposes of NRS 112.150(2)(a) and constituted an asset for purposes of the UFTA.

Mr. Radecki further argues that the transfer was not made by the debtor but by the HOA. This is nonsensical. On the one hand, Mr. Radecki argues that it received the debtor's interest in the Property (despite the express language in the Foreclosure Deed), and now he argues that it was Cambridge that transferred the interest in the Property. Mr. Radecki cannot have it both ways.

Either Mr. Radecki did not receive the debtor's interest in the Property, in which case Mr. Radecki has only a lien interest from Cambridge (per the express terms of the Foreclosure Deed) or Mr. Radecki received an involuntary transfer of the debtor's interest. By definition, a transfer is a parting with an asset or an interest in an asset, which can be voluntarily completed by the debtor or involuntarily completed by a creditor of the debtor (*i.e.*, a foreclosure sale). NRS 112.150(12). The very definition of involuntary means that the transfer was not performed by the debtor. It was performed by a creditor under the color of law.

Here, Wells Fargo is entitled to avoid the sale as a constructively fraudulent transfer. Mr. Radecki does not dispute that (i) the HOA sale purportedly transferred the debtor's interest in the Property to Mr. Radecki; (ii) the $4,000.00 paid for the Property was not reasonably equivalent value; and (iii) at the time of the sale, Ms. Munar was insolvent and was engaged in a transaction for which his remaining assets were unreasonably small.

The undisputed evidence establishes all of the necessary elements of a constructively fraudulent transfer under the UFTA, and the HOA sale should be avoided as a fraudulent transfer.

II. CONCLUSION

For the foregoing reasons and for the reasons set forth in Wells Fargo's Opening Brief, Wells Fargo respectfully requests that the district court's judgment be reversed.

Dated: December 21, 2017.

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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)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 3,612 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

3. Finally, 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that this foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 21st day of December 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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