IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74575

U.S. BANK N.A. N.D. a foreign Corporation

Plaintiff and Appellant

V.

RESOURCES GROUP LLC, a Nevada limited liability company
Defendant and Respondent

Appeal from a Judgment

Of the Eighth Judicial District Court, County of Clark

Hon. Timothy Williams

APPELLANT'S OPENING BRIEF

Kristin A. Schuler-Hintz, Esq (NSB#7171)
Thomas N. Beckom, Esq (NSB#12554)
McCARTHY HOLTHUS LLP
9510 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
Phone No. (702) 685-0329
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK N.A. N.D. a foreign Corporation

Appellant

V.

RESOURCES GROUP LLC, a Nevada limited liability company

Respondent

From the Eighth Judicial District Court, Clark County, Nevada
Case No. A-12-667690-C

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person and entities as describes in NRAP 26.1(a) and must be disclosed. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal. U.S. Bank N.A. is a wholly owned subsidiary of U.S. Bancorp, which is a publically traded corporation. To date McCarthy Holthus the Law Offices of Les Zeive have appeared in this action on behalf of U.S. Bank.

DATED this April 4, 2018

McCARTHY HOLTHUS LLP

/s/ Thomas N. Beckom, Esq
THOMAS N. BECKOM, ESQ (NSB#12554)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

As outlined below, jurisdiction before the Honorable Supreme Court of Nevada is proper.

NRS §2.090 states in pertinent part that

> "The Supreme Court has jurisdiction to review upon appeal:
>
> A judgment in an action or proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the Supreme Court, and to review upon appeal from such judgment any inter mediate or decision involving the merits and necessarily affecting the judgment and in a criminal action, any order changing or refusing to change the place of trial of the action or proceeding."

Nev. R. App. Pro 4 further states that

> "In a civil case in which an appeal is permitted by law from a district court to the Supreme Court, the notice appeal required by Rule shall be filed with the district court clerk. Except as provide in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served."

In this instant case, the judgment being appealed is the Finding of Fact and Conclusion of Law regarding the Quiet Title and Judicial Foreclosure Claims [Appx Vol 7 pp. 1547-1556] which is a traditional State Law Claim and as such it is "embraced in the general jurisdiction of the Supreme Court." As such jurisdiction properly lies with the Honorable Supreme Court of Nevada would be available on this basis.

ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court pursuant to Nev. R. App. Pro 17 for several reasons. Pursuant to Nev. R. App. 17, the Nevada Supreme Court has exclusive jurisdiction over all matters in its jurisdiction which are not presumptively assigned to the Court of Appeals. NRS §2.090 states that the Nevada Supreme Court has jurisdiction over a judgment from the District Court and any matter which effects the merits of the judgment. This instant case is an appeal from a Quiet Title determination in a Nevada Homeowners Association foreclosure matter and therefore is not presumptively assigned to the Court of Appeals. Nev. R. App. Pro 17(b). As such jurisdiction lies with the Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it held that there was no requirement under Nevada Law that the Notice of Default needs to be sent to the First Deed of Trust Holder and that the Deed of Trust Holder had to "opt in" to receive notice?
2. Does a mechanical failure, such as failing to serve a Notice of Default on a First Deed of Trust Holder, render the foreclosure sale void as opposed to voidable under the *Shadow Wood* analysis?
3. Did the District Court err in refusing to invalidate a Homeowners Association foreclosure sale for an obviously inadequate purchase price and failing to make a finding of Fraud, Unfairness, and Oppression in light of the totality of the circumstances in this appeal?

STATEMENT OF THE CASE

On August 30, 2012; U.S. Bank National Association ND filed a Complaint for Judicial Foreclosure stemming from a Breach in a Mortgage Note and related Deed of Trust by George R. Edwards and *inter alia* sued both Mr. Edwards as well as the instant respondent, Resource Group, LLC. On July 16, 2014; Resources Group filed an Answer and Counterclaim contending that they own the property free and clear of the encumbrance of U.S. Bank due to a foreclosure by a Homeowners Association in January, 2012.

U.S. Bank and Resources Group engaged in discovery on two separate occasions and filed dispositive Summary Judgment motions on May 16, 2016 and January 3, 2017. Both times, U.S. Bank *inter alia* claimed the sale should be held void due to Glenview's failure to serve them with the Notice of Default. Both times, U.S. Bank's Summary Judgment motion was denied. Ultimately this case was decided on a three day bench trial held before the Court on October 2-3, 2017. The Court ultimately ruled that U.S. Bank lost their security interest as the sale was simply not tainted by fraud, unfairness, or oppression on November 1, 2017 and that NRS §116.3116 *et seq* was an opt in noticing statute and therefore U.S. Bank was not require to receive the Notice of Default. U.S. Bank filed a timely notice of appeal on November 22, 2017.

STATEMENT OF FACTS

A. UNDISPUTED FACTS

1. On March 3, 2009, George R. Edwards signed an Equiline Agreement with U.S. Bank which was secured by real his home located at 4254 Rollingstone Dr. Las Vegas, NV 89103 (hereinafter "Subject Property"). (Appx. Vol. 3 at 678-683; Appx. Vol. 3 at 685-693).

2. U.S. Bank recorded a Deed of Trust (hereinafter "DOT") memorializing this agreement in the Property Records of Clark County, NV. (Appx. Vol. 3 at 685-693).
3. The Subject Property was subject to the CC&R's for Glenview West Townhomes. (Appx. Vol. 4 at 975-989).
4. In 2010 Mr. Edwards stopped paying his HOA dues and the Law Firm of Alessi & Koenig (A&K) was retained to collect the amounts due, which as of November 3, 2010, purported to be $1,855.00. (Appx. Vol. 3 at 715).
5. A Notice of Delinquent Assessment Lien was recorded in the Clark County records. (Appx. Vol. 5 at 1003).
6. Thereafter, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded in the Clark County records. (Appx. Vol. 5 at 1005).
7. Thereafter, a Notice of Trustee's Sale recorded in the Clark County Records. The Notice of Sale was executed by Ryan Kerbow, Esq. (Appx. Vol. 5 at 1007).
8. Ultimately the Property sold to the 4254 Rollingstone Dr. Trust. (Appx. Vol. 5 at 1009).
9. A Trustee's Deed Upon Sale was recorded in the Clark County records stating that the 4254 Rollingston Dr. Trust had purchased the property, again Ryan Kerbow, Esq executed the deed.
10. The Subject Property sold for $5,331.00. (Appx. Vol. 8 at 1765).

B. U.S. BANK WAS NOT PROVIDED THE NOTICE OF DEFAULT

11. There are several different entities and addresses in the recorded DOT. The DOT listed the following entities in the following capacities:

    a. **"Prepared by"**
    Southwest Financial Services Ltd.
    597 E. Pete Rose Way Suite 300
    Cincinnati, OH 45202

b. "**Return to:"**
U.S. Recordings
2925 Country Dr. Suite 201
St. Paul, MN 55117

c. **"Trustee"**
111 SW Fifth Ave.
Portland, OR 97204

d. **"Lender"**
U.S. Bank National Association ND
4326 17th Ave. SW
Fargo, ND 58103
(Appx. Vol. 3 at 685-693)

12. In addition, Section 16 of the DOT (Entitled "NOTICE") states that all Notices regarding the DOT should be mailing to appropriate addresses on page 1 of the DOT.) (Appx. Vol. 3 at 690).
13. At Trial, Bryan Heifner, Corporate Representative for U.S. Bank, testified he did not know who Southwest Financial Services Ltd., was; he further testified that Southwest Financial was not related to U.S. Bank, and that Mail to Southwest Financial would not reach U.S. Bank. (Appx. Vol. 7 at 1680-1681).
14. Mr. Heifner further testified that he did not know who U.S. Recordings was; U.S. Recordings was not affiliated with U.S. Bank, and that any mail sent to U.S. Recordings would not reach U.S. Bank. (Appx. Vol. 7 at 1681).
15. Additionally, Mr. Heifner testified that U.S. Bank inserts its preferred address for receipt of notice within the Deed of Trust; within the DOT the address is 4325 17th Ave. SW, Fargo, North Dakota, 58103. Further, U.S. Bank's understanding was that the recorded DOT gave record notice U.S. Bank was to receive notice at the stated address. (Appx. Vol. 7 at 1681-1682).
16. During his testimony, David Alessi, the corporate representative for Alessi & Koenig, testified **unequivocally testified that A&K failed to provide or mail the Notice of Default to U.S. Bank at their designated address for service and**

instead mailed U.S. Recordings, an unrelated entity. (Appx. Vol. 7 at 1749-1750; Appx. Vol. 8 at 1751).

17. Mr. Alessi further testified that A&K had a title report that identified U.S. Bank National Association, ND as the beneficiary on the Deed of Trust. (Appx. Vol. 7 at 1744-1745).

18. The evidence implicated it required an affirmative action for the Notice of Default to be mailed to a different address that that within the Deed of Trust. (Appx. Vol. 8 at 1751-1752).

19. The failure to mail the Notice of Default was suspect as U.S. Bank National Association ND was much later mailed the Notice of Sale. (Appx. Vol. 8 at 1754-1755).

C. THE VALUE OF THE PROPERTY IS INADEQUATE

20. At trial, U.S. Bank presented George Holmes ("Holmes") as an expert in residential real property appraisal.

21. Homes testified that he rendered an opinion of "market value" which he defined as "the most probably price between an informed and willing buyer and seller in an open market." (Appx. Vol. 8 at 1898).

22. Holmes additionally expressly excluded forced sale values from his definition of "market value." (Appx. Vol. 8 at 1898).

23. Ultimately, Holmes testified that "market value" of the Subject Property was $48,000.00 at the time of the sale. (Appx. Vol. 8 at 1900 *also* Appx. Vol. 5 at 1016-1028).

24. Resources Group additionally produced an expert, Michael Brunson, whom testified that the Subject Property was worth $5,300.00 (Appx. Vol. 8 at 1934).

25. U.S. Bank objected to the admission of Mr. Brunson's testimony and report because Brunson was not testifying as to Fair Market Value of the Subject Property (which was the applicable standard under *Shadow Wood*) accordingly

the testimony was irrelevant under *Shadow Wood* and Supreme Court precedent in *Unruh*. (Appx. Vol. 8 at 1920-1931).

26. Brunson used a modified version of the Sales Comparison Approach; however the only sales he compared were other forced sale properties. (Appx. Vol. 8 at 1918-1920).

D. THE FORECLOSURE TRUSTEE TESTIFEID THAT THERE WAS AN INAPPROPRIATE RELATIONSHIP BETWEEN THE FORECLOSURE COMPANY AND THE PURCHASER

27. At trial Mr. Alessi testified as the Corporate Representative for A&K that A&K performed the foreclosure for Glenview on the Subject Property. (Appx. Vol. 7 at 1726-1727).

28. Mr. Alessi testified that Ryan Kerbow, the attorney whom executed the notice of sale and trustee's deed, was an attorney that worked in his office at Alessi & Koenig and assisted in processing the foreclosure of the Subject Property. (Appx. Vol. 7 at 1735-1736).

29. Mr. Alessi also testified that it was not unusual, and relatively routine, for A&K to represent a purchaser when A&K was acting as the Trustee. (Appx. Vol. 7 at 1735-1736).

30. Iyad "Eddie" Haddad the representative for Resources Group, testified that attorney's from A&K did legal work for him and specifically Quiet Title Work involving Homeowners Association Foreclosures. (Appx. Vol. 8 at 1799-1800).

31. A&K did assist the Respondent in this action in Quieting Title to this property he purchased at his own sale. (Appx. Vol. 7 at 1739).

32. Finally, Mr. Alessi testified that he believed that bidding may be depressed because of the known litigation risk associated with these sales. (Appx. Vol. 8 pp. 1781-1782)

E. TESTIMONY EVIDENCED THAT RESOURCES GROUP IS NOT A GOOD FAITH PURCHASER

33. Mr. Alessi testified it was generally known that his sales were tantamount to "inheriting what seems to be never ending lawsuits" and that this knowledge was "common sense." (Appx. Vol. 7. at 1733).
34. Mr. Alessi testified that the purchasers closely monitored the outcomes of legal proceedings. (Appx. Vol. 8 at 1769).
35. Mr. Haddad was aware there would be litigation involving these properties before he purchased them; especially if there was a Deed of Trust on the Property. (Appx. Vol. 8 at 1803-1805).
36. Mr. Haddad testified that under penalty of perjury in Bankruptcy Court, the Subject Property was worth $35,000.00. (Appx. Vol. 8 at 1811-1812).
37. Mr. Haddad also testified in bankruptcy, five months after the HOA foreclosure sale, he believed there was a mortgage that would need to be treated within bankruptcy. (Appx. Vol. 8 at 1813-1815).

SUMMARY OF ARGUMENT

This sale should have been void under *Shadow Wood* and *Shadow Canyon* and/or declared subject to U.S. Bank's Deed of Trust. First, the purchase price was "obviously inadequate" and the District Court should have seized on *any* small amount of evidence impugning this sale. In light of the sliding scale standard this Honorable Court adopted in *Shadow Canyon*, three key facts of this case indicted the sale was void:

(1) No Notice of Default was mailed to the Deed of Trust holder at its record address;

(2) The sale was for an inadequate purchase price as shown by Resource Groups own Bankruptcy Petition and U.S. Bank's expert witness. (There was no other competent testimony evidencing any other value as Brunson's testimony

was irrelevant as it was a forced sale value which is not "fair market value" under *Unruh*.

(3) The insider relationship between Resources and the HOA collection company and the chilled billing.

I.

INTRODUCTION

The Honorable Court should reverse the holding of the District Court after reviewing the totality of the circumstances which either rendered the sale void as to U.S. Bank or inequitable to U.S. Bank, an innocent party, and voidable in light of the evidence which demonstrates that Resources Group fully expected litigation and a post-sale challenge.

First, this property sold for 11.1% if fair market value. The only competent evidence of "fair market value" was the expert testimony of Holmes whom testified that the fair market value of the Subject Property was $48,000.00. Other evidence, including the Bankruptcy Petition of Resources Group, provided the property was worth in excess of the $5,331.00 purchase price. While Resources Group did produce an expert whom testified that the property was worth approximately what was paid for the property at the HOA sale, their expert used the sales comparison approach using *only* other distressed HOA sale real estate. This is simply not the purchase price between a willing buyer and a willing seller and therefore not relevant in this matter.

Additionally, the District misapplied the sliding scale approach this Court adopted in *Shadow Canyon*[1]. When the Subject Property sold for 11.1% of Fair

[1] Admittedly *Shadow Canyon* had not been decided at the time the District Court entered judgment on this issue.

Market Value, the District Court had a duty to closely scrutinize the foreclosure sale. If there was any defects, no matter how small that the sale was not conducted in accordance with the law, the sale should be void. The record is void of any evidence disputing the unfairness of this sale.

First, it is undisputed that U.S. Bank N.A. ND was not sent the Notice of Default from the HOA Collection Company despite recording an address for notice. On that basis, the holding that U.S. Bank was not required to receive the Notice of Default was simply erroneous. Second, the Collection Company was both the foreclosing entity and actively acting as counsel for the insider/purchaser in Quiet Title actions in many of the purchaser's cases is additional evidence of unfairness sufficient to set aside this sale in light of the *Shadow Canyon* analysis. Finally, the witness for the HOA collection company testified that bidding was chilled at sale and he was aware of this fact.

Finally, Nevada is a very "common sense" jurisdiction in regards to the application of our bona fide purchaser doctrine. In this specific instance when Resources Group was filing bankruptcy documents indicating they believe the Subject Property was subject to a mortgage, their own attorney's took a noncommittal stance as to the nature of the asset being sold, and their own testimony indicated they expected and planned for litigation; common sense dictates Respondent was not a bona fide purchaser.

II.

STANDARD OF REVIEW

This Court reviews questions of law *de novo* see, *Grand Hotel Gift Shop v. Granite St. Ins.* 1078 Nev. 811, 815 (1992). This Court "defe[s]" to the district court's findings regarding questions of fact unless they are clearly erroneous or not

based on substantial evidence." *Grisham v. Grisham* 128 Nev. 679, 687 (2012). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich* 124 Nev. 302, 308 (2008). "Mixed question of law and fact are those in which the historical facts are admitted or established, the rule of law is undisputed, the issue is whether the facts satisfy the statutory standard." *Khan v. Holder* 584 F.3d 773, 780 (9th Cir. 2009). Questions of law and fact require de novo review. *State of Bennet* 119 Nev. 589, 599 (2003).

This appeal requires de novo review because it involves questions of law and mixed questions of law and fact. Whether the uncontested facts of the case constitute a void sale is a mixed question of law and fact. Whether Resources groups was a bona purchaser under the facts of the case is a mixed question of law and fact. Whether the HOA sale is void due to a failure to send U.S. Bank the Notice of Default is an issue of law. Thus, de novo review is appropriate here.

III.

LAW AND ARGUMENT

A. THE DISTRICT COURT ERRED IN FAILING TO QUIET TITLE IN THE NAME OF U.S. BANK

This Court's analysis should be primarily driven by two cases: *Shadow Wood* and *Shadow Canyon*. In *Shadow Wood*, this Honorable Court laid out the overall standard for a party to set aside a foreclosure by a Homeowners Association under NRS §116.3116 *et seq* which requires a low purchase price and a finding of fraud, unfairness, or oppression. *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2016). In *Shadow Canyon* this Honorable Court clarified what does and does not amount to "fraud, unfairness, and oppression" sufficient to set aside a foreclosure sale. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 2017 Nev. LEXIS 121 (2017).

Shadow Wood lay out three inquires in this matter. There must be an inadequate price, some element of fraud, unfairness, or oppression, and the bona fide purchaser status of the buyer must be considered. *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2016). In addition, *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* provides further clarification as to what does and does not constitute "fraud, unfairness, or oppression" sufficient to invoke equity in the context of an HOA foreclosure. 2017 Nev. LEXIS 121 (2017).

Shadow Canyon is an extremely standard fact pattern in terms of an HOA foreclosure, Saticoy Bay purchased real property worth $335,000.00 for $35,000.00 (e.g. 10% of value). *Id.* This Court agreed with the District Court affirming the HOA sale. The Court clarified in *Shadow Canyon* that, while price alone is not sufficient to invalidate an HOA foreclosure sale, it is an important element of evaluating the propriety of an HOA foreclosure sale. *Id.* Specifically, "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." *Id. citing Golden v. Tomiyasu* 79 Nev. 503, 515-16 (1963) In essence, when a foreclosure sale price is so little as to shock the conscience, any evidence of impropriety in a sale should be sufficient to set it aside.

This Court then listed, several items which were fraudulent, unfair, and oppressive and several things which were not. In Footnote 11 of *Shadow Canyon*; this Court indicated that the following may rise to the level of fraud, unfairness and oppression:

1. Failure to mail the Deed of trust beneficiary the statutorily required notices;
2. An HOA's representation that the foreclosure sale will not extinguish the deed of trust;
3. Collusion between the winning bidder and the entity selling the property;

4. A foreclosure trustee's refusal to accept a higher bid; or

5. A foreclosure trustee's misrepresentation of the sale date

Id. At FN 11.

The Court made it clear it was a nonexclusive list and other things could be fraudulent, unfair, or oppressive.

Appellant herein produced evidence of a low purchase price, lack of statutorily required notice, and insider purchase and chilled bidding. Sufficient evidence to invalidate the sale.

B. THE PRICE WAS OBVIOUSLY INADEQUATE

U.S. Bank contends that the purchase price for the Subject Property was "obviously inadequate" under *Shadow Wood* in that the Subject Property was worth $48,000.00 at the time of the sale (Appx. Vol. 8 at 1900; Appx. Vol. 5 at 1016-1028) and sold for only $5,331.00 (Appx. Vol 8 p 1765) only 11.1% of Fair Market Value. Moreover, under *Shadow Canyon* this obviously inadequate purchase price had the effect of substantially lowering U.S. Bank's burden of proof in regards to demonstrating "fraud, unfairness, or oppression." Finally, the $48,000.00 value, as testified to by George Holmes, was the only competent indication of value in this scenario as Resource Group's expert did not testify as to "fair market value" at his own admission, but instead testified as to HOA forced sale value which makes this incompetent evidence under *Hallmark*.

This Court, in enunciating the *Shadow Wood* standard, consistently used "fair market value" in determining whether or not a piece of property sold for an inadequate purchase price. *Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (Nev. 2015). The same holds true for *Shadow Wood's* companion case, *Shadow Canyon,* again, this Honorable Court states "fair market

value" is the proper indicator of whether or not a property's purchase price is inadequate. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641 (Nev. 2017).

"Fair Market Value" is a defined term in this State, and is defined as "the price which a purchaser, willing but not obligated to pay, would pay an owner willing but not obligated to sell, taking into consideration all uses to which the property is adopted and might in reason be applied." *Lee v. Verex Assur* 103 Nev. 515 (Nev. 1987) *also Unruh v. Streight* 96 Nev. 684 (Nev. 1980). This is in line with other holdings defining "fair market value. The Alaska Supreme Court, citing to the U.S. Supreme Court noted that "Fair Market Value" has been defined as:

> "not the fair "forced sale" value of the real estate, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate."
>
> *Baskurt v. Beal* 101 P.3d 1041 (AK 2004).

Blacks Law Dictionary similarly defines "Fair Market Value" as:

> "The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts."
>
> *Blacks Law Dictionary 597* (6th Ed. 1990)

Even the Restatement takes the following approach:

> "The standard by which "gross inadequacy" is measured is the fair market value of the real estate. For this purpose, the latter means, not the fair "fair forced sale" value of the real estate, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate."
> *Restatement of Property Third: Mortgages* §8.3 Comment (b).

Mr. Holmes testified that he used the sales comparison approach to determine "market value." (Appx. Vol. 8 at 1898). Mr. Holmes definition of "market value" was synonymous with the Uniform Standards of Appraisal Practice (USPAP) and

his own personal definition was "the most probably price between an informed and willing buyer and seller in an open market." (Appx. Vol. 8 at 1898). Using this analysis, Holmes came to the conclusion that $48,000.00 was the price between a willing buyer and a willing seller which is "Fair Market Value" in this jurisdiction.

Contrast this with the testimony of Mr. Brunson who testified the property was worth $5300.00. (Appx. Vol. 8 at 1934). Brunson, admitted he only compared other forced sale properties from other HOA foreclosure sales. (Appx. Vol. 8 at 1918-1920). U.S. Bank vigorously objected to his testimony. (Appx. Vol. 8 at 1920-1931). The Brunson testimony is completed inapplicable to the definition of "fair market value" in Nevada which is:

> "the price which a purchaser, willing but not obligated to pay, would pay an owner willing but not obligated to sell, taking into consideration all uses to which the property is adopted and might in reason be applied."
> *Lee v. Verex Assur* 103 Nev. 515 (Nev. 1987) *also Unruh v. Streight*, 96 Nev. 684 (Nev. 1980)

Brunson comparing nothing but other forced sale properties is simply not the standard in *Shadow Wood* and the only testimony as to the *Unruh* standard was that of Holmes, whom testified the property was worth $48,000.00.

This is an important point under this Court's precedent. It is undisputed that price alone cannot set this sale aside. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641 (Nev. 2017). However, these facts do indicate in that under *Shadow Canyon* "the price/ fair-market value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale." *Id.* at 648 *also Odell v. Cox* 151 Cal. 70 (Cal 1907) ("While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as cause for vacating it, especially if the inadequacy be so gross

as to shock the conscience."). At 11.1 % of Fair Market Value, the Court should seized on anything wrong with this sale.

As outlined below, (1) the lack of notice, (2) the insider relationship between the Seller (counsel) and Buyer (client), and (3) the chilled bidding are all "circumstance impeaching the fairness of the transaction" warranting voiding sale.

C. THE FAILURE TO SEND U.S. BANK THE NOTICE OF DEFAULT ENTIRE RENDERED TE SALE UNFAIR AND VOIDABLE AND/ OR STATUTORILY VOID

1. Nevada Law Required the Notice of Default to be Sent to U.S. Bank

NRS §116.3116 *et seq* requires U.S. Bank be mailed the Notice of Default. This was not done and it is undisputed this was not done. The District Court misapplied the law when it determined that U.S. Bank was not entitled to notice under the statute.

Prior to the 2015 amendments to NRS §116.31168 stated:

> "The Provisions of NRS §107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed."

While the HOA Statutes alone do not provide an independent basis for requiring mailing a Notice of Default to the Deed of Trust beneficiary, the incorporation of NRS §107.090(3) requires it be mailed. Specifically NRS §107.090(3) states:

> "[t]he trustee or person authorized to record the notice of default, shall, within 10 days after the notice of default is recorded, cause to be deposited in the United States mail an envelope, registered or certified and with postage prepaid, containing a copy of the notice, addressed to: (a) Each person who has filed a request for a copy of; and (b) Each person with an interest whose interest or claimed interest is subordinate to the deed of trust."

When read together with NRS §116.31168, which stated "the provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed" evidence that the statutes text required notice to parties who recorded an interest, such as here U.S. Bank and specifically require that the Notice of Default be sent to U.S. Bank. Assuming, *arguendo* that the statutory scheme does not affirmatively require that the Notice of Default be sent to U.S. Bank, U.S. Bank stated in its Deed of Trust Notice should be sent to the North Dakota address which would affirmatively satisfy the provisions requesting notice. (Appx. Vol. 3 at 685-693). On this basis, the Statute required the Notice of Default be mailed to U.S. Bank and the collection company failed to comply with the requirements of the Statute. (Appx. Vol. 7 at 1749-1750; Appx. Vol. 8 at 1751). It is U.S. Bank's position this is more than "unfair". A failure to follow the statutory provisions renders a HOA Foreclosure sale *void,* not voidable, under *Shadow Wood* accordingly, the Court is not required to find unfairness to void the sale, nor consider bona fide purchaser protections for Resource Group as outlined below.

2. The Sale Was Void for Failure to Follow Statutory Requirements for Notice

This Court has previously held that failure to follow the statutory requirements for noticing a foreclosure can, and does, render the foreclosure sale void. *Title Ins. & Trust Co. v. Chicago Title Ins Co.* 634 P.2d 1216 (Nev. 1981) (Order of this Court affirming a holding that a Foreclosure Sale was void due to failure to send a Notice of Default). The effect of this is important and the subtle difference between a "voidable" and "void" sale is, and should be, a distinction this Court makes. "If a Property transfer is void, rather than voidable, then it cannot be taken by a bona fide purchaser." *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77 Supp 584 (S.D. Tx. 2015) *also Rosenberg v. Schmidt* 727 P.2d 778 (Ak 1986)(stating that a lack of a substantive basis to foreclose renders a sale "void" and that only voidable

sales raise an issue of bona fide purchaser status). If there is a statutory defect in the sale, bona fide purchaser status is not part of the inquiry. *Sonderman v. Remington Constr. Co.* 127 N.J. 96 (1996); *Fjeldsted v. Lien (In re Fjelsted)* 293 B.R. 12 (2003)("bona fide purchaser status alone is not cause to validate a [void]sale"); *Ocwen Loan Servicing LLC v. Gonzalez Fin Holding Inc* 77 Supp. 584 (S.D. Tx 2015)("if the foreclosure sale is void, rather than voidable, then it cannot be taken by a bona fide purchaser").

It is undisputed that U.S. Bank National Association ND was not mailed and did not receive the Notice of Default. U.S. Bank included on the Deed of Trust that its address was 4326 17th Ave. SQ Fargo, ND 58103. David Alessi, the corporate representative for Alessi & Koenig, testified that A&K failed to mail the Notice of Default to U.S. Bank at their designated address for service and instead mailed U.S. Recordings, an unrelated entity. (Appx. Vol. 7 at 1749-1750; Appx. Vol. 8 at 1751). Alessi testified that A&K had a title report which stated that U.S. Bank needed to be served with foreclosure notices yet U.S. Bank was not mailed the Notice of Default. (Appx. Vol. 7 at 1744-1745). The HOA collection company did not follow the statutory requirements and mail the Notice of Default to U.S. Bank. This failure along is sufficient to void the foreclosure sale.

Moreover, this sale should be rendered void and not voidable as contemplated under *Shadow Wood* and *Shadow Canyon*. The law supports this assessment, the basic constitutional due process rights of entities involved in a foreclosure proceeding is that interested parties must receive notice reasonably calculated to reach the party effected, or it runs afoul of our Constitution in the foreclosure context. *Mullane v. Cent. Hanover Bank & Trust Co* 339 U.S. 306 (1950). A ruling that a foreclosure sale that does not follow the noticing requirements is void would protect these rights. This sale must be held void to protect U.S. Bank's due process rights in this instance.

D. UNFAIRNESS WAS PRESENT IN THIS SALE.

1. The District Court Did not Properly Apply the Sliding Scale Analysis Under *Shadow Canyon*

The Plaintiff in a Quiet Title Action, has the burden of proof to prove good title in themselves, yet contrast this with ability of an interested party to set aside a foreclosure if a property is sold for an inadequate purchase price and is tainted by some element of fraud, unfairness, or oppression. *Breliant v. Preferred Equities Corp.*112 Nev. 663 (1996) ("In a Quiet Title Action, the burden of proof rests with the plaintiff to prove good title in himself") *See, also Shadow Wood Homeowners Ass'n v. New York Cmty Bancorp* 366 P.3d 1105 (2016). As discussed *supra* this is a sliding scale analysis, the greater the inadequacy of the purchase price the less fraud, unfairness, and oppression needed to void the sale. *Nationstar Mortg., LLC v. Saticoy Bay LLC series 2227 Shadow Canyon*405 P.3d 641 (2017).

When the inadequacy of price is great then the slightest circumstances of unfairness will operate to set aside the sale. *Ballentyne v. Smith* 205 U.S. 285 (1907) *also Zyzzx 2 v. Dizon* 2016 U.S. Dist. LEXIS 39467 (D.Nev. 2016) ("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts."). Other jurisdictions have held

> "when the inadequacy of consideration is great and the notice of sale given by the officers is vague, or from any act of his, bidders are kept away from the place of sale, who would have bid for the land if there, an unconscionable advantage was obtained by the purchaser, who bid off the land at a grossly inadequate price, a court of equity will interfere and set aside the sale so made." *Parker v. Glenn* 72 Ga. 637 (1884).

As discussed above, the purchase price when compared to the "fair market value" of the Subject Property necessarily draws a conclusion that it sold for an inadequate purchase price of 11.1% of fair market value. Per *Shadow Canyon* this requires the court to seize on any slight circumstances of unfairness in equity and good conscience. This did not happen. As outlined *infra* three specific things in this sale were more than "slightly" unfair and should have compelled the court to set aside this sale.

2. The Sale Was "Unfair" (e.g. Voidable) Due to Lack of Noticing.

As briefed in greater depth *supra,* U.S. Bank was entitled to receive the Notice of Default from Glenview and A&K and this did not happen. For reasons unclear, A&K sent notice to U.S. Recordings and not U.S. Bank. (Appx. Vol. 7 at 1749-1750; Appx. Vol. 8 at 1751). A&K had a title report showing U.S. Bank needed to receive notice. (Appx. Vol. 7 at 1744-1745). U.S. Bank stated in their Deed of Trust that their mailing address was 4325 17th Ave. SW, Fargo, North Dakota, 5810. (Appx. Vol. 7 at 1681-1682). This Court has specifically noted that irregularities that rise to the level of fraud, unfairness, or oppression expressly include an HOA failure to mail a deed of trust beneficiary the statutorily required notices. *Nationstar v. Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641at FN 11 (Nev. 2017). This is exactly what happened here. This unfairness, combined with the obviously inadequate purchase price should have led to the inescapable conclusion that equity needed to intervene in this circumstances.

3. The Sale was "Unfair" Due to the Insider Relationship Between A&K and Haddad

Additional evidence impeaches the fairness of this HOA Foreclosure Sale. The attorney whom signed the Notice of Sale and actual foreclosure deed was Resource Group's attorney. (Appx. Vol. 7 at 1735 1736) *also* (Appx. Vol. 8 at

1799-1800). In fact it was common and relatively routine for A&K to represent purchasers at their own HOA Sales in Quiet Title Litigation. (Appx. Vol. 7 at 1735-1736). This impeaches the HOA Foreclosure sale and under the sliding scale analysis and the express statement of this Court, this amounts to unfairness. *Nationstar v. Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641at FN 11 (Nev 2017). It is extremely common for sales to be unwound when there is an insider relationship between the seller and the buyer. *Louisville Trust Co. v. Louisville N.A. & C.R. Co.* 174 U.S. 674 (1899)(reversing appellate Court's finding validating a foreclosure sale when two parties colluded to frustrate the lien rights of subordinate lien holders); *Polish Nat'l v. White Eagle Hall Co.*98 A.D.2d. 400 (Discussing the apparent unfairness of agreements between sellers of foreclosed properties and buyers) *Nationstar v. Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* 405 P.3d 641at FN 11 (Nev 2017) (stating that apparent collusion in a Homeowners Association foreclosure sale may be unfair).

Again, all of these facts have to be taken in the context of the 11.1% purchase price at the foreclosure auction, as this Court has instructed. Indeed Resources actually purchased this property for *less* than the opening bid as the opening bid was $5,370.00 and the property sold to Resources for $5,331.00. (Appx. Vol. 5 at 1007 *also* Appx. Vol. 8 at 1765). All of these actions necessarily impeach the credibility of this sale and when taken in context with the mandate that when the sales price low; an Equity Court must seize on the unfairness to set the sale aside, this sale should have been set aside.

4. The Errors Led to Chilled Bidding, Which Justifies Setting aside the Sale

David Alessi, the Corporate Representative for A&K, testified that he believed that bidding may have been depressed because of the known litigation risk associated with these sales. (Appx. Vol. 8 at 1781-1782) David Alessi testified specifically that

is was generally known that his sales were tantamount to "inheriting what seems to be never ending lawsuits" and that this knowledge was "common sense." (Appx. Vol. 7 at 1733). This property was actually sold for less than the opening bid.

Chilled bidding is a type of unfairness, and can be sufficient to set aside a foreclosure sale. See, *Gelfert v. National City Bank* 313 U.S. 221, 232 (1941). Misunderstanding as to the risk associated with a particular piece of real property which causally relate to chilled bidding do constitute unfairness to set aside a sale. *Golfland Entertainment Ctrs. V. Peaks Inv.* 119 F.3d 852, 860 (10th Cir 1997); *United States v. Clinger* 2002 U.S. Dist. LEXIS 20458 (D.Colo 2002); *also United States v. Tempelman* 2002 U.S. Dist. LEXIS 3111 (D.NH 2002)

This property actually sold for less than the opening bid. The opening bid on the day of the sale was $5,370.00 and the property sold to Resources for $5,331.00. It appears that based on the uncertain nature of the asset being sold, that bidding indeed went in reverse. This is chilled bidding in its purest form, especially when read in conjunction with the *Ballentyne/ Shadow Canyon* analysis when a property sells for 11.1% of Fair Market Value a Court must seize on any apparent unfairness.

E. RESOURCES GROUP WAS SIMPLY NOT A BONA FIDE PURCHASER.

Mr. Haddad aware that U.S. Bank would seek to recover the property based on the inadequate purchase price at the HOA sale. Mr. Haddad testified in Bankruptcy Court there was a mortgage on this property which would need to be addressed during the Bankruptcy Reorganization. (Appx. Vol. 8 at 1813-1815). Mr. Haddad was aware that if there was a mortgage or deed of trust on a property, he would need to litigate these issues and he could potentially lose the property. (Appx. Vol. 8 at 1803-1805). Indeed, the fact that Mr. Haddad filed *bankruptcy* on this property 5 months after his purchase of this unit would indicate that he believe there was a creditor.

Under the recording statute, in order to be considered a bona fide purchaser without notice, it is the purchaser that must make an affirmative showing that they had no notice. *Berge v. Fredericks* 95 Nev. 183, 188 (1979) This Court has stated this to be true. *Price v. Ward* 26 Nev. 387 (1902) ("The burden is on the purchaser to show that he did not have notice of a third person's title"); *Moore v. De Bernardi*47 Nev. 33 (1923) (same). Notice is generally imputed by the slightest set of circumstances which generate a duty of inquiry which is imputed to the buyer. *Id.* From there under the *Berge* standard, burden shifts to the purchaser to rebut the presumption of notice by showing that they made due investigation without discovery the prior right or title they were bound to investigate. *Id.*

This standard has applied to mules. *Moresi v. Swift* 15 Nev. 215 (1880) (Case involving the sale of mules and placing the onus of bona fide purchaser on the party asserting the status). This standard has applied to oral contracts for real property. *Bailey v. Butner* 64 Nev. 1 (1947). This standard has applies to sheriff's sale. *Hewitt v. Glaser Land & Livestock*97 Nev. 207 (1981)("To claim this [bona fide purchaser] status, **a purchaser must show**, *inter alia* that the conveyance of legal title was made without notice of outstanding equities.)(Emphasis added)

Moreover, Nevada has acknowledged this is a general common sense approach. *Cooper v. Pacific Auto Ins. Co.*95 Nev. 798 (1979). For example, in Nevada an individual cannot purchase a car at a bar for $5,000.00, be given all lawful documents for ownership of the car, have no actual notice of any issues, and thereafter claim bona fide purchaser status. *Cooper v. Pacific Auto Ins. Co.*95 Nev. 798 (1979). This is because, as the trial judge in that case found, basic common sense dictates that you should not buy a discounted car at a bar while having no clue what you are getting. *Id.* In Nevada people are simply not "bona fide" when common sense dictates that something is amiss. *Id.*

Once someone is put on inquiry notice of something as basic as whether or not the property was free and clear of a mortgage or whether or not they were going to be trespassed, in Nevada time and time again this ripens the burden of proof for bona fide purchaser status *to the party asserting the status*. *Berg v. Fredicks* 591 P.2d 246 (Nev. 1979). Legitimate questions of possession have always raised a presumption **against** bona fide purchaser status in favor of the party moving to set aside the transaction. *Brophy Mining Co.v. Brophy & Dale Gold & Silver Mining Co.*15 Nev. 101 (1880).

The common sense approach in Nevada, would indicate that a man does not dive head first into litigation involving purported creditors on a house and thereafter claim any form of innocence. Mr. Haddad declared *bankruptcy* to shield himself from creditors he now claims he did not know had an interest in this home. In fact, Mr. Haddad full well knew that he would be pursued by creditors. (Appx. Vol. 8 at 1803-1805).

/…/…/

/…/…/

/…/…/

/…/…/

/…/…/

IV.

CONCLUSION

For the foregoing reasons, the District Court should be reversed and the Sale should be unwound. The Property sold for 11.1% of Fair Market Value, which is the proper benchmark for the analysis under *Shadow Wood*. Secondly, the price was so low that the (1) failure to mail the Notice of Default (2) attorney client relationship between Alessi & Koenig and Resources, and (3) the testimony concerning chilled bidding necessarily invoke a Court in equity to make a finding of unfairness and void the Sale. Finally, due to failure to mail the Notice of Default to a required party, the basic no nonsense common sense approach in Nevada demands a finding that Resources Group is simply not a bona fide purchaser.

Dated this 4th Day of April 2018 **McCarthy Holthus LLP**

/s/ Thomas N. Beckom, Esq
Thomas N. Beckom (NSB# 12554)

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Font Times New Roman
2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7) because the brief contains 7291 words and is 23 pages long.
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. Further I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters of the record to 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 sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th Day of April 2018

/s/ Thomas N. Beckom, Esq.

McCARTHY HOLTHUS LLP
Kristin A. Schuler-Hintz (NSB# 7171)
Thomas N. Beckom (NSB# 12554)
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117