IN THE SUPREME COURT OF FLORIDA

NICHOLAS ARSALI,

Petitioner/Appellant,

v.

CASE NO.: SC12-600
L.T. NO.: 4D11-2348

CHASE HOME FINANCE LLC,
AMY B. WILSON, and
CHRISTOPHER D. MANNING,

Respondents/Appellees.
_____/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from an order granting a motion to vacate a foreclosure sale and final judgment. After the lower court granted the motion to vacate Petitioner Nicolas Arsali ("Petitioner"), the successful third-party purchaser at the foreclosure sale, appealed to the Fourth District Court of Appeal. The Fourth District affirmed the lower court but certified a question of great public importance involving the proper application of this Court's precedent. The opinion is reported at *Arsali v. Chase Home Finance, LLC,* 79 So. 3d 845 (Fla. 4th DCA 2012) ("*Arsali"*) and a copy is attached as Appendix 1.

In 2010, Respondent Chase Home Finance, LLC ("Chase" or "the bank") filed a foreclosure action against Respondents Amy B. Wilson and Christopher D. Manning ("the Borrowers"). Appx.2. In September 2010, the lower court entered a final summary judgment of foreclosure against the Borrowers in the amount of $86,979.93, and set the sale date for eight months later, on May 9, 2011. Appx.2. The final judgment did not address redemption rights. Appx.2. The Borrowers did not seek rehearing of the final judgment nor did they appeal it. The sale took place as scheduled on May 9, 2011. Appx.3. A third-party purchaser, Iron National Trust ("Iron National"), purchased the property at the sale for $125,300. Appx.3. Iron National then assigned its rights to Petitioner. Appx.1 at 1.

Several days after the sale the Borrowers filed an unverified Motion to Vacate Foreclosure Sale and Certificate of Sale ("motion to vacate"). Appx.4. They alleged that Chase had offered to reinstate their loan and dismiss the foreclosure action if they paid $12,018 by May 3, 2011. Appx.4. The Borrowers asserted that they paid the specified amount in a timely manner but Chase failed to cancel the sale. Appx.4. The Borrowers set the motion to vacate for hearing on the lower court's uniform motion calendar ("UMC") for May 26, 2011. Appx.5. In the meantime, on May 19, 2011, Petitioner moved to intervene in the action based on his status as the assignee/third-party purchaser of the property. The lower court granted the motion to intervene on May 24, 2011. Appx.6.

The lower court heard the Borrowers' motion to vacate at the May 26th UMC hearing. The lower court granted the motion based solely on the unverified motion and argument of the Borrowers' counsel. Appx.7. Although the Borrowers' motion attached documents purporting to show a reinstatement (not a redemption), there was no evidence submitted in the form of an affidavit or testimony. Appx.4. Upon granting the Borrowers' motion, the lower court not only set aside the sale but also vacated the final judgment entered eight months earlier, even though the Borrowers' motion did not request such relief and alleged no grounds for setting aside the judgment. Appx.7, 4.

After receiving the order vacating the sale and final judgment, Petitioner moved for rehearing, arguing the Borrowers' attorney had agreed to cancel the UMC hearing on the motion to vacate and set it for an evidentiary hearing. Appx.8. He also argued that the motion to vacate was facially insufficient in that it did not meet the two-part test for setting aside a sale – a grossly inadequate sale bid and that the inadequacy of the bid resulted from some mistake, fraud or other irregularity in the sale. Appx.8. In support Petitioner cited *Blue Star Investments, Inc. v. Johnson,* 801 So. 2d 218 (Fla. 4th DCA 2001). Appx.8. Petitioner alleged that the sale price was more than 72% of the fair market value of the property and therefore not inadequate. Appx.8. In a one-sentence order the lower court denied Petitioner's motion for rehearing. Appx.9.

Petitioner then timely appealed to the Fourth District Court of Appeal. Appx.10. The Fourth District *sua sponte* considered the case *en banc* and affirmed. Appx.1. In its opinion the Fourth District acknowledged its *Blue Star* two-part test for setting aside a foreclosure sale:

> [T]o vacate a foreclosure sale, the trial court must find (1) that the foreclosure sale bid was grossly or startlingly inadequate; and (2) that the inadequacy of the bid resulted from some mistake, fraud or other irregularity in the sale.

Appx.1 at 2-3 (citing *Blue Star,* 801 So. 2d at 219). The Fourth District explained that in *Blue Star,* it relied upon this Court's decision in *Arlt v. Buchanan,* 190 So. 2d 575 (Fla. 1966). *Arlt* stated an inadequate sale price is not sufficient grounds

for setting aside a sale unless the inadequacy is gross and results from "any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party." Appx.1 at 2, n.2, (quoting *Arlt*, 190 So. 2d at 577). The Fourth District reasoned that to the extent *Blue Star* suggests that the two-part test applies to every attempt to set aside a foreclosure sale, it is contrary to this Court's statement of law in *Moran-Alleen Co. v. Brown,* 123 So. 561 (Fla. 1929). Appx.1 at 3.

In *Brown*, this Court evaluated a request to set aside a sale on a number of grounds such as gross inadequacy of consideration, surprise, accident, mistake, and irregularity in the conduct of the sale, any of which, "upon proper showing made" can justify setting aside a sale. *Brown,* 123 So. at 561. But the *Brown* Court held that the plaintiffs there had not proven any of the asserted grounds so the request to set aside the sale was properly denied. *Id.* According to the Fourth District in this case, the *Brown* language indicates that surprise, accident, mistake, and irregularity in the conduct of the sale are four independent grounds that would support setting aside a sale, even if there is no inadequacy in the bid price. Appx.1 at 3. The court cited a Second District Court of Appeal decision that analyzed what it deemed to be a potential conflict between *Brown* and *Arlt*. Appx.1 at 4 (citing *Ingorvaia v. Horton,* 816 So. 2d 1256 (Fla. 2d DCA 2002)). The *Ingorvaia* court reconciled the

cases by concluding *Brown* should be applied when grounds other than inadequate bid price are at issue and *Arlt* should be applied when the adequacy of the bid is at issue. Appx.1 at 4 (citing *Ingorvaia*, 816 So. 2d at 1257-59).

The Fourth District agreed and receded from *Blue Star* and a number of other decisions "to the extent [they] indicate[] that inadequacy of price must *always* be part of the legal equation in a motion to set aside a foreclosure sale." Appx.1 at 4. The court affirmed the lower court's order vacating the sale and final judgment based on the bank's mistake in failing to cancel the sale after its "settlement" with the Borrowers. Appx.1 at 5. The court further held that Petitioner was not entitled to an evidentiary hearing on the motion to set aside the sale because such a hearing is required "only if a grossly inadequate sale price was *necessary* to obtain this relief [to set aside a sale]. . . ." *Id.* (emphasis in original).

Given the Fourth District's concern that *Brown* can be read to conflict with *Arlt*, it certified the following question (first certified in *Ingorvaia*) as a matter of great public importance:

> DOES THE TEST SET FORTH IN ARLT V. BUCHANAN, 190 So. 2D 575, 577 (FLA. 1966), FOR VACATING A FORECLOSURE SALE APPLY WHEN ADEQUACY OF THE BID PRICE IS NOT AT ISSUE?

Appx.1 at 5; *Ingorvaia*, 816 So. 2d at 1259. Following the denial of his motion for rehearing, Petitioner timely sought discretionary review before this Court. Appx.11, 12. The Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Fourth District erred in concluding *Brown* and *Arlt* conflict. This conclusion misreads the language and holding of *Brown*. It also assumes this Court overruled itself, *sub silentio,* several times which the Court does not do intentionally. The court's faulty interpretation led it to certify a question that does not answer the issue in this case and does not provide appropriate guidance for future courts.

This Court should restate the Fourth District's certified question to ask whether, in cases not involving an inadequate bid, a court can set aside a sale for reasons unconnected with any irregularity in the conduct of the sale, such as a party's unilateral mistake. The Court should answer this question in the negative based on decades of precedent. This resolution will preserve the integrity of the sale process and assist courts in considering motions to set aside judicial sales.

A negative answer to the restated question requires reversal of the Fourth District's decision. The sole basis alleged in this case for setting aside the sale was the bank's failure to cancel the sale after a reinstatement of the mortgage loan. Reinstatement after the final judgment was impermissible and did not present a proper basis for cancelling the foreclosure sale. Even if restatement could have prevented the sale, the Borrowers' bank committed a unilateral mistake in

neglecting to cancel the sale as promised. Without more, this is an insufficient basis to set aside a properly conducted sale that resulted in an adequate bid price.

Finally, and at a minimum, the Fourth District erred in concluding an evidentiary hearing was unnecessary before the lower court vacated the sale. Parties are entitled to an evidentiary hearing in order to prove or disprove the allegations of a motion to set aside a sale or vacate a final judgment. The District Court's decision should be reversed and the lower court's order vacated.

ARGUMENT

STANDARD OF REVIEW

This Court reviews *de novo* the issues in this case which are purely legal in nature. *See Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011) (question of law concerning proper test to be applied to issue is reviewed *de novo*); *D'Angelo v. Fitzmaurice,* 863 So. 2d 311, 314 (Fla. 2003) (standard of review for pure questions of law is *de novo* and no deference is given to judgment of lower courts).

I. *BROWN* AND *ARLT* DO NOT CONFLICT.

The Fourth District's decision is premised on the notion that the Court's decisions in *Brown* and *Arlt* conflict. They do not. In *Brown* the plaintiffs tried to set aside a judicial sale on several grounds: "gross inadequacy of consideration, surprise and fraud imposed on the complainant, irregularity in the conduct of the sale, and the admission of irrelevant and incompetent testimony." *Brown*, 123 So. at 561. This Court dispensed with the evidentiary ground because there was competent testimony to support the lower court's finding. *Id.* The Court then noted that the other grounds asserted by the plaintiffs could provide a basis to set aside a sale:

> On the question of gross inadequacy of consideration, surprise, accident, or mistake imposed on complainant, and irregularity in the conduct of the sale, this court is committed to the doctrine that a

> judicial sale may on proper showing made, be vacated and set aside on any or all of these grounds.

Brown, 123 So. at 561. However, the Court affirmed the refusal to set aside the sale because the plaintiffs had not in fact proven any of the foregoing grounds. The Court did not hold that any one of the asserted grounds, standing alone, would be a sufficient basis to set aside a sale. Instead it merely held that the *Brown* plaintiffs had not proven any of the alleged bases. *Id.*

In *Arlt* the Court again was faced with allegations of a grossly inadequate bid price and other deficiencies. It confirmed the rule that an inadequate bid can be a sufficient basis to set aside a sale only if the inadequacy resulted from a mistake, misconduct, or other irregularity in the sale:

> The general rule is, of course, that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.

Arlt, 190 So. 2d at 577. The Court held that the *Arlt* plaintiff had stated a claim for relief by alleging a grossly inadequate bid resulting from sale irregularities. *Id.*

Thus *Brown* said that grounds for setting aside judicial sales include grossly inadequate bids, surprise, accident, or mistake, and irregularity in the conduct of the sale. *Arlt* then confirmed that in the case of a grossly inadequate bid, a sale can be set aside only if the inadequacy resulted from a mistake, accident, surprise, or

other irregularity in the sale. *Arlt* simply reiterated the long-standing rule about what is required when relying on one of the bases for setting aside a sale. Under this straightforward reading, *Brown* and *Arlt* are consistent and there is nothing to reconcile.

Nonetheless, in *Ingorvaia*, the Second District Court of Appeal accepted an argument that the decisions conflict. It interpreted *Brown* to state that a grossly inadequate sale price alone is a sufficient ground to set aside a foreclosure sale. *Ingorvaia*, 816 So. 2d at 1258. Under this interpretation *Brown* contradicts *Arlt*, which stated an inadequate bid alone is not sufficient to justify setting aside a sale. *See Arlt*, 190 So. 2d at 577. The *Ingorvaia* court reconciled the perceived conflict by concluding *Arlt* applies when bid inadequacy is at issue and *Brown* applies when bid inadequacy is not at issue. *Ingorvaia*, 816 So. 2d at 1258. The Fourth District followed this faulty analysis in *Arsali*. Appx.1 at 4.

The analysis is erroneous for several reasons. First, *Brown* simply does not contain the language or the holding that *Ingorvaia* and *Arsali* attribute to it. Nowhere in *Brown* did the Court "state[] that gross inadequacy of price alone is sufficient to set aside a foreclosure sale." *Ingorvaia*, 816 So. 2d at 1258. In fact, such a holding would have been contrary to decades of precedent. *See MacFarlane v. Macfarlane*, 39 So. 995, 998 (Fla. 1905) ("in the case of *Lawyers' Co-op Pub. Co. v. Bennett*, 16 So. 185, [(Fla. 1894)] this court laid down the

generally accepted doctrine that mere inadequacy of price alone is not sufficient to set aside a judicial sale . . . ."). Nor did *Brown* hold, as *Arsali* suggests, that surprise, accident, or mistake and irregularity in the conduct of the sale "are four independent grounds that would support the setting aside of a foreclosure sale, even where there is not a grossly inadequate sale price." Appx.1 at 3. The *Brown* Court was not faced with the question of whether gross inadequacy of price or any of the other factors, alone, is enough. *Brown* merely decided that gross inadequacy and other circumstances may justify setting aside a sale, but the plaintiff in *Brown* had not proven any such circumstances.

In concluding *Brown* stands for the proposition that an inadequate bid or any other factor alone is enough, *Arsali* and *Ingorvaia* placed an inordinate amount of emphasis on the language represented in underline, at the expense of the language represented in bold: "a judicial sale may **on a proper showing made**, be vacated and set aside <u>on any or all</u> of these grounds." *Brown*, 123 So. at 561 (emphasis added); *see* Appx.1 at 3. In the cases *Brown* cited for this proposition, a 'proper showing' was made when an inadequate bid price combined with other factors. *See Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach*, 300 So. 2d 679 (Fla. 1974) ("proper showing" to set aside sale was made in the case of a court error that generated an inadequate bid); *Marsh v. Marsh*, 72 So. 638 (Fla. 1916) (plaintiff stated claim to set aside sale for inadequate consideration and

fraud); *MacFarlane,* 39 So. at 998 (inadequate bid and defective notice of sale publication justified setting aside sale); *Florida Fertilizer Mfg. Co. v. Hodge,* 60 So. 127 (Fla. 1912) (affirmed order vacating sale for mistake and grossly inadequate price)). Placing the emphasis on "any and all" at the expense of "on a proper showing made" takes the *Brown* statement out of context and reads more into it than is warranted, particularly given the existing precedent.

Second, if *Brown* really meant that inadequacy of the bid or other factors alone were enough to justify setting aside a sale, the Court would have overruled itself, *sub silentio,* several times. Since before *Brown* it was well-established that an inadequate bid alone is not enough to set aside a sale, holding otherwise -- as *Ingorvaia* suggests the Court did -- would have resulted in a *sub silentio* overruling of the Court's earlier precedent. Then, when *Arlt* later said that inadequacy of the bid alone is not enough (essentially returning to its pre-*Brown* precedent), the Court would have overruled itself again, *sub silentio.* As the Fourth District acknowledged, this Court has made clear that it does not intentionally overrule itself *sub silentio.* Appx.1 at 4 (citing *Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002)).

Lastly, in resolving the perceived conflict, *Ingorvaia* and *Arsali* concluded that *Brown* and *Arlt* are mutually exclusive and *Brown* does not apply to cases involving inadequate bids. This conclusion, however, ignores the fact that

inadequate bids were at issue in *Brown* and the cases upon which it relied. *See Brown*, 123 So. 2d at 561 (citing *Marsh*, 72 So. 638 (inadequacy of price can be basis to set aside sale if it is connected with or shown to result from a mistake, accident, surprise, misconduct, fraud, or irregularity); *Macfarlane*, 39 So. 995; *Florida Fertilizer*, 60 So. 127 (uneducated property owner thought after consulting attorney that no further proceedings would be taken; sale then proceeded and generated grossly inadequate price)). Thus the manner in which the Fourth and Second Districts resolved the purported conflict was also a misreading of *Brown*.

The Fourth District's erroneous analysis is a sufficient basis to overturn the *Arsali* decision. The court's perceived need to reconcile *Brown* and *Arlt* also led the Fourth District to certify a question that does not actually resolve the issue in this case and will not provide guidance to future courts.

II. THE FOURTH DISTRICT'S CERTIFIED QUESTION SHOULD BE REPHRASED AND ANSWERED IN THE NEGATIVE.

The Fourth District's certified question is:

> DOES THE TEST SET FORTH IN ARLT V. BUCHANAN, 190 So. 2D 575, 577 (FLA. 1966), FOR VACATING A FORECLOSURE SALE APPLY WHEN ADEQUACY OF THE BID PRICE IS NOT AT ISSUE?

Appx.1 at 5. As just discussed, there is no need to decide whether to apply *Arlt* rather than *Brown* to requests to set aside foreclosure sales because *Brown* and *Arlt* do not conflict. Moreover, deciding that *Arlt* does not apply to the instant case

fails to answer the question of whether the sale was properly set aside. If *Arlt* does not apply, then presumably *Brown* does. The real question, then, is whether *Brown's* "any and all" language must be construed to mean that a sale can be set aside for any of the following reasons without more: surprise, or accident, or mistake, or irregularity in the sale unconnected to the bid price?

If this Court simply answers the Fourth District's certified question in the affirmative, declaring that *Arlt* does not apply in cases where inadequacy of the bid is not at issue, the real question that led to the Fourth District's decision will remain unanswered. The courts will then struggle with what circumstances justify setting aside a sale when the bid price is not at issue. Therefore, in order to properly resolve this case and to provide guidance to the courts in future decisions, the certified question should be rephrased as follow:

> WHEN CONSIDERING WHETHER TO SET ASIDE A FORECLOSURE SALE, IF THE ADEQUACY OF THE BID PRICE IS NOT AT ISSUE, CAN A COURT SET ASIDE A SALE FOR REASONS UNCONNECTED WITH ANY IRREGULARITY IN THE CONDUCT OF THE SALE, SUCH AS A PARTY'S UNILATERAL MISTAKE?

The Fourth District essentially answered this question in the affirmative. It concluded the sale could be set aside based solely on the bank's unilateral mistake in failing to cancel the sale even though the mistake did not result in an inadequate bid price and the sale was properly conducted. Appx.1. This is erroneous.

The restated question should be answered in the negative. Doing so would be consistent with *Brown, Arlt,* and decades of case law. Of the nearly sixty Florida cases citing *Brown* or *Arlt* over the past eighty years, only two dozen held that it was appropriate to set aside a sale. In all of those cases except the instant *Arsali* decision, the circumstances involved either an inadequate bid combined with a mistake or irregularity in the sale, or an error by the court or clerk of court. Until now, none of the citing cases involved only a party's mistake or other factor, without more.

Those cases citing *Brown* or *Arlt* which set aside sales for inadequate bids plus mistakes or sale irregularities are as follows: *Ohio Realty*, 300 So. 2d 679 (after petitioner filed notice of appeal clerk told counsel sale would not take place but it went forward; inadequacy of bid alleged); *Horne v. Miami-Dade Cty.*, 89 So. 3d 987 (Fla. 3d DCA 2012) (owner entitled to evidentiary hearing upon allegations of bid price disparity and irregularity in sale); *CitiMortgage, Inc. v. Synuria*, 86 So. 3d 1237 (Fla. 4th DCA 2012) (grossly inadequate bid resulting from bank attorney's mistake and improper publication of notice of sale); *Arsali v. Deutsche Bank Nat'l Trust Co.*, 82 So. 3d 833 (Fla. 4th DCA 2012) ("*Arsali I*") (reversed denial of motion for rehearing on order setting aside sale where order setting aside was entered without notice to purchaser and without evidentiary hearing on bank's allegations that bid was grossly inadequate and resulted from mistake, fraud or

other irregularity), *receded from in Arsali*; *In re King*, 463 B.R. 555 (Bankr. S.D. Fla. 2011) (sale set aside for inadequate bid plus defects in notice and timing of sale); *Long Beach Mtg. Corp. v. Bebble*, 985 So. 2d 611 (Fla. 4th DCA 2008) (grossly inadequate sale price and mortgagee was victim of mistakes by its attorneys and agents); *Wells Fargo Fin. Syst. Fla., Inc. v. GRP Fin. Svcs. Corp.*, 890 So. 2d 383 (Fla. 2d DCA 2004) (unilateral mistake that resulted in grossly inadequate price can be sufficient but court has to exercise discretion); *United Companies Lending Corp. v. Abercrombie*, 713 So. 2d 1017 (Fla. 2d DCA 1998) (same); *Kerrigan v. Mosher*, 679 So. 2d 874 (Fla. 1st DCA 1996) (reversed refusal to set aside sale; inadequate bid and attorney mistake); *Bennett v. Ward*, 667 So. 2d 378 (Fla. 1st DCA 1995) (mortgagor did not get copies of notice of sale or certificates of sale and title; bid price at issue); *RSR Investments, Inc. v. Barnett Bank of Pinellas Cty.*, 647 So. 2d 874 (Fla. 2d DCA 1994) (inadequate bid plus cooperation by bidders and joint bid); *Fernandez v. Suburban Coastal Corp.*, 489 So. 2d 70 (4th DCA 1986) (permissible to set aside sale "because the company's failure to attend the sale – an incident connected with the sale process [as arranged by mortgagee] – resulted in an inadequate bid price."); *Kaecek v. Knight*, 447 So. 2d 900 (Fla. 2d DCA 1984) (irregularity in clerk announcement at sale and inadequate bid); *Kaplan v. Dade Fed. Sav and Loan Ass'n of Miami*, 381 So. 2d 1184 (Fla. 4th DCA 1980) (inadequate bid and irregularity in sale); *Van Delinder v.*

Albion Realty & Mtg., Inc., 287 So. 2d 352 (Fla. 3d DCA 1973) (inadequate bid and attorney mistake); *Levy v. Gourmet Masters, Inc.*, 214 So. 2d 82 (Fla. 3d DCA 1968) (inadequate bid plus failure to properly describe property to be sold in notice of sale); *Subsaro v. Van Heusden*, 191 So. 2d 569 (Fla. 3d DCA 1966) (mistake and inadequate bid).

Those cases citing *Brown* or *Arlt* which set aside sales due to court error are as follows: *Ingorvaia v. Horton,* 816 So. 2d 1256 (Fla. 2d DCA 2002) (clerk did not provide mortgage holder with copy of notice of sale); *Texas Commerce Bank Nat. Ass'n v. Nathanson,* 763 So. 2d 1107 (Fla. 4th DCA 1999) (clerk acknowledged irregularity and mistake with sale); *U-M Publishing Inc. v. Home News Pub. Co., Inc.*, 279 So. 2d 379 (Fla. 3d DCA 1973) (court had ordered defendant to do impossible act during bankruptcy stay and clerk ordered sale pursuant to repealed statute).[1]

Before the instant *Arsali* opinion, the Fourth District's case law was likewise consistent in not permitting a properly conducted sale to be set aside merely for a mistake, without more. *See Esque Real Estate Holdings, Inc. v. C.H. Consulting, Ltd.*, 940 So. 2d 1185 (Fla. 4th DCA 2006) (affirmed refusal to set aside sale on basis that mortgagee did not respond to requests for estoppel letters); *Action Realty*

[1] *Gulf State Bank v. Blue Skies, Inc. of Georgia,* 639 So. 2d 161 (Fla. 1st DCA 1994), which cited *Brown*, also held that it was appropriate to set aside the sale of an alcoholic beverage license but the opinion does not contain any facts indicating the basis for vacating the sale. *Id.*

& Invest., Inc. v. Grandison, 930 So. 2d 674 (Fla. 4th DCA 2006) (reversed order setting aside sale where price not inadequate and no irregularity in sale); *Blue Star Investments, Inc. v. Johnson*, 801 So. 2d 218 (Fla. 4th DCA 2001) (reversed order setting aside sale where purchase price was not inadequate as alleged); *Bush v. Atl. Mortg. & Inv. Corp.*, 785 So. 2d 611 (Fla. 4th DCA 2001) (affirmed denial of objections to foreclosure sale where no showing that inadequate bid resulted from mistake, fraud or other sale irregularity); *Cueto v. Mfrs & Traders Trust Co.*, 791 So. 2d 1125 (Fla. 4th DCA 2000) (reversed order setting aside sale; untimely attempt to exercise redemption is not basis to set aside and price not inadequate).[2]

Thus *Brown*, *Arlt*, and several decades of Florida cases support answering the restated certified question in the negative. A party should not be able to set aside a properly conducted foreclosure sale that resulted in an adequate bid price merely for a unilateral mistake or other issue unconnected to the sale price or an irregularity in the sale process.

Keeping the focus on an irregularity in the sale process is consistent with the purposes behind the judicial sale and objection procedures. When there is an irregularity in the sale process – such as an error in the notice of sale or the timing of the sale – it can impact the number of bidders that appear at the sale and thereby

[2] In *Arsali* the Fourth District receded from all of these cases to the extent they hold that an inadequate bid is required to set aside a sale. Appx.1 at 4 n.4.

impact the bid price for the property. As this Court has explained, "the object of [the judicial sale] procedure is to bring about the sale of the property at as near its full market value as possible, and to assure this, to attract all possible bidders at the appointed hour of sale." *Ohio Realty*, 300 So. 2d at 681; *see also Emanuel v. Bankers Trust Co., N.A.*, 655 So. 2d 247, 250 (Fla. 3d DCA 1995) (purpose of sale, confirmation, and objection procedures is to "afford a mechanism to assure all parties and bidders to the sale that there is no irregularity at the auction or any collusive bidding, etc.").

Florida and Federal courts have recognized that protecting innocent third party purchasers stabilizes the market for foreclosure and bankruptcy assets, which in turn benefit debtors and lenders. *See e.g., In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990) (noting "the importance of encouraging finality in bankruptcy sales by protecting good faith purchasers and thereby increasing the value of the assets that are for sale"); *Bebble*, 985 So. 2d at 613 (noting that standard to set aside foreclosure sales is narrow "to ensure a competitive market in the foreclosure sale process" and discouraging precedent "that encourages the easy setting aside of foreclosure sales"); *Demars v. Vill. of Sandalwood Lakes Homeowners Assn.*, 625 So. 2d 1219, 1221 (Fla. 4th DCA 1993) (concluding that voidable service by publication should not defeat interest of bona fide purchaser

because "[t]o declare otherwise seriously impairs the marketability of title to real property.")).

Absent a holding by this Court on the restated question, parties will be able to cite *Arsali* to support motions to set aside sales involving unilateral mistakes unconnected with any irregularity in the sale process or an inadequate bid. This introduces needlessly excessive uncertainty into the foreclosure sale process. The uncertainty may drive away foreclosure sale bidders which will in turn negatively impact borrowers who will be liable for higher deficiencies, banks which will lose more on the loans, and the market itself through further depressed property values. *See Grandison*, 930 So. 2d at 677 n.1 (setting aside sale for negligence prevents innocent purchaser at foreclosure sale from deriving benefit of its investment through no fault of it); *LR5A-JV v. Little House, LLC,* 50 So. 3d 691, 695 (Fla. 5th DCA 2010) (court may consider interests of all of the parties in determining matter of judicial sale; prompt resolution of foreclosure cases acknowledges issues of property values and community stabilization, citing Fla. Supreme Court Task Force on Residential Mortgage Foreclosure Cases); *Ohio Realty*, 300 So. 2d at 681 (purpose of sale process is to attract as many bidders as possible to bring about sale of property as near as possible to its full market value).

Allowing sales to be set aside for unilateral party mistakes also provides little incentive for plaintiffs to follow proper procedures since any mistake can be

easily corrected even after a sale. This negatively impacts finality, prejudices third-party purchasers, and further taxes limited judicial resources. *C.f.* Task Force on Residential Mortg. Foreclosure Cases, Fla. Supreme Court, *Final Report and Recommendations on Residential Mortgage Foreclosure Cases* at 20 (2009) ("Many of these cases are being resolved after final judgment, many even after sale. As a result, these cases are consuming every available judicial resource to reach a resolution that may have been available at the beginning of the case. Sales are frequently cancelled at the last minute due to negotiations or a resolution. While we want to encourage settlement, that process should occur at the front end of the case, so that properties that must be sold on the courthouse steps can get a reasonable sale date without months of delay due to cancellations taking those sale spots.").

Nor does answering the restated question in the negative eliminate the lower court's discretion. Discretion to set aside or cancel sales never permitted such relief merely on the basis of benevolence or compassion for the borrowers to the detriment of other parties. *See Republic Federal Bank, N.A. v. Doyle*, 19 So. 3d 1053, 1054 (Fla. 3d DCA 2009) ("Although granting continuances and postponements are, generally speaking, within the discretion of the trial court, the 'ground' of benevolence and compassion (or the claim asserted below that the defendants might be able to arrange for payment of the debt during the extended

period until the sale) does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other. . . ."; footnote omitted); *LR5A-JV*, 50 So. 3d at 693 (rejecting notion that judgment holder has right to control if or when foreclosure sale takes place; property owners association had right to ask court to order sale to protect its interests); *Grandison*, 930 So. 2d at 677 n.1 (recognizing rights of third-party purchasers at foreclosure sale). The lower courts remain, as before, free to exercise discretion when evaluating whether to set aside sales based on the particular circumstances in cases involving inadequate bids combined with other factors or in the case of court errors.

Thus the Court should answer the restated question in the negative and hold that when considering whether to set aside a foreclosure sale, if the adequacy of the bid price is not at issue, a court cannot set aside a sale for reasons unconnected to an irregularity in the conduct of the sale, such as a party's unilateral mistake.

III. THERE WAS NO BASIS TO SET ASIDE THE FORECLOSURE SALE OR JUDGMENT IN THIS CASE.

In the instant case, answering the restated question in the negative requires a reversal of the Fourth District's decision. The only basis the Borrowers alleged for setting aside the sale was that their bank failed to cancel the sale after they met its reinstatement terms. Appx.4. Reinstatement following the foreclosure judgment would not have been a valid basis to cancel the sale in the first place. After entry of the foreclosure judgment, the note and mortgage merged into the foreclosure

judgment. *See JPMorgan Chase Bank, N.A. v. Hernandez*, -- So. 3d --, 2011 WL 2499641 (Fla. 3d DCA Jun. 22, 2011) (promissory note and mortgage merge into foreclosure judgment and are thereby extinguished). Thus the loan could not have been "reinstated" because it was extinguished. *See Matter of Boromei*, 83 B.R. 74, 76-77 (Bankr. M.D. Fla. 1988) (generally Florida law would not authorize a reinstatement of a mortgage subsequent to acceleration; citing *Old Republic Ins. Co. v. Lee*, 507 So. 2d 754 (Fla. 4th DCA 1987); debtor does not have right to cure default and reinstate mortgage subsequent to entry of foreclosure judgment).

Accordingly a redemption would have been necessary to cancel the sale. Redemption rights are prescribed by statute and generally can be exercised only before the certificate of sale is filed:

> At any time before the later of the filing of the certificate of sale. . . or the time as specified in the judgment . . . of foreclosure, . . . the mortgagor . . . may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment of foreclosure . . . . **Otherwise there is no right of redemption.**

§ 45.0315, Fla. Stat. (2011) (emphasis added). Since the final judgment here did not fix any different time for redemption, the statute controlled and the Borrowers' right of redemption terminated upon filing the certificate of sale. *See* Appx.2; *Emanuel*, 655 So. 2d at 249 (where judgment is silent on issue of redemption, redemptive rights lost upon clerk's filing of certificate of sale).

In this case the Borrowers paid only a reinstatement figure of approximately $12,000. Appx.4. Since this did not constitute a redemption of the nearly $87,000 judgment, the bank had no authority to direct the clerk to cancel the sale. *See Cueto,* 791 So. 2d at 1126-27 (reversed order setting aside sale; untimely attempt to exercise redemption is not basis to set aside and price not inadequate).[3]

Even if the Borrowers could have reinstated the loan, and even if reinstatement could have justified cancelling the sale, the bank did not actually cancel the sale. Appx.4. Its failure to do so was at most a unilateral mistake. The sale in this case took place as noticed and there was no allegation of any fraud or any other accident, surprise, or misconduct in connection with the sale. Appx.2-4. Nor was there any allegation that the bid price was inadequate. As Petitioner noted in his motion for rehearing, he bid 72% of the fair market value of the property. Appx.8. This does not constitute a "grossly inadequate" bid. *See Wells Fargo Credit Corp. v. Martin,* 605 So. 2d 531 (Fla. 2d DCA 1992) (affirmed sale at 17% of fair market value); *Shipp Corp. Inc. v. Charpilloz,* 414 So. 2d 1122 (Fla. 2d DCA 1982) ($1.1 million bid on $2.8-3.2 million property not grossly inadequate). Because the only basis alleged for vacating the sale was a unilateral mistake, without more, the Borrowers did not present a valid basis for setting aside the sale and their motion should have been denied.

[3] In fact, the foreclosure judgment permitted the sale to be cancelled only by court order. Appx.2 at 2.

Not only did the court vacate the sale at the UMC hearing, it also vacated the eight month-old final judgment of foreclosure, even though the Borrowers' motion to vacate did not request any relief relating to the judgment nor did it allege any grounds to set aside the judgment. Appx.7. This was erroneous. *See* Fla. R. Civ. P. 1.110(b) (motions shall state with particularity grounds therefore and relief sought); Fla. R. Civ. P. 1.540 (specifying grounds for setting aside final judgment); *Bank of America, N.A. v. Lane,* 76 So. 3d 1007 (Fla. 1st DCA 2011) (court could not set aside judgment based on excusable neglect where such an issue was not presented by pleadings, noticed for hearing, or litigated by the parties). The lower court abused its discretion in vacating the sale and final judgment and the Fourth District erred in affirming the order.

IV. THE LOWER COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING ON THE MOTION TO SET ASIDE THE SALE.

At a minimum, the District Court erred in concluding an evidentiary hearing was not necessary before vacating the foreclosure sale. The District Court found that such a hearing is necessary only if a grossly inadequate sale price is required to set aside a sale. Appx.1 at 5. To the contrary, regardless of the grounds asserted, the parties are entitled to an evidentiary hearing to prove up (or refute) the allegations upon which a motion to set aside is based. *See Avi-Isaac v. Wells Fargo Bank, N.A.,* 59 So. 3d 174, 177 (Fla. 2d DCA 2011) (purchaser at

foreclosure sale entitled to notice and opportunity to be heard at evidentiary hearing on motion to vacate sale; neither submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing); *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383 (Fla. 4th DCA 1980) (court can vacate judicial sale only if requisite degree of proof establishes grossly inadequate price coupled with exceptional circumstances set forth in *Arlt*).

Likewise, it was erroneous for the lower court to vacate the entire final judgment absent any evidence (or even allegations) to support such relief. Appx.7; *see Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.*, 636 So. 2d 838, 840 (Fla. 2d DCA 1994) (unsworn motion without more does not warrant vacating prior final judgment appearing proper on its face and in absence of stipulation; court cannot make factual determination based on attorney's unsworn statements); *Chancey v. Chancey*, 880 So. 2d 1281, 1282 (Fla. 2d DCA 2004) (if Rule 1.540 motion to set aside default judgment alleges colorable entitlement to relief court should conduct limited evidentiary hearing); *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996) (if allegations of motion for relief from judgment raise colorable entitlement to relief formal evidentiary hearing is required).

Accordingly, the Fourth District erred in holding no evidentiary hearing was required in order for the Borrowers to prove up the allegations in their motion to vacate the sale or final judgment.

CONCLUSION

The Court should reverse the District Court's decision affirming the lower court's order setting aside the sale and final judgment. The lower court's order should be vacated, the final judgment of foreclosure reinstated, and certificates of sale and title issued in Petitioner's name.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been served by First Class U.S. Mail this _26th__ day of July, 2012, upon: Ryan David Watstein, Esq., Wargo French, 999 Peachtree Street NE, 26th Floor, Atlanta, Georgia 30309; and Marshall C. Osofsky, 225 South Olive Ave., West Palm Beach, FL 33401.

I HEREBY CERTIFY that the font type and size used in this brief is Times New Roman 14 point. The undersigned certifies that the font used in this brief complies with the requirements of Rule 9.210(a)(2).

_/s/ Beth M. Coleman_____
Beth M. Coleman, Esq.