IN THE SUPREME COURT OF THE STATE OF NEVADA

7510 PERLA DEL MAR AVE TRUST,

Appellant,

vs.

BANK OF AMERICA, N.A.,

Respondent.

Case No. 75603

APPEAL
from the Eighth Judicial District Court, Clark County, Department 30
The Honorable Jerry A. Wiese, District Judge
District Court Case No. A-14-703140-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel certifies the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

BAC North America Holding Company

Bank of America, N.A.

Bank of America Holding Corporation

Bank of America Corporation

NB Holdings Corporation

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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RESPONDENT'S STATEMENT REGARDING ROUTING

This case belongs in the Court of Appeals. Although the case does not fall under one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b), the issues presented are controlled by on-point precedent from the Supreme Court.

ISSUES PRESENTED

1. Whether the district court correctly concluded that Bank of America, N.A.'s (**BANA),** offer to pay the amount of the superpriority component of the HOA's lien cured the default as to that component of the lien, thereby precluding the subsequent foreclosure sale from extinguishing BANA's deed of trust.

2. Alternatively, whether the district court's order should be affirmed on the alternative ground that the sale should be set aside in equity due to the grossly inadequate sales price and corresponding evidence of unfairness and oppression.

STATEMENT OF THE CASE

This case involves a dispute about the effect of a homeowner association's foreclosure on its lien under NRS 116.[1] Appellant 7510 Perla Del Mar Avenue Trust appeals the district court's judgment entered after trial holding that BANA's tender in the amount of an HOA's superpriority lien cured the default as to that lien, thereby precluding a subsequent foreclosure sale from extinguishing BANA's deed of trust. Respondent—the plaintiff below—purchased property at an HOA lien foreclosure sale for a mere 9.2% of its fair market value. Respondent then filed suit against BANA seeking to extinguish BANA's deed of trust, which encumbered the property.

After a bench trial, the district court found that BANA's offer to pay the superpriority amount constituted a valid tender which cured the default as to the superpriority component. The court concluded the subsequent HOA sale must necessarily have been based on the subpriority component of the lien only, which—being junior to BANA's deed of trust—could not have extinguished the deed of trust.

[1] Unless otherwise noted, all references to NRS 116 refer to the pre-2015 version of the statute in effect at the time of the association sale in this case.

STATEMENT OF FACTS

I. Factual Background

A. The Borrowers execute a deed of trust.

In 2010, Dominic Nolan (the **Borrower**) purchased real property located at 97510 Perla Del Mar Ave., Las Vegas, Nevada (the **Property**). (JA1b 197). The property is located at the Mandolin Phase 3 at Mountain's Edge, a planned unit development. (JA1b 197). The Property is subject to the control of that community's homeowners' association (the **HOA**). (JA1b 197). It is also subject to the control of the Mountain's Edge Master Association (the **Master HOA**). (JA1b 197).

The Borrower executed a deed of trust (the **Deed of Trust**) encumbering the Property, which secured a loan in the amount of $164,032 from KBA Mortgage LLC. (JA1b 197). The Deed of Trust identified Mortgage Electronic Registration Systems, Inc. (**MERS**) as the beneficiary. (JA1b 197). On January 6, 2012, MERS assigned the deed of trust to BANA, successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. (JA1b 199). BANA was the servicer of the loan until July 21, 2013. (JA1b 197).

The deed of trust provided:

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including . . . paying any sums secured by a lien which has priority over this Security Instrument[.]

(SA 59-60). The Deed of Trust also included a Planned Unit Development Rider which provided, "[i]f Borrower does not pay [HOA] dues and assessments when due, then Lender may pay them." (SA 74).

B. The HOA refuses BANA's tender and conducts a foreclosure sale on the lien.

The Borrower fell behind on his obligations to the HOA and Master HOA. (*See* JA1b 197). Nevada Association Services (**NAS**)—on behalf of the HOA—sent the Borrower a pre-lien letter on December 8, 2011. (JA1b 197). NAS then recorded a notice of delinquent assessment lien on January 4, 2012. (JA1b 197). NAS recorded a notice of default and election to sell on February 27, 2012. (JA1b 197).

On February 2, 2012, Silver State Trustee Services (**Silver State**)—on behalf of the Master HOA—recorded a notice of delinquent assessment lien. (JA1b 197-198). Then, on August 14, 2012, Silver State recorded a notice of default and election to sell. (JA1b 198).

In response, BANA retained the law firm of Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**) sent letters to NAS and Silver State respectively. (JA1b 198, SA 136-137). The letters requested a statement of the amount of the HOAs' superpriority liens (equal to nine months' worth of assessments) and offered to pay those amounts upon proof of the same. (SA136-137; JA1b 94-95, 127). The letters stated:

> [A] portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessments . . . That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client **hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.**

(SA 136-137). (emphasis added). The letters state BANA "does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues." (SA 137).

NAS received Miles Bauer's letter, but did not respond on behalf of the HOA based on its claim that doing so would violate the FDCPA.[2] (JA1b 198). The Master HOA did, however, provide a statement of account showing the total amount the Borrower owed the Master HOA through September 20, 2012. (JA1b 198). That statement showed that the Master HOA's quarterly assessment amount was $75. On October 4, 2012, Miles Bauer delivered to the Master HOA a check in the amount of $932.83, which was comprised of nine months' worth of the Master HOA's

[2] Though NAS's legal counsel, Mr. Chris Yergensen, confirmed at trial that NAS later began responding to letters of this kind with payoff ledgers because of a change in state law (as opposed to a change in the FDCPA) that authorized NAS to collect a $150 fee for doing so, despite the associated legal risk. (JA2 412:10-413:16; 416:2-9).

assessments ($225), plus an additional, voluntary payment of certain collection costs and fees. (JA1b 199).

A former Miles Bauer attorney, Mr. Rock Jung, testified at trial that Miles Bauer was hired **specifically** to obtain information regarding the HOAs' superpriority liens and pay them off to protect BANA's deeds of trust. (JA2 358:16-25). Mr. Jung further testified that BANA had hired Miles Bauer for this specific purpose "probably 6,000 or so" times during the period of time that he worked at Miles Bauer. (JA2 359-60). Finally, Mr. Jung further testified that Miles Bauer's standard practice for these 6,000 or so matters was to obtain the amount of the superpriority lien, recommend to BANA that this amount be paid, receive a wire from BANA for that amount, and then convert the wired amount into a check and deliver that check by hand to the HOA's agent. (JA2 361). This was Miles Bauer's "typical procedure," which it was able to follow with respect to the Master HOA because the Master HOA provided a payoff ledger. (JA2 370:18-23).

Mr. Jung also testified that for the first several years he worked on these matters, NAS would usually respond to Miles Bauer's letters seeking the superpriority amount with a payoff ledger. (JA2 363:7-13). But, he testified, at some point in 2012 NAS began refusing these requests citing "concerns of violating the FDCPA." (JA2 363:14-25). When NAS began refusing to provide payoff ledgers,

Miles Bauer would look at its database for old payoff ledgers pertaining to the same HOA at issue in an effort to find the assessment amount. (JA2 364:9-20).

Mr. Jung further testified that, by the time Miles Bauer sent the letter at issue in this case to NAS, Miles Bauer had sent "close to a thousand" similar letters, and that it was standard practice to follow up with a check if NAS provided the payoff ledger. (JA2 374:5-8). Having handled "close to a thousand" of these matters with NAS, Mr. Jung understood that it would always reject [the check] unless it was for the full amount." (JA2 374:14-18).

Ms. Jessica Woodbridge, a BANA Vice President, similarly testified that Miles Bauer was hired for the specific purpose of obtaining information regarding HOA superpriority liens and paying them off. (JA2 443-44). She further testified that once the amount had been determined, her standard practice was to request that the funds be wired to Miles Bauer so that Miles Bauer would then write a check for the same amount to the HOA. (JA2 445). Finally, she confirmed, unequivocally, that "[i]f NAS had provided a ledger, [] Bank of America [would] have followed its procedure of wiring funds to Miles Bauer to pay the super-priority portion of the lien[,]" as it did with respect to the Master HOA's lien. (JA2 446).

Former NAS legal counsel, Mr. Chris Yergensen, confirmed at trial that he understood that after Miles Bauer sent its first letter seeking the superpriority amount, it would follow up with a letter accompanied by a check. (JA2 404: 6-9).

Mr. Yergensen further confirmed that he understood that Miles Bauer's letter sought the superpriority amount because it "would like to pay it off." (JA2 407:5-23). NAS policy with respect to payments for the superpriority amount only, however, was to reject them if there were any "conditions" placed on them. (JA2 410:3-14). Finally, Mr. Yergensen confirmed that at this point in time, NAS was actively encouraging HOAs to foreclose so that the HOA and NAS could get paid. (JA2 421:20-422:10).

On November 15, 2012, NAS—having refused to provide BANA with a statement of the amount of the superpriority component of the HOA's lien—recorded a notice of foreclosure sale, advising that it intended to conduct a public auction of the Property on December 14, 2012. (JA1b 199). The auction took place on February 1, 2013, at which the Property was sold to Appellant for $14,600. (JA1b 199). NAS then recorded a foreclosure deed on February 7, 2013. (JA1b 199). The fair market value of the Property at the time of the sale was $158,500. (JA1b 200). Appellant thus purchased the Property for 9.2% of its fair market value.

II. Procedural Background

On September 28, 2013, Appellant filed its amended complaint in this case. (JA1 1). On August 10, 2016, BANA filed its amended answer to Appellant's amended complaint. (JA1 7). The case proceeded to trial. On January 5, 2018, the parties filed a joint pre-trial memorandum. (JA1 97). On February 8 and 9, 2018, Appellant filed a pre-trial memorandum and brief. (JA1b 153, 179). On February 12,

2018, the parties filed a list of stipulated facts. (JA1b 196). The trial began the same day. On March 20 2018, the district court entered findings of fact and conclusions of law in favor of BANA. (JA1c 220). The next day, March 21, 2018, the court entered an amended set of findings of fact and conclusions of law, also in favor of BANA. (JA1c 216). The district court concluded that the HOA had foreclosed only on the sub-priority portion of its lien because the superpriority portion of the lien had been extinguished by BANA's tender. (JA1c 216). The court further found that—as a result—Appellant took title to the Property subject to BANA's deed of trust. (JA1c 216). Appellant filed a notice of appeal on April 12, 2018. (JA1c 237).

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Appellant took title to the Property subject to BANA's Deed of Trust because BANA's tender of the superpriority component of the HOA's lien cured the default as to that lien and prevented any foreclosure from taking place as to that lien. Appellant's arguments to the contrary are meritless and the district court's decision should thus be affirmed.

First, Appellant argues that BANA's offer to pay the superpriority component did not constitute valid tender because BANA did not offer "immediate" payment and failed to prove that it had the ability to pay at the time of the tender. This argument is completely belied by the evidence in the record, which establishes that BANA's tender letter expressly stated that BANA offered to pay the full amount of

the superpriority component of the HOA's lien as soon as NAS provided it with a statement showing the amount due. Trial testimony of witnesses from Miles Bauer and BANA also confirmed that BANA had the ability to pay at the time of the tender, as it had attempted to do many times before.

Second, Appellant's argument that NAS's purported good faith refusal of BANA's tender on the ground that it did not offer to pay collection costs and fees somehow defeated BANA's tender is incorrect and should be rejected. For one thing, NAS never objected to the amount of BANA's tender at the time of the tender. Any objection has thus been waived. More importantly, no reasonable person could have believed that the superpriority component included collection costs and fees, even before this Court's ruling in *Ikon Holdings.*

Third, BANA was not—as Appellant argues—required to record evidence of its tender to keep its tender good. This Court has repeatedly rejected that argument, most recently in *Bank of America*, and it should do so again in this case.

Fourth, Appellant's assertion that it was a *bona fide* purchaser for value is entirely irrelevant. This Court has expressly held that one's status as a *bona fide* purchaser is not relevant where, as here, a lender has tendered the amount of the superpriority component of the HOA's lien. And in any event, Appellant is not a bona fide purchaser because it had inquiry notice of BANA's tender.

Finally, and in the alternative, should the Court find that BANA's tender did not cure the default as to the superpriority component of the HOA's lien, the Court should still affirm the district court's order on the ground that the sale should be set aside in equity. Appellant purchased the property for a mere 9.2 percent of its fair market value. This grossly inadequate sales price was caused by the unfair and/or oppressive conduct of the HOA's agent, NAS.

ARGUMENT

I. Standard of Review

This Court reviews a district court's findings of fact "for an abuse of discretion." *NOLM, LLC v. County of Clark*, 120 Nev. 736, 100 P.3d 658, 660–61 (Nev. 2004). It "will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence." *Id.* This Court reviews the district court's legal conclusions using a de novo standard of review. *State, DMV v. Taylor-Caldwell*, 126 Nev. 132, 229 P.3d 471, 472 (Nev. 2010). Finally, the Supreme Court reviews a district court's decisions concerning equitable remedies for an abuse of discretion. *American Sterling Bank v. Johnny Management LV, Inc.*, 126 Nev. 423, 245 P.3d 535, 538 (Nev. 2010).

II. The District Court Correctly Concluded That BANA's Tender of the Superpriority Lien Preserved Its Interest in the Property.

The district court correctly concluded that BANA's tender of the superpriority lien preserved its interest in the Property. Miles Bauer, on behalf of BANA, sent a letter to NAS requesting a statement of the value of the HOA's superpriority lien and offering to pay that amount. (JA1b 198). The letter stated:

> [A] portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessments . . . That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client ***hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA***.

(SA 136-137). NAS refused to respond to the offer based on its claim that doing so would violate the FDCPA. (JA1b 198).

Under Nevada law and basic principles of tender, BANA's unjustifiably rejected offer completed tender of the superpriority lien because it was an unconditional offer to pay coupled with the present ability to perform. Alternatively, this Court should hold that the offer constituted a tender under the closely related doctrines of waiver of tender and excuse of tender. A tender of a specific sum was excused because that amount depended on accounts accessible only by the HOA and NAS, which refused BANA's request for that sum.

A. BANA's unconditional offer, coupled with its present ability to perform, was sufficient tender.

In *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 334 P.3d 408 (2014), this Court called the split lien a "specially devised mechanism designed to strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. 334 P.3d at 412 (internal quotation marks omitted). The lender's ability to tender payment for the HOA's superpriority lien is a crucial part of that "specially devised mechanism."

"[T]he purpose of the law of tender is to enable the debtor to relieve himself or herself of interest and costs and to relieve his or her property of encumbrance by offering his or her creditor all that he or she has any right to claim; this does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount actually due." *Dohrman v. Tomlinson*, 399 P.2d 255, 258 (Idaho 1965); 74 Am. Jur. 2d *Tender* § 2 (same). A tender is "an unconditional offer of payment in full or with conditions for which the tendering party has a right to insist." *Bank of America, N.A. v. Ferrell Street Trust*, No. 70299, 416 P.3d 208 (Table), 2018 WL 2021560, at *1 (Nev. April 27, 2018) (unpublished); *see also* 74 Am. Jur. 2d *Tender* § 22 (tender is "an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist").

Here, BANA's offer to pay met the requirements for tender. It was undisputed that BANA offered to pay the actual composition of the superpriority portion: "the nine months of assessments for common expenses incurred before the date of [the] notice of delinquent assessment." (SA 136-137). BANA also proved that it had the "ability of immediate performance" to pay the amount of the lien. BANA offered to pay the superpriority portion as soon as it received "adequate proof of the" amount. (SA 136-137). Mr. Yergensen, NAS legal counsel, even confirmed at trial that he understood that Miles Bauer's letter sought the superpriority amount because it "would like to pay it off." (JA2 407:5-23). It is only because of the "refusal of cooperation by" NAS that "the obligation" was not "immediately satisfied," *Cochran*, 993 A.2d at 167-68.

Appellant argues BANA's offer to pay the superpriority amount was not sufficient tender because Miles Bauer did not actually deliver a payment. (AOB at 9-11). This Court has never announced such an absolute rule. To the contrary, tender can be effective without a payment under some circumstances. For example, in *Bank of Am., N.A., v. SFR Invs. Pool 1, LLC*, No. 69323, 2018 WL 3025973 (Nev. Jun. 15, 2018) (unpublished) and *The Bank of N.Y. Mellon v. SFR Invs. Pool 1, LLC*, No. 68165, 2018 WL 3025963 (Nev. June 15, 2018) (unpublished), this Court cited multiple cases stating that an offer to pay that meets certain criteria is sufficient tender. *See* 2018 WL 3025973 at *1; 2018 WL 3025963, at *1. Under these

authorities, an offer to pay is sufficient tender when it is: (1) "a present offer of timely payment," *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 320 P.3d 579, 585 (Or. Ct. App. 2014), and (2) "coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." *Cochran v. Griffith Energy Serv., Inc.*, 993 A.2d 153, 167-68 (Md. App. 2010); *see also Graff v. Burnett*, 414 N.W.2d 271, 276 (Neb. 1987) ("tender of payment is an offer to perform, coupled with the present ability of immediate performance").[3] Contrary to Appellant's argument, there was a well-established legal basis for the district court to find a non-payment tender occurred.

Because BANA's offer to pay met the requirements for a non-payment tender, it cured the default and prevented foreclosure as to the HOA's superpriority lien. *See Bank of Am. N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 120 (Nev. 2018). The

[3] As Appellant points out (AOB at 11), the unpublished order also cites a Florida case stating "the debtor must actually attempt to pay the sums due." *Southfork Invs. Grp., Inc. v. Williams*, 706 So. 2d 75, 79 (Fla. Dist. Ct. App. 1998). However, in *Southfork* the debtor told the creditor that he "was willing to pay ... after presentment of proper affidavits as to fees and costs, and review by an appropriate judicial official." *Id*. Since he was not willing to pay until there had been a **judicial determination** of the amount due, the court understandably concluded the debtor "did not transmit payment or, for that matter, even transmit an actual offer to pay." *Id*. In this case, BANA made no demand that there be a judicial determination of the amount due before it would send payment. It only asked "how much?"

district court thus correctly concluded that the HOA foreclosed only upon the subpriority component of its lien—as the default related to the superpriority component had been cured—and that Appellant thus took title to the Property subject to the Deed of Trust. (APP232, 236).

B. Appellant's arguments that BANA failed to meet the requirements for tender set forth in McDowell, Cochran, and Graff are incorrect and should be rejected.

Appellant's arguments that BANA failed to meet the requirements for tender set forth in *McDowell*, *Cochran*, and *Graff* are incorrect and should be rejected. Appellant actually cites each of these cases in his brief, but argues that Miles Bauer's offer was not an offer of "immediate" payment because Miles Bauer did not know the precise amount of the superpriority lien. (AOB at 12). Appellant further argues that "[n]o details were provided as to how long it would take for BANA to make the payment or even if BANA would agree to pay the amount requested." (AOB at 13). These arguments are nonsensical. Miles Bauer's letter stated that BANA "hereby offers to pay" the amount of the superpriority lien as soon as NAS provided it with a statement of account showing the of the superpriority lien (SA 136-137), which is the **earliest possible point** at which BANA could have written a check for the amount of the superpriority lien.

Appellant also argues that BANA failed to prove at trial that it had the "ability of immediate performance" at the time of the tender. (AOB at 13). This argument

should be rejected because the district court found as fact that BANA did in fact have the ability to pay when the tender was made. (JA1c 229). This conclusion should be affirmed on appeal because it is supported by substantial evidence, including the testimony of Miles Bauer attorney Mr. Rock Hung and BANA Vice President Ms. Jessica Woodbridge. *See NOLM*, 100 P.3d at 660-61 (on appeal, court will not set aside findings of fact unless they are clearly erroneous or not supported by substantial evidence).

Mr. Jung testified at trial that Miles Bauer was hired **specifically** to obtain information regarding HOA superpriority liens and pay them off to protect BANA's deeds of trust. (JA2 358). Mr. Jung further testified that BANA had hired Miles Bauer for this specific purpose "probably 6,000 or so" times during the period of time that he worked at Miles Bauer. (JA2 359-60). Finally, Mr. Jung further testified that Miles Bauer's standard practice for these 6,000 or so matters was to obtain the amount of the superpriority lien, recommend to BANA that this amount be paid, receive a wire from BANA for that amount, and then convert the wired amount into a check and deliver that check by hand to the HOA's agent. (JA2 361).

Ms. Woodbridge similarly testified that Miles Bauer was hired for the specific purpose of obtaining information regarding HOA superpriority liens and paying them off. (JA2 443-44). She further testified that once the amount had been determined, her standard practice was to request that the funds be wired to Miles

Bauer so that Miles Bauer would then write a check for the same amount to the HOA. (JA2 445). Finally, she confirmed, unequivocally, that "[i]f NAS had provided a ledger, [] Bank of America [would] have followed its procedure of wiring funds to Miles Bauer to pay the super-priority portion of the lien[.]" (JA2 446).

The testimony of Mr. Jung and Ms. Woodbridge proved that BANA had the "ability of immediate performance." Appellant does not even attempt to argue that this conclusion was clearly erroneous or not supported by substantial evidence. Instead, Appellant merely asserts—with no discussion of the record in this case—that BANA "did not prove" that Miles Bauer had the ability to pay at the time of the tender. (AOB at 13). This court should affirm.

C. Alternatively, this Court should affirm the district court's conclusion that sending a check for the superpriority amount would have been futile.

Alternatively, this Court should affirm the district court's conclusion tender of an actual check for the superpriority amount was excused because it would have been futile. (JA1c 231-232). Even if the Court were to hold that BANA's offer did not constitute a tender because it did not send a check along with its offer, such a tender would be excused because knowledge of the amount of the superpriority component depended on accounts accessible only to the HOA and NAS, which refused BANA's request for that amount.

An offeree's refusal to cooperate with a tender is not fatal to its effect. Courts have long recognized the inherent unfairness of allowing the offeree to withhold information within its possession regarding the proper amount of money necessary to discharge an obligation and thereby defeat tender. Tender is "excused" if "the amount depends on the balance shown by accounts that are inaccessible to the party from whom the tender would otherwise be required … and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor[.]"74 AM. JUR. 2D *Tender* § 4. For example, in *Cochran*, the debtor's email to the creditor requesting information necessary to process a check was held sufficient tender because "with that information, Liberty Mutual, as Griffith's insurer, could have immediately produced the check." 993 A.2d at 168. "Thus, the March 8, 2007 e-mail was an offer to pay the judgment coupled with the present ability of immediate performance, so that, had the Cochrans cooperated, the judgment would have been satisfied, i.e., a tender." *Id.*[4]

[4] *Accord*, *e.g.*, *Barnett v. O'Neal*, 116 So. 2d 375, 377-78 (Ala. 1959) (holding tender excused when the amount due could not be ascertained by the offering party); *Isaacson v. House*, 119 S.E.2d 113, 703 (Ga. 1961) (holding tender excused when "defendant refused to divulge the information [about the amount owed] to the plaintiff and thus prevented a tender of the amount due"); *Diamond v. Sandpoint Title Ins., Inc.*, 968 P.2d 240, 246 (Idaho 1998) (holding that creditor's misrepresentation about the amount owed and refusal to provide wiring instructions excused delivery of tender funds); *Kriegel v. Scott*, 439 S.W.2d 445, 448 (Tex. Ct. App. 14th Dist. 1969) (holding tender was excused by creditor's refusal to provide

The Ninth Circuit applied this rule in *In re Campbell*, holding that a debtor was excused from making tender of the specific amount due under a promissory note because of the creditor's "failure to inform the debtor as to the net amount which had accrued under the agreement." 105 F.2d 197, 200 (9th Cir. 1939). In that case, the creditor foreclosed under the note after refusing the debtor's request for a statement of account. *Id*. at 198-99. As a result, the court held that "the debtor was under no duty to perform so long as she was prevented from doing so by appellee." *Id*. at 200.

In the same way, the Supreme Court of Mississippi held that "it was not necessary for [debtors] to make a tender" in a case where the balance owed "could only be ascertained from the books of [the lender]." *Spinks v. Jordan*, 66 So. 405, 406 (Miss. 1914). The court held that the lender was barred from foreclosing because he had prevented the debtors from tendering the amount due by denying them information on the amount of the debt. *Id*.

In this case, BANA was prevented from learning the amount due. NAS refused to disclose the amount of the superpriority component of the HOA's lien, even after BANA's request. (JA1b 198). Trial testimony confirms that NAS understood that BANA was seeking to discover the superpriority amount. (JA2 400:23-401:16; 407:5-408:4). Therefore, as in *Campbell* and *Spinks*, a tender of the

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the amount owed; "[a]ppellee could hardly tender payment of a sum whose total could not be determined").

specific amount due was excused when NAS deliberately kept BANA from learning the superpriority amount.

The related doctrine of waiver of tender also applies to this case. Under this rule, "tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, that it will not be accepted." *Mark Turner Properties, Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001); *accord Needy v. Sparks*, 393 N.E.2d 1252, 1255 (Ill. App. 1979) ("Where a creditor… informs the party under obligation to pay that he will not accept the amount actually due in discharge of the indebtedness, the party under obligation to pay is relieved of the duty of tendering the amount actually due."); *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 350 N.W.2d 1, 5 (Neb. 1984) ("A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made"); *Alfrey v. Richardson*, 231 P.2d 363, 368 (Okla. 1951) (tender waived "if a strict legal tender had been made, defendant would not have accepted the money").

Here, it was NAS policy to reject any check from BANA sent through Miles Bauer that was not for the "full of the entire HOA lien" if it included terms it believed to be "conditions." (JA2 409:21-410:14). By not responding to Miles Bauer and refusing to accept payment, NAS, as the agent for the HOA, waived any requirement for BANA to make a formal tender (with a check) as a matter of law.

The cases this Court has cited in its decisions on tender are not to the contrary. In *Graff v. Burnett*, the court defined tender in a way that expressly acknowledged that the offeree's non-cooperation with the tender would not defeat it:

> A tender is an **offer to perform** a condition or obligation, coupled with the **present ability of immediate performance**, so that if it were **not for the refusal of cooperation** by the party to whom tender is made, the condition or **obligation would be immediately satisfied**.

Graff, 414 N.W.2d at 276 (emphasis added). *Cochran* even stated plainly: "On the offer to pay versus actual payment issue, we do not read the relevant cases—*Platsis, supra*, and *Chesapeake Bay Distributing Co., supra*—to equate 'tender' with the actual payment of money." *Cochran*, 993 A.2d at 168. While *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 320 P.3d 579, 585 (Or. Ct. App. 2014) did not expressly discuss the rule that tender could be excused or waived, it defined an offer ***without*** an accompanying payment to be a tender if it contained "a present offer of timely payment." Thus, the offeror's written offers, which modified the parties' agreement and only promised payment at some undefined point in the future, was not a tender. *Southfork Invs. Group, Inc. v. Williams*, 706 So. 2d 75, 79 (Fla. Dist. Ct. App. 1998) involved application of a Florida UCC provision governing redemption that was subsequently repealed in Florida, and this Court has indicated the UCC has no application to NRS 116 foreclosures. *See Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 642-43 (Nev. 2017)

[hereinafter, "*Shadow Canyon*"] (holding that UCC's commercial reasonable standard "has no applicability in the context of an HOA foreclosure"). Thus, well-established principles of the common law of tender, which appear to have been fully adopted by this Court, hold that a requirement of tender can be both excused and waived due to the non-cooperation of the offeree.

In this case, it is clear that even if BANA had been able to determine the correct sum of the superpriority portion, the tender would have been rejected. Miles Bauer knew that NAS would not accept payment for the exact statutory super-priority amount of the HOA's lien. As Mr. Jung testified, he had handled thousands of lien matters for BANA, and while some HOA agents did accept superpriority payments, he could not recall NAS ever accepting payments for anything less than the full amount of the HOA's lien. (*See* JA2 383:9-384:4). Therefore, if BANA had been able to learn the assessment rate and send a payment for the correct superpriority portion along with an indication that it covered that whole amount, NAS would not have accepted the payment. As such, any obligation BANA had to deliver an actual check was excused, and its offer constituted a tender as a matter of law. Thus, the district court's conclusion that BANA was not required to send an actual check in order to protect its interest in the Property (JA1c 232) is supported by substantial evidence and legal authority and should thus be affirmed.

D. NAS's purported "good faith" rejection of BANA's tender did not preserve the superpriority lien.

Appellant argues that BANA's tender failed because NAS was justified in rejecting it based on its purported "good faith" belief that it was entitled to recover attorneys' collection costs as part of the superpriority lien. (AOB at 14-19). This argument fails for several reasons.

First, Appellant failed to make this argument at trial, and has waived the right to make the argument on appeal. *See, e.g., Old Aztec Mine,* 97 Nev. at 52.

Third, BANA was never required to pay any collection costs in order to cure the default as to the superpiority portion of the lien, and no one could have believed that it was, even before this Court issued its decision in *Ikon Holdings*. NAS's wildly erroneous belief that it was entitled to more than the superpriority amount does not justify its rejection of BANA's tender. *See Kelley v. Clark*, 129 P. 921, 924 (Idaho 1912). This is especially true in this case as NAS's former general counsel, Mr. Yergensen, testified that NAS was well aware of the risk it was taking that its position regarding the amount of the superpriority lien would turn out to be incorrect:

> Q. NAS – here's what I'm getting at: NAS understood that the super priority could – might be only nine months, no costs or fees?
>
> A. Absolutely. Absolutely. We knew that risk. Still think the Nevada Supreme Court got it wrong.

(APP417:13-18).

In *Kelley*, the Idaho Supreme Court expressly rejected the notion that a legally sufficient tender could be rendered ineffective by the lienholder's mistaken calculation of the amount due based on a misreading of a statute. The appellant in *Kelley*, acting on advice of counsel, refused a mortgagor's tender of an amount sufficient to redeem the property based on a mistaken reading of an Idaho statute, believing he was entitled to demand an additional payment to satisfy another lien on the property as a condition for redemption. *Id.* at 922. After he realized the error of his position, he made a written offer to the mortgagor to accept the tender in the amount originally offered; however, the mortgagor refused to renew his offer. *Id.* Nonetheless, the Idaho Supreme Court concluded that the tender was effective and discharged the appellant's lien. *Id.* at 924-25. The court reasoned:

> Tender is the unconditional offer of a debtor to the creditor of the amount of his debt. *This means the real amount of the debt as fixed by the law*, and the purpose of the law of tender is to enable the debtor to relieve himself of interest and costs and to relieve his property of incumbrance by offering his creditor all that he has any right to claim. *This does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due—actually due.*

Id. at 924 (emphasis added). The court further rejected the notion that a tendering party must keep the offer good "at least for a reasonable length of time such as would enable the creditor in good faith to ascertain and determine his rights both in fact and in law." *Id.* The court held:

> Such a holding places the debtor at a great disadvantage as the creditor might involve him in prolonged litigation in order to determine some imaginary right … thus compelling the debtor to employ counsel and go to the expense of a defense in an action which might be delayed for months and even years.

Id. at 924-25.

The court's reasoning in *Kelley* applies precisely here. By offering to pay the full amount of the superpriority lien, BANA tendered the "amount due—actually due" under NRS 116.3116, as this Court reaffirmed in *Ikon Holdings*. "[Everyone] is presumed to know the law, and this presumption is not even rebuttable." *Smith v. State*, 151 P. 512, 513 (Nev. 1915) (cited in *Sengel v. IGT*, 2 P.3d 258, 262-63 (Nev. 2000)). The tender doctrine is designed "to enable the debtor to … relieve his property of encumbrance by offering his creditor all that he has any right to claim," which "does not mean that the debtor must offer an amount beyond reasonable dispute, but it means *the amount due, — actually due.*" *Dohrman*, 399 P.2d at 258 (emphasis added). BANA followed the law and perfected its tender by offering to pay the amount due. (SA 136-137, JA1b 94-95, 127).

Moreover, in *Bank of America*, this Court wrote that "[a] plain reading of [NRS 116.3116(2)] indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of assessments." 427 P.3d at 117; *accord Ikon Holdings*, 373 P.3d at 73 ("the superpriority lien … is limited to an amount equal to the common expense

assessments due during the nine months before foreclosure"). The statute read just as plainly in 2012 as it did when this Court interpreted it in *Ikon Holdings* in 2016 and *Bank of America* in 2018. Thus, even if there were any evidence that the HOA or NAS rejected BANA's tender because of a belief that the superpriority lien included collection costs or attorney's fees, that would not be a basis for holding the tender ineffective.

E. The record demonstrates that BANA remained ready and willing to pay the amount of the superpriority lien.

The record demonstrates that BANA remained ready and willing to pay the amount of the superpriority lien, even after its tender was rejected. The district court thus correctly concluded that it was (through Miles Bauer) "ready, willing, and able" to provide payment for a superpriority tender. (JA1c 229). Appellant nonetheless argues that "[t]he record does not contain any evidence proving that payment for any specific amount of money was available ‘upon demand' after NAS did not respond to Miles Bauer's letter, dated March 16[.]" (AOB at 19-21). Thus, Appellant argues, BANA did not "keep [its] tender good." (AOB at 19-21). This argument is belied by the record and should be rejected.

First, as discussed above, the March 16 letter expressly stated that BANA "hereby offers to pay [nine months of assessments for common expenses] upon presentation of adequate proof of the same by the HOA." (SA 136-137). The March 16 letter thus provides evidence that payment for a specific amount, nine months of

assessments, was available upon demand, when NAS provided documents showing the amount so that Miles Bauer could write a check. NAS never made such a demand, but Ms. Woodbridge confirmed, unequivocally, that "[i]f NAS had provided a ledger, [] Bank of America [would] have followed its procedure of wiring funds to Miles Bauer to pay the super-priority portion of the lien[.]" (JA2 446). And in fact, BANA and Miles Bauer did exactly that with respect to the Master HOA's lien. (JA1b 199). The district court's conclusion that BANA was ready and willing to pay the superpriority amount is thus supported by substantial evidence and should be affirmed. For the same reason, Appellant's argument that BANA did not provide evidence that it remained willing to pay to "keep [its] tender good" should be rejected. (AOB at 19-21).

F. BANA was not required to record its tender.

BANA was not required to record its tender as Appellant argues. This Court has repeatedly rejected the argument that BANA was required to record evidence of its tender to keep it valid, most recently in the unanimous, en banc *Bank of America*, decision. 427 P.3d at 119-120; *see also Aspinwall Court Trust*, 2018 WL 3544962 at *1; *RJRN Holdings, LLC v. JPMorgan Chase Bank, N.A.*, No. 73163, 2018 WL 3545160 at *1 (Nev. July 20, 2018) (unpublished disposition). Undeterred, Appellant argues that BANA's "failure to record its claim that the superpriority lien had been discharged makes that claim void as to plaintiff." (AOB at 21). The Court

in this case was correct to reject that argument, set forth in Appellant's pre-trial memorandum, and find that BANA's tender cured the default as to the superpriority component of the lien. Its finding should be affirmed for two reasons.

First, the statutory subsections cited by Appellant, NRS 111.315 and 111.325, do not apply because they concern only "instruments." *See* NRS 111.315; NRS 111.325 (discussing "conveyances," which NRS 111.010 defines as "every instrument in writing . . . "). BANA's tender was not an "instrument." *See* INSTRUMENT, Black's Law Dictionary (10th ed. 2014) (defining instrument as, "A written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.").

Even if these statutes did apply, they are simply codifications of the *bona fide* purchaser doctrine, which does not apply to a void sale like this one. NRS 111.315's only purpose is to establish that recording imparts record notice to a third party. The statute says, "every conveyance of real property, and every instrument . . . whereby any real property may be affected . . . **to operate as a notice to third persons,** shall be recorded . . ." NRS 111.315 (emphasis added). Even if the conveyance or instrument is not recorded, it "**shall be valid and binding between the parties thereto** without such record." NRS 111.315 (emphasis added).

Even if Appellant were correct that the tender needed to be recorded (and Respondent is not), failure to record would not impair the validity of the tender. It

would only mean that Appellant would not have had record-notice of it. But this Court has determined:

> A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void.
>
> * * *
>
> Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest.

Bank of America, 427 P.3d at 121 (citations omitted). This Court concluded that BANA's valid tender rendered the sale void "as to the superpriority portion," *id.*, regardless of whether the foreclosure buyer was a *bona fide* purchaser. Even if the tender fell within the scope of NRS 111.315 and NRS 111.325, the statutes' own words confirm the tender is valid even if unrecorded, and nothing in Chapter 111 contradicts the Court's conclusion that a valid tender satisfies the superpriority component and renders *bona fide* status irrelevant. *See Aspinwall Court Trust*, 2018 WL 3544962 at *1 & n.3 (noting that argument that BANA had to record evidence of its tender was "moot" because the rejected tender caused "the HOA's foreclosure sale for the entire lien [to] result[] in a void sale").

Second, Appellant's "subrogation" argument (AOB at 21-24) is nonsensical. As Appellant itself recognizes, this Court has held that tender of the superpriority portion of the HOA's lien "does not create, alienate, assign, or surrender an interest

in land." *Bank of America*, 427 P.3d at 119. Simply put, equitable subrogation does not apply to statutory liens like NRS 116 liens. *See In re Fountainebleau Las Vegas Holdings, LLC,* 289 P.3d 1199, 1208 (Nev. 2012). In *Fontainebleau*, this Court held that equitable subrogation could not apply to mechanics' liens. *Id.* at 1212. Like an HOA superpriority lien, the mechanics' liens at issue in *Fontainebleau* were part of a "specific statutory scheme whereby [the] lien is afforded priority" to further a policy of the Legislature: "to safeguard payment for work and materials provided for construction or improvements on land." *See id.* Because mechanics' liens are part of a "specific statutory scheme," this Court held they have "no place in equity jurisprudence." *Id.*

The statement in *Fontainebleau* that equitable subrogation cannot be applied against statutory liens also applies to HOA liens. This Court has noted that the split-lien system of NRS 116 is "a specially devised mechanism designed to strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *SFR Investments Pool 1 v. U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev. 2014). Equitable subrogation of the superpriority portion of an HOA lien would not advance those priorities, helping neither the HOA nor the lender. In fact, it would create the confusing situation where one part of the same lien would be held by an HOA while

the other part was held by the tendering party. This would create confusion for the homeowner, potential purchasers, and other parties with interests in the property.

Furthermore, the text of NRS 116 indicates that the Legislature intended only the HOA to hold superpriority liens. *See* NRS 116.3116(1) ("[t]he **association** has a lien on a unit . . . .") (emphasis added). This language is clear—only HOAs can have superpriority liens. *Id.* If equitable subrogation applied, any tendering party would end up holding an HOA superpriority lien after tendering the superpriority amount, as the lien would be "equitably assigned." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428-29, 245 P.3d 535, 539 (Nev. 2010). The text of NRS 116 simply does not support that outcome.

Accordingly, it does not make sense to suggest that the HOA had a duty to assign the superpriority lien "in recordable form" to BANA. (AOB at 21). And in any event, the purpose of the subrogation doctrine on which Appellant relies would be—if it applied—to allow BANA to collect the amount of the superpriority component of the lien from the Borrower. (*See* AOB at 23). The doctrine has nothing to do with whether the default as to the superpriority component was cured (it was), or whether the cure of the default meant that the foreclosure sale was void as to the superpriority component of the lien (it was).

G. The district court correctly found that Appellant's status as a bona fide purchaser is moot by virtue of the superpriority component of the HOA's lien having been extinguished.

The district court correctly found that Appellant's status as a *bona fide* purchaser is moot by virtue of the superpriority component of the HOA's lien having been extinguished. (JA1c 232). The district court's conclusion on this issue should be affirmed for two reasons. First, the *bona fide* purchaser doctrine is irrelevant where a party has tendered and thus extinguished the superpriority component of the HOA's lien, as this Court recently affirmed. Second, even if *bona fide* purchaser status is considered, this Court should find that Appellant was not a *bona fide* purchaser.

This Court recently expressly rejected the argument that a foreclosure buyer's purported status as a bona fide purchaser can somehow cause a foreclosure sale to extinguish a lender's first deed of trust after a tender. *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 133, 121 (Nev. 2018). In *Bank of America*, the Court held:

> A foreclosure sale on a mortgage lien after valid tender satisfies that lien [as] void, as the lien is no longer in default . . . It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.
>
> Because Bank of America's valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion. Accordingly, the HOA could not convey full title to the property, as Bank of America's

> first deed of trust remained after foreclosure. As a result, [the foreclosure buyer] purchased the property subject to Bank of America's deed of trust.

Id. (citations omitted).

In this case, as in *Bank of America*, and as discussed above, BANA's valid tender cured the default as to the superpriority portion of the HOA's lien. Thus, pursuant to this Court's holding in *Bank of America*, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion of the lien. *See id.* As a result, BANA's deed of trust survived the foreclosure sale irrespective of whether Appellant was or was not a bona fide purchaser at that sale. *See id.*

And in any event, Appellant was not a bona fide purchaser. Appellant's claim otherwise is defeated by inquiry notice of the tender due to specific language in the Deed of Trust that put Appellant on notice of BANA's tender. NRS 111.180 defines the bona fide purchaser defense as requiring that the purchaser lack not only actual knowledge, but also "constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title, or interest in, the real property." The corollary to this principle is that a "duty of inquiry" exists,

> when the circumstances are such that a purchaser is in possession of **facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights**. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose.

Berge v. Fredericks, 591 P.2d 246, 249 (Nev. 1979) (emphasis added). In order to rebut the presumption of notice, the purchaser must "show[] that he made due investigation without discovering the prior right or title he was bound to investigate."

This Court has confirmed that the duty of inquiry applies to purchasers at HOA sales just as it does for any land purchaser. *Telegraph Rd. Trust v. Bank of America, N.A.*, No. 67787, 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished). In that appeal, this Court held that an unrecorded deed of trust defeated the HOA-sale purchaser's claim to be a bona fide purchaser. *Id.* at *2. The HOA-sale purchaser "contend[ed] that even if it did have a duty of inquiry, [the beneficiary of the unrecorded deed] failed to produce evidence showing that such an inquiry would have revealed the existence of the [unrecorded deed of trust]." *Id.*, at *2. This Court "conclude[d] that this argument is misplaced," as "**it was [the HOA-sale purchaser]'s obligation to show that it made a due investigation and that the investigation did not reveal** the existence of the unrecorded 2006 deed of trust." *Id.* (citing *Berge*, 591 P.2d at 249) (emphasis added).

Here, the Deed of Trust states that if the Borrower, "fails to perform the covenants and agreements contained in this Security Instrument" then the lender "may do and pay for whatever is reasonable or appropriate," including "paying any sums secured by a lien which has priority over this Security Instrument[.]" (SA 59-60). The Planned Unit Development Rider further stated, "If Borrower does not pay

[HOA] dues and assessments when due, then Lender may pay them." (SA 59-60). Thus, the Deed of Trust specifically informed the public that BANA might seek to tender delinquent assessments.

Because the Deed of Trust was recorded, Appellant indisputably had record notice. Despite having record notice, there is no evidence in the record to suggest that Appellant made the "due investigation" required of it, a fact which Appellant essentially admits in its Brief. (AOB at 31 ("[e[ven if Mr. Haddad had made such an inquiry . . .")). In fact, despite acknowledging that if a sale was going to be conducted pursuant to NRS 116, he would generally "look for any type of deeds of trust that are recorded on a property" (JA2 252:14-22), Mr. Haddad essentially admitted that in this case he did not investigate whether BANA had tendered the superpriority lien. (JA2 281:14-283:11). Appellant has thus failed to carry its burden of showing that it is a *bona fide* purchaser. This Court can affirm the district court's ultimate conclusion based on this alternative ground even if it finds that Appellant's purported status as a *bona fide* purchaser were relevant.

III. Alternatively, Equity Requires Setting Aside The Sale.

As discussed above, BANA's tender was valid and thus preserved its Deed of Trust. Should the Court disagree and conclude that BANA's tender was invalid because it was not accompanied by a check, then the Court should affirm on the alternative basis that the sale should be set aside as commercially unreasonable.

As this Court held in *Shadow Wood*, the courts have the power to set aside a foreclosure sale on equitable grounds when two requirements are met: (1) the sales price was inadequate; and (2) there is a showing of fraud, unfairness, or oppression. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1112 (Nev. 2016); *see also Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641 (2017). This case meets both of these requirements.

First, the sales price in this case was grossly inadequate. Appellant purchased the Property for $14,600. (APP199). The fair market value of the Property at the time of the sale was $158,500. (JA1b 200). Appellant thus purchased the Property for 9.2% of its fair market value.

Second, "a wide disparity" in the sales price and the property's fair market value means that the court "may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale." *Shadow Canyon*, 405 P.3d at 648. Thus, "where the inadequacy of the price is great, a court may grant relief based on **slight evidence** of fraud, unfairness, or oppression." *Id*. at 643 (emphasis added). Appellant claims that the grossly inadequate sales price was the result of "features inherent to a foreclosure sale," not to fraud, unfairness, or oppression. But the fact that there was a foreclosure sale at all constitutes more than "slight evidence" of fraud, unfairness, or oppression because BANA offered to pay the very amount that the HOA stood to recover as a result of the foreclosure sale.

Simply put, if the Court agrees with Appellant that NAS's rejection of BANA's tender caused the foreclosure sale to extinguish BANA's Deed of Trust, then its decision to reject BANA's tender was unfair and/or oppressive. *See Shadow Canyon*, 405 P.3d at 650 (noting that the irregularities in presale notices that prevent a loan servicer from paying off the superpriority amount qualify as "fraud, unfairness or oppression" that can justify setting aside the HOA sale). In *Shadow Canyon*, this Court recognized that it was "significant[]" that there was no evidence in the record "to suggest that Nationstar ever tried to tender payment in any amount to the HOA." *Id.* By necessary implication, evidence of a deed of trust holder's efforts to tender (including an offer of payment) and the HOA's refusal to provide adequate information to permit the holder to write a check is a "significant[]" factor in equitable balancing.

Here, in line with its standard policy of rejecting and refusing Miles Bauer's attempts to tender the super-priority amount of HOA liens, NAS also refused here to provide BANA with a statement of the amount of the superpriority lien and instead simply ignored BANA's efforts. (JA1b 198). Trial testimony confirms that NAS understood that BANA was seeking to discover the superpriority amount. (JA2 400:23-401:16; 407:5-408:4). Nonetheless, NAS thwarted BANA's attempts to pay the super-priority amount by ignoring BANA's inquiries. And as a direct result, the HOA foreclosed on the Property, and Appellant actually admits that this was the

reason for the low sales price. This provides—at the very least—the "slight" evidence of unfairness required by *Shadow Canyon*.

For these reasons, the Court should hold that the foreclosure sale should be set aside on equitable grounds if it finds that BANA's tender did not extinguish the superpriority lien.

CONCLUSION

For all of the above reasons, the district court's ruling that the Deed of Trust survived the foreclosure sale should be affirmed.

Dated this 19th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

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 this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 9,366 words.

FINALLY, I CERTIFY that I have read this **Respondent's Answering 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 opening 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 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of December, 2018.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 19th day of December, 2018, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP