IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006 J-8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J8,

Appellants,

vs.

NV EAGLES, LLC,

Respondent.

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Case No. 81239

APPEAL

from the Eighth Judicial District Court, Clark County, Department XXXII
The Honorable Rob Bare, District Judge
District Court Case No. A-13-685203-C

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Akerman LLP

Bank of America, N.A.

BAC North America Holding Company

NB Holdings Corporation

Bank of America Corporation

Berkshire Hathaway Inc.

Bank of New York Mellon Corporation

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

APPELLANTS' STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Appellants The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 (**BoNYM**) and Bank of America, N.A. (**BANA**) (collectively, **Appellants**) state this case should be assigned to 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 BANA's attorney's delivery of a check in an amount calculated to pay the superpriority portion of the association's lien to the association's agent constituted a valid tender and protected the deed of trust in the ensuing foreclosure sale.

2. Whether the district court's judgment should be reversed under controlling Nevada law on the excuse-of-tender doctrine because the evidence unequivocally demonstrated that the homeowner association's agent had a known policy of rejecting BANA's tenders of the superpriority portion of the lien.

3. Whether the district court's order should be reversed because BANA was excused from tendering payment of the superpriority portion of the lien

because the homeowner association's agent frustrated payment of the same by failing to provide any statement showing the superpriority amount.

4. Whether the district court's order should be reversed because the sale was due to be set aside on equitable grounds, namely the grossly inadequate foreclosure sale price and unfairness and oppression in the homeowner association trustee's failure to identify the superpriority amount or accept tender on behalf of the beneficiary of the deed of trust.

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] Before the foreclosure, the deed of trust beneficiary's counsel tendered payment to the Madeira Canyon Homeowners Association's (**HOA**) agent, in an amount that constituted a good-faith calculation of the superpriority amount of the HOA's lien. However, the HOA's agent, Nevada Association Services, Inc. (**NAS**), rejected the tender because it had a policy of rejecting tenders of the superpriority portion of a lien. Despite this known policy of rejecting payments, the district court concluded Respondent NV Eagles, LLC (**NV Eagles**) acquired title free and clear of the deed of trust. That holding cannot be sustained in light of the Nevada Supreme Court's holding that formal tender is

[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's sale in this case.

excused when the evidence shows the party entitled to the payment (*i.e.*, the HOA's agent) had a known policy of rejecting the payments. Additionally, the excuse of tender doctrine also applies because NAS failed to provide the superpriority amount when it was provided a letter inquiring about the same. Alternatively, the sale should be set aside on equitable grounds considering the grossly inadequate sale price and unfairness and oppression surrounding the sale.

STATEMENT OF FACTS

I. Factual Background

A. The Borrower executes a deed of trust.

On November 20, 2006, Melissa Lieberman (**Borrower**) executed a senior deed of trust (the **Deed of Trust**) in favor of Mortgage Electronic Registration Systems, Inc. as the beneficiary for real property located at 2184 Pont National Drive, Henderson, Nevada 89044 (the **Property**). (2JA 346). The Deed of Trust secured a loan in the original principal amount of $511,576.00. (2JA 347). On or about September 14, 2011, the Deed of Trust was assigned to BoNYM via an assignment recorded in the Clark County Recorder's Office as Instrument Number 201109190000030. (2JA 365).

B. The HOA refuses to accept the tender check as a matter of course.

The Property is governed by the HOA's Declaration of Covenants, Conditions, and Restrictions, which require the Property's owner to pay certain assessments to the HOA. (2JA 379-450). The Borrower failed to pay those assessments, and on October 27, 2010, NAS, as agent for the HOA, recorded a Notice of Delinquent Assessment Lien. (2JA 367). On December 21, 2010, NAS recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. (2JA 368).

In response to the Notice of Default, BANA (then the servicer of the mortgage loan secured by the Deed of Trust) retained the law firm of Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**) to contact NAS in an effort to satisfy the superpriority portion of the HOA's lien. (*See* 2JA 451). Miles Bauer's procedure for these types of files was to first send a letter to the HOA's agent that (1) requested a statement of account so that Miles Bauer could calculate the superpriority amount, and (2) offered to pay that amount. (4JA 836). Consistent with these policies, Rock Jung, an attorney at Miles Bauer, sent a letter to NAS on February 22, 2011, which sought to determine the superpriority amount of the HOA's lien and "offer[ed] to pay that sum upon presentation of adequate proof of the same by the HOA." (2JA 455-56).

On or about March 12, 2011, NAS responded to Mr. Jung and sent him a document showing the total amount the Borrower owed the HOA broken down by categories, which included amounts due for "monthly assessments." (2JA 452, 458-59). The document showed the "Present rate" of the "Quarterly Assessment Amount" as $162.00. (2JA 458-59). The document also listed three separate "Prior rate[s]" of the Quarterly Assessment Amount: (1) $210.00; (2) $180.00; and (3) $234.00. (*Id*.) However, the document did not specify the dates for which each prior rate applied, nor did it include any superpriority number. *Id*. Moreover, the

ledger listed all of the miscellaneous charges associated with the HOA's foreclosure in the column under the "present rate" of $162.00. (*Id.*)

Based on the document provided by NAS, on or about April 1, 2011, Miles Bauer sent a $486.00 check to NAS, enclosed by a letter explaining the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BoNYM's "obligations to the HOA as a holder of the first deed of trust against a property." (2JA 461-63). NAS rejected the $486.00 check. (2JA 465).

Importantly, Jung knew NAS would reject any payment that was not for the full amount of the HOA's lien when he tendered the $486.00 check based on previous experience. (*See* 4JA 841). Mr. Jung testified his firm had been retained "five to six thousand separate times" to attempt to tender payment to an HOA or its agent (4JA 837), and that NAS was "the HOA trustee or collection agent [he] dealt with the most," making him familiar with NAS's policies and practices. (4JA 838). Mr. Jung further testified that, aside from a few instances where he had a client retain his firm to pay the association's full lien amount, NAS would refuse delivery of tender checks "because they claimed it wasn't for the full amount." (4JA 841). Mr. Jung confirmed that NAS would reject tender checks even when Miles Bauer included additional amounts in excess of nine months of assessments for reasonable attorneys' fees and costs. (4JA 856-57).

NAS routinely rejected Miles Bauer's superpriority tenders for two reasons. First, NAS did not believe the foreclosure of an association's lien could extinguish a senior deed of trust because it did not believe an association's superpriority lien existed until the senior deed of trust encumbering the same property was foreclosed. (4JA 731). Second, NAS believed the superpriority amount included not only nine months of assessments, but also nine months of interest, nine months of late fees, a transfer fee, and all costs of collecting. (*Id*.; *see also* 4JA 828 (Susan Moses testifying that NAS would reject payments that were for less than the full lien amount if the correspondence included a condition that payment was "in full" for the superpriority portion of the lien)). NAS made these positions clear in global litigation between BANA and dozens of homeowners associations and collection agents, in which BANA sought a declaration regarding the priority and scope of associations' liens. (4JA 728-45).

In that global litigation, NAS stated in a motion to dismiss filed only about a week before the tender in this case that "until such time as [BANA] actually forecloses on a property, there is and can be no priority dispute" between BANA and an association because an association's "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." (4JA 731). NAS also stated that "unless and until it becomes the owner of a property subject to a Super Priority Lien, [BANA] is not liable for any of the amounts owing under the Super Priority Lien." (4JA

741). In its reply in support of its motion to dismiss, NAS declared that BANA's "pre-payment scheme" (*i.e.*, the "scheme" of submitting superpriority payments before an association's sale to protect its senior deeds of trust) "is, at its core, a hypothetical scenario void of sufficient definiteness to enable this Court to dispose of this controversy." (4JA 748). Finally, making clear its intent to reject all BANA's superpriority tenders, NAS declared "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender prior to foreclosure." (4JA 751).

C. After rejecting the tender, the HOA forecloses on the Property.

After rejecting Miles Bauer's superpriority tender, NAS proceeded to record a Notice of Foreclosure Sale on April 1, 2013, which set the sale for April 26, 2013. (2JA 370). On June 7, 2013, NAS foreclosed, selling the Property to Underwood Partners, LLC (**Underwood**) for $30,000.00. (2JA 372). The fair market value of the Property at the time of the sale was $430,000. (JA 192). On September 18, 2013 – after Borrower brought a lawsuit challenging the foreclosure – Underwood conveyed its interest in the Property to NV Eagles. (2JA 375).

II. Procedural Background

On July 16, 2013, the Borrower initiated this action by filing a complaint against Madiera Canyon Community Association, NAS, BANA, Resurgent Capital Services, LP, and Underwood as case No A-13-685203-C. (1JA 001-007). The

Borrower then filed an amended complaint on April 5, 2013, against the same defendants. (1JA 010-016).

On August 19, 2013, NAS filed an answer and counterclaims against the Borrower. (1JA 019-026). The same day, NAS filed a third-party complaint, asserting claims against Cogburn Law Offices, LLC, Norma Teran, Lawyers Title of Nevada as Trustee for MERS, as nominee for Pulte Mortgage, LLC, and BoNYM. (1JA 030-038). On September 12, 2013, BANA filed an answer to Plaintiff's amended complaint. (1JA 039-044). Also on September 12, 2013, BoNYM filed an answer to NAS's third party complaint. (1JA 045-049).

On January 9, 2014, the district court dismissed NAS's third party claims against third party defendants Cogburn Law Offices and Norma Teran. (1JA 063-067). The district court granted in part and denied in part third party defendant Underwood's motion to dismiss on January 21, 2014. (1JA 076-079).

After dismissal of certain claims made by the Borrower against NAS and the HOA, Underwood filed a motion to consolidate this matter with a related case, Case No. A-13-690944-C, which was pending in Department X. (1JA 091-116). The district court granted that motion and consolidated the actions on March 27, 2014. (1JA 117-118).

Appellant BANA and Respondent NV Eagles, LLC filed competing motions for summary judgment, and each of the motions were denied on October 25, 2016. (1JA 135-138).

On July 12, 2019, BoNYM filed its cross-claim against NV Eagles. (1JA 142-150). NV Eagles filed its cross-claim against BANA and BoNYM on July 15, 2019. (1JA 151-157). BANA and BoNYM each answered NV Eagles's cross-claims on July 30, 2019. (1JA 158-171).

After filing pre-trial memorandums and stipulations of fact, a bench trial took place on January 14 and 15, 2020. Ultimately, the district court entered judgment in NV Eagles's favor, holding that NV Eagles took title to the Property free and clear of BoNYM's Deed of Trust. (4JA 914-920).

On May 27, 2020, Appellants timely filed their notice of appeal. (4JA 930-931).

SUMMARY OF THE ARGUMENT

The district court's judgment should be reversed because Bank of America proved it was excused from tendering a superpriority payment. In *7510 Perla Del Mar Ave Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020) ("*Perla Trust*"), the Supreme Court of Nevada held that a materially identical record established that a formal tender from Miles Bauer was excused because it would have been futile. The Court ruled that Bank of America's obligation to tender

payment was "excused because NAS would have rejected the check." 136 Nev. at 67, 458 P.3d at 361. Evidence in this case shows that NAS would have rejected any check from Miles Bauer for a superpriority payment, and therefore, BANA was excused from tendering the amount.

Additionally, the district court's decision should be overturned because NAS failed to provide the superpriority amount to Miles Bauer, which made it impossible to pay the appropriate superpriority amount and excuses BANA from tendering such payment.

Alternatively, this Court should hold that the Deed of Trust survived as an equitable matter because the HOA's foreclosure sale was unfair. Nevada law affirms that an HOA foreclosure sale can be set aside when the sale price is inadequate and there is evidence of fraud, unfairness or oppression. Both elements are met here. The Property was sold for less than seven percent of its fair market value, well below the threshold for gross inadequacy. Unfairness and oppression are met by NAS's refusal to accept the superpriority tender from BANA and subsequent foreclosure without disclosing the facts of the tender. These facts provide a sufficient basis to set the sale on an equitable basis.

For each of these reasons, this Court should overturn the district court's ruling.

ARGUMENT

I. Standard of Review

Under Nevada law, a "district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence." *Cnty. of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). The district court's conclusions of law are reviewed *de novo*. *Sun State Props.*, 119 Nev. at 334, 72 P.3d at 957.

II. Miles Bauer Made a Valid Tender, Thereby Protecting the Deed of Trust.

The district court's judgment should be reversed because BANA's tender through its lawyers at Miles Bauer was valid. The Supreme Court of Nevada has left no doubt about the effect of a lender's pre-foreclosure tender: "[a] valid tender of payment operates to discharge a lien or cure a default." *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018). As the Supreme Court recognized in *Bank of America*, Miles Bauer's tenders were based on the only information available to them: the "HOA's representations." *Id.*, 134 Nev. at 605, 427 P.3d at 116; *see also Bank of America, N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 623 (9th Cir. 2019) (holding that a Miles Bauer tender "based on the ledger provided by [the association]" was valid

and caused the purchaser to acquire title subject to the deed of trust); *Cochran v. Griffith Energy Serv., Inc.*, 993 A.2d 153, 168 (Md. App. 2010) (holding that an offer to pay, coupled with a request for information for the amount owed, was a sufficient tender because the creditor refused to provide the amount owed).

The district court, however, held that the tender was not sufficient because the actual superpriority amount of the HOA's lien—the sum of the nine months of unpaid assessments predating the institution of foreclosure proceedings—was $540.00, or $54 more than Miles Bauer's tender. (4JA 916). That reasoning does not work. *First*, the district court ignored the fact that the ledger provided to Miles Bauer provided no information that would have allowed for precise calculation of the superpriority amount. The ledger actually recited four different quarterly assessment rates, none of which included information regarding the applicable date. (2JA 458-59). Furthermore, all of the miscellaneous charges associated with foreclosure activity were listed under the "present rate," which is what Miles Bauer used to calculate the tender. *Id.* Under the circumstances, Miles Bauer's tender was based on the "HOA's representations" and was valid.

Second, any purported shortfall in the tender was waived when NAS did not point it out in response. Both of Mr. Jung's letters to NAS expressly and repeatedly indicated that Miles Bauer wanted to pay the superpriority amount, calculated as "the nine months of assessments for common expenses incurred before the date of

your notice of delinquent assessment dated December 17, 2010." (2JA 455-56; *see also* 2JA 461-62). In the letter enclosing the tender check, Mr. Jung invited NAS to reach out to him by telephone if it had "any questions or concerns." (2JA 462). Mr. Jung testified at trial that, had NAS specified that a different assessment rate applied, Miles Bauer "would have been happy to use that rate" and pay the additional amounts necessary to satisfy the superpriority portion of the lien. (4JA 856).

Instead, the undisputed evidence at trial showed that NAS rejected the tender check without making any effort to contact Mr. Jung and notify him of any additional amounts that were due. (4JA 843-44). Under the tender doctrine, "a person to whom a tender is made must, at the time, specify the objections to it, or they are waived." *First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983); *see also Sellwood v. Equitable Life Ins. Co. of Iowa*, 42 N.W. 2d 346, 353 (Minn. 1950) ("the grounds of objections to a tender must be specified by the creditor"); *Blackford v. Judith Basin Cty.*, 98 P.2d 872, 876 (Mont. 1940) ("objections to a tender are waived unless specified at the time"). By failing to object to Miles Bauer's tender based on Mr. Jung's slight miscalculation of the superpriority amount, NAS waived any objection to the tender on that basis.

Finally, even if Mr. Jung slightly miscalculated the superpriority amount, the tender was still effective under *Bank of America* and the doctrine of substantial

compliance. The doctrine of "[s]ubstantial compliance may be sufficient to avoid harsh, unfair[,] or absurd consequences." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475–76, 255 P.3d 1275, 1278 (2011) (internal quotation omitted). The Nevada Supreme Court has applied the substantial compliance doctrine to an HOA's compliance with NRS 116's requirements to otherwise validate foreclosures that did not strictly comply with NRS. *See, e.g., Saticoy Bay 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 187-88, 444 P.3d 428, 435 (2019); *U.S. Bank, N.A. v. Resources Grp.*, 135 Nev. 199, 203-04, 444 P.3d 442, 447 (2019).

Here, the district court's judgment holding that a miscalculation in the amount of $54 caused the extinguishment of a security interest securing a debt over half a million dollars is a quintessential "harsh, unfair, and absurd" result. Mr. Jung's reading of the ambiguous ledger provided by NAS was completely reasonable, and at no point did NAS provide him with information that his calculated tender amount was slightly short. Under the circumstances, the delivery of the $486 check substantially complied with the requirements of the tender doctrine. If homeowners associations are entitled to the benefit of the substantial compliance doctrine, so, too, should be Appellants.

Although Appellants raised each of these arguments to the district court, the court did not squarely address any of them in its Findings of Fact and Conclusions

of Law. The district court summarily found that "notwithstanding the fact that the Miles Bauer check was for an amount less than the superpriority amount, BANA and/or [BoNYM] had adequate time and notice to correct this error prior to the foreclosure sale." (4JA 926). There is no evidence in the record (much less substantial evidence) supporting this finding. It is undisputed that NAS never provided any additional information to Miles Bauer regarding the correct assessment amount. Even after acknowledging there was "no way to tell from this document [the ledger] what the monthly assessments were" between January 2010 and April 2011 (4JA 855), the district court appeared to be fixated on the possibility that Mr. Jung could have arrived at a different number for the superpriority tender calculation. (*See* 4JA 861-62). But that is beside the point. Mr. Jung calculated the superpriority tender amount as best he could based on the limited information available from NAS. NAS never identified a supposed shortfall that would have allowed Mr. Jung to pay the extra $54 (which he attested he would be happy to do (4JA 856)). The law of tender is not so rigid as to penalize the party acting in good faith who makes a *de minimis* error and reward the recalcitrant party. The district court's judgment should be reversed.

III. The Deed of Trust Survived Under the Excuse of Tender Doctrine.

If the Court determines the delivery of the check from Miles Bauer did not constitute a legal tender, this Court should nevertheless reverse the district court's

judgment based on the excuse of tender doctrine. BANA presented evidence showing NAS had a known policy of rejecting superpriority tenders from Miles Bauer during the relevant time period. Indeed, regardless of what superpriority amount would have been tendered in this case, it is clear from the record the tender would have been rejected. Because NAS would have rejected the superpriority payment regardless of the amount used to calculate the same, the payment would have been futile, and the excuse of tender doctrine applies to the payment.

A. The evidence before the district court shows that a tender of the superpriority portion would have been futile.

The district court found that BANA, through Miles Bauer, tendered a check to NAS for $486.00 and that this amount was miscalculated and did not satisfy the full superpriority amount of $540.00. (4JA 915-16). However, it is clear from the testimony in this case that tender for the superpriority amount would have been rejected, regardless of the amount of the check.

The Supreme Court of Nevada has held that NAS's known policy of rejecting correctly calculated superpriority tender checks rendered tender efforts futile and excuse a formal tender requirement. In *Perla Trust*, as in this case, Bank of America retained Miles Bauer to protect its interest in a recorded first deed of trust after receiving a notice from NAS that it was foreclosing on a homeowner's association lien. 458 P.3d at 349, 136 Nev. at 64. The trial testimony indicated that for the entire relevant time period of 2011 through 2013, NAS "systematically

rejected checks [from Miles Bauer] if it was for less than the entirety of the lien amount." 458 P.3d at 350, 136 Nev. at 64.

Under those facts, the Supreme Court held that Bank of America's obligation to tender payment was "excused because NAS would have rejected the check." *Perla Trust*, 458 P.3d at 350, 136 Nev. at 64. Under the "generally accepted exception" of futility, "'[a]n actual tender is unnecessary where it is apparent the other party will not accept it.'" *Id.* (quoting *Schmitt v. Sapp*, 223 P.2d 403, 406-07 (Ariz. 1950)). Under that rule, "the Bank was excused from making a formal tender in this instance because, pursuant to NAS's known policy, even if the Bank had tendered a check for the superpriority portion of the lien, NAS would have rejected it." *Id.* Accordingly, the Court concluded "that the district court properly determined that the Bank preserved its interest in the property such that Perla Trust purchased the property subject to the Bank's first deed of trust." 458 P.3d at 352, 136 Nev. at 67.

The Court's ruling in *Perla Trust* applies precisely here. The trial testimony demonstrated that, as proved in *Perla Trust*, NAS had a policy of rejecting checks from Miles Bauer delivered that were for less than the full unpaid amount of the HOA's lien. (4JA 843-44). During this time period, NAS would reject checks that were for superpriority liens because NAS mistakenly believed the amount needed to include fees and costs. (*Id.*; *see also* (4JA 841) (NAS rejected superpriority

payments "99 percent of the time . . . because they claimed it wasn't for the full amount.")). In fact, NAS employee Susan Moses testified at trial that the reason for the rejection of Miles Bauer's purportedly insufficient tender check was not the $54 shortfall, but NAS's general policy of refusing to accept a superpriority tender as payment in full for the superpriority obligation. (4JA 856).

Additionally, Appellants submitted evidence showing that NAS made it perfectly clear it would not accept Miles Bauer's superpriority payment. The Supreme Court has previously held that the excuse of tender doctrine was proven by arbitration filings from NAS where it "characterized [the bank's] attempt to make a superpriority tender as a 'scheme' and stated NAS did not believe the superpriority component of an HOA's lien came into existence until after the first deed of trust was foreclosed." *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC,* 464 P.3d 125 (Table), 2020 WL 3003017, at *1 (Nev. Jun. 4, 2020) (unpublished). Reviewing these filings, the Supreme Court wrote, "[t]he necessary implication of these statements is that NAS would not accept a superpriority tender before the first deed of trust was foreclosed." *Id.* The Supreme Court concluded, "this evidence is sufficient to demonstrate that NAS had a ‘known policy of reject[ion]' sufficient to excuse formal tender." *Id.*

Appellants submitted evidence of very similar statements made in global litigation between BANA and dozens of homeowner associations and collection

agents, in which BANA sought a declaration regarding the priority and scope of associations' superpriority liens. (4JA 692-701). In that global litigation, NAS stated in its motion to dismiss that "until such time as [BANA] actually forecloses on [a] property, there is and can be no priority dispute" between BANA and an association because an association's "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." (4JA 731). NAS continued: "Unless and until it becomes the owner of a property subject to a Super Priority Lien, [BANA] is not liable for any of the amounts owing under the Super Priority Lien." (4JA 741). Moreover, in its reply, NAS declared that BANA's "pre-payment scheme" (*i.e.*, the "scheme" of submitting superpriority payments before an association's sale to protect its senior deeds of trust) "is, at its core, a hypothetical scenario void of sufficient definiteness to enable this Court to dispose of this controversy." (4JA 748). Finally, making clear its intent to reject all BANA's superpriority tenders, NAS declared that "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender prior to foreclosure." (4JA 751).

These types of statements and filings leave no doubt that NAS had a known policy against accepting payments of the superpriority portion of an association's lien. Just as in *Perla Trust* and the unpublished *U.S. Bank* opinion, Appellants proved that a formal tender would have been rejected by NAS and therefore was futile, and any tender obligation was excused. "The law does not require one to do

a vain and futile thing." *Perla Trust*, 458 P.3d at 351, 136 Nev. at 66 (quoting *Sapp*, 223 P.2d at 406-07).

Even though Appellants raised the futility argument at trial and discussed it at length in their trial brief, (2JA 256-260), the district court never addressed the issue in its Findings of Fact and Conclusions of Law. The district court appears to have believed the only issues presented were whether the tender was sufficient to pay the full superpriority amount of the HOA's lien and whether the foreclosure sale should be set aside in equity. (4JA 916, 918-19). The district court's failure to recognize that the undisputed evidence established that any correctly calculated tender would have been futile constitutes a reversible error.

B. NAS's refusal to provide accurate figures for the superpriority amount also excused tender.

Appellants were also excused from tendering a superpriority payment because NAS did not provide sufficient information to calculate the superpriority amount to Miles Bauer. Hornbook law holds that a formal 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; *accord Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("any affirmative

tender of performance is excused when performance has in effect been prevented by the other party to the contract").[2]

As the Nevada Supreme Court has explained, "a plain reading of NRS 116.3116" shows that a senior lender has the right to satisfy the superpriority portion of an association's lien to protect its deed of trust. *See Bank of America*, 134 Nev. at 608, 427 P.3d at 115. The necessary corollary is that a senior lender is entitled to know the superpriority amount it must pay. Since the publicly-recorded foreclosure notices do not provide that information, an association's collection agent must provide it to a senior lender. In fact, the Supreme Court has held that a collection agent's "refus[al] to give information regarding the monthly assessments" to Miles Bauer supports a finding that the agent "lacked good faith in rejecting [Miles Bauer]'s tender." *See Nevada Ass'n Serv., Inc. v. Las Vegas Rental*

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[2] *See also Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) (tender waived where creditor "refused... to name the amount she claimed to be due her"); *Spinks v. Jordan*, 66 So. 405, 406 (Miss. 1914) ("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]."); *Barnett v. O'Neal*, 116 So. 2d 375, 377-78 (Ala. 1959) (tender excused when the amount due could not be ascertained by the offering party); *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 amount owed; "[a]ppellee could hardly tender payment of a sum whose total could not be determined"); 86 C.J.S. *Tender* § 5 ("[t]ender of an amount due is therefore waived when the party entitled to payment ... in any other way obstructs or prevents a tender").

& Repair, LLC Series 78, 432 P.3d 744 (Table), 2018 WL 6829004, at *1 (Nev. Dec. 27, 2018).

Here, as discussed above, the document provided by NAS did not list the superpriority amount or provide enough information to accurately calculate it. The document listed four different quarterly assessment amounts without delineating which amount applied to which time period. (2JA 458-59). Miles Bauer used the first-listed of the four amounts, multiplied it by three to calculate nine months of assessments, and tendered a check for that amount to NAS. (2JA 461-63). NAS rejected the superpriority payment without informing Miles Bauer which quarterly-assessment amount was the correct one to use to calculate the superpriority, even though Mr. Jung testified that he would have been happy to submit another check at the proper rate if NAS had provided that information. (4JA 856).

This case forcefully demonstrates the purpose behind the long-recognized rule that tender can be excused when it is "frustrated" or "obstructed" by the party due to receive the tender. But for NAS's failure to provide clear information—either in the initial ledger, or through any other correspondence with Miles Bauer—it is clear Miles Bauer would have tendered the full superpriority amount and protected the Deed of Trust from extinguishment.

Putting the onus on the tendering party to correctly guess the amount needed to tender without having the full information sets a terrible precedent. The large

volume of cases related to homeowner association's foreclosure sales is steadily reaching its end. Going forward, the tender rule will be most beneficial to borrowers, including borrowers on consumer loans. Nevada law should not (and presumably would not) create a rule that a borrower seeking to make a mortgage payment who receives only part of the information needed to calculate the amount due has to guess the exact figure—and a $54 error, with no further notice, means foreclosure. Yet that is the upshot of the rule of law applied by the district court.

Again, Appellants raised this argument at length to the district court (2JA 260-62), yet the district court did not even address this issue in its final order—instead, the district court simply found that Miles Bauer made a payment that was not equal to the total superpriority amount. (4JA 916). Simply put, the reason Miles Bauer tendered a different amount was because NAS did not provide the superpriority amount. For this additional reason, this court should reverse.

IV. Alternatively, Equity Requires Setting Aside the Sale.

As discussed above, tender was either completed or excused under these circumstances, and the Deed of Trust was preserved. But even if it were not, the district court's order should be reversed on the alternative basis that the sale should be set aside on equitable grounds. Under well-established precedent, an HOA sale can be set aside on the basis of inadequacy of price and a showing of unfairness or oppression. Each of those elements are satisfied in this case.

It is well-settled that a sale can be invalidated if two elements are met. First, the price must be inadequate; second, there must be "a showing of fraud, unfairness, or oppression." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 747-49, 405 P.3d 641, 647-49 (2017) (internal quotation marks omitted). This case meets both of these elements.

First, the sales price in this case was grossly inadequate. Underwood, the original purchaser, acquired title to the Property at the HOA's foreclosure sale for $30,000.00. (2JA 372). The fair market value of the property at the time of the foreclosure sale was $430,000.00 on the date of the sale. (1JA 192). NV Eagles' predecessor purchased the Property for just less than **7%** 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*, 133 Nev. at 749, 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 741, 405 P.3d at 643 (emphasis added).

If NAS's rejection of the tender caused the foreclosure sale to extinguish the Deed of Trust, then that decision to reject the tender was unfair and/or oppressive. *See id.* at 648 n.11, 405 P.3d at 749 n.11 (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 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.* at 650, 405 P.3d at 753. By necessary implication, evidence of a deed of trust holder's efforts to tender (including delivery of a check to pay the superpriority portion of the lien) 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, NAS rejected Miles Bauer's check because it did not believe a superpriority lien even existed. Miles Bauer acted in good faith and in accordance with the legislature's intent in making sure that homeowner associations would receive payment from secured lenders for a portion—but only a portion—of their lien to avoid foreclosure. NAS's rejection of the check was based on a fundamental misinterpretation of the language of NRS 116.

Moreover, and as a practical consideration, unfairness exists in this case because the Deed of Trust—securing a half-million dollar promissory note—was extinguished based on an underpayment of $54 that only occurred because the ledger was extremely vague and left Miles Bauer to guess what the correct superpriority amount was. Clearly, these facts provide the "slight" evidence of unfairness required by *Shadow Canyon*.

The district court rejected Appellants' argument that the HOA's foreclosure sale should be set aside in equity, holding that Appellants "provided no evidence of any kind to show a nexus between any alleged act of fraud, unfairness, or oppression that accounted for/brought about the sales price of the Subject Property and/or affected the foreclosure sale." (4JA 919). That holding cannot be squared with *Shadow Canyon* where the Supreme Court held it to be "significant[]" to the equitable considerations that there was no evidence the secured lender "ever tried to tender payment in any amount to the HOA" or "was confused or otherwise prejudiced" by the lack of information needed to calculate the superpriority amount in the notice of sale. *Shadow Canyon*, 133 Nev. at 753, 405 P.3d at 650. Here, of course, it is undisputed that BANA tried to tender payment to the HOA and, to the extent the tender was ineffective, was severely prejudiced by the unclear information provided by NAS. And Mr. Jung's unrebutted testimony established that if NAS had actually provided information about the correct assessment amount, Miles Bauer would have been happy to pay it. (4JA 856). In other words, Appellants presented the very sort of evidence the Nevada Supreme Court suggested would dictate a different result in *Shadow Canyon*. The district court's holding that BoNYM failed to present evidence showing that NAS's unfair conduct "affected the foreclosure sale" finds no support in the record.

Considering the grossly inadequate foreclosure sale price and NAS's thwarting of the tender attempt, the sale should be set aside on equitable grounds.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed and remanded with instruction to enter judgment in favor of Appellants.

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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 6,509 words.

FINALLY, I CERTIFY that I have read this **Appellant's Opening 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.

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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 25th day of November, 2020.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on November 25, 2020, the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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/ Patricia Larsen
An employee of AKERMAN LLP