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' REPLY 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.

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

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ARGUMENT

The district court's judgment holding that respondent NV Eagles obtained title to the subject property free and clear of the deed of trust should be reversed. As appellants pointed out in their opening brief, their agent Rock Jung at the Miles Bauer law firm tendered an amount calculated based on the representations of the HOA's agent NAS that was meant to pay off the superpriority portion of the HOA's lien. NAS waived any objection that the amount was insufficient when it returned the check without comment. In fact, the undisputed evidence establishes that NAS would not have accepted any check from Miles Bauer that was not sufficient to pay the full amount of the HOA's lien.

I. Any De Minimus Error in the Tender Amount Did Not Thwart the Legal Effect.

NV Eagles's entire legal argument rests on a shaky foundation: the assumption that a supposed $54 shortfall in the tender amount caused appellants to lose a security interest securing a debt worth over $500,000. As appellants explained in their opening brief, the tender was adequate because it was based on the account statement furnished by NAS, which seemed to indicate that superpriority amount of the HOA's lien was $486—the amount of the tender check. But, assuming for the sake of argument that the amount actually due was $540, NV Eagles's legal assumption is wrong for two reasons.

First, NAS waived any objection it had based on the amount of the tender check. Both of the letters Miles Bauer delivered to NAS unambiguously indicated that BANA wanted to pay the superpriority amount of the HOA's lien—that is, "the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated December 17, 2010." (2 JA 455-56; *see also* 2 JA 461-62). In response to Miles Bauer's first letter, NAS furnished a statement of account that did not identify any sort of "superpriority amount." Instead, the statement showed four different quarterly assessment rates, none of which included information regarding the applicable date. (2 JA 458-59). The Miles Bauer attorney apparently took the "present rate" (which was the only column showing fees for foreclosure-related activity), multiplied it by three, and delivered a check in that amount.

In any normal business dealings, that would have been the time for NAS to point out an error amounting to about 11% of the check amount. 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. (4 JA 856). Instead, NAS flatly rejected the check without any further correspondence with Mr. Jung. (4 JA 843-44).

The common law of tender has specific rules to prevent the absurd consequences sought by NV Eagles in this very situation. As the Utah Supreme Court has held, "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). In *Maxwell*, the buyer under an installment real estate contract fell into default. Although the buyer tendered an amount intended to bring the account current, it was actually $259 short of the amount needed to cure the full delinquency, and the seller rejected the payment, claiming forfeiture. The Utah Supreme Court flatly rejected the argument that the shortfall was a basis for negating the tender, holding that the seller had waived any such objection when it was not raised at the time the tender was made. *Id.* at 1081-82. *See also Blackford v. Judith Basin Cty.*, 98 P.2d 872, 876 (Mont. 1940) (noting that the tenderee's argument that the tender was insufficient in amount had been waived because it had not been raised at the time, and further noting that tender is excused when "the tenderee's attitude would make the tender a vain and idle ceremony"); *cf.* 74 Am. Jur. *Tender* § 20 (Feb. 2021) (if the tenderee does not disclose the amount owed, "the debtor's tender of what he or she believes, in good faith, is owing is deemed sufficient even if it is a smaller amount than that actually owed").

Here, the circumstances for waiver are even more compelling than in *Maxwell*. Just as in *Maxwell*, it is undisputed that the tendering party intended to

pay the full amount due (here, the superpriority portion of the lien), and that the tenderee party never raised any objection based on the amount of the tender. But in *Maxwell*, the Utah Supreme Court specifically noted that the actual amount due was "readily ascertainable" for the tendering party. *Maxwell*, 659 P.2d at 1081. Here, the only information available to Miles Bauer was the indecipherable statement of account furnished by NAS. NAS was the only party in position to identify the error for Miles Bauer, allowing Mr. Jung to tender a check in the correct amount.[1] Its failure to do so constitutes waiver and does not negate the effect of the tender.

Even though appellants raised and briefed the waiver issue in detail in its opening brief (*see* AOB at 13-14), NV Eagles **never** **once** mentions the issue in its answering brief. While this Court has the discretion to consider this omission as a confession of error, *see Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010), it also underscores that there is no authority suggesting that waiver is inapplicable here. The common law developed a specific doctrine to mitigate the

[1] NV Eagles repeats the district court's unsupported assertion that BANA had "adequate time and notice to correct this error prior to the foreclosure." RAB at 10. That grossly distorts the facts. The undisputed evidence shows that NAS rejected **every** tender check delivered by Miles Bauer that did not pay off the full outstanding amount of the HOA's lien, non-priority amounts included. (4 JA 843-44). It is also undisputed that NAS never provided Miles Bauer with a basis for recalculating the tender amount here. BANA and Miles Bauer can hardly be faulted for failing to recognize a supposed error that could not be gleaned from the limited information on the statement of account and was never identified by NAS.

exceedingly harsh consequences of a slightly miscalculated tender; the district court's failure to apply that law requires reversal.

Second, and similarly, the facts of this case call for application of the doctrine of substantial compliance, which is specifically intended to be invoked "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). 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. Under the circumstances, the delivery of the $486 check substantially complied with the requirements of the tender doctrine.

NV Eagles ignores this issue as well, never once addressing it in its answering brief. Again, the Court has the discretion to consider NV Eagles's silence to be a confession of error. *Polk*, 126 Nev. at 185, 233 P.3d at 360. But more importantly, neither the district court nor NV Eagles provided any reason why the doctrine of substantial compliance should not apply here.

II. BANA's Tender Obligation Was Excused.

As appellants argued in their opening brief, any tender obligation—and certainly any obligation to tender an additional $54—was excused as a matter of law, for two reasons. First, under *7510 Perla Del Mar Ave Trust v. Bank of*

America, N.A., 136 Nev. 62, 458 P.3d 348 (2020) ("*Perla Trust*"), appellants presented abundant evidence at trial demonstrating that NAS had a "known policy" of rejecting tender for the superpriority amount of the HOA's lien, rendering the delivery of a tender check futile. Second, any tender obligation was excused by virtue of the fact that NAS did not provide BANA with sufficient information to tender payment and thereby obstructed the effort. The district court's judgment should be reversed for both of those reasons.

A. The trial evidence showed NAS had a known policy of rejecting tender checks.

While NV Eagles rightfully acknowledges the rule under *Perla Trust* that tender is excused when the tenderee has a known policy of rejecting the tender, its efforts to distinguish *Perla Trust* from the evidence in this case fall flat. NV Eagles first argues that BANA (through its agents) could not have "known" that NAS had a policy of rejecting checks because BANA actually attempted to deliver a check in this case. That is completely beside the point. Mr. Jung testified unequivocally that the very reason he knew about NAS's policy was because of his thousands of experiences in trying to send NAS checks. (4 JA 837-41). BANA's diligence in delivering checks that were certain to be rejected may have been overkill, but it certainly is not a logical basis for thinking NAS had a different sort of policy.

Second, NV Eagles conveniently ignores the mountain of record evidence concerning NAS's known policy—including the testimony of former NAS employee Susan Moses, the testimony of Mr. Jung, and NAS's own filings in the global litigation involving it and BANA (all discussed at length in appellants' opening brief)—to spotlight one entry in NAS's records indicating that the check here was not "accept[ed]" because the amount was "not paid in full." RAB at 13 (quoting 4 JA 905). NV Eagles and the district court badly misconstrued that notation, and did so in a manner that contradicted all of the other evidence in the case. NAS rejected the tender check because it was, literally, insufficient for the full amount of the HOA's lien to be "paid in full." That was NAS's global policy at the time, as Mr. Jung described in detail (4 JA 841, 843-44) and Ms. Moses acknowledged (4 JA 828). In fact, at that time NAS did not even believe that a superpriority lien amount existed before the bank foreclosed on its own deed of trust (*see* 4 JA 731, 741): it would have no basis whatsoever for rejecting a superpriority tender as "insufficient," when it did not believe there was any superpriority amount at all. One stray notation, interpreted in a way that runs contrary to all of the other evidence and without support from the record keeper, does not constitute the substantial evidence needed to sustain the district court's judgment.

Finally, NV Eagles attacks purported trial testimony from Chris Yergensen (NAS's former general counsel), apparently suggesting his testimony is hearsay. *See* RAB at 14-15. Mr. Yergensen did not even testify in this case. To the extent NV Eagles means to argue that the Nevada Supreme Court erred in affirming summary judgment in favor of the deed of trust holder in *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) under the excuse-of-tender doctrine (based, in part, on Mr. Yergensen's testimony), that is hardly a basis for supporting the district court's judgment here.

In short, all of the evidence introduced at trial established that NAS had a known policy of rejecting tender checks for any amount less than the full amount owed to the HOA. Under *Perla Trust*, BANA was excused from any tender requirement. If it was excused from delivering any check at all, it was certainly excused from making good on a supposed $54 shortfall that was never identified by any party.

B. NAS's refusal to provide information to BANA excused any tender requirement.

In their opening brief, appellants cited both hornbook law and a string of cases recognizing the rule that tender is excused when the tenderee does not provide the information about the amount due necessary for the tendering party to make a tender. *See* AOB at 21-24. As appellants argued at trial, that rule applies

squarely here, given NAS's failure to provide any clear indication as to the amount due on the statement of account and complete silence in the face of Miles Bauer's tender efforts.

As with several of the issues noted above, NV Eagles does not even respond to this argument in its answering brief. The omission should be deemed a confession of error. *Polk*, 126 Nev. at 185, 233 P.3d at 360. The district court's judgment should be reversed for that additional reason.

III. The Sale Should Be Set Aside in Equity.

For the reasons discussed in appellants' opening brief, the judgment should be reversed on the alternative basis that the HOA's foreclosure sale should be set aside in equity. *See* AOB at 24-28. NV Eagles does not contest that the foreclosure sale price was grossly inadequate (about 7% of fair market value), or that the general circumstances of the sale involved "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). NV Eagles only argues that any fraud, unfairness, oppression must "br[ing] about / result[]" in the purchase price in order for the sale to be set aside. RAB at 16.

That argument cannot be squared with the Nevada Supreme Court's holdings. First, nothing in *Resources Group, LLC v. Nevada Association Services,*

Inc., 135 Nev. 48, 437 P.3d 154 (2019) supports the notion that an HOA's agent's inequitable dealings with a tendering party are irrelevant to the equitable analysis. In that case (which turned on the timing of a tender right before a foreclosure sale), the Court specifically held that the equities weighed against setting aside the sale, given the tendering party's failure to take additional measures to ensure the timely delivery of the check. *See id.* at 56-57, 437 P.3d at 161. The Court did so by assuming (without deciding) that such considerations were relevant to the analysis. By no means can *Resources Group* be read as holding that inequitable conduct with regard to tender cannot be considered as part of the "totality of the circumstances." *Id.* at 55, 437 P.3d at160.

Furthermore, reading *Resources Group* as setting a rule that inequitable dealings concerning tender are irrelevant cannot be squared with the Nevada Supreme Court's holding in *Shadow Canyon*. In *Shadow Canyon*, the Court noted that irregularities in pre-sale notices that prevent a servicer from paying off the superpriority amount qualify as "fraud, unfairness or oppression" and can justify setting aside an HOA sale. 133 Nev. at 747-52, 405 P.3d at 647-50 (holding that failure to list the unpaid lien amount in the notice of sale did not warrant setting the sale aside because there was no evidence that the servicer attempted to make tender). The Court further 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.* 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. *See also Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, No. 71332, 2017 WL 6543883, at *1 (Nev. Dec. 20, 2017) (unpublished) (reversing district court's summary judgment for failure to address whether inconsistencies in the amounts listed in pre-sale notices were sufficient "evidence of fraud, unfairness, or oppression" to set the sale aside).

Here, NAS rejected Miles Bauer's check because it did not believe a superpriority lien even existed, and without ever noting a purported $54 shortfall. These facts provide the "slight" evidence of unfairness required by *Shadow Canyon*. Considering the grossly inadequate sale price and NAS's thwarting of the tender attempt, the court can set aside the sale on equitable grounds.

CONCLUSION

For the reasons stated above and in appellants' opening brief, the district court's judgment should be reversed and remanded with instructions to enter judgment in favor of appellants.

DATED this 29th day of March, 2021

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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 2,815 words.

FINALLY, I CERTIFY that I have read this **Appellants' Reply 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 29th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on March 29, 2021, the foregoing **APPELLANTS' REPLY 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/ Carla Llarena
An employee of Akerman LLP