IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A.; THE BANK OF NEW YORK MELLON, F/K/A 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.

Electronically Filed
Sep 14 2022 03:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 84552

APPEAL
from the Eighth Judicial District Court, Department XXIX
The Honorable David M. Jones, District Judge
District Court Case No. A-13-685203-C

APPELLANTS' OPENING BRIEF

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Docket 84552 Document 2022-28829

NRAP 26.1 DISCLOSURE STATEMENT

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

BAC North America Holding Company
Bank of America, N.A.
Bank of America Holding Corporation
Bank of America Corporation
NB Holdings Corporation
Berkshire Hathaway Inc.
Akerman LLP
Bank of New York Mellon Corporation

DATED this 14th day of September 2022

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STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The district court dismissed Nevada Association Services, Inc.'s (**NAS**) third-party claims against Cogburn Law Offices and Norma Teran on January 9, 2014, with a notice of entry entered the same day. (1AA 063–070). On January 21, 2014, the district court dismissed Melissa Lieberman's (**borrower**) claims for violation of NRS 598 and abuse of process against Underwood Partners, LLC (1AA 076–079), with a notice of entry entered on May 4, 2022. (6AA 1291). On February 14, 2014, the district court dismissed borrower's claims against NAS and Madeira Canyon Community Association, with a notice of entry entered the next day. (1AA 080–090). The district court dismissed NAS's claims against Lawyers Title of Nevada, Inc. on November 4, 2015, with notice of entry entered on November 12, 2015. (1AA 119–134). Borrower dismissed her claims against Resurgent Capital, LP on November 21, 2018. (1AA 139–141).

On April 30, 2020, the district court entered judgment, certified as final under NRCP 54(b), in favor of NV Eagles, LLC on its quiet title and declaratory relief claims against Bank of America, N.A. (**BANA**) and The Bank of New York Mellon FKA 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**) (BANA and BoNYM collectively, **Appellants**), and BoNYM's quiet

title and declaratory relief claims against NV Eagles, with notice of entry entered the same day. (4AA 914–929). Appellants timely appealed. (4AA 930–931). This Court reversed and remanded. (6AA 1224–1226).

Following remand, the district court again entered judgment in NV Eagles' favor on March 11, 2022, with notice of entry entered the same day. (6AA 1258–1279). Appellants again timely appealed on April 8, 2022. (6AA 1284–1285).

APPELLANTS' STATEMENT REGARDING ROUTING

This Court should retain this case under NRAP 17(a)(12), as it presents a novel question of statewide public importance: whether the tender futility test this Court announced in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020) (***Perla Trust***) requires that a deed of trust beneficiary prove it decided not to tender in reliance on a collection agent's tender-rejection policy.

ISSUES PRESENTED

1. Whether the district court erred by finding that Miles Bauer knew of NAS's tender-rejection policy, yet concluding that tender was not excused as futile?

2. Whether the district court erred by holding that the *Perla Trust* test for tender futility requires that a deed of trust beneficiary prove it decided not to tender in reliance on a collection agent's tender-rejection policy?

STATEMENT OF THE CASE

This is an NRS 116 dispute with three familiar players: BANA, its counsel at Miles, Bauer, Bergstrom & Winters, LLP, and NAS. Before Madeira Canyon Community Association's foreclosure sale, BANA followed its standard protocol by retaining Miles Bauer to satisfy the superpriority portion of Madeira's lien to protect the deed of trust. Madeira's agent, NAS, had a standard policy of rejecting Miles Bauer's superpriority tenders.

NAS had rejected thousands of Miles Bauer attorney Rock Jung's superpriority tenders, so he knew tendering was futile. Jung nonetheless tendered NAS a check for what he believed to be the superpriority amount of Madeira's lien based on an ambiguous payoff ledger NAS had provided. NAS followed its known policy and rejected the check.

Following a bench trial, the district court held that NV Eagles' predecessor, Underwood Partners, had acquired free and clear title at NAS's foreclosure sale because Jung had slightly miscalculated the superpriority amount. The district court did not address Appellants' argument that tender was excused because it was futile.

Appellants appealed, and this Court reversed. The Court explained that Appellants had presented evidence that NAS had a "known business practice to systematically reject any check tendered for less than the full lien amount," and that Jung knew of NAS's policy when he tried to tender. The Court declined to reverse

and render, and instead vacated and remanded so the district court could consider in the first instance Appellants' "tender futility argument in light of" this Court's decision in *Perla Trust*.

The district court entered judgment for NV Eagles again on remand. It found that Jung knew of NAS's tender-rejection policy from the thousands of times NAS rejected his tenders. But the district court held that *Perla Trust* cannot apply as a matter of law unless the deed of trust beneficiary decides not to tender in reliance on a collection agent's tender-rejection policy.

That is an error of law. *Perla Trust* controls, and material evidence regarding tender futility there and here is the same. This Court should reverse and render judgment for Appellants that BoNYM's deed of trust encumbers NV Eagles' title to the property.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. The borrower executes the deed of trust.

On November 20, 2006, borrower executed a senior deed of trust in favor of Mortgage Electronic Registration Systems, Inc. that encumbers real property located at 2184 Pont National Drive, Henderson, Nevada 89044 (**property**). (2AA 346). The deed of trust secures a loan in the original principal amount of $511,576. (2AA

347). The deed of trust was assigned to BoNYM on or about September 14, 2011. (2AA 365).

BANA serviced the loan secured by the deed of trust from its origination through June 2013. (4AA 816:21–817:1).

B. BANA and Miles Bauer's policies to protect BANA's deeds of trust from Nevada HOA foreclosures.

BANA had a well-established policy to protect its deeds of trust from Nevada HOA liens. (4AA 817:2-12). Upon receiving a foreclosure notice, BANA would retain Miles Bauer to determine the lien's superpriority amount, and once that amount was determined, BANA would wire that amount to Miles Bauer, who would then tender a superpriority check to the HOA's collection agent. (*See id.*; *see also* 4AA 836:14–837:2).

BANA and Miles Bauer used this policy frequently. Jung alone handled between 5,000 and 6,000 superpriority tender matters for BANA during a 4.5-year period, including the one for the property here. (4AA 845:9–846:4).

C. NAS's tender-rejection policies and Miles Bauer's knowledge of them.

With respect to Miles Bauer's tenders, NAS's policy was well-established: reject them all. (*See* 4AA 827:19–828:19 (testimony of NAS's paralegal, Susan Moses); *see also* 4AA 841:1-23, 844:6-12, 847:24–848:9, 853:14-22 (Jung testimony)). NAS rejected Miles Bauer's superpriority tenders for two reasons: (1)

NAS did not believe the foreclosure of an HOA's lien could extinguish a senior deed of trust because it did not believe a superpriority lien existed until the senior deed of trust encumbering the same property was foreclosed (*see* 4AA 729–731); and (2) NAS believed the superpriority amount included not only nine months of assessments, but also nine months of interest, nine late fees, a transfer fee, and all collection costs (*see* 4AA 765–767, 783).

NAS made these positions clear in global litigation between BANA and dozens of HOAs and collection agents, in which BANA sought a declaration regarding the priority and scope of HOA superpriority liens. (*See* 4AA 729–731). There, in its motion to dismiss BANA's complaint, NAS stated that "until such time as [BANA] actually forecloses on [a] property, there is and can be no priority dispute" between BANA and an HOA because an HOA's "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." (4AA 731 (emphasis in original)). According to NAS, "[p]rior to [BANA]'s foreclosure, there is no application of NRS 116.3116[.]" (4JA 736; *see also id.* ("[U]nless 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.")).

In its reply in support of its motion, NAS declared that BANA's "pre-payment scheme" – that is, the "scheme" of tendering superpriority payments before an HOA'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." (4AA 748). The "[r]eason being," NAS explained, is that "in the absence of foreclosure of a first deed of trust, there is no super-priority analysis under NRS 116.3116." (*Id.*). Leaving no doubt as to its intent to reject all of BANA's superpriority tenders through Miles Bauer, NAS declared that "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender[s] prior to foreclosure." (4AA 751).

NAS's pleadings in this global litigation are consistent with the trial testimony of NAS's paralegal, Susan Moses, in this case. Moses confirmed that NAS rejected all Miles Bauer's superpriority tenders as a matter of course. (4AA 828:9-19).

Jung was well aware of NAS's tender-rejection policies during the relevant period here. NAS's owner, David Stone, told Jung that NAS would not accept any of BANA's tenders. (4AA 853:14-22). Stone was right: NAS rejected every superpriority check that Jung tendered on BANA's behalf. (4AA 841:14-23).

D. The typical interplay between Miles Bauer and NAS occurs for Madeira's HOA lien.

The typical interplay between BANA and Miles Bauer's tender policy and NAS's tender-rejection policy occurred with respect to Madeira's HOA lien here. On October 27, 2010, NAS recorded a notice of delinquent assessment lien against the property. (1AA 191, ¶ 6). On December 21, 2010, NAS recorded a notice of default and election to sell against the property. (*Id.*, ¶ 7).

After it received the notice of default, BANA retained Miles Bauer to satisfy the superpriority portion of Madeira's lien to protect the deed of trust. (*Id.*, ¶ 8). Miles Bauer assigned Jung to the file. (*Id.*, ¶ 9; *accord* 2AA 452, ¶ 6). He followed Miles Bauer's standard policy by sending a letter to NAS on February 22, 2011, which sought to determine the superpriority amount of Madeira's lien and "offer[ed] to pay that sum upon presentation of adequate proof of the same by [NAS]." (2AA 455–456; *see also* 1AA 191, ¶ 9).

NAS responded by sending Jung a document showing the total amount the borrower owed Madeira broken down by categories, including amounts due for "monthly assessments." (2AA 458–459; *see also* 1AA 191, ¶ 10). The document showed the "Present rate" of the "Quarterly Assessment Amount" as $162. (2AA 458). The ledger listed three separate "Prior rate[s]" of the Quarterly Assessment Amount: (1) $210; (2) $180; (3) $234. (*Id.*). It did not specify the dates for which each Prior Rate applied. (*Id.*).

On or about April 1, 2011, Jung sent a $486 check to NAS, enclosed by a letter that explained that the check was equal to "9 months' worth of delinquent assessments" and was intended to satisfy BoNYM's "obligations to the HOA as a holder of the first deed of trust against a property." (2AA 461–463).

NAS's receptionist rejected the $486 check. (*Id.*, 465). Under NAS's tender-rejection policies, NAS would have rejected any check for less than the full lien amount (4AA 828:16-19), which was at least $3,852.46 at the time (2AA 458).

After it rejected Miles Bauer's tender, NAS foreclosed on Madeira's lien, selling the property to Underwood Partners, LLC for $30,000.00. (1AA 191, ¶ 12). Underwood then conveyed the property to its affiliate, NV Eagles. (*Id.*, ¶ 15).

II. PROCEDURAL BACKGROUND

On July 16, 2013, borrower initiated this action by filing a complaint against Madeira, NAS, Underwood, BANA, and Resurgent Capital Services, LP in the District Court for Clark County, Case No. A-13-685203-C. (1AA 001). On March 27, 2014, this action was consolidated with another case concerning NAS's foreclosure sale that NV Eagles had filed as Case No. A-13-690944-C. (1AA 117).

The various parties' claims were whittled down until the only ones remaining were those involving NV Eagles, BANA, and BoNYM to determine whether BoNYM's senior deed of trust survived NAS's foreclosure such that NV Eagles' title to the property remained encumbered by the deed of trust.[1] These claims preceded to a two-day bench trial that began on January 14, 2020. (4AA 795).

[1] The disposition of the other claims, which are not material to this appeal, are detailed in Appellants' jurisdictional statement above.

At trial, BANA's assistant vice president, Diane Deloney, testified regarding BANA's standard practice of retaining Miles Bauer to tender superpriority payments, and that BANA followed that practice here. (4AA 816:18–818:2). Jung testified that he followed Miles Bauer's standard practices to tender thousands of superpriority payments to NAS, and NAS rejected every one of them. (4AA 836:17–841:23). Moses testified that NAS's standard practice was to reject every superpriority tender from Miles Bauer. (4AA 826:14–828:15).

The district court focused on Jung's slight miscalculation of the superpriority amount at trial. (4AA 850:22–856:8). The district court acknowledged that there "was no way to tell from" the payoff ledger that NAS provided to Jung "the dates of delinquency, say from January '10 through April of '11 … there's no way to tell what the monthly assessments were during that timeframe, or before that even." (4AA 855:10-15). But it ultimately held Jung's nominal miscalculation was fatal.

On March 30, 2020, the court entered findings of fact, conclusions of law, and a judgment in favor of NV Eagles. (4AA 923–929). It held BoNYM "failed to carry its burden" to show a valid superpriority tender under *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (***Diamond Spur***) because "the check delivered to NAS by Miles Bauer did not satisfy the superpriority amount of [Madeira's] HOA lien." (4AA 927–928, ¶ 9). The court did not address

Appellants' argument that tender was excused because tendering to NAS was futile. (4AA 923–929).

Appellants timely appealed. (4AA 930–931). This Court reversed. (5AA 962–964). While it noted that NAS provided Jung with a ledger "that did not clearly identify the superpriority amount," this Court agreed with the district court that Jung's superpriority tender was insufficient under *Diamond Spur*. (5AA 963). But this Court explained that Appellants "argued below that their failure to submit valid tender should be excused because any tender attempt would have been futile." (*Id.*). This Court also stated that Appellants "support[ed]" their futility argument with "evidence—including testimony from a NAS employee and evidence of NAS's testimony from previous cases—to show NAS had a 'known business practice to systematically reject any check tendered for less than the full lien amount,'" along with "evidence that [Jung] was aware of this policy when [he] remitted [the tender] check to NAS in an attempt to cure the superpriority default and preserve [A]ppellants' deed of trust." (*Id.*).

This Court noted that the district court had failed to address Appellants' "futility argument." (*Id.*). It thus vacated and remanded so the district court could "consider the tender futility argument in light of *Perla Trust*." (5AA 964). NV Eagles petitioned for *en banc* reconsideration, which this Court denied. (5AA 937).

On remand, the district court ordered the parties to submit supplemental briefing on *Perla Trust*'s application to the evidence offered at trial. (5AA 942–1186; 6AA 1187–1255). Following a hearing, the Court entered a minute order on February 14, 2022, which stated that "the tender in this situation was never for the correct amount, so even by Bank of America's definition of a tender there was never a valid tender." (6AA 1257).

On March 11, 2022, the district court entered findings of fact, conclusions of law, and an order that again held that BoNYM's deed of trust was extinguished and that NV Eagles owns the property free and clear. (6AA 1269–1279). The district court found that Jung "handled as many as five to six thousand HOA foreclosure cases, most of which were dealing with NAS as the collection agent for the HOA, and despite NAS typically rejecting anything less than the full amount, BANA and Miles Bauer nonetheless tendered as many as twenty-five hundred (2500) checks." (6AA 1277, ¶ 6). The district court also concluded that "BANA and Miles Bauer … interpreted NRS 116.3116 as they saw appropriate and that was the only thing they considered in determining whether or not, and in what amount, to tender," even though their "interpretation of the law was clearly contrary to any interpretation on the part of NAS." (6AA 1277–1278, ¶ 7).

Ultimately, the court concluded that *Perla Trust* "requires [that a] bank establish that futility is the reason Miles Bauer did not tender," meaning *Perla Trust*

can never "be applicable if Miles Bauer actually" attempts to tender. (6AA 1276, ¶ 5 (emphasis in original)). Since Jung tried to tender here, the district court held that *Perla Trust* did not protect the deed of trust. (*Id.*).

Appellants timely appealed. (6AA 1284).

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's judgment in favor of NV Eagles and render judgment for Appellants. *Perla Trust* settled the legal effect Miles Bauer's attempts to tender superpriority payments to NAS. Because NAS systematically rejected thousands of those payments, Miles Bauer was excused from futilely tendering them.

The record evidence regarding futility here and in *Perla Trust* is the same. Applying the same facts to the same law should yield the same result: the senior deed of trust survived the HOA's foreclosure. The district court avoided that result by adding a "reliance" element to the tender futility test that finds no support in *Perla Trust*. That legal error is entitled to no deference from this Court. Under controlling law, tender was excused, and BoNYM's deed of trust survived.

ARGUMENT

I. STANDARD OF REVIEW

This Court applies different standards of review to a district court's findings of fact and its conclusions of law. Findings of fact "will be upheld unless they are

not supported by substantial evidence or are clearly erroneous." *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013).

A district court's conclusions of law are reviewed *de novo*. *County of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT MILES BAUER WAS NOT EXCUSED FROM TENDERING A SUPERPRIORITY PAYMENT.

This Court should reverse and render judgment for BoNYM for three reasons. ***First***, Appellants satisfied *Perla Trust*'s two-element test for tender futility at trial by proving NAS had a tender-rejection policy and that BANA and Miles Bauer had knowledge of it. ***Second***, the fact that Jung made a good faith effort to tender the correct superpriority amount is irrelevant under *Perla Trust*. ***Third***, *Perla Trust* does not require that a deed of trust beneficiary rely on a collection agent's tender-rejection policy in deciding not to tender.

A. Tender was excused under *Perla Trust* because Miles Bauer knew of NAS's tender-rejection policy.

BoNYM's deed of trust survived under *Perla Trust*. There, this Court held that a "formal [superpriority] tender is excused when evidence shows that the [HOA's agent] had a known policy of rejecting such" tenders. 136 Nev. at 63. The *Perla Trust* test for excused tender has two elements: (1) the collection agent's

tender-rejection policy; and (2) the beneficiary, its servicer, or its servicer's attorneys' knowledge of that policy. *See id.*

This Court held that BANA satisfied this test in *Perla Trust* on a record nearly identical to the one here. *Perla Trust* and this case involve the same players: BANA and Miles Bauer on the one hand, and NAS and its HOA-client on the other. *See id.* at 63. As in *Perla Trust*, testimony from a BANA employee and Jung established BANA and Miles Bauer's tender policy and the 1,000+ times that policy was put to use. *Compare id.* at 64, *with* (4AA 817:2-12, 836:14–837:2, 845:9-15). As in *Perla Trust*, NAS's paralegal, Susan Moses, testified that NAS systematically rejected Miles Bauer's superpriority tenders. *Compare* 136 Nev. at 64–65, *with* (AA4 827:19–828:19). Jung's knowledge of this policy was established in both cases by his testimony that NAS rejected every superpriority tender that he submitted on BANA's behalf. *Compare* 136 Nev. at 64, *with* (AA4 841:17-23, 853:14-22).

Both here and in *Perla Trust*, "the evidence at trial established that … it was NAS's business policy to … reject any check for less than the full lien amount, and … further established that Miles Bauer and [BANA] had knowledge of this business practice[.]" *See Perla Trust*, 136 Nev. at 67. On these facts in *Perla Trust*, this Court held that Miles Bauer "was excused from making a formal tender … because, pursuant to NAS's known policy, even if [Miles Bauer] had tendered a check for the superpriority portion of the lien, NAS would have rejected it." *Id.* This was a

straightforward application of the "generally accepted [tender] exception" of futility,[2] under which "'[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)). Because Miles Bauer was "excused from making a formal tender," this Court held "that under [*Diamond Spur*], the ensuing foreclosure sale did not extinguish the first deed of trust." *See id.* at 63.

The relevant evidence[3] and controlling law here are the same. That means the result should also be the same: Miles Bauer "was excused from making a formal

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[2] The futility exception to tender is indeed widely accepted. *See, e.g., Telemark Dev. Grp., Inc. v. Mengelt*, 313 F.3d 972, 978 (7th Cir. 2002) ("[T]ender may be excused when the conduct of the creditor makes it reasonably clear that such [tender] would be a vain, idle, or useless act.") (quotations omitted); *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 929 (1st Dist. 1972) ("[I]t is equally well established that the law does not require the performance of an idle act and a formal tender of performance is excused by the refusal in advance of the party to accept the performance."); *Fox Run Prop., LLC v. Murray*, 654 S.E. 2d 676 (Ga. App. 2007) ("[T]ender is excused or waived where the seller, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused" because "the law does not require a futile tender or other useless act."); *Roundville Partners, LLC v. Jones*, 118 S.W. 3d 73, 79 (Tex. App. 2003) ("[W]hen actual tender would have been a useless act, an idle ceremony, or wholly nugatory, constructive tender will suffice.").

[3] In fact, there is more evidence supporting futility here than in *Perla Trust*; specifically, NAS's pleadings from the global litigation and filings from the global arbitration between BANA and numerous HOAs and collection agents in which NAS referred to BANA and Miles Bauer's tender policies as a misguided "scheme" and explained that "nothing in NRS 116.3116 prohibits [NAS] from rejecting [Miles Bauer]'s tender[s] prior to foreclosure." (*See* 4JA 751, 754). This Court has held that this evidence **alone** "is sufficient to demonstrate that NAS had a 'known policy of reject[ion]' sufficient to excuse formal tender under [*Perla Trust*]." *U.S. Bank, N.A., as Tr. v. SFR Investments Pool 1, LLC*, 464 P.3d 125 (table), 2020 WL

tender … because, pursuant to NAS's known policy, even if [Miles Bauer] had tendered a check for the superpriority portion of the lien, NAS would have rejected it." *See id.* at 67. As a result, Madeira and NAS's "ensuing foreclosure sale did not extinguish [BoNYM's] first deed of trust." *See id.* at 63.

B. Jung's good-faith miscalculation of the superpriority amount is a red herring.

There is one fact that distinguishes this case and *Perla Trust*: Jung did tender a check to NAS, but he miscalculated the superpriority amount from a ledger NAS provided that, in this Court's words, "did not clearly identify the superpriority amount." (*See* 5AA 962). The district court agreed the superpriority amount was impossible to calculate from the ledger NAS provided to Jung. (*See* 4AA 850:22–851:4, 854:4–855:9). It explained that "there is no way to tell from [the NAS payoff ledger] the dates of delinquency" or "specifically what the assessments were[.]" (4AA 855:10-16). Despite recognizing that this ledger made it impossible for Jung to calculate the superpriority amount, the district court held that Jung's nominal, good-faith miscalculation renders *Perla Trust* inapplicable because Jung "fully intended to tender, did in fact attempt to tender, but made an inadequate tender that NAS had every right to reject." (6AA 1276:4-14).

3003017, at *1 (Nev. June 4, 2020) ("The necessary implication of [NAS's pleadings] is that NAS would not accept a superpriority tender before the first deed of trust was foreclosed.").

This was a legal error by the district court. Jung's slight miscalculation is irrelevant under *Perla Trust*. What is relevant is that NAS had a policy of rejecting tenders, and Miles Bauer knew it. 136 Nev. at 63; *accord Bank of America, N.A. v. Pacific Legends Green Valley Owners' Ass'n*, 849 Fed. Appx. 693, 694 (9th Cir. June 10, 2021) (The *Perla Trust* analysis "queries solely whether [the HOA's collection agent] had a known policy of rejecting tender."). There is substantial and uncontroverted evidence on both points. (*See* 4AA 827:19–828:19 (Moses testimony); *see also id.*, at 841:1-23, 844:6-12, 847:24–28:9, 853:14-22 (Jung testimony)).

But the district court nonetheless held that "the facts of this case simply do not meet the criteria for the application of *Perla* [*Trust*]" because the "uncontroverted evidence in this case reveals that BANA made an ineffective tender that was insufficient to cure the super-priority default," and "NAS was justified in rejecting said tender for insufficiency." (6AA 1275, ¶ 1).

Undisputed evidence shows NAS did not reject the check because of Jung's nominal miscalculation. Moses testified that NAS rejected every one of the thousands of Miles Bauer's superpriority checks that was for less than the full amount of an HOA's lien and accompanied by Miles Bauer's now familiar "second letter." (*See* 4AA 827:19–828:19). Indeed, the district court found that Jung "handled as many as five to six thousand HOA foreclosure cases, most of which

were dealing with NAS," and "despite NAS typically rejecting anything less than the full amount,[4] BANA and Miles Bauer nonetheless tendered as many as twenty-five hundred (2500) checks." (6AA 1277, ¶ 6). It also found that although "Jung knew of the likelihood that NAS might decline to accept anything less than an amount it believed was properly due, Miles Bauer followed its own policies and tendered what it believed to be adequate to satisfy the bank's obligations." (*Id.*).

As this Court explained in *Perla Trust*, "[t]he law does not require one to do a vain and futile thing." 136 Nev. at 66 (quoting *Schmitt*, 223 P.2d at 406–07). Jung's diligence in delivering a check even though he knew the check would be rejected was "not require[d]," and was indeed "futile." *See id.* But there is no logical, legal, or policy reason to hold that BoNYM should be worse off because Jung made a futile attempt rather than no attempt at all. NAS had a tender-rejection policy, and Jung and BANA knew it. That is all that matters under *Perla Trust*.

[4] While the district court notes that NAS "typically" rejected checks for less than the "full" amount of an HOA's lien (*see* 6AA 1277, ¶ 6), Jung testified that BANA only paid the "full amount" of an HOA's lien when it was seeking to protect a "second deed of trust." (4AA 841:14-23). An HOA's entire lien is senior to a second deed of trust under NRS 116.3116(2). That is why BANA would seek to pay the entire lien amount to protect a second deed of trust. (*See id.*). Only nine months of delinquent assessments is senior to a first deed of trust under NRS 116.3116(2). That is why BANA and Miles Bauer set up a policy to pay that amount to protect first deeds of trust. (*See id.*). Combining these policies shows BANA and Miles Bauer's overarching policy was to pay the amount required by NRS 116.3116 to protect any of BANA's deeds of trust.

C. The district court made a legal error by imputing a new "reliance" element into *Perla Trust*.

The district court's next legal error comes from its rationale for holding that a deed of trust beneficiary's attempt to tender is worse than no tender at all. To get there, the district court deduced a third element of "reliance" from *Perla Trust* to graft onto *Perla Trust*'s actual two-element test. (*See* 6AA 1276, ¶ 4). As it explains, to "satisfy what is being defined as the *Perla* [*Trust*] standard," a deed of trust beneficiary must "provide evidence that it actually relied on [NAS's tender-rejection] policy[.]" (*See id.* (emphasis in original)). Because "[t]here must be a nexus between" Miles Bauer's knowledge of NAS's tender-rejection policy "and the inaction on the part of Miles Bauer," the district court held that *Perla Trust's* test for tender "futility cannot be applicable if Miles Bauer actually tendered." (*See id.* (emphasis in original)).

The district court's new "reliance" element finds no basis in *Perla Trust*. BANA and Miles Bauer's knowledge of NAS's tender-rejection policy was not even the reason it withheld a superpriority payment in *Perla Trust*. *See* 136 Nev. at 63–65. There, Miles Bauer could not make a formal tender because NAS refused to respond to Miles Bauer's request for the superpriority amount of the HOA's lien. *See id.* *Perla Trust* cannot contain an unstated but implicit requirement that Miles Bauer's knowledge of a tender-rejection policy be the reason it did not tender when such a requirement could not be met in *Perla Trust* itself. *See id.*

The ancient cases the district court cites to support a "reliance" requirement do not impose such a requirement either. (6AA 1276, ¶ 4). The cited Virginia case from 1812 held that a formal pre-suit tender stopped the running of pre-judgment interest as to the tendered amount; it had nothing to do with whether the futility of tendering excuses a formal tender. *See Shobe's Ex'rs v. Carr*, 3 Munf. 10, 14 (Va. 1812). The West Virginia case from 1898 does note that under "the strict law of tender," for a creditor's "refus[al] to allow" an actual tender to "dispense[ ] with" a formal tender, it "must be clear that the offer to pay was an actual offer, with money present on the person of the tenderer[.]" *Shank v. Groff*, 45 W. Va. 543, 32 S.E. 248, 249 (1898). But that is entirely consistent with *Perla Trust*'s holding that "a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender." *See* 136 Nev. at 65.

From the final ancient case, *McCalley v. Otey*, 99 Ala. 584, 12 So. 406 (1893), the district court quotes the following proposition: "Actual tender of money is dispensed with if the debtor is willing and ready to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it." (6AA 1276, ¶ 4). From this proposition, the district court infers that for *Perla Trust* to apply, "the circumstances must be such as to show that the [deed of trust beneficiary] was ready, willing, and able to make actual payment, and that he would have done so *but for* some action or statement of the creditor" (6AA 1276, ¶ 4 (emphasis in original)).

This does not mesh with *Perla Trust*, and this Court's precedent controls over an Alabama case from 1893. To borrow *McCalley*'s phrasing, NAS did "declare[ ]" to Miles Bauer that it would "not receive" superpriority tenders. *See* 99 Ala. at 588. The evidence in *Perla Trust* showed NAS declared that to Miles Bauer so often that it became "a known policy" that NAS would "reject[ ] any payment for less than the full lien amount," which excused Miles Bauer's obligation to tender a superpriority payment at all. 136 Nev. at 66.

At the end of its order, the district court faults Miles Bauer for having a policy of tendering superpriority payments in the first place. (*See* 6AA 1277–1278). The district court concluded that "BANA and Miles Bauer interpreted NRS 116.3116 as they saw appropriate and that was the only thing they considered in determining whether or not, and in what amount, to tender," even though they knew their "interpretation of the law was clearly contrary to any interpretation on the part of NAS." (*See id.*). The district court explained that this Court "has addressed this exact same scenario" in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 2020 WL 2306320, at *1 (Nev. May 7, 2020) ("***Jessup II***").

Jessup II is an unpublished decision regarding whether another collection agency, ACS, had a known policy of rejecting tenders. *See id.* *Perla Trust* is a published decision where this Court reviewed the same record evidence that is present here regarding Miles Bauer's tender policy and NAS's "known business

practice to systematically reject any check tendered for less than the full lien amount." *See* 136 Nev. at 67. *Perla Trust*, not *Jessup II*, is where this Court addressed the "exact same scenario" presented here. (*See* 6AA 1277–1278). As it did in *Perla Trust*, this Court should hold that BANA and Miles Bauer were "excused from making a formal tender" and, as a result, they "preserved [BoNYM's] interest in the property such that [NV Eagles] purchased the property subject to [BoNYM's] first deed of trust." *See* 136 Nev. at 67.

CONCLUSION

For these reasons, this Court should reverse the judgment in NV Eagles' favor and render a judgment in Appellants' favor that BoNYM's deed of trust survived NAS's foreclosure sale and encumbers NV Eagles' title to the property.

DATED this 14th day of September 2022

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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 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 brief complies with the page or type-volume limitations of NRAP 32(a)(7) as modified by this Court's order 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 5,607 words.

FINALLY, I CERTIFY that I have read this **Appellants' 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 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 if the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of September 2022

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 14, 2022, 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