IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., 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, Appellants, v. NV EAGLES, LLC, Respondent.	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

APPELLANT'S APPENDIX, VOLUME VI

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Alphabetical Index

V	64.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust* (Part 1)	0976
VI	65.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust* (Part 2)	1187
I	30.	Bank of America, N.A.'s Answer to NV Eagles, LLC's Cross-Claims	0158
I	8.	Bank of America, N.A.'s Answer to Plaintiff's First Amended Complaint	0039
I	9.	BNY Mellon's, as Trustee, Answer to Nevada Association Services, Inc.'s Third Party Complaint	0045
I	1.	Complaint	0001
I	17.	Conclusion of Law and Order Granting Third Party Defendants' Motion to Dismiss	0063
I	29.	Cross-Claim Against 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-J-8	0151
I	28.	Cross-Claim Against NV Eagles, LLC	0142
I	2.	Declaration of Service - Resurgent Capital Services, LP	0008
V	63.	Defendant/Counterclaimant NV Eagles, LLC's Post-Remand Points and Authorities Regarding Futility Defense	0942
VI	68.	Defendant/Counterclaimant NV Eagles, LLC's Response to Bank of America, N.A. and the Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust*	1248
I	22.	Defendant Underwood Partners, LLC's Motion to Consolidate	0091
IV	57.	Findings of Fact, Conclusions of Law and Judgment	0914
VI	71.	Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing	1258

I	3.	First Amended Complaint for Quiet Title	0010
I	32.	Individual Pre-Trial Memorandum	0172
VI	69.	Minutes from February 10, 2022 Hearing	1256
VI	70.	Minute Order	1257
V	61.	Nevada Supreme Court Remittitur, Clerk's Certificate, and Judgment	0937
IV	58.	Notice of Entry of Findings of Facts, Conclusions of Law and Judgment	0921
I	18.	Notice of Entry of Order (1-9-14)	0068
I	21.	Notice of Entry of Order (2-15-14)	0084
I	25.	Notice of Entry of Order (11-12-15)	0125
VI	72.	Notice of Entry of Order (3-11-2022)	1269
VI	75.	Notice of Entry of Order Granting in Part and Denying in Part Defendant Underwood Partners, LLC's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment	1291
VI	66.	Notice of Entry of Order Regarding Appeal Bond	1227
I	27.	Notice of Voluntary Dismissal of Plaintiff's Claims Against Defendant Resurgent Services, LP, Only, Without Prejudice	0139
I	34.	NV Eagles, LLC's Motion for Judgment as a Matter of Law Pursuant to NRCP Rule 50	0196
II	37.	NV Eagles, LLC's Post Trial Brief	0267
I	26.	Order Denying Defendant NV Eagles, LLC's Motion for Summary Judgment and Order Denying Defendant Bank of America, N.A.'s Countermotion for Summary Judgment	0135
I	23.	Order Granting Defendant Underwood Partners, LLC's Motion to Consolidate	0117
I	19.	Order Granting in Part and Denying in Part Defendant, Underwood Partners, LLC's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment	0076
I	20.	Order Granting the Motion by Defendant Nevada Association Services, Inc. to Dismiss Plaintiff's Complaint	0080

I	24.	Order Granting Third-Party Defendant Lawyers Title of Nevada, Inc.'s Motion to Dismiss	0119
V	62.	Order Scheduling Status Check	0940
I	12.	Plaintiff/Counter-Defendant Melissa Lieberman's Reply to Counterclaimant Nevada Association Services, Inc.'s Counterclaims	0052
IV	54.	Recorders Transcript of Hearing Re: Bench Trial Day 1, January 14, 2020	0795
IV	55.	Recorders Transcript of Hearing Re: Bench Trial Day 2, January 15, 2020	0821
IV	56.	Recorders Transcript of Hearing Re: Bench Trial Day 3 (Decision), February 5, 2020	0898
I	5.	Return of Service - Underwood Partners, LLC (8-15-13)	0018
I	33.	Stipulated Facts for Trial	0189
I	31.	The Bank of New York Mellon, as Trustee's Answer to NV Eagles, LLC's Cross-Claims	0165
I	7.	Third Party Complaint by Nevada Association Services, Inc.	0030
II	38.	Trial Exhibit 1 - Deed of Trust	0346
II	39.	Trial Exhibit 2 - Assignment of Deed of Trust	0365
II	40.	Trial Exhibit 3 - Notice of Delinquent Assessment Lien	0367
II	41.	Trial Exhibit 4 - Notice of Default and Election to Sell Under Homeowners Association Lien	0368
II	42.	Trial Exhibit 5 - Notice of Foreclosure Sale	0370
II	43.	Trial Exhibit 6 - Foreclosure Deed	0372
II	44.	Trial Exhibit 8 – Declaration of Covenants, Conditions, and Restrictions for Madeira Canyon	0379
II	45.	Trial Exhibit 9 - Miles Bauer Affidavit	0451
II	46.	Trial Exhibit 10 - Miles Bauer Borrower Letter Affidavit	0468
III	47.	Trial Exhibit 11 – NRCP 16.1 Initial Disclosures by Nevada Association Services, Inc.	0474
III	48.	Trial Exhibit 12 – Residential Appraisal Summary Report	0662
III	49.	Trial Exhibit 13 - Pleadings and Order from Case No. 2:11-cv-00167 (Part 1)	0692

IV	50.	Trial Exhibit 13 - Pleadings and Order from Case No. 2:11-cv-00167 (Part 2)	0724
IV	51.	Trial Exhibit 14 - Briefing and Arbitration Award from NRED Case No. 12-58	0765
IV	52.	Trial Exhibit 15 - Payoff Statement	0789
IV	53.	Trial Exhibit 16 - Lis Pendens	0792

Chronological Index

Volume	Tab	Document	Bates Number
I	1.	Complaint	0001
I	2.	Declaration of Service - Resurgent Capital Services, LP	0008
I	3.	First Amended Complaint for Quiet Title	0010
I	4.	Affidavit of Service - Nevada Association Services, Inc. (8-6-13)	0017
I	5.	Return of Service - Underwood Partners, LLC (8-15-13)	0018
I	6.	Answer of Defendant Nevada Association Services, Inc.; Counterclaims of Counterclaimant Nevada Association Services	0019
I	7.	Third Party Complaint by Nevada Association Services, Inc.	0030
I	8.	Bank of America, N.A.'s Answer to Plaintiff's First Amended Complaint	0039
I	9.	BNY Mellon's, as Trustee, Answer to Nevada Association Services, Inc.'s Third Party Complaint	0045
I	10.	Affidavit of Service - Cogburn Law Offices (9-30-13)	0050
I	11.	Affidavit of Service - Norman Teran (9-30-13)	0051
I	12.	Plaintiff/Counter-Defendant Melissa Lieberman's Reply to Counterclaimant Nevada Association Services, Inc.'s Counterclaims	0052
I	13.	Affidavit of Service - Cogburn Law Offices (10-3-13)	0057
I	14.	Affidavit of Service - Mortgage Electronic Systems, Inc. (10-8-13)	0058
I	15.	Affidavit of Service - Madeira Homeowner's Association (10-22-13)	0059
I	16.	Affidavit of Service - Resurgent Capital Services, LP (12-10-20)	0061
I	17.	Conclusion of Law and Order Granting Third Party Defendants' Motion to Dismiss	0063

I	18.	Notice of Entry of Order (1-9-14)	0068
I	19.	Order Granting in Part and Denying in Part Defendant, Underwood Partners, LLC's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment	0076
I	20.	Order Granting the Motion by Defendant Nevada Association Services, Inc. to Dismiss Plaintiff's Complaint	0080
I	21.	Notice of Entry of Order (2-15-14)	0084
I	22.	Defendant Underwood Partners, LLC's Motion to Consolidate	0091
I	23.	Order Granting Defendant Underwood Partners, LLC's Motion to Consolidate	0117
I	24.	Order Granting Third-Party Defendant Lawyers Title of Nevada, Inc.'s Motion to Dismiss	0119
I	25.	Notice of Entry of Order (11-12-15)	0125
I	26.	Order Denying Defendant NV Eagles, LLC's Motion for Summary Judgment and Order Denying Defendant Bank of America, N.A.'s Countermotion for Summary Judgment	0135
I	27.	Notice of Voluntary Dismissal of Plaintiff's Claims Against Defendant Resurgent Services, LP, Only, Without Prejudice	0139
I	28.	Cross-Claim Against NV Eagles, LLC	0142
I	29.	Cross-Claim Against 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-J-8	0151
I	30.	Bank of America, N.A.'s Answer to NV Eagles, LLC's Cross-Claims	0158
I	31.	The Bank of New York Mellon, as Trustee's Answer to NV Eagles, LLC's Cross-Claims	0165
I	32.	Individual Pre-Trial Memorandum	0172
I	33.	Stipulated Facts for Trial	0189

IV	56.	Recorders Transcript of Hearing Re: Bench Trial Day 3 (Decision), February 5, 2020	0898
IV	57.	Findings of Fact, Conclusions of Law and Judgment	0914
IV	58.	Notice of Entry of Findings of Facts, Conclusions of Law and Judgment	0921
IV	59.	Bank of America and The Bank of New York Mellon, as Trustee's Notice of Appeal	0930
IV	60.	Bank of America and The Bank of New York Mellon, as Trustee's Case Appeal Statement	0933
V	61.	Nevada Supreme Court Remittitur, Clerk's Certificate, and Judgment	0937
V	62.	Order Scheduling Status Check	0940
V	63.	Defendant/Counterclaimant NV Eagles, LLC's Post-Remand Points and Authorities Regarding Futility Defense	0942
V	64.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust* (Part 1)	0976
VI	65.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust* (Part 2)	1187
VI	66.	Notice of Entry of Order Regarding Appeal Bond	1227
VI	67.	Bank of America, N.A. and the Bank of New York Mellon, as Trustee's Response to NV Eagles, LLC's Post-Remand Points and Authorities	1235
VI	68.	Defendant/Counterclaimant NV Eagles, LLC's Response to Bank of America, N.A. and the Bank of New York Mellon, as Trustee's Supplemental Brief Regarding *Perla Trust*	1248
VI	69.	Minutes from February 10, 2022 Hearing	1256
VI	70.	Minute Order	1257
VI	71.	Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing	1258
VI	72.	Notice of Entry of Order (3-11-2022)	1269

VI	73.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Notice of Appeal	1284
VI	74.	Bank of America, N.A. and The Bank of New York Mellon, as Trustee's Case Appeal Statement	1287
VI	75.	Notice of Entry of Order Granting in Part and Denying in Part Defendant Underwood Partners, LLC's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment	1291

DATED this 14th day of September, 2022.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 14, 2022, the foregoing **APPELLANT'S APPENDIX, VOLUME VI** 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

Exhibit "1"

ORD
JOHN B. LEACH, ESQ.
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TRACY A. GALLEGOS, ESQ.
Nevada Bar No. 9023
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Attorneys for Spring Mountain Ranch Master Association

FILED
Dec 22 8 35 AM '06
Shirley A. Bryan
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 20, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John B. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issue, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,963.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall [illegible] Nevada Association Services, Inc., Miles, Bauer, Bergstrom & Winters, LLP, on behalf of the Intervenor, Bank of America, N.A., Countrywide Home Loans, Inc., and Recontrust Company, N.A.

Dated this 20 day of December, 2006.

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

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Attorneys for Defendant Spring Mountain Ranch Master Association

Approved as to Form and Content:

THE COOPER CASTLE LAW FIRM

Anita M. McFarland, Esq.
Matty G. Baker, Esq.
820 S. Valley View Blvd.
Las Vegas, NV 89107

Attorneys for Korbel Family Trust

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

CLERK OF THE COURT

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STATE OF NEVADA
DEPARTMENT OF BUSINESS & INDUSTRY
REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

BAC HOME LOANS SERVICING, LP, Plaintiff, v. STONEFIELD HOMEOWNERS ASSOCIATION, ET AL. Defendants.	ADR CLAIM NO. 12-58 JOINDER OF DEFENDANT NEVADA ASSOCIATION SERVICES IN BRIEF SUBMITTED BY DEFENDANTS L,J.S&G DBA LEACH, JOHNSON, SONG & GRUCHOW AND FIRST LIGHT

TO ALL PARTIES:

Defendant Nevada Association Services, Inc. hereby joins in the brief in this matter submitted by defendants L,J,S&G dba Leach, Johnson, Song & Gruchow and First Light.

Date: September 10, 2012

LAW OFFICES OF RICHARD VILKIN, P.C.
By: _____
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Attorneys for defendant Nevada Association Services, Inc.

ARBA
Ara H. Shirinian, NSB #6124
Ara Shirinian Mediation
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(702) 496-4985

Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Bank of America, N. A., Claimant, vs. Stonefield Homeowners Association, et. al. Respondents	NRED Control No.: 12-58 **NON-BINDING ARBITRATION AWARD**

On or about June 13, 2012 the Arbitrator in this action ruled this matter would be decided upon the briefing of the parties, without hearing, unless objection to this procedure was made by a party. With no party objecting to the matter being decided upon the briefs of the parties, and the hearing being waived by the parties, this arbitration award follows. The Arbitrator rules that all parties participated in good faith in this matter.

Having considered the extensive pleadings submitted by the parties to this matter, the Arbitrator finds as follows:

1. Claims Presented

This arbitration involves two primary claims for relief. Firstly, the Claimant seeks a declaration establishing whether it has a right to pay-off or redeem a Homeowners Association

("HOA") super-priority lien before it forecloses under a senior deed of trust. Secondly, the Claimant seeks a declaration establishing that a HOA's super-priority lien does not include attorneys' fees and costs when such costs increase the amount of the lien to a sum greater than nine months of monthly assessments. These requests for declaration are ruled upon below in reverse order.

2. Assessments Enforceable Under NRS 116.3116 Include all Reasonable Collection Costs and Fees Relating to the Nine Month Period

In a departure from traditional lien property law, and to *expand* the rights of homeowners associations, Nevada has adopted the Uniform Common Interest Ownership Act. This act is codified in NRS 116. The instant matter involves the interpretation of NRS 116. As is relevant herein, NRS 116.3116 generally provides that, upon a foreclosure, an association's lien to a new owner of property for moneys due the association by a prior owner is superior to all other liens, including those filed earlier, such as the first mortgagee's interest. It is the *nature and extent* of this "priority" lien which is the subject of this suit.

The Arbitrator appreciates that there has been differing decisions made by different administrative bodies, judges and arbitrators regarding the interpretation of NRS 116.3116. See CCIC Opinion No.2010-11; Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Clark County District Court Case No.: 06-AO523959-C; Elkhorn Community Assoc. v. MERS, Clark County District Court No. A607051; JP Morgan v. Countrywide Home Loans, Clark County District Court Case No. A562678. See differing opinions found in the November 18, 2010 advisory opinion of the Nevada Financial Institution Division, and by the Court in Wingbrook Capital v. Peppertree HOA, Clark County District Court Case No. A-11-636948-B. The Arbitrator also appreciates the fact that the issues raised in this matter will ultimately be heard by the Nevada Supreme Court. However, as of this date, the Nevada Supreme Court has not published a decision interpreting NRS 116.3116. Thus, this action is being reviewed by this Arbitrator as a case of first impression.

It is not disputed that interest, late fees, and third party costs of collection are considered a part of the assessments under NRS 116.3116, and are subject to inclusion into a HOA priority lien. Claimant argues nevertheless that 116.3116 1.(C) limits the priority lien to a gross figure not to exceed an amount equal to 9 months of *normal homeowners assessments or monthly dues.* The Arbitrator disagrees.

NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." The plain reading of the *entirety* of this statute and the *entirety* of Chapter 116 indicates that what is meant by the words "would have become due" was to allow homeowners associations a priority lien to the extent of, and in a gross amount equal to, what these associations would have been able to be awarded for a nine month period had lien priority not been an issue. This gross amount would include all association dues in arrears, as well as all other costs and fees the association might be entitled to. For example, in a *non-foreclosure setting*, if a property owner was delinquent for 9 months in paying his $200 per month hypothetical homeowner's dues, there could not be a dispute that the homeowners association could sue for, obtain a lien for, and be awarded the sum of $1,800, *plus* all costs associated with collection. In this example, let us assume that collection costs and other charges equal $2,000. In this hypothetical, the homeowners association could obtain a lien for, and be awarded the total sum of $3,800.

Again, NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." In the hypothetical noted above had action been taken prior to foreclosure, what "would have become due" to the homeowners association by the home owner would be $3,800. Thus, using the figures in our example, in a foreclosure setting, the homeowners association would be limited to a priority lien in the sum of $3,800, or an amount equal to what "***would have become due*** ... in the 9 months immediately preceding institution of the lien."

The lien limitation set forth in NRS 116.3116 requires the trier of fact to look-back and to the limit a lien to what "would have become due" had an action been filed at the end of a nine month period. That amount would include delinquent homeowners' dues, attorneys' fees, interest, penalties, interest and all other charges which a homeowners association legally could seek in a non-foreclosure setting. While the 9 month limitation is a cap, it is cap which includes collection costs and fees, because those costs "would have become due" had a matter been filed outside foreclosure. See Hudson House Condo. V. Brooks, 611 A.2d 862 (Conn. 1992) in support. [1] The Claimant's request for relief in this regard is denied.

3. Absent Foreclosure of a Lien Respondents Are Not Obligated to Resolve Lien Disputes

All parties to this matter seem to agree that a super-priority lien attaches or is "triggered" when the first deed of trust holder forecloses upon its deed of trust. The Claimant nevertheless seeks a declaration establishing that it has an absolute right to pay-off or redeem a Homeowners Association ("HOA") super-priority lien before it is triggered or attaches, or before it forecloses under a senior deed of trust. Claimant argues that the respondent homeowners associations must, in effect, pre-determine the likely amount of the super-priority lien, and do so before collection costs and other charges are incurred, so that entities such as the Claimant can avoid the imposition of these fees and costs.[2]

---

[1] The Respondents make several additional arguments in support of the proposition that the super priority lien includes costs of collection. The merits of those additional arguments are not ruled upon herein.

[2] The Respondents have set forth many reasons why it would be difficult, if not impossible, to determine exact lien amounts prior to foreclosure, so that an appropriate demand can be made upon a pending or potential super-priority lien. The Respondents also point out the several pitfalls of accepting a lien pay-off prior to attachment of the lien. The Arbitrator finds the Respondents arguments in this regard to be persuasive. However, these arguments are not necessary to support the Arbitrator's decision herein.

While the Claimant certainly has the *right* to *negotiate a settlement* with homeowners associations regarding liens prior to foreclosure, there is nothing in the law which requires or sets forth an *obligation* of homeowners associations to either negotiate with the Claimant, or to enter into a settlement or resolution. There is simply no provision in the law which requires Respondents to pre-determine likely lien amounts before those liens are triggered or attach. There is simply no provision in the law which requires Respondents to then accept that amount in lieu of going forward with the procedures now followed by the Respondents. The Claimant's request for relief in this regard is denied.

4. Conclusion

Based upon the foregoing, non-binding arbitration award is herewith granted in **favor of the Respondents**, and each of them, and against the Claimant on all claims for relief.

Dated: September 18, 2012

Ara H. Shirinian

Arbitrator

EXHIBIT F

EXHIBIT F

MILES BAUER AFFIDAVIT

State of California }
}ss.
Orange County }

Affiant being first duly sworn, deposes and says:

1. I am a paralegal with the law firm of Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**) in Costa Mesa, California. I am authorized to submit this affidavit on behalf of Miles Bauer.

2. I am over 18 years of age, of sound mind, and capable of making this affidavit.

3. The information in this affidavit is taken from Miles Bauer's business records. I have personal knowledge of Miles Bauer's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of Miles Bauer's regularly conducted business activities; and (c) it is the regular practice of Miles Bauer's to make such records. I have personal knowledge of Miles Bauer's procedures for creating and maintaining these business records. I personally confirmed that the information in this affidavit is accurate by reading the affidavit and attachments, and checking that the information in this affidavit matches Miles Bauer's records available to me.

4. Bank of America, N.A. (**BANA**) retained Miles Bauer to tender payments to homeowners associations (**HOA**) to satisfy super-priority liens in connection with the following loan:

Loan Number: REDACTED

Borrower(s): Melissa Lieberman

Property Address: 2184 Pont National Drive, Henderson, Nevada 89044

5. Miles Bauer maintains records for the loan in connection with tender payments to HOA. As part of my job responsibilities for Miles Bauer, I am familiar with the type of records maintained by Miles Bauer in connection with the loan.

6. Based on Miles Bauer's business records, attached as **Exhibit 1** is a copy of a February 22, 2011 letter from Rock K. Jung, Esq., an attorney with Miles Bauer, to Madeira Canyon, A Planned Community, care of Nevada Association Services, Inc.

7. Based on Miles Bauer's business records, attached as **Exhibit 2** is a copy of Statement of Account from Nevada Association Services, Inc. received by Miles Bauer in response to the February 22, 2011 letter identified above.

8. Based on Miles Bauer's business records, attached as **Exhibit 3** is a copy of a April 1, 2011 letter from Mr. Jung to Nevada Association Services, Inc. enclosing a check for $486.00.

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9. Based on Miles Bauer's business records, on April 1, 2011, Nevada Association Services, Inc. refused delivery of the April 1, 2011 letter and the $486.00 check. A copy of the delivery receipt from Miles Bauer's business records is attached as **Exhibit 4**. A copy of a screenshot containing the relevant case management note confirming the check was returned is attached as **Exhibit 5.**

FURTHER DECLARANT SAYETH NOT.

Date: 2/20/15

Declarant Adam Kendis

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of Orange

Subscribed and sworn to (or affirmed) before me on this 20th day of February, 2015,

by Adam Kendis, proved to me on the basis of satisfactory evidence to be
(Name of Signer)

the person who appeared before me.

Signature _____ (Seal)
(Signature of Notary Public)

AMANDA MARIA MENDOZA
Commission # 2078315
Notary Public - California
Los Angeles County
My Comm. Expires Aug 17, 2018

EXHIBIT 1

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
MARK T. DOMEYER*
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TAMI S. CROSBY*
L. BRYANT JAQUEZ *
DANIEL L. CARTER *
GINA M. CORENA
WAYNE A. RASH *
ROCK K. JUNG
VY T. PHAM *
KRISTA J. NIELSON
HADI R. SEYED-ALI *
ROSEMARY NGUYEN *
JORY C. GARABEDIAN
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KRISTIN S. WEBB *
BRIAN H. TRAN *
ANNA A. GHAJAR *
CORI B. JONES *
STEVEN E. STERN
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ANDREW H. PASTWICK
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MILES, BAUER, BERGSTROM & WINTERS, LLP
ATTORNEYS AT LAW SINCE 1985

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* CALIFORNIA OFFICE
1231 E. DYER ROAD
SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

February 22, 2011

SENT VIA FIRST CLASS MAIL

Madeira Canyon, A Planned Community
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146

Re: *Property Address: 2184 Pont National Drive, Henderson 89044*
MBBW File No. 11-H0279

Dear Sirs:

This letter is in response to your Notice of Default with regard to the HOA assessments purportedly owed on the above described real property. This firm represents the interests of MERS as nominee for BAC Home Loans Servicing, LP afka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to these issues. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property.

As you know, NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
> ...
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

Subsection 2b of NRS 116.3116 clearly provides that an HOA lien "is prior to all other liens and encumbrances on a unit except: a first security interest on the unit..." But such a lien is prior to a first security interest to the extent of the assessments for common expenses which would have become due during the 9 months before institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably senior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated December 17, 2010. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BAC should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

Please let me know what the status of any HOA lien foreclosure sale is, if any. My client does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues.

Thank you for your time and assistance with this matter. I may be reached by phone directly at (702) 942-0412. Please fax the breakdown of the HOA arrears to my attention at (702) 942-0411. I will be in touch as soon as I've reviewed the same with BAC.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

EXHIBIT 2

MA

Lieberman, Melissa
2184 Pont National Dr

Madeira Canyon
Account No.: REDACTED
NAS #N 62616

Assessments, Late Fees, Interest, Attorneys Fees & Collection Costs *Dates of Delinquency:01/10-04/11*	**Amount** Present rate	**Amount** Prior Rate	**Amount** Prior rate	**Amount** Prior rate	**Amount** Prior rate
Balance forward	0.00	0.00	0.00	0.00	0.00
No. of Months Subject to Interest	0	0	0	0	0
Interest due on Balance Forward	0.00	0.00	0.00	0.00	0.00
Quarterly Assessment Amount	162.00	210.00	180.00	234.00	0.00
No. of Months Delinquent	2	2	4	4	0
No. of Months Subject to Interest	0	0	0	0	0
Total Monthly Assessments due	324.00	420.00	720.00	936.00	0.00
Late fee amount	15.00	0.00	15.00	0.00	0.00
No. of Months Late Fees Incurred	1	0	4	0	0
Total Late Fees due	15.00	0.00	60.00	0.00	0.00
Interest Rate	0.12	0.12	0.12	0.12	0.12
Interest due	4.73	0.00	4.73	0.00	0.00
Special Assessment Due	0.00	0.00	0.00	0.00	0.00
Special Assessment Late Fee	0.00	0.00	0.00	0.00	0.00
Special Assessment Months Late	0	0	0	0	0
Special Assessment Interest Due	0.00	0.00	0.00	0.00	0.00
Transfer Fee	0.00	0.00	0.00	0.00	0.00
Mgmt Intent to Lien	0.00	0.00	0.00	0.00	0.00
Audit Fee	0.00	0.00	0.00	0.00	0.00
Management Co. Fee	0.00	0.00	0.00	0.00	0.00
Demand Letter	135.00	0.00	0.00	0.00	0.00
Lien Fees	325.00	0.00	0.00	0.00	0.00
Prepare Lien Release	30.00	0.00	0.00	0.00	0.00
Certified Mailing	56.00	0.00	0.00	0.00	0.00
Recording Costs	57.00	0.00	0.00	0.00	0.00
Pre NOD Ltr	75.00	0.00	0.00	0.00	0.00
Payment Plan Fee	0.00	0.00	0.00	0.00	0.00
Breach letters	0.00	0.00	0.00	0.00	0.00
Personal check returns	0.00	0.00	0.00	0.00	0.00
Escrow demand fee	0.00	0.00	0.00	0.00	0.00
Collection Costs on Violations	**0.00**	0.00	0.00	0.00	0.00
Subtotals	$1,021.73	$420.00	$784.73	$936.00	$0.00

Credit	**Date**	
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
NAS fees & costs		(0.00)
HOA TOTAL		**$3,852.46**

"Nevada Association Services Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose."

Printed: 3/12/2011

BANA 000134

Foreclosure Fees & Costs	Amount		Attorneys Cre	Date	
					(0.00)
Foreclosure Fees	400.00				(0.00)
Title Report	290.00		Collection Cre	Date	
Posting/Publication	0.00				(0.00)
Courier	0.00				(0.00)
Postponement of Sale	0.00				(0.00)
Conduct Sale	0.00				(0.00)
Prepare/Record Deed	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
					(0.00)
SUBTOTAL	$690.00				(0.00)
					(0.00)
					(0.00)
		$3,852.46			
FORECLOSURE TOTAL			Collection Credits SubTotal		$0.00

EXHIBIT 3

DOUGLAS E. MILES *
Also Admitted in California and Illinois
RICHARD J. BAUER, JR.*
JEREMY T. BERGSTROM
Also Admitted in Arizona
FRED TIMOTHY WINTERS*
KEENAN E. McCLENAHAN*
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CATHERINE K. MASON *

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SUITE 100
SANTA ANA, CA 92705
PHONE (714) 481-9100
FACSIMILE (714) 481-9141

April 1, 2011

Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146

Re: *Property Address:* 2184 Pont National Drive
ACCT NO.: REDACTED
LOAN # REDACTED
MBBW File No. 11-H0279

Dear Sir/Madame:

As you may recall, this firm represents the interests of BAC Home Loans Servicing, LP fka Countrywide Home Loans, Inc. (hereinafter "BAC") with regard to the issues set forth herein. We have received correspondence from your firm regarding our inquiry into the "Super Priority Demand Payoff" for the above referenced property. The Statement of Account provided by you in regards to the above-referenced address shows a full payoff amount of $3,852.46. BAC is the beneficiary/servicer of the first deed of trust loan secured by the property and wishes to satisfy its obligations to the HOA. Please bear in mind that:

NRS 116.3116 governs liens against units for assessments. Pursuant to NRS 116.3116:

> The association has a lien on a unit for:
>
> ...
>
> *any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section*

While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:

2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $486.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to NEVADA ASSOCIATION SERVICES in the sum of $486.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BAC's financial obligations towards the HOA in regards to the real property located at 2184 Pont National Drive have now been "paid in full".

Thank you for your prompt attention to this matter. If you have any questions or concerns, I may be reached by phone directly at (702) 942-0412.

Sincerely,

MILES, BAUER, BERGSTROM & WINTERS, LLP

Rock K. Jung, Esq.

Miles, Bauer, Bergstrom & Winters, LLP Trust Acct 11-H0279 Initials: SRN

Payee: NEVADA ASSOCIATION SERVICES, Check #: 8684 Date: 3/28/2011 Amount: 486.00

Inv. Date	Reference #	Description	Inv. Amount	Case #	Matter Description	Cost Amount
3/28/2011	0309-01	To Cure HOA Deficiency	486.00			

Miles, Bauer, Bergstrom & Winters, LLP
Trust Account
1231 E. Dyer Road, #100
Santa Ana, CA 92705
Phone: (714) 481-9100

Bank of America
1100 N. Green Valley Parkway
Henderson, NV 89074
16-66/1220
1020

REDACTED
Loan #REDACTED

8684

Date: 3/28/2011

Amount $**** 486.00

Check Void After 90 Days

Pay $*****Four Hundred Eighty-Six & No/100 Dollars
to the order of

NEVADA ASSOCIATION SERVICES, INC.
6224 W. Desert Inn Rd.,Ste. A
Las Vegas, NV 89146

Security features. Details on back.

REDACTED

BANA 000139

EXHIBIT 4

On this day, April 1, 2011, Nevada Association Services, Inc. received: (1) letters accompanying each of the checks listed below that address the purpose of the tender and the effect of accepting said checks *and* (2) the following checks for the following addresses:

Amount	Address	Ref#	MBBW#
486.00	2184 Pont National Dr.	REDACTED	11-H0279
123.75	9451 Baltinglass St.		11-H0296
1,332.00	10550 W. Alexander Rd. #1209		11-H0282
2,250.00	2122 Pine Breeze Lane		11-H0101
468.00	2617 Star Manor St.		11-H0341

By signing below you acknowledge and confirm receipt of said checks.

Signature:_____ Date_____

An Employee of Nevada Association Services, Inc.

RUN. # 907
FIRM MILES, BAUER, BERGSTROM, WINTERS, LLC
ADDR 2200 PASEO VERDE PKWY. # 270.$250
PH # 702-369-5960

384-0305 • Fax: 384-8638
1118 Fremont St.
Las Vegas, NV 89101

0117575886

ATTN: _____ DATE: _____ AM PM

CASE NAME _____ NO. _____
DOCUMENTS _____ CK # _____ $_____
REF # _____ Limit of Liability: $100.00 per form

☐ Return Copy ☐ Return Original ☐ Call When Completed/Problem (Extra Fee)

1.

2.

3.

☐ NEXT DAY ☐ REGULAR ☐ SPECIAL (4 HRS) ☐ EXPEDITED (2 HRS)

Statute Expires _____

May be subject to an additional charge
LAST DATE 1 1 (SPECIFY DATE/TIME)
RETURN DATE 1 1

Received by _____
Date _____ Time _____
☐ NOT COMPLETE DUE TO (4) CR 4/1/11 3RD JGMT
ACCEPT, NOT PAID IN FULL PER CARLY.

☐ DISTRICT
☐ ARB ☐ DISC.
☐ M/C ☐ D.A.
☐ JUDGE ☐ INDEX

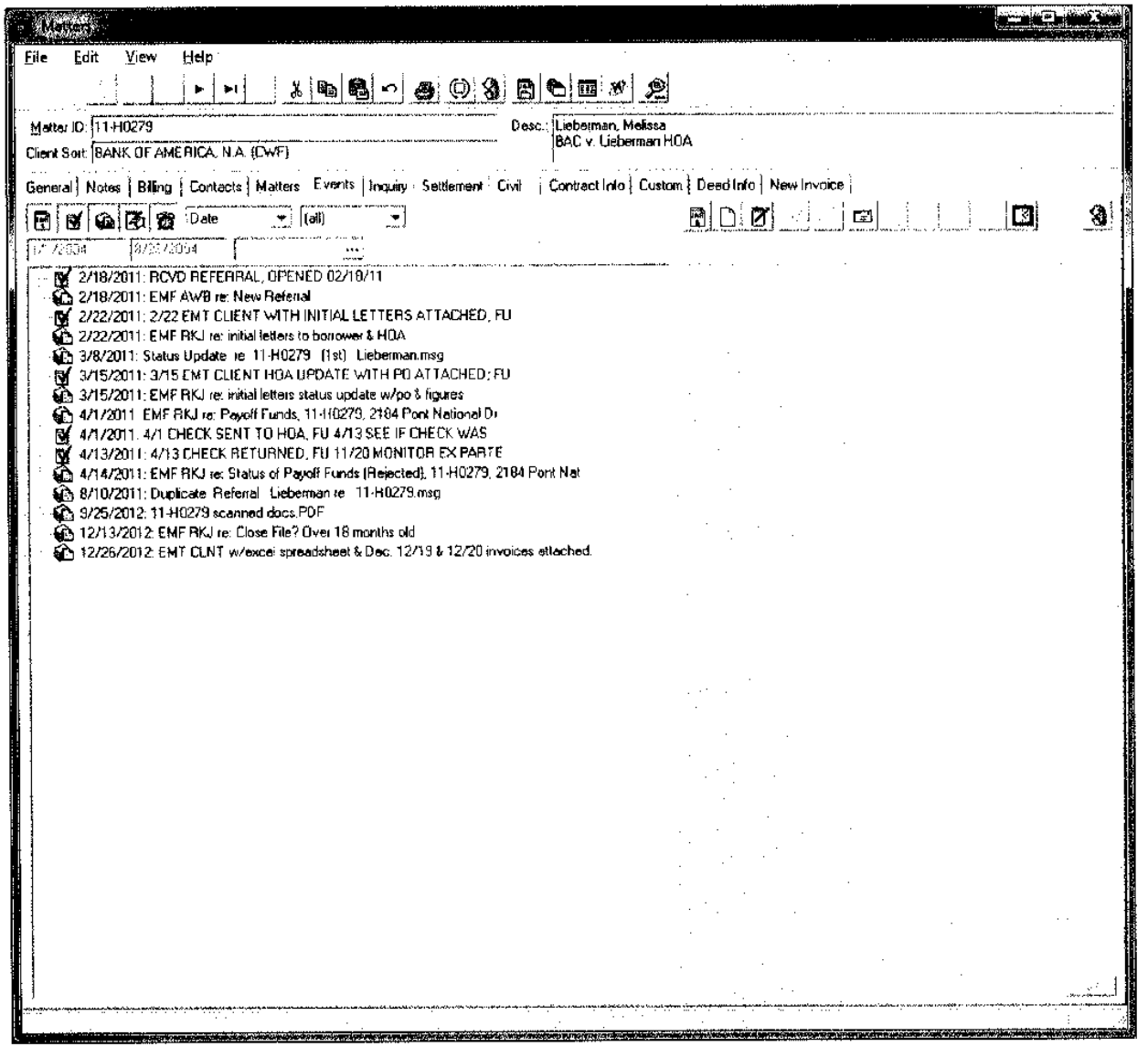
☐ FAMILY
☐ M/C ☐ D.A.
☐ JUDGE ☐ INDEX

☐ JUSTICE _____
☐ CIVIL ☐ EVICT
☐ CRIM ☐ S.C.
☐ TRAF ☐ D.A.

☐ MUNI CT _____
☐ RECORDER
☐ CONSTABLE
☐ SHERIFF
☐ FEDERAL
☐ BANKRUPTCY
☐ SECTRY OF STATE
☐ HEARINGS OFFICER
☐ APPEALS OFFICER

BANA 000141

EXHIBIT 5


Matters
File Edit View Help
Matter ID: 11-H0279
Desc.: Lieberman, Melissa
BAC v. Lieberman HOA
Client Sort: BANK OF AMERICA, N.A. (DWF)
General | Notes | Billing | Contacts | Matters | Events | Inquiry | Settlement | Civil | Contract Info | Custom | Deed Info | New Invoice
Date
(all)
2/18/2011: RCVD REFERRAL, OPENED 02/18/11
2/18/2011: EMF AWB re: New Referral
2/22/2011: 2/22 EMT CLIENT WITH INITIAL LETTERS ATTACHED, FU
2/22/2011: EMF RKJ re: initial letters to borrower & HOA
3/8/2011: Status Update re 11-H0279 (1st) Lieberman.msg
3/15/2011: 3/15 EMT CLIENT HOA UPDATE WITH PO ATTACHED; FU
3/15/2011: EMF RKJ re: initial letters status update w/po & figures
4/1/2011 EMF RKJ re: Payoff Funds, 11-H0279, 2184 Pont National Di
4/1/2011: 4/1 CHECK SENT TO HOA, FU 4/13 SEE IF CHECK WAS
4/13/2011: 4/13 CHECK RETURNED, FU 11/20 MONITOR EX PARTE
4/14/2011: EMF RKJ re: Status of Payoff Funds (Rejected), 11-H0279, 2184 Pont Nat
8/10/2011: Duplicate Referral Lieberman re 11-H0279.msg
9/25/2012: 11-H0279 scanned docs.PDF
12/13/2012: EMF RKJ re: Close File? Over 18 months old
12/26/2012: EMT CLNT w/excel spreadsheet & Dec. 12/19 & 12/20 invoices attached.

BANA 000143

EXHIBIT G

EXHIBIT G

FFCL
JOSEPH Y. HONG, ESQ.
State Bar No. 005995
HONG & HONG LAW OFFICE
1980 FESTIVAL PLAZA DRIVE, SUITE 650
Las Vegas, Nevada 89135
Telephone No.: (702) 870-1777
Facsimile No.: (702) 870-0500
Email: Yosuphonglaw@gmail.com
Attorney for NV Eagles, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of herself and all others similarly situated; Plaintiff, vs. MADEIRA CANYON COMMUNITY ASSOCIATION, *et al.*, Defendants.	Case No.: A-13-685203-C Dept. No.: XXXII
And related claims.	

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

This matter having come on for Bench Trial on January 14 and 15, 2020, and for the Court's Decision hearing on February 5, 2020; the Court having considered the evidence; and good cause appearing therefor, enters the following Findings of Facts, Conclusions of Law and Judgment.

FINDINGS OF FACTS

1. This case involves a real property commonly known as 2184 Pont National Drive, Henderson, Nevada 89044, APN 190-20-311-033 ("Subject Property").

2. The Subject Property is governed by the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") of the Mediera Canyon Community Association *now known as* Madeira Canyon Homeowners Association ("HOA"), which were recorded in the Clark County Recorder's Office as Instrument No. 20050524-0002414.

3. On or about November 20, 2006, Melissa Lieberman ("Borrower") executed a promissory note for $511,576.00 ("Note") in favor of Pulte Mortgage, LLC.

4. The Note was secured by a deed of trust recorded in the Clark County Recorder's Office as Instrument No. 20061127-0002922 ("DOT").

5. On or about September 14, 2011, the DOT was assigned to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2006 J-8, Mortgage Pass-Through Certificates, Series 2006-J8 ("BNYM"), via an Assignment of DOT recorded in the Clark County Recorder's Office as Instrument No. 20110919-0000030.

6. After the Borrower defaulted on her obligations to the HOA, the HOA retained Nevada Association Services, Inc. ("NAS") to collect the delinquency.

7. On October 27, 2010, NAS, on behalf of the HOA, recorded a Notice of Delinquent Assessment Lien in the Clark County Recorder's Office as Instrument No. 20101027-0002037.

8. On December 21, 2010, NAS, on behalf of the HOA, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") in the Clark County Recorder's Office as Instrument No. 20101221-0000548.

9. After it received the NOD, Bank of America, N.A. ("BANA"), who serviced the loan secured by the DOT and was the predecessor to BNYM, retained Miles, Bauer, Bergstrom & Winters LLP ("Miles Bauer") to obtain information from the HOA as to the association lien and the superpriority amount of same.

10. On February 22, 2011, Rock Jung, Esq. ("Jung"), an attorney for Miles Bauer, sent a copy of its standard letter seeking to determine the nine-month super-priority lien amount (the "Miles Bauer Letter") to NAS.

11. NAS responded on or about March 12, 2011, providing Jung an accounting ledger showing the total amount the Borrower owed the HOA broken down by categories, including amounts due for "monthly assessments." *See Joint Trial Exhibit 9, bate 134* (hereinafter "HOA Ledger").

12. On or about April 1, 2011, Miles Bauer sent a check for $486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

13. However, Miles Bauer miscalculated the superpriority amount as the actual nine-month superpriority amount was $540.00. *See Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.* Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual superpriority amount of $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.*

14. Thereafter, neither Miles Bauer nor BANA nor BNYM did anything to satisfy the superpriority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office.

15. On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC ("Underwood"), as the highest bidder in the amount of $30,000.00, purchased the Subject Property.

16. Underwood then conveyed its interest in the Subject Property to NV Eagles.

17. There was no valid tender of the superpriority portion of the HOA lien in the amount of $540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted on June 7, 2013.

18. There was no evidence of any kind of fraud, unfairness or oppression that accounted for and/or brought about the purchase price of the Subject Property at the foreclosure sale and/or affecting the foreclosure sale of the Subject Property.

19. Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less than the superpriority amount, BANA and/or BNYM had adequate time and notice to correct this error prior to the foreclosure sale. BANA and/or BNYM did nothing.

CONCLUSIONS OF LAW

1. As confirmed by the Nevada Supreme Court in its *SFR* Decision, a foreclosure sale that was conducted pursuant to NRS Chapter 116 extinguished BNYM and/or its predecessor's deed of trust encumbering the Subject Property as a matter of Nevada law.

2. The Nevada Supreme Court in its *SFR* and *Shadow Wood* Decisions held and confirmed that the recitals as contained in the Foreclosure Deed serve as conclusive proof that the statutory requirements have been complied with as to the notice provisions of NRS 116.31162 through 116.31168, which concern the occurrence of default, notice, and publication of the foreclosure sale. *See SFR* at 411-412.

3. Therefore, the conclusiveness of the recitals as contained in the Foreclosure Deed can only be challenged via post-sale equitable claims supported by a finding of unfairness of the sale. *See Shadow Wood* at 1110-1112.

4. The Nevada Supreme Court in its *PNC* Order in the case of *PNC Bank National Association v. Saticoy Bay LLC Series 9320 MT. Cash Ave. UT 103,* Nevada Supreme Court case no. 69595 (Nev. May 25, 2017 (unpublished Order of Affirmance) held that the amounts as stated in

the pre-sale notices constituted prima facie evidence that a HOA was foreclosing on its superpriority lien comprised of monthly assessments pursuant to NRS Chapter 116.

5. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC.*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (Nev. 2018) ("*Diamond Spur*"), the Nevada Supreme Court expressly held that a "[v]alid tender requires payment in full." *Id.*

6. Under NRS 116.31162(b), the superpriority portion of the Association's lien is comprised of nine months of common assessments and charges for nuisance-abatement and maintenance under NRS 116.310312. In this case, the evidence absolutely and conclusively confirmed that the superpriority portion of the HOA lien was in the amount of $540.00.

7. The Nevada Supreme Court, in *Diamond Spur* established that a "lien may be lost by …payment or tender of the proper amount of the debt secured by the lien." *Id.* Additionally, the Nevada Supreme Court in *Diamond Spur* held that a "[v]alid tender requires payment in full." *Id.* Furthermore, as recently as January 23, 2020, the Nevada Supreme Court confirmed its holding in *Diamond Spur* in its unpublished Order in *Nationstar v. 2016 Marathon Keys Trust*, case # 75967 (unpublished Order, January 23, 2020) ("*Marathon*"), that again confirmed that "[v]alid tender requires payment in full." *Id.*

8. In Nevada, "[t]he burden of demonstrating that the delinquency was cured presale, rendering the sale void, [is] on the party challenging the foreclosure…" *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"). Further, *Resources Group* established that the party contesting the validity of the HOA's foreclosure of its superpriority lien bears the burden of demonstrating that it tendered its "delinquency-curing check," and whether it met the burden by proving that it "paid the delinquency amount in full prior to the sale." *Id.*, 437 P.3d at 159.

9. Here, BNYM failed to carry its burden as the check delivered to NAS by Miles Bauer did not satisfy the superpriority amount of the HOA lien. Thus, under Nevada law, the tender

was invalid and insufficient to cure the superpriority portion of the HOA lien. *See Diamond Spur, Resources Group and Marathon.*

10. The Nevada Supreme Court in the case of *Nationstar Mortgage, LLC. v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (November 22, 2017), held that the commercial reasonableness standard, which derives from Article 9 of the Uniform Commercial Code, has no applicability in the context of an HOA foreclosure involving the sale of real property. The Nevada Supreme Court, therefore, confirmed its holding in *Shadow Wood* as to the long-standing rule that "inadequacy of price, however, gross, is not in itself a sufficient ground for setting aside a trustee's sale" absent additional "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." *Shadow Wood* at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963).

11. The evidence provided by BNYM at trial was insufficient to establish that the foreclosure sale of the property was commercially unreasonable under *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), which requires some proof of some element of fraud, unfairness or oppression as accounts for/brings about a grossly inadequate price. Nevada law does not permit a Court to invalidate a sale solely on the basis of price. Thus, the HOA foreclosure sale of the Subject Property was commercially reasonable as a matter of law. BNYM 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 sale price of the Subject Property and/or affected the foreclosure sale.

THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the deed of trust and any assignments thereof, as liens on the Subject Property are hereby cancelled and without legal force or effect, and do not convey any right, title or interest in and to the Subject Property to BNYM and/or its predecessors in interest and/or its assignees.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that BNYM and/or its predecessors in interest and/or assignees do not have any estate, right, title, lien or interest in or to the Subject Property or any part of the Subject Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that there is no just reason for delay of entry of final judgment and final judgment is so entered pursuant to Rule 54 of the Nevada Rules of Civil Procedure.

DONE and DATED this 30th day of April, 2020.

DISTRICT COURT JUDGE
ROB BARE

HGL

Respectfully submitted by:

HONG & HONG LAW OFFICE

/s/ Joseph Y. Hong
JOSEPH Y. HONG, ESQ.
State Bar No. 005995
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Attorney for NV Eagles, LLC

EXHIBIT H

EXHIBIT H

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.

No. 81239

FILED
JUN 16 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER VACATING AND REMANDING

This is an appeal from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.[1]

The original owner of the subject property failed to make periodic payments to her homeowners' association (HOA). The HOA recorded a notice of delinquent assessment lien and later, a notice of default and election to sell, to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Before the sale, appellants—holders of the first deed of trust on the property—sent a payoff request to the HOA's foreclosure agent, Nevada Association Services, Inc. (NAS), asking for the amount of the lien entitled to superpriority status and offering to pay that amount upon proof of the same. NAS responded with a ledger that did not clearly identify the superpriority amount. Appellants guessed at the

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

superpriority amount and sent a check to NAS with a letter indicating they intended the check to satisfy the superpriority portion of the lien. NAS returned the check to appellants because it was for an amount less than the HOA's full lien. After buying the property from the purchaser at the foreclosure sale, respondent instituted a quiet title action and the matter proceeded to a bench trial. The district court concluded that appellants' check was not effective tender because it did not pay the full amount of the superpriority portion of the lien, rejected their equitable arguments, and entered judgment in respondent's favor.

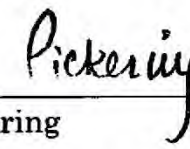
Initially, we agree with the district court's conclusion that appellants' check was insufficient to constitute a valid tender because it did not satisfy the full amount of the superpriority portion of the lien.[2] *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) ("Valid tender requires payment in full."). However, appellants also argued below that their failure to submit valid tender should be excused because any tender attempt would have been futile. In support of that argument, they presented 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." *7510 Perla Del Mar Ave. Tr. v. Bank of Am., N.A. (Perla Trust)*, 136 Nev. 62, 67, 458 P.3d 348, 351 (2020). Appellants also presented evidence that its counsel was aware of this policy when it remitted its check to NAS in an attempt to cure the superpriority default and preserve appellants' deed of trust. The district court, however, made no findings regarding appellants' futility argument. And the parties

[2]The district court found, and the parties do not dispute, that appellants' check was $54 short of the superpriority amount.

and the district court did not have the benefit of our opinion in *Perla Trust*, which addressed tender futility and evidence similar to that presented below, albeit without the failed tender. *See id.* at 67, 458 P.3d at 352. In these circumstances, we decline to consider the parties' arguments with respect to the futility issue. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) ("[T]his court will not address issues that the district court did not directly resolve."). Instead, we vacate the district court's judgment and remand for the district court to consider the tender futility argument in light of *Perla Trust*.[3]

It is so ORDERED.

_____, J.
Cadish



_____, J.
Pickering

_____, J.
Herndon

cc: Chief Judge, Eighth Judicial District Court
Department 32, Eighth Judicial District Court
Kristine M. Kuzemka, Settlement Judge
Akerman LLP/Las Vegas
Hong & Hong
Eighth District Court Clerk

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[3]We reject appellants' argument that the foreclosure sale should be set aside on equitable grounds because the district court did not abuse its discretion denying relief on this basis. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) (reviewing a district court's decision whether to set aside a foreclosure sale on equitable grounds for an abuse of discretion).

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C

Dept. No.: XXIX

Consolidated with: A-13-690944-C

NOTICE OF ENTRY OF ORDER REGARDING APPEAL BOND

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TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that the **ORDER REGARDING APPEAL BOND** has been entered on the 1st day of February 2022, in the above-captioned matter. A copy of said Order is attached hereto as **Exhibit A.**

DATED this 2nd day of February 2022

AKERMAN LLP

/s/ Melanie D. Morgan
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February 2022 and pursuant to NRCP 5(b), I served via the Clark County electronic filing system a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER REGARDING APPEAL BOND**, addressed to:

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The Wright Law Group, P.C.
John H Wright efile@wrightlawgroupnv.com

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/ Doug J. Layne
An employee of AKERMAN LLP

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EXHIBIT A

ELECTRONICALLY SERVED
2/1/2022 4:01 PM

Electronically Filed
02/01/2022 4:01 PM
CLERK OF THE COURT

ORDR

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C

Dept. No.: XXIX

Consolidated with: A-13-690944-C

ORDER REGARDING APPEAL BOND

…

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On May 27, 2020, Defendant Bank of America, N.A. (**BANA**) and Cross-Claimant/Cross-Defendant 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**) appealed to the Nevada Supreme Court from this Court's findings of fact and conclusions of law and judgment. Doc No. 118. BANA and BoNYM posted an appeal bond in this matter in the amount of Five Hundred Dollars and No Cents ($500.00), as evidenced by the notice of posting bond filed on June 9, 2020. Doc. No. 120.

On December 1, 2021, the Nevada Supreme Court entered the Clerk's Certificate/Remittitur, vacating the previous judgment and remanding this matter back to this court. Doc. No. 123.

As this appeal is now concluded, the court will refund to Akerman LLP, on behalf of BANA and BoNYM, the $500.00 appeal bond.

DATED: _____, 2022.

Dated this 1st day of February, 2022

A4A F50 3ECE D9C7
David M Jones
District Court Judge

Respectfully submitted by:

AKERMAN LLP

/s/ Melanie D. Morgan
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melissa Lieberman, Plaintiff(s) vs. Mediera Canyon Community Association, Defendant(s)	CASE NO: A-13-685203-C DEPT. NO. Department 29

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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Attorneys for Bank of America, N.A. 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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C

Dept. No.: XXIX

Consolidated with: A-13-690944-C

BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S RESPONSE TO NV EAGLES, LLC'S POST-REMAND POINTS AND AUTHORITIES

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**) submit this response to NV Eagles, LLC's post-remand points and authorities.

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I. INTRODUCTION

The Nevada Supreme Court made clear this case is about whether it was futile for Miles Bauer to tender a superpriority payment to NAS in its Order vacating this Court's judgment and "remand[ing] for [this] court to consider tender futility in light of *Perla Trust*." Under the *Perla Trust* test for excused tender, the senior lender must show the HOA's collection agent had a tender-rejection policy and that the lender or its agent was aware of the policy. The trial evidence here establishes both elements.

NV Eagles' efforts to graft on a third "reliance" element find no support in tender jurisprudence, much less *Perla Trust* itself. The material facts in this case and *Perla Trust* are nearly indistinguishable. Tender was excused, and BoNYM's deed of trust survived.

II. FACTS PROVEN AT TRIAL

The Deed of Trust

This matter concerns title to real property located at 2184 Pont National Drive, Henderson, Nevada 89044 (**property**). BANA's Supplemental Brief Regarding *Perla Trust* (**BANA Br.**), Ex. A (Stipulated Facts for Trial), at ¶ 1. Melissa Lieberman borrowed $511,576.00 to finance her purchase of the property via a loan secured by a deed of trust executed in favor of Pulte Mortgage, LLC (**deed of trust**). *Id.*, at ¶ 3.

BoNYM is the deed of trust's current beneficiary. *Id.*, at ¶ 4. BANA serviced the loan secured by the deed of trust during the period relevant to this litigation. BANA Br., Ex. B (Trial Transcript – Day 1), at 22:21–23:1.

BANA and Miles Bauer's Tender Policies

BANA had a well-established policy to protect its deeds of trust from Nevada HOA liens. *See id.*, at 23:2-12. Upon receiving an HOA's 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* BANA Br., Ex. C (Trial Transcript – Day 2), at 16:14–17:2.

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BANA and Miles Bauer used this policy frequently. One Miles Bauer attorney, Rock Jung, handled between 5,000 and 6,000 superpriority tender matters for BANA during a 4.5-year period, including the matter for the property here. BANA Br., Ex. C, at 25:9–26:4.

NAS's Tender Rejection Policies & Miles Bauer's Knowledge of Them

With respect to Miles Bauer's tenders, NAS's policy was well-established: reject them all. *See id.*, at 7:19–8:19 (testimony of NAS's paralegal, Susan Moses); *see also id.*, at 21:1-23, 24:6-12, 27:24–28:9, 33:14-22 (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 (BANA Br., Ex. D (pleadings from global litigation involving BANA and NAS), at BANA 784–86); 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 (BANA Br., Ex. E (briefs from global arbitration involving BANA and NAS), at BANA 910–12, 994).

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* BANA's Br., Ex. D. 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." *Id.*, at BANA 786 (emphasis in original); *see also id.*, at BANA 791 ("Prior to [BANA]'s foreclosure, there is no application of NRS 116.3116[.]"); *id.*, at BANA 796 ("[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**.") (emphasis added).

In its reply in support of its motion to dismiss, 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." *Id.*, at BANA 803. The "[r]eason being," NAS explained, is that "in the absence of foreclosure of a first deed of trust, there is no super-priority

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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." *Id.*, at BANA 806.

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. BANA Br., Ex. C, at 8:9-19.

Jung was well aware of NAS's tender-rejection policies during the period relevant to this case. NAS rejected every superpriority tender that Jung sent on BANA's behalf. *Id.*, at 21:14-23. NAS's owner, David Stone, told Jung that NAS would not accept any of BANA's tenders. *Id.*, at 33:14-22.

Madeira's HOA Lien on the Property

The typical interplay between BANA and Miles Bauer's tender policy and NAS's tender-rejection policy occurred with respect to Madeira Canyon Homeowners Association's (**Madeira**) lien here. On October 27, 2010, NAS recorded a notice of delinquent assessment lien against the property. BANA Br., Ex. A, at ¶ 6. On December 21, 2010, NAS recorded a notice of default and election to sell against the property. *Id.*, at ¶ 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.*, at ¶ 8. Miles Bauer assigned Jung to the file. *Id.*, at ¶ 9; *accord* BANA Br., Ex. F (Miles Bauer Affidavit), at ¶ 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]." BANA Br., Ex. F, at BANA 131–32; *see also* BANA Br., Ex. A, at ¶ 9.

NAS responded on or about March 12, 2011, sending Jung a document showing the total amount the borrower owed the HOA broken down by categories, including amounts due for "monthly assessments." *See* BANA's Br., Ex. F, at BANA 134–35; BANA Br., Ex. A, at ¶ 10. The document showed the "Present rate" of the "Quarterly Assessment Amount" as $162.00. BANA Br., Ex. F, at BANA 134. The ledger listed three separate "Prior rate[s]" of the Quarterly Assessment Amount: (1) $210.00; (2) $180.00; (3) $234.00. *Id.* It did not specify the dates for which each Prior Rate applied. *Id.*

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On or about April 1, 2011, Jung sent a $486.00 check to NAS, enclosed by a letter which 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." BANA Br., Ex. E, at BANA 137–41.

NAS's receptionist rejected the $486.00 check. *Id.,* at BANA 141. Under NAS's tender-rejection policies, NAS would have rejected any check for less than the full lien amount (BANA Br., Ex. C, at 8:16-19), which was at least $3,852.46 at the time (BANA Br., Ex. F, at BANA 134).

After it rejected Miles Bauer's tender, NAS foreclosed on Madeira's lien, selling the property to Underwood Partners, LLC for $30,000.00. BANA's Br., Ex. A, at ¶ 12. Underwood then conveyed the property to its affiliate, NV Eagles. *Id.*, at ¶ 15.

NV Eagles Wins at Trial

Following a bench trial, this Court held that Underwood purchased the property free and clear. The Court found that the superpriority amount of Madeira's lien was $540.00, and that Jung had "miscalculated the superpriority amount" to be $486.00. BANA Br., Ex. G, at Findings of Fact ¶¶ 12–13. The Court explained that under *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 72, 427 P.3d 113 (2018) (***Diamond Spur***), a formal "tender requires payment in full." *Id.*, at Conclusions of Law ¶ 7. Because Miles Bauer's $486.00 check was less than the $540.00 superpriority amount, this Court held that the tender was insufficient under *Diamond Spur*. *Id.*, at Conclusions of Law ¶ 9.

At trial, defendants argued that a formal tender was excused because the evidence established that NAS rejected Miles Bauer's tenders as a matter of course, and that BANA and Miles Bauer were aware of that policy at the time. BANA Br., Ex. C, at 62:1–63:18. This Court did not make any findings of fact or conclusions of law regarding excused tender. *See generally*, BANA Br., Ex. G.

NV Eagles Loses on Appeal

The Nevada Supreme Court reversed. BANA Br., Ex. H. It agreed that Miles Bauer's $486.00 check "was insufficient to constitute a valid tender because it did not satisfy the full amount of the superpriority portion of the lien." *Id.*, at 2. But the Supreme Court explained that defendants supported their excused tender argument with "evidence—including testimony from [Susan Moses] and evidence of NAS's testimony from previous cases—to show NAS had a 'known business practice to

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systematically reject any check tendered for less than the full lien amount.'" *Id.* (quoting *Perla Trust*, 136 Nev. at 67). The Supreme Court continued: "[Defendants] also presented evidence that [Miles Bauer] was aware of this policy when it remitted its check to NAS in an attempt to cure the superpriority default and preserve [BoNYM's] deed of trust." *Id.* But because this Court "made no findings regarding [defendants' tender] futility argument,"[1] and "did not have the benefit of [the] opinion in *Perla Trust*," the Supreme Court declined to reverse and render, and instead vacated and "remand[ed] for [this Court] to consider the tender futility argument in light of *Perla Trust*." *Id.*, at 3.

NV Eagles petitioned for *en banc* reconsideration. The Supreme Court denied the petition.

III. ARGUMENT

A. The deed of trust survived under *Perla Trust* because Miles Bauer was excused from making a futile tender to NAS.

BoNYM's deed of trust survived Madeira's foreclosure sale under *Perla Trust*. The *Perla Trust* test for excused tender has two elements: (1) the collection agent's tender-rejection policy; and (2) the beneficiary or its servicer's knowledge of that policy. *See Perla Trust*, 136 Nev. at 63.

BoNYM clearly established both elements at trial with much of the same evidence that established excused tender in *Perla Trust* itself. That means BoNYM's deed of trust survived and encumbers NV Eagles' title to the property. NV Eagles' attempt to graft a third "reliance" element onto the *Perla Trust* test is a desperate attempt to avoid that result.

1. NAS's tender rejection policy was clearly established at trial.

NAS's tender rejection policy was clearly established at trial. NAS's paralegal, Susan Moses, testified that NAS rejected every one 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* BANA Br., Ex. C at 7:19–8:19. This letter contained no impermissible conditions because nine months was the correct superpriority amount, as the Nevada Supreme Court held in both *Diamond Spur* and *Perla Trust*. *See Perla Trust*, 136 Nev. at 67 n.4 (rejecting the argument that "Miles Bauer's letter was not an unconditional offer because it required NAS to submit to Miles Bauer's reading of

[1] The Supreme Court clearly disagrees with NV Eagles' claim that this court "considered [BANA's] futility arguments and rejected them" at trial. NV Eagles Br. at 7.

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NRS 116.3116 (2012) to calculate the superpriority portion of the lien" in favor of the "plain language of NRS 116.3116(2)") (citing *Diamond Spur*, 134 Nev. at 606)).

Jung did miscalculate the superpriority amount here, which NV Eagles' (prior) counsel admitted in closing arguments was simply a "mistake" caused by the sheer number of superpriority payments Jung was tendering. BANA Br., Ex. C at 52:11-18 ("Mr. Jung, fair enough, he had 2,000 to 2,500 of these, Your honor. I mean, goodness sake, they're going to make mistakes here and there."). But Moses' trial testimony leaves no doubt that NAS would have rejected a check for the right superpriority amount (or any amount less than the full lien amount) just the same. *See* BANA Br., Ex. C at 7:19–8:19. It is this fact that establishes the first element of *Perla Trust*: NAS's "business practice to systematically reject any check tendered for less than the full lien amount." 136 Nev. at 67.

NV Eagles contends that NAS's "[r]ejection, in this case, was NOT based upon some policy of rejecting every tender that failed to pay the entire lien." NV Eagles Br. at 7. This cannot be squared with Moses' testimony that this was the reason NAS rejected **every single one** of Miles Bauer's superpriority tenders. *See* BANA Br., Ex. C, at 7:19–8:19.

2. Miles Bauer and BANA knew of NAS's tender-rejection policy because NAS rejected thousands of tenders.

Jung knew of NAS's tender-rejection policy well. It rejected every superpriority tender that Jung sent on BANA's behalf. *Id.* at 21:14-23. NAS's owner, David Stone, told Jung that NAS would not accept any of BANA's tenders. *Id.* at 33:14-22. As it must, NV Eagles concedes Jung knew of NAS's tender-rejection policy: "Jung … testified that while employed at Miles Bauer," he tendered "as many as twenty-five hundred (2500) checks" to NAS "despite NAS typically rejecting anything less than the full [lien] amount[.]" NV Eagles Br. at 11.

NV Eagles makes clear why it stated "NAS **typically** reject[ed] anything less than the full [lien] amount" later in its brief: "[W]hen it was in BANA's best interest, in their opinion, to tender the full amount [of an HOA's lien], they did, and NAS accepted those payments." NV Eagles Br. at 13 (emphasis added). This is a blatant misrepresentation of the record.

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." BANA Br., Ex. C at 21:17-23. An HOA's entire lien is senior to a

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second deed of trust under NRS 116.3116(2).[2] That is why BANA would seek to pay the entire lien amount to protect a second deed of trust. BANA Br., Ex. C at 21:17-23. 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. BANA Br., Ex. C at 16:14–17:2. Combining these policies in a non-pejorative and non-misleading way, it is fair to say BANA and Miles Bauer's policy was to pay the amount required by NRS 116.3116 to protect any of BANA's deeds of trust.

Desperate to avoid *Perla Trust*—a published 2020 decision involving BANA, Miles Bauer, and NAS—NV Eagles says this Court should apply an unpublished 2018 decision, *CitiMorgage, Inc. v. K&P Homes, LLC*, which held that "CitiMortgage's belief that the HOA's agent would reject a tender did not preclude it from making a tender." NV Eagles Br. at 15. This Court must apply *CitiMortgage*, in NV Eagles' mind, because it shows the "Supreme Court has made clearly that reliance on ones' mere belief that the tender will not be accepted is not a reasonable justification for not making the tender in the full amount due." NV Eagles Br. at 15.

It's unclear how NV Eagles extrapolates the "full amount due" part from *CitiMortgage*. There was no tender attempted there. Rather, the senior lender argued futility of tender, and the Supreme Court rejected that defense: "CitiMortgage's belief that the HOA's agent would reject a tender did not preclude it from making a tender … the alleged futility of any such effort does not establish unfairness or oppression." 2018 WL 3545287, at *1. This unpublished decision was never binding, and it certainly does not control over the published *Perla Trust* decision, which held that BANA and Miles Bauer's knowledge of NAS's "known business practice to systematically reject any check tendered for less than the full lien amount" establishes futility of tender. 136 Nev. at 67.

NV Eagles next misrepresents two seminal cases— *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 130 Nev.757 (2014) ("***SFR I***") and *Shadow Wood HOA v. N.Y. Cmty. Bancorp*, 132 Nev. 49, 366 P.3d 1105 (2016)—to make it appear that Defendants had to do more to protect the Deed of Trust. NV Eagles claims *SFR I* "held that a bank must do more to prevent the loss of its

[2] All cites to NRS 116 are to the operative version of the statute at the time of the Madeira's foreclosure.

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security" (NV Eagles Br. at 16) by quoting the following from *SFR I*: "Nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance." 130 Nev. at 418. But of course, numerous cases following *SFR I* have held that senior lenders were not required to pay "the entire amount" to protect their deeds of trust; just the superpriority amount. *See, e.g.*, *Diamond Spur*, 134 Nev. at 608 ("a plain reading of NRS 116.3116 indicates that at the time of BANA's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of [an HOA's] lien"). And again, if the senior lender wants to pay the superpriority amount but the collection agent won't accept less than the full lien amount, there's a case directly on-point: *Perla Trust*. 136 Nev. at 67. In that situation, the deed of trust survives. *Id.* That's the situation here.

Turning to *Shadow Wood*, NV Eagles describes it as a case where "the bank actually tendered the nine months of assessments, fees and costs, but the agent for the association demanded additional assessments, fees and costs and the bank did nothing more to prevent the sale of the property." NV Eagles Br. at 16. According to NV Eagles, the Supreme Court "held that the bank is required to do more to protect its security interest." *Id.*

Part of that is blatantly false, and the other is highly misleading. The "bank" in *Shadow Wood* had no "security interest." *Id.* The *Shadow Wood* "bank" was not a deed of trust beneficiary; it owned the subject property. 132 Nev. at 61 (noting "NYCB" – the entity NV Eagles refers to as "the bank" – was "the owner of the property"). That's a critically important distinction for the amount a "bank" owes to protect its interest from an HOA foreclosure. If the "bank" is the beneficiary of a senior deed of trust, that amount is nine months of assessments. NRS 116.3116(2). If the "bank" is the title owner, as in *Shadow Wood*, that amount is the entire amount of the HOA's lien. 132 Nev. at 61. So yes, the Supreme Court "held that the bank" that owned the property in *Shadow Wood* was "required to do more" than tender nine months of assessments to protect its title to the property. *See* NV Eagles Br. at 16. But that is irrelevant to what actions Defendants had to take to protect the Deed of Trust here.

Next, NV Eagles turns to relying on vacated trial findings, noting the trial court found from the bench that BANA and Miles Bauer "had plenty of time to cure the problem with the [short superpriority check] or otherwise deal with it, which [BANA] didn't do." NV Eagles Br. at 16 (citing

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Trial Tr., day 3, at 12:20-25). When it vacated the judgment in NV Eagles' favor, the Supreme Court explained that BANA presented "evidence—including testimony from [Susan Moses] 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.'" *Id.* (quoting *Perla Trust*, 136 Nev. at 67).

NAS's policy meant BANA could not "cure the problem" with Jung's mistakenly miscalculated superpriority check. Moses testified unequivocally that NAS wouldn't ever accept such a check from Miles Bauer. BANA Br., Ex. C at 8:16-19. And Jung knew that if he "tendered a check for the superpriority portion of the lien" here, "NAS would have rejected it." *See Perla Trust*, 136 Nev. at 67. NV Eagles thus "purchased the property subject to [BoNYM's] deed of trust" under *Perla Trust*.

3. Miles Bauer and BANA knew of NAS's tender-rejection policy because NAS rejected thousands of tenders.

Unable to rebut the clear evidence satisfying the only two *Perla Trust* factors, NV Eagles resorts to manufacturing a third element: the senior lender must "rel[y] on th[e] knowledge" that tender will be rejected "in not tendering." NV Eagles Br. at 9. This made-up element finds no basis in *Perla Trust*.

NV Eagles claims it "has long been held" that "the party who claims waiver or futility of tender" must show "reliance on the futility[.]" NV Eagles Br. at 10. Unable to find support for this element in *Perla Trust*, NV Eagles cites a Virginia case from 1812 and a West Virginia case from 1898 instead. *Id.* The Virginia case 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 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.

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That holding is not at issue here. The relevant *Perla Trust* holding is what this Court described as a "generally accepted exception" to the "rule that a mere offer does not constitute a valid tender": when a collection agent has "a known policy of rejecting any payment for less than the full lien amount," the beneficiary's "obligation to tender the superpriority portion of the lien [is] excused" because it would just be "rejected." *Id.* at 66.

Further, BANA'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. Rather, BANA could not make a formal tender because NAS refused to respond to Miles Bauer's request for the superpriority amount of the association's lien. *Perla Trust* cannot "implicit[ly]" require (NV Eagle Br. at 9) that BANA'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.*

NV Eagles' policy argument for adding this reliance element is not convincing. It claims that "[a]pplying a blanket defense and excusing the duty to tender would eviscerate the creditor's right to reject insufficient tenders." NV Eagles Br. at 5. That is hardly the case. *Perla Trust* simply prevents a creditor from enacting a "business practice" of "systematically reject[ing]" sufficient tenders. 136 Nev. at 67. It provides no impediment to a creditor rejecting an insufficient tender **because the tender is insufficient**. *See id.* NV Eagles tries to make it seem like that's why NAS rejected Miles Bauer's tender here. Moses' testimony confirms that was not the reason; the check was rejected because it was not for the full lien amount. BANA Br., Ex. C at 8:16-19.

And if NAS would have rejected it because it was $54 short, it would have had to let Miles Bauer know that's why it was being rejected. *First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983) ("a person to whom a tender is made must, at the time, specify the objections to it, or they are waived"). NAS knew Miles Bauer was seeking to properly calculate the nine-month superpriority amount like they had done thousands of times before. And Jung's letters made that clear. BANA Br., Exs. F-1, F-3. Indeed, Jung testified at trial that, had NAS specified that a different assessment rate applied, he "would have been happy to use that rate" and pay the additional amounts necessary to satisfy the lien's superpriority portion. BANA Br., Ex. C, at 36:14-22. But Jung knew that if he did, "true with their policy, [NAS] would reject it, unless it was for the full amount listed in

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their payoff statement." *Id.* at 37:4-5. Moses again confirmed that "if a check came [from Miles Bauer] for any amount less than full payoff, with [Miles Bauer's standard second] letter," that "would cause NAS to reject the payment." *Id.* at 8:16-19.

Put differently, NAS had a "known business practice to systematically reject any check tendered for less than the full lien amount." *Perla Trust*, 136 Nev. at 67. That means BANA was "excused from making a formal tender." *Id.* BoNYM's deed of trust thus survived.

IV. CONCLUSION

For these reasons, this Court should enter a judgment in defendants' favor holding that BoNYM's deed of trust encumbers NV Eagles' title to the property.

DATED this 4th day of February, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 4th day of February, 2022, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S RESPONSE TO NV EAGLES, LLC'S POST-REMAND POINTS AND AUTHORITIES**, in the following manner:

☒ **(ELECTRONIC SERVICE)** Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

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☐ **(UNITED STATES MAIL)** By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written: N/A.

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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

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NV EAGLES, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated, Plaintiff, vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES I through X, inclusive; ROE CORPORATIONS, I through X, inclusive, Defendants.	CASE NO. A-13-685203-C DEPT. NO. XXXII **Hearing Date: February 10, 2022** **Hearing Time: 9:00 a.m.**
AND ALL RELATED MATTERS.	

DEFENDANT/COUNTERCLAIMANT NV EAGLES, LLC'S RESPONSE TO BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S SUPPLEMENTAL BRIEF REGARDING *PERLA TRUST*

COMES NOW, Defendant/Counterclaimant, NV EAGLES, LLC (hereinafter "EAGLES"), by and through its counsel of record, JOHN HENRY WRIGHT, ESQ., of THE WRIGHT LAW GROUP, P.C., and hereby submits its Response to Bank of America, N.A. and the Bank of New York Mellon, as Trustee's Supplemental Brief regarding *Perla Trust*.

/ / /

This Response is submitted in accordance with the Order of the Court dated December 15, 2021, and is based upon the points and authorities contained herein, the exhibits attached hereto, the records and files of this case and any argument adduced at hearing hereon.

DATED this 4th day of February, 2022.

Respectfully submitted by:
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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT:

"Shallow men believe in luck or in circumstance. Strong men believe in cause and effect." ― Ralph Waldo Emerson.

"It has been said that an act which in no way contributed to the result in question cannot be the cause of it; but this, of course does not mean that an event which *might* have happened in the same way though the defendant's act or omission had not occurred, is not a result of it. The question is not what would have happened, but what did happen." Joseph H. Beale, *The Proximate Causes of an Act*, 33 Harv. L. Rev. 633, 638 (1920).

This is the one glaring reality that is continuously overlooked by the banks and many courts involving failed tenders by Bank of America, N.A. ("BANA") to Nevada Association Services, INC. ("NAS"). Here, the evidence establishes that regardless of any policy on the part of NAS, BANA fully intended to tender, did in fact tender, but made an inadequate tender that NAS had every right to reject.

To support its arguments in favor of the application of *Perla Del Mar* to this case, BANA has attached endless hours of transcripts from this case and others. However, there is testimony that is noticeably lacking. There is no testimony by any BANA representative or its attorney at

Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), stating that the reason they "did not" tender was because NAS had a policy of rejecting any and all tenders. There is no such testimony because BANA's futility claims are simply arguments of sheer convenience contrived more than a decade after the events in this case.

While BANA today argues that any amount would have been futile, the facts reveal that at the time in question, neither BANA nor Miles Bauer ever relied on any NAS policy when determining whether and in what amount to tender. It was BANA's policy to retain Miles Bauer to pay the super-priority amount of the lien, and BANA did in fact hire Miles Bauer to pay the super-priority lien in this case. It is readily apparent that during all relevant times when these HOA foreclosures were occurring, no bank, specially BANA, was saying it did not tender because the collection agents would not accept its tender. Rather, despite any collection agents' interpretation of NRS § 116.3116, BANA and Miles Bauer were, in fact, making thousands of tenders based on their own interpretation of the law. This is even confirmed in BANA's own brief:

> As in Perla Trust, testimony from a BANA employee and Jung established BANA's tender policy and the 1,000+ times that policy was put to use.

(BANA's brief at 6:19-21).

Reliance on the "futility" defense requires the bank to establish that futility is the reason Miles Bauer did not tender. There must be a nexus between the NAS policy and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles Bauer and BANA had their own policy of actually tendering. *Perla Del Mar* simply does not apply here.

It is implicit when establishing a rule which requires knowledge of a policy that in fact that knowledge had some role in why the tender was not made.

> Therefore the circumstances must be such as to show that the party was ready to make actual payment, and that he would have done so ***but for*** such refusal. "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.**" *McCalley v. Otey*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12 So 406).

Shank v. Groff, 32 S.E. 248, 249 (1898) (emphasis added). This is the *Proximate Cause of an Act*, referenced above. The authorities cited by the Nevada Supreme Court in defining the futility

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defense all acknowledged that the obligor was **prevented** from tendering by the words or conduct of the creditor. In *Jessup I*, the Supreme Court stated:

> Alternatively, the Bank contends that its obligation to tender the superpriority amount was excused because ACS stated in its fax that it would reject any such tender if attempted. We agree with the Bank, as this is generally accepted exception to the above-mentioned rule. *Guthrie v. Curnutt*, 417 F.2d 764, 765 (10th Cir. 1969) ("[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced."); *In Re Pickel,* 493 B.R. 258, 271 (Bankr. D.N.M. 2013) ("Tender is unnecessary if the other party has stated that the amount due would not be accepted."); *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, and acceptance of it will be refused." (Internal quotation marks and alterations omitted)); 74 Am. Jur. 2d Tender § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted."); 86 C.J.S. Tender § 5 (2017) (same); cf. *Cladianos v. Fried hoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("The law is clear . . . that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract.").

135 Nev. Adv. Op., at 7 (March 7, 2019). In *every* instance cited above, the obligating party would have tendered but for the words or conduct of the other party. Those essential facts are not present in the instant case. Thus, the futility defense has no application to this case. Below is an examination of the facts the cases cited by the Nevada Supreme Court in recognizing the futility defense.

In *Guthrie v. Curnutt*, 417 F.2d 764, 765 (10th Cir. 1969), the plaintiff desired to redeem a property sold at a tax sale by tendering payment to the defendant. Her attorney's efforts to handle the matter with the defendant or his lawyer were frustrated by the actions and attitudes of the defendant. After an evidentiary hearing, the trial court found that the plaintiff exerted more than a reasonable effort to locate the defendant within the county where the property was located, and her inability to do so could be traced directly to purposeful action by the defendant. The appellate court agreed, stating "[w]e are convinced that the defendant purposefully avoided the plaintiff, her lawyer, and her agent, in an effort to prevent redemption." (417 F.2d at 766).

In *In Re Pickel,* 493 B.R. 258, 271 (Bankr. D.N.M. 2013), the evidence showed that the defendant attempted to cure the default within the cure period, including a tender of full payment, but that the agent refused to accept the tender. The court, relying on *Williston on Contracts* stated

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"[t]he party claiming that an anticipatory repudiation has excused the performance of a condition precedent must show that but for the repudiation he or she would have been ready, willing and able to perform his or her obligations under the contract." *Id* at 270.

The case of *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) involved another tax sale wherein the successor in title attempted to redeem the property but the tax deed holder had waived the requirement of tender by refusing to communicate with the successor in title. The Court stated:

> Tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, an acceptance will be refused. (Citations omitted). Ms. Evans refused, in response to the September 1998 letter, to name the amount she claimed to be due here, and she thereafter failed to respond in any way to repeated contracts by Appellant's president... It is unnecessary to make a tender, to prove that a tender legal in every particular has been made, where the person to whom it is offered will not accept it even though it were a perfect tender... Where as here, an offer is made to pay whatever amount is due and the person to whom tender is due refuses by her conduct to accept any amount, the refusal dispenses with the formality of making a legal tender.

(554 S.E.2d at 495). Again, engaging in conduct that made it impossible for the offeror to make a tender.

In *every* instance the obligating party would have tendered but for the words or conduct of the other party. In every case, there was a direct link between the party's failure to tender and the conduct of the party due the tender.

Further still, in the case of *Strasbourger v. Leerburger*, 233 N.Y. 55 (1922), the New York Court of Appeals addressed the requirement of a connection between the failure to tender and the conduct of the party entitled to tender, as follows:

> No tender having in fact been made, can it be said that its necessity had been waived? The law requires no one to do a vain thing. A formal tender is never required where by the act or word the other party has shown that if made it would not be accepted. Had the plaintiff here been told in advance that such an act would be useless, he would stand excused. We think the same rule applies when at the time of an informal tender he is told that any effort to correct the informality will be unavailing.

(233 N.Y. at 60).

Again, the *Strausbeourger* case involved a tender that was not made because of the conduct of the party entitled to receive the tender.

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All of these cases reveal that there must be a nexus between the alleged policy and a failure to tender. But, there was a tender in this case, just in an insufficient amount. Without a failure to tender, there can be no claim that NAS' policy, which was ignored by BANA anyhow, gives rise to a futility defense.

To put this cause and effect requirement into a perspective that BANA should understand, there is little distinction from the arguments that have been made by the various banks in these HOA cases regarding commercial reasonableness. In nearly every case, including this one, the bank has argued that it should be entitled to equitable relief based on the low sales price and the slightest of irregularities in the foreclosure process. The banks have repeatedly argued that a price + irregularities = a win for the bank, as if we were adding ingredients to a recipe without there being any relationship between them until mixed. This too, was ultimately proven incorrect by the Supreme Court in *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d. 641 (Nev. 2017), wherein the Court applied the principle of cause and effect as follows:

> As to the restatement's 20-percent standard, we clarify the *Shadow Wood* did not overturn this court's longstanding rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale'" absent additional "'proof of some element of fraud, unfairness or oppression ***as accounts for and brings about*** the inadequacy of price.'" 132 Nev Adv. Op. 5, 366 P.3d at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963). That does not mean, however, that sales price is wholly irrelevant. In this respect, we adhere to the observation in Golden that where the inadequacy of price is great, a court may grant relief based on slight evidence of fraud, unfairness, or oppression. 79 Nev. at 514-15, 387 P.2d at 994-95 (discussing *Oller v. Sonoma County Land Title Co.*, 137 Cal. App. 2d 633, 290 P.2d 880, (Cal. Ct. App. 1955)). Because Nationstar's identified irregularities do not establish that fraud, unfairness, or oppression ***affected the sale***, we affirm the district court's summary judgment in favor of respondent Saticoy Bay.

(405 P.3d at 642-43, emphasis added).

Thus, there is little doubt that the Nevada Supreme Court has adhered to the principle that there must be a causal connection between the action complained of and the actual result, *cause and effect*.

II. CONCLUSION:

Unless causation upon the policy is required to be established, then whether the policy was known or unknown is irrelevant and the requirement of establishing same is meaningless. Courts

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do not impose meaningless requirements. Learning of the policy after the time to perform would still not change the fact that the policy existed and the tender was rejected. The obvious reason to require knowledge -at the time of required tender- is that the courts are attempting to narrow the rule to only those occasions where the knowledge of the policy had an impact on the outcome-meaning the policy is what caused the party not to tender. This has not been explicitly stated, by our Supreme Court, as it has by others, but for clarity's sake and to ensure the exception does not become the rule, *Perla Del Mar* needs to be narrowly applied so that the rule only applies to situations where the knowledge of the policy of rejection actually had an impact on the parties' conduct.

Here, the evidence clearly reveals that despite being aware of NAS' position, Miles Bauer and BANA nonetheless made thousands of tenders to NAS. This undoubtedly shows that at no time did BANA rely on, nor possibly believe that tendering a proper amount would be futile. But, even it BANA could show that it ever believed in futility, the tender made in this case was insufficient to cure the super-priority default and was properly rejected.

DATED this 4th day of February, 2022.

Respectfully submitted by:
THE WRIGHT LAW GROUP, P.C.

/s/ *John Henry Wright, Esq.*
JOHN HENRY WRIGHT, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT/COUNTERCLAIMANT NV EAGLES, LLC'S RESPONSE TO BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S SUPPLEMENTAL BRIEF REGARDING *PERLA TRUST*** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 4th day of February 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

AKERMAN LLP
Melanie D. Morgan, Esq. melanie.morgan@akerman.com
Lilith V. Xara, Esq. lilith.xara@akerman.com

Attorneys for Bank of America, N.A. and the Bank of New York Mellon

I further certify that I served a copy of this document by mailing a true and correct copy, thereof, postage prepaid, addressed to:

None.

/s/ Andrelle Stanley
An Employee of **THE WRIGHT LAW GROUP, P.C.**

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

02/10/2022

Hearing (9:00 AM) (Judicial Officer Jones, David M)
Parties Present
02/10/2022 9:00 AM
Defendant
Wright, John H. - Attorney
Consolidated Case Party
Wright, John H. - Attorney
Cross Defendant
Xara, Lilith Vala - Attorney

Minutes
02/10/2022 9:00 AM
- Following arguments by counsel, COURT ORDERED, matter taken UNDER ADVISEMENT.

02/14/2022	**Minute Order** (3:00 AM) (Judicial Officer Jones, David M) **Minutes** 02/14/2022 3:00 AM - Order Regarding Supplemental Briefing After further consideration of the filed papers and oral arguments, the Court hereby finds in favor of Nevada Association Services. The attempted 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. Counsel for Nevada Association Services to prepare the order. CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt

ELECTRONICALLY SERVED
3/11/2022 9:43 AM

Electronically Filed
03/11/2022 9:43 AM
CLERK OF THE COURT

FFCL
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Attorney for Defendant/Counter-claimant
NV EAGLES, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated, Plaintiff, vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES I through X, inclusive; ROE CORPORATIONS, I through X, inclusive, Defendants. _____ AND ALL RELATED MATTERS.	CASE NO. A-13-685203-C DEPT. NO. XXIX Hearing: February 10, 2022 Time: 9:00 a.m.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON POST-REMAND HEARING

THIS MATTER concerning the parties' post-remand arguments, having come on for hearing, on the 10th day of February, 2022, John Henry Wright, Esq., appearing on behalf of Defendant/Counterclaimant NV EAGLES, LLC, and Melanie Morgan, Esq., appearing on behalf of Defendant BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES, and the Court having reviewed the Parties' Post-Remand Briefs and the respective

Oppositions thereto and all exhibits attached thereto, considered the arguments of counsel, and being fully appraised in the premises, and good cause having been shown, makes the following Findings of Fact, Conclusions of Law and Orders as follows:

FINDINGS OF FACT

1. In the lead up to an HOA foreclosure auction authorized pursuant to NRS 116, of the property located at 2185 Pont National Dr., Henderson, Nevada, ("Subject Property") , on behalf of the first deed of trust holder, on or about April 1, 2011, Miles Bauer, its counsel, sent a check for $486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

2. However, Miles Bauer miscalculated the super-priority amount as the actual nine-month super-priority amount was $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215*. Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual super-priority amount of $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.* See also, Nevada Supreme Court Order of Remand at p.2, establishing tender was insufficient. The attempted payment was rejected by NAS.

3. Thereafter, neither Miles Bauer nor BANA nor BNYM did anything further to attempt to satisfy the super-priority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office.

4. On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC ("Underwood"), as the highest bidder in the amount of $30,000.00, purchased the Subject Property.

5. Underwood then conveyed its interest in the Subject Property to NV Eagles.

6. There was no valid tender of the super-priority portion of the HOA lien in the amount of $540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted on June 7, 2013.

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7. There was no evidence of any kind of fraud, unfairness or oppression that accounted for and/or affected the purchase price of the Subject Property at the foreclosure sale and/or affecting the foreclosure sale of the Subject Property.

8. Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less than the super-priority amount, BANA and/or BNYM had adequate time and notice to correct this error prior to the foreclosure sale. BANA and/or BNYM did nothing.

CONCLUSIONS OF LAW

1. The Nevada Supreme Court remanded this case in order for this Court to consider whether the holding in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020), setting forth the futility of tender defense, fits this factual scenario where an insufficient amount was actually tendered and rejected. The uncontroverted evidence in this case reveals that BANA made an ineffective tender that was insufficient to cure the super-priority default. NAS was justified in rejecting said tender for insufficiency. To apply *Perla Del Mar* to this case would have the effect of making the futility exception the rule regardless of whether or not a tender was made or intended to be made. The facts of this case simply do not meet the criteria for the application of *Perla Del Mar*. The rule in *Perla De Mar* is met to excuse a tender which was never sent because it was known to be futile - not excuse a tender that was insufficient.

2. As provided in *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019)„ the party contesting the validity of the HOA's foreclosure of its super-priority lien bears the burden of demonstrating that it tendered its "delinquency-curing checks" and that it paid the correct delinquency amount in full prior to the sale. *Resources Group*, 437 P.3d 154, 159 (2019). *Resources Group* clearly and unequivocally sets forth that it is the bank's burden to show that the super-priority component of the HOA lien, was paid in full.

3. *Perla Del Mar* confirms *Resources Group,* "[w]e conclude that an offer to pay the super-priority amount in the future once that amount is determined, does not constitute tender sufficient to preserve the first deed of trust..." 136 Nev. Av. Rep 6 at 2. What *Perla Del Mar* actually does is create a very fact specific carve out: "[w]e further conclude, however, that formal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting

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such payments." *Id*. The Supreme Court expressly points out that "excused tender" is based on the specific facts and specific evidence. *Id*.

4. The futility defense has no application where the facts clearly establish that the bank's actions or lack thereof were never influenced by a known policy of rejection and in fact, in the instant case, actions were taken in spite of any policy of NAS. Here, the evidence establishes that BANA fully intended to tender, did in fact attempt to tender, but made an inadequate tender that NAS had every right to reject. Therefore, the circumstances must be such as to show that the party 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. "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." *McCalley v. Otey*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12 So 406). It has long been held that there must be evidence that the party who claims waiver or futility was in some way influenced by the actions or statements. See *Shoebe's Ex'rs v. Carr,* 17 Va. 10, 1812 Va. Lexus, 3 Munf. 10 (Va. 1812) (citing *Shank v. Groff*, 45 W.Va. 543, 32 S.E. 248).

5. Thus, employment of the "futility" defense, an affirmative defense, requires the bank to establish that futility is the reason Miles Bauer did not tender. There must be a nexus between the "knowing" and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles Bauer actually tendered. *Perla Del Mar* simply does not apply here. It is BANA's burden to establish that NAS's policy was the reason it failed to tender a sufficient amount in this case. Not by chance. Not by BANA benefiting from its own neglect. This necessarily involves a requirement that BANA provide evidence that it actually relied on the policy in order to satisfy what is being defined as the *Perla Del Mar* standard. BANA supplied no such evidence and cannot, because it attempted to tender.

6. The futility exception cannot apply in a case where a failed tender was made and rightfully rejected. The facts reveal that neither BANA nor Miles Bauer never relied on any NAS policy when determining whether and in what amount to tender. It was BANA's policy to retain Miles Bauer to pay the super-priority amount of the lien, and BANA did in fact hire Miles Bauer to pay the super-priority lien in this case Despite any collection agents' interpretation of NRS 116.3116,

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BANA and Miles Bauer were, in fact, making thousands of tenders based on their own interpretation of the law. The trial testimony by both BANA's representative and Rock Jung, Esq., the attorney from Miles Bauer, bares these truths out. This is even confirmed in BANA's own brief:

> As in Perla Trust, testimony from a BANA employee and Jung established BANA's tender policy and the 1,000+ times that policy was put to use.

(BANA's brief at 6:19-21). There is nothing in the trial testimony to suggest that BANA relied in any manner on the policies of any HOA or their respective collection agents during the relative times between 2010 and 2013. Rather, it was BANA's policy to retain Miles Bauer to pay the super-priority portion of the HOA lien. And, Miles Bauer did exactly that. The testimony of Rock Jung reveals that even though it 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. Rock Jung testified that while employed by Miles Bauer he 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.

7. There is testimony that is also noticeably lacking. There is no testimony by any BANA representative or its attorney at Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), stating that the reason they "did not" tender was because NAS had a policy of rejecting any and all tenders. This lack of testimony clearly reveals that it did not matter to Miles Bauer or BANA what NAS's policy was. BANA and Miles Bauer, as reflected in their letters, 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. Miles Bauer is a law firm that interpreted the statute before writing its letters and making its inadequate tender. Miles Bauer's interpretation of the law was clearly contrary to any interpretation on the part of NAS. Moreover, the Supreme Court has addressed this exact same scenario in 2020 Nev. Unpub. LEXIS 471, 462 P.3d 255 2020 (*Jessup II)* wherein the Supreme Court stated:

> [T]he district court found that "Mr Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property." The implication behind this factual finding is that the

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> district court determined it was unreasonable for Mr. Jung to abandon Miles Bauer's legal position regarding NRS 116.3116(2) (2009) based solely on ACS's September 2011 letter, and we are not persuaded that this finding was clearly erroneous.

(*Id*, at 3). Rock Jung is the same attorney that authored the letter to NAS and testified at trial in this case. Thus, there can be no reliance on NAS's misinterpretation of NRS 116.3116 upon which any policy could have been based.

8. Further, one's "mistaken belief regarding the foreclosure sale's effect could not alter the sale's actual legal effect, particularly when the super-priority portion of the HOA's lien was still in default at the time of the sale." *see Jessup I*, citing *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 426 P.3d 593 (Nev. 2018)("subjective beliefs as to the effect of the foreclosure sale are irrelevant"). Moreover, as noted above, any argument of reliance on NAS's interpretation is contrary to Miles Bauer's own interpretation of the same statute and its own actions.

9. Here, the evidence establishes that regardless of any policy on the part of NAS, BANA fully intended to tender, did in fact tender, but made an inadequate tender that NAS had every right to reject.

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ORDER

Now therefore, **IT IS HEREBY ORDERED**, that the Tender made by Miles Bauer on behalf of BANK OF AMERICA, in the amount of Four Hundred Eighty-Six dollars ($486.00) was insufficient to cure the default in the Super-Priority component of the MADEIRA CANYON HOMEOWNERS' ASSOCIATION's Delinquent Assessment Lien and was, therefore, rightfully rejected. The futility of tender defense available to a party which in fact tenders, or attempts to tender but provides an insufficient amount. The defense is available as an excuse to tender, not an excuse to tender the wrong amount.

IT IS FURTHER ORDERED that the HOA Foreclosure Sale conducted on June 7, 2013, extinguished BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES' Deed of Trust.

IT IS FURTHER ORDERED that Defendant/Counterclaimant NV Eagles, LLC's is Granted Quiet Title to the Property free and clear of any claims by BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES' and all others.

IT IS SO ORDERED.

Dated this ____ day of March, 2022.

Dated this 11th day of March, 2022

HONORABLE DAVID M. JONES
5A9 3D6 CA3E 4216
David M Jones
District Court Judge

Order Prepared by:

DATED this 10th day of March, 2022.

THE WRIGHT LAW GROUP, P.C.

/s/ John Henry Wright, Esq.
JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102

Attorney for Defendant/Counter-claimant NV EAGLES, LLC

Approved as to Form and Content:

DATED this 10th day of March, 2022.

AKERMAN LLP

/s/ *Lilith V. Xara, Esq.*
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Attorneys for Plaintiff Bank of America, N.A. and The Bank of New York Mellon

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Candi Ashdown

From: lilith.xara@akerman.com
Sent: Thursday, March 10, 2022 5:49 PM
To: Candi Ashdown
Cc: melanie.morgan@akerman.com
Subject: RE: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

Hello Candi,

We have reviewed and you may submit with my e-signature.

Thank you,

Lilith V. Xara
(She/Her/Hers)
Associate, Consumer Financial Services, Data and Technology (CFS+) Practice Group
Akerman LLP | 1635 Village Center Circle, Suite 200 | Las Vegas, NV 89134
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From: Candi Ashdown <Candi@wrightlawgroupnv.com>
Sent: Thursday, March 10, 2022 4:01 PM
To: Morgan, Melanie (Ptnr-Las) <melanie.morgan@akerman.com>; Xara, Lilith (Assoc-Las) <lilith.xara@akerman.com>
Subject: FW: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

[External to Akerman]

Have you had a chance to review the attached Order?

From: Candi Ashdown
Sent: Wednesday, March 9, 2022 5:38 PM
To: melanie.morgan@akerman.com; lilith.xara@akerman.com
Cc: carla.llarena@akerman.com; patricia.larsen@akerman.com; Dayana Shakerian <dayana@wrightlawgroupnv.com>
Subject: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

Hello Counsel,

Please see the attached *Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing* in the above referenced case. If the Order meets with your approval, may I have your permission to affix your e-signature? As always, your time and consideration is appreciated. Thank you.

Sincerely,

Candi Ashdown
Legal Assistant/Paralegal
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melissa Lieberman, Plaintiff(s) vs. Mediera Canyon Community Association, Defendant(s)	CASE NO: A-13-685203-C DEPT. NO. Department 29

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/11/2022

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Attorneys for Defendant/Counter-claimant
NV EAGLES, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated, Plaintiff, vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES I through X, inclusive; ROE CORPORATIONS, I through X, inclusive, Defendants. AND ALL RELATED MATTERS.	CASE NO. A-13-685203-C DEPT. NO. XXIX

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that an Findings of Fact, Conclusions of Law and Order on Post Remand Hearing was entered on March 11, 2022, a copy of which is hereto attached as

/ / /

/ / /

/ / /

/ / /

THE WRIGHT LAW GROUP P.C.
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Exhibit 1.

Dated this 11th day of March, 2022.

Respectfully Submitted By:
THE WRIGHT LAW GROUP, P.C.

/s/ John Henry Wright, Esq.
JOHN HENRY WRIGHT, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF ENTRY OF ORDER was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 11th day of March, 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

AKERMAN LLP
Melanie D. Morgan, Esq. melanie.morgan@akerman.com
Lilith V. Xara, Esq. lilith.xara@akerman.com

Attorneys for Bank of America, N.A. and the Bank of New York Mellon

I further certify that I served a copy of this document by mailing a true and correct copy, thereof, postage prepaid, addressed to:

None

/s/ Candi Ashdown
An employee of **THE WRIGHT LAW GROUP, P.C.**

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EXHIBIT 1

ELECTRONICALLY SERVED
3/11/2022 9:43 AM

Electronically Filed
03/11/2022 9:43 AM
CLERK OF THE COURT

FFCL
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NV EAGLES, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated, Plaintiff, vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES I through X, inclusive; ROE CORPORATIONS, I through X, inclusive, Defendants. _____ AND ALL RELATED MATTERS.	CASE NO. A-13-685203-C DEPT. NO. XXIX Hearing: February 10, 2022 Time: 9:00 a.m.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON POST-REMAND HEARING

THIS MATTER concerning the parties' post-remand arguments, having come on for hearing, on the 10th day of February, 2022, John Henry Wright, Esq., appearing on behalf of Defendant/Counterclaimant NV EAGLES, LLC, and Melanie Morgan, Esq., appearing on behalf of Defendant BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES, and the Court having reviewed the Parties' Post-Remand Briefs and the respective

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Oppositions thereto and all exhibits attached thereto, considered the arguments of counsel, and being fully appraised in the premises, and good cause having been shown, makes the following Findings of Fact, Conclusions of Law and Orders as follows:

FINDINGS OF FACT

1. In the lead up to an HOA foreclosure auction authorized pursuant to NRS 116, of the property located at 2185 Pont National Dr., Henderson, Nevada, ("Subject Property") , on behalf of the first deed of trust holder, on or about April 1, 2011, Miles Bauer, its counsel, sent a check for $486.00 to NAS enclosed with a cover letter explaining that the check was equal to "9 months worth of delinquent assessments" and intended to satisfy BANA's, as the predecessor to BNYM, "obligations to the HOA as holder of the deed of trust against the Property." *See Joint Trial Exhibit 9, bates 137-139.*

2. However, Miles Bauer miscalculated the super-priority amount as the actual nine-month super-priority amount was $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 7, 14-16; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215*. Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual super-priority amount of $540.00. See *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15; see also Joint Trial Exhibit 9, bate 134; see also Joint Trial Exhibit 11, bate 215.* See also, Nevada Supreme Court Order of Remand at p.2, establishing tender was insufficient. The attempted payment was rejected by NAS.

3. Thereafter, neither Miles Bauer nor BANA nor BNYM did anything further to attempt to satisfy the super-priority portion of the HOA lien, and on April 1, 2013, NAS recorded a Notice of Foreclosure Sale in the Clark County Recorder's Office.

4. On June 7, 2013, NAS conducted the foreclosure sale wherein Underwood Partners, LLC ("Underwood"), as the highest bidder in the amount of $30,000.00, purchased the Subject Property.

5. Underwood then conveyed its interest in the Subject Property to NV Eagles.

6. There was no valid tender of the super-priority portion of the HOA lien in the amount of $540.00 by BANA, Miles Bauer, BNYM or any party prior to the HOA foreclosure sale conducted on June 7, 2013.

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7. There was no evidence of any kind of fraud, unfairness or oppression that accounted for and/or affected the purchase price of the Subject Property at the foreclosure sale and/or affecting the foreclosure sale of the Subject Property.

8. Furthermore, notwithstanding the fact that the Miles Bauer check was for an amount less than the super-priority amount, BANA and/or BNYM had adequate time and notice to correct this error prior to the foreclosure sale. BANA and/or BNYM did nothing.

CONCLUSIONS OF LAW

1. The Nevada Supreme Court remanded this case in order for this Court to consider whether the holding in *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020), setting forth the futility of tender defense, fits this factual scenario where an insufficient amount was actually tendered and rejected. The uncontroverted evidence in this case reveals that BANA made an ineffective tender that was insufficient to cure the super-priority default. NAS was justified in rejecting said tender for insufficiency. To apply *Perla Del Mar* to this case would have the effect of making the futility exception the rule regardless of whether or not a tender was made or intended to be made. The facts of this case simply do not meet the criteria for the application of *Perla Del Mar*. The rule in *Perla De Mar* is met to excuse a tender which was never sent because it was known to be futile - not excuse a tender that was insufficient.

2. As provided in *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019)„ the party contesting the validity of the HOA's foreclosure of its super-priority lien bears the burden of demonstrating that it tendered its "delinquency-curing checks" and that it paid the correct delinquency amount in full prior to the sale. *Resources Group*, 437 P.3d 154, 159 (2019). *Resources Group* clearly and unequivocally sets forth that it is the bank's burden to show that the super-priority component of the HOA lien, was paid in full.

3. *Perla Del Mar* confirms *Resources Group,* "[w]e conclude that an offer to pay the super-priority amount in the future once that amount is determined, does not constitute tender sufficient to preserve the first deed of trust..." 136 Nev. Av. Rep 6 at 2. What *Perla Del Mar* actually does is create a very fact specific carve out: "[w]e further conclude, however, that formal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting

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such payments." *Id*. The Supreme Court expressly points out that "excused tender" is based on the specific facts and specific evidence. *Id*.

4. The futility defense has no application where the facts clearly establish that the bank's actions or lack thereof were never influenced by a known policy of rejection and in fact, in the instant case, actions were taken in spite of any policy of NAS. Here, the evidence establishes that BANA fully intended to tender, did in fact attempt to tender, but made an inadequate tender that NAS had every right to reject. Therefore, the circumstances must be such as to show that the party 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. "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." *McCalley v. Otey*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12 So 406). It has long been held that there must be evidence that the party who claims waiver or futility was in some way influenced by the actions or statements. See *Shoebe's Ex'rs v. Carr,* 17 Va. 10, 1812 Va. Lexus, 3 Munf. 10 (Va. 1812) (citing *Shank v. Groff*, 45 W.Va. 543, 32 S.E. 248).

5. Thus, employment of the "futility" defense, an affirmative defense, requires the bank to establish that futility is the reason Miles Bauer did not tender. There must be a nexus between the "knowing" and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles Bauer actually tendered. *Perla Del Mar* simply does not apply here. It is BANA's burden to establish that NAS's policy was the reason it failed to tender a sufficient amount in this case. Not by chance. Not by BANA benefiting from its own neglect. This necessarily involves a requirement that BANA provide evidence that it actually relied on the policy in order to satisfy what is being defined as the *Perla Del Mar* standard. BANA supplied no such evidence and cannot, because it attempted to tender.

6. The futility exception cannot apply in a case where a failed tender was made and rightfully rejected. The facts reveal that neither BANA nor Miles Bauer never relied on any NAS policy when determining whether and in what amount to tender. It was BANA's policy to retain Miles Bauer to pay the super-priority amount of the lien, and BANA did in fact hire Miles Bauer to pay the super-priority lien in this case Despite any collection agents' interpretation of NRS 116.3116,

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BANA and Miles Bauer were, in fact, making thousands of tenders based on their own interpretation of the law. The trial testimony by both BANA's representative and Rock Jung, Esq., the attorney from Miles Bauer, bares these truths out. This is even confirmed in BANA's own brief:

> As in Perla Trust, testimony from a BANA employee and Jung established BANA's tender policy and the 1,000+ times that policy was put to use.

(BANA's brief at 6:19-21). There is nothing in the trial testimony to suggest that BANA relied in any manner on the policies of any HOA or their respective collection agents during the relative times between 2010 and 2013. Rather, it was BANA's policy to retain Miles Bauer to pay the super-priority portion of the HOA lien. And, Miles Bauer did exactly that. The testimony of Rock Jung reveals that even though it 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. Rock Jung testified that while employed by Miles Bauer he 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.

7. There is testimony that is also noticeably lacking. There is no testimony by any BANA representative or its attorney at Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), stating that the reason they "did not" tender was because NAS had a policy of rejecting any and all tenders. This lack of testimony clearly reveals that it did not matter to Miles Bauer or BANA what NAS's policy was. BANA and Miles Bauer, as reflected in their letters, 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. Miles Bauer is a law firm that interpreted the statute before writing its letters and making its inadequate tender. Miles Bauer's interpretation of the law was clearly contrary to any interpretation on the part of NAS. Moreover, the Supreme Court has addressed this exact same scenario in 2020 Nev. Unpub. LEXIS 471, 462 P.3d 255 2020 (*Jessup II)* wherein the Supreme Court stated:

> [T]he district court found that "Mr Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property." The implication behind this factual finding is that the

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> district court determined it was unreasonable for Mr. Jung to abandon Miles Bauer's legal position regarding NRS 116.3116(2) (2009) based solely on ACS's September 2011 letter, and we are not persuaded that this finding was clearly erroneous.

(*Id*, at 3). Rock Jung is the same attorney that authored the letter to NAS and testified at trial in this case. Thus, there can be no reliance on NAS's misinterpretation of NRS 116.3116 upon which any policy could have been based.

8. Further, one's "mistaken belief regarding the foreclosure sale's effect could not alter the sale's actual legal effect, particularly when the super-priority portion of the HOA's lien was still in default at the time of the sale." *see Jessup I*, citing *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 426 P.3d 593 (Nev. 2018)("subjective beliefs as to the effect of the foreclosure sale are irrelevant"). Moreover, as noted above, any argument of reliance on NAS's interpretation is contrary to Miles Bauer's own interpretation of the same statute and its own actions.

9. Here, the evidence establishes that regardless of any policy on the part of NAS, BANA fully intended to tender, did in fact tender, but made an inadequate tender that NAS had every right to reject.

ORDER

Now therefore, **IT IS HEREBY ORDERED**, that the Tender made by Miles Bauer on behalf of BANK OF AMERICA, in the amount of Four Hundred Eighty-Six dollars ($486.00) was insufficient to cure the default in the Super-Priority component of the MADEIRA CANYON HOMEOWNERS' ASSOCIATION's Delinquent Assessment Lien and was, therefore, rightfully rejected. The futility of tender defense available to a party which in fact tenders, or attempts to tender but provides an insufficient amount. The defense is available as an excuse to tender, not an excuse to tender the wrong amount.

IT IS FURTHER ORDERED that the HOA Foreclosure Sale conducted on June 7, 2013, extinguished BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES' Deed of Trust.

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IT IS FURTHER ORDERED that Defendant/Counterclaimant NV Eagles, LLC's is Granted Quiet Title to the Property free and clear of any claims by BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, AS TRUSTEES' and all others.

IT IS SO ORDERED.

Dated this ____ day of March, 2022.

Dated this 11th day of March, 2022

HONORABLE DAVID M. JONES
5A9 3D6 CA3E 4216
David M Jones
District Court Judge

Order Prepared by:

DATED this 10th day of March, 2022.

THE WRIGHT LAW GROUP, P.C.

/s/ John Henry Wright, Esq.
JOHN HENRY WRIGHT, ESQ.
Nevada Bar No. 6182
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102

Attorney for Defendant/Counter-claimant NV EAGLES, LLC

Approved as to Form and Content:

DATED this 10th day of March, 2022.

AKERMAN LLP

/s/ *Lilith V. Xara, Esq.*
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Candi Ashdown

From: lilith.xara@akerman.com
Sent: Thursday, March 10, 2022 5:49 PM
To: Candi Ashdown
Cc: melanie.morgan@akerman.com
Subject: RE: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

Hello Candi,

We have reviewed and you may submit with my e-signature.

Thank you,

Lilith V. Xara
(She/Her/Hers)
Associate, Consumer Financial Services, Data and Technology (CFS+) Practice Group
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Sent: Thursday, March 10, 2022 4:01 PM
To: Morgan, Melanie (Ptnr-Las) <melanie.morgan@akerman.com>; Xara, Lilith (Assoc-Las) <lilith.xara@akerman.com>
Subject: FW: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

[External to Akerman]

Have you had a chance to review the attached Order?

From: Candi Ashdown
Sent: Wednesday, March 9, 2022 5:38 PM
To: melanie.morgan@akerman.com; lilith.xara@akerman.com
Cc: carla.llarena@akerman.com; patricia.larsen@akerman.com; Dayana Shakerian <dayana@wrightlawgroupnv.com>
Subject: CASE NO. A-13-685203-C -Ordr- MELISSA LIEBERMAN vs. MADEIRA CANYON HOMEOWNERS' ASSOCIATION, et al.

Hello Counsel,

Please see the attached *Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing* in the above referenced case. If the Order meets with your approval, may I have your permission to affix your e-signature? As always, your time and consideration is appreciated. Thank you.

Sincerely,

Candi Ashdown
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melissa Lieberman, Plaintiff(s) vs. Mediera Canyon Community Association, Defendant(s)	CASE NO: A-13-685203-C DEPT. NO. Department 29

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/11/2022

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Attorneys for Bank of America, N.A. 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

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C
Dept. No.: XXIX

Consolidated with: A-13-690944-C

BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S NOTICE OF APPEAL

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Notice is hereby given that 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**) and Bank of America, N.A. (**BANA**) appeal to the Nevada Supreme Court from this Court's (1) Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing entered on March 11, 2022, for which a Notice of Entry was entered on the same day; and (2) all interlocutory orders incorporated therein.

DATED this 8th day of April, 2022.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 8th day of April, 2022 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S NOTICE OF APPEAL**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

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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

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DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C
Dept. No.: XXIX

Consolidated with: A-13-690944-C

BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S CASE APPEAL STATEMENT

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 and Bank of America, N.A. submit their Case Appeal Statement pursuant to NRAP 3(f)(3).

1. The appellants filing this case appeal statement are 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**) and Bank of America, N.A. (**BANA**) (collectively, **Appellants**).

2. The orders appealed are Judge Jones's (1) Findings of Fact, Conclusions of Law and Order on Post-Remand Hearing entered on March 11, 2022, for which a Notice of Entry was entered on the same day; and (2) all interlocutory orders incorporated therein.

3. Counsel for Appellants are Melanie D. Morgan, Esq. and Lilith V. Xara, Esq. of AKERMAN LLP, 1635 Village Center Circle, Suite 200, Las Vegas, Nevada 89134.

4. Trial counsel for Respondent NV Eagles LLC (**Respondent**) is John Henry Wright, Esq. of THE WRIGHT LAW GROUP, P.C., 2340 Paseo Del Prado, Suite D-305, Las Vegas, Nevada 89102. Appellants are not aware whether trial counsel for Respondent will also act as its appellate counsel.

5. Counsel for Appellants are licensed to practice in Nevada. Trial counsel for Respondent is licensed to practice law in Nevada.

6. Appellants are represented by retained counsel in the district court.

7. Appellants are represented by retained counsel on appeal.

8. Appellants were not granted leave to proceed *in forma pauperis* by the district court.

9. The date proceedings commenced in the district court was July 16, 2013.

10. In this consolidated action, Respondent asserted quiet title and cancellation of instruments claims against Respondents, contending that it owns property located at 2184 Pont National Drive, Henderson, Nevada 89044 (**property**), free and clear of BoNYM's deed of trust after Respondent's predecessor-in-interest, Underwood Partners, LLC (**Underwood**), purchased the property at a foreclosure sale conducted by Nevada Association Services, Inc. (**NAS**) on behalf of Madeira Canyon Homeowners Association (**HOA**). BoNYM asserted quiet title and declaratory relief crossclaims against Respondent, contending the deed of trust survived because BANA's counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles Bauer**) tendered payment for what it calculated to be the superpriority amount of the HOA's lien – even though both BANA and Miles Bauer had knowledge of NAS's global tender-rejection policy – before NAS's foreclosure sale. NAS rejected

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Miles Bauer's tender pursuant to its known policy. Respondent never answered BoNYM's crossclaims.

Following a bench trial, the district court entered judgment, certified as final under NRCP 54(b), in Respondent's favor, holding Respondent took title to the property free and clear of BoNYM's deed of trust because Miles Bauer's tender was for slightly less than the superpriority amount. It did not address Appellants' tender futility argument. Appellants appealed the final judgment to the Nevada Supreme Court, which entered an order vacating the district court's judgment, noting that Appellants supported their tender futility argument with "evidence—including testimony from [NAS's paralegal] 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,'" and remanding for the district court to consider tender futility.

Following post-remand briefing, the district court ruled in favor of Respondent, holding that NAS's known policy of rejecting all tenders that were for less than the full amount of an HOA's lien was irrelevant because Miles Bauer had attempted to tender its calculation of the superpriority amount. The district court granted quiet title to the property free and clear of BoNYM's deed of trust.

11. This case has been the subject of a previous appeal: Nevada Supreme Court Case No. 81239.

12. This appeal does not involve child custody or visitation.

13. Appellants are willing to discuss settlement with Respondent.

DATED this 8th day of April, 2022.

AKERMAN LLP

/s/ Lilith V. Xara
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 8th day of April, 2022 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON, AS TRUSTEE'S CASE APPEAL STATEMENT**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

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John H Wright efile@wrightlawgroupnv.com

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Robert Larsen rlarsen@gordonrees.com

Hong & Hong, APLC
Debbie Batesel dbhonglaw@hotmail.com
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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

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Attorneys for Bank of America, N.A. 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

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated;

Plaintiff,

v.

MADEIRA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation, BANK OF AMERICA, N.A., a federal savings bank, RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity, and DOES 1 through 10, inclusive; ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

Case No.: A-13-685203-C

Dept. No.: XXIX

Consolidated with: A-13-690944-C

NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNDERWOOD PARTNERS, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that an the **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNDERWOOD PARTNERS, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** had been entered on the 21st day of January 2014, in the above-captioned matter. A copy of said Order is attached hereto as **Exhibit A.**

DATED this 4th day of May 2022

AKERMAN LLP

/s/ Lilith V. Xara
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May 2022 and pursuant to NRCP 5(b), I served via the Clark County electronic filing system a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNDERWOOD PARTNERS, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**, addressed to:

Hong & Hong Law Office
Joseph Y. Hong, Esq. yosuphonglaw@gmail.com
Debbie Batesel dbhonglaw@hotmail.com

Gordon & Rees LLP
Robert Larsen rlarsen@gordonrees.com
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The Wright Law Group, P.C.
John H Wright efile@wrightlawgroupnv.com

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

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EXHIBIT A

EXHIBIT A

ODRG
Zachary T. Ball (SBN 8364)
THE BALL LAW GROUP LLC
3455 Cliff Shadows Pkwy, Ste. 150
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Email: zball@balllawgroup.com

Attorney for Plaintiff,
Nevada Title Company

DISTRICT COURT

CLARK COUNTY, NEVADA

MELISSA LIEBERMAN, an individual, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

MEDIERA CANYON HOMEOWNERS' ASSOCIATION, a Nevada homeowners association, NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; BANK OF AMERICA, N.A., a federal savings bank; RESURGENT CAPITAL SERVICES, LP, a national corporation, UNDERWOOD PARTNERS, LLC, an unknown business entity; and DOES I through X, inclusive; ROE CORPORATIONS, I through X, inclusive,

Defendants.

AND ALL RELATED ACTIONS.

Case No.: A685203

Dept. No.: XXXII

Date of Hearing: October 17, 2013

Time of Hearing: 9:00 a.m.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT, UNDERWOOD PARTNERS, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant, UNDERWOOD PARTNERS, LLC's ("UNDERWOOD") Motion to Dismiss or, in the alternative, Motion for Summary Judgment ("Motion"), having come on for hearing on the 17th day of October, 2013 at 9:00 a.m., and the Court, having reviewed the

papers and pleadings on file herein, and having considered oral argument of counsel for the parties at the time of the hearing, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that UNDERWOOD's Motion is granted in part, thereby dismissing Plaintiff's fifth cause of action for Violation of NRS 598 *et seq.* and Plaintiff's sixth cause of action for Abuse of Process.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that UNDERWOOD's Motion is denied in part as to Plaintiff's second claim for relief for Quiet Title.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action is stayed for ninety (90) days, or until January 15, 2013, excluding the Third Party Defendants Cogburn Law Offices, LLC and Norma Teran's Motion to Dismiss Third Party Complaint by Nevada Association Services and Countermotion for Sanctions, which motion is currently set for hearing on December 10, 2013 at 9:00 a.m.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon oral stipulation between UNDERWOOD and Defendants BANK OF AMERICA, N.A. and BNY MELLON at the time of the hearing, all arguments related to BANK OF AMERICA, N.A. and BNY MELLON's recorded lien on 2184 Pont National Drive, Henderson, Nevada (the "Property"), as stated in their Opposition to UNDERWOOD's Motion, including its priority and the related application of UNDERWOOD as a bona fide purchaser of the Property, are stayed, not part of the instant motion practice and not a part of this Court's ruling.

DATED AND DONE this 6 day of ~~November~~ Jan, 2013.

DISTRICT COURT JUDGE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Submitted By:

THE BALL LAW GROUP

Zachary T. Ball, Esq.
Nevada Bar No. 8364
Attorney for Defendant,
Underwood Partners, LLC

THE BALL LAW GROUP
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Las Vegas, NV 89129
Telephone: (702) 303-8600

Reviewed and Approved By:

DATED this 18 day of November, 2013.

COGBURN LAW OFFICES

Jamie S. Cogburn, Esq.
Ryan H. Devine, Esq.
2879 St. Rose Parkway, Suite 200
Las Vegas, Nevada 89052
Attorneys for *Plaintiff*

DATED this __ day of November, 2013.

AKERMAN SENTERFITT LLP

#8256

Ariel E. Stern, Esq.
Steven G. Shevorski, Esq.
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Attorneys for *Bank of America, N.A. and BNY Mellon, as Trustee*

DATED this 14TH day of November, 2013.

LAW OFFICE OF RICHARD VILKIN, P.C.

Richard J. Vilkin, Esq.
1286 Crimson Sage Avenue
Henderson, Nevada 89012
Attorney for *Nevada Association Services Inc.*

THE BALL LAW GROUP
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Telephone: (702) 303-8600

DATED this 18 day of ~~November~~ December, 2013.

PARKER SCHEER LAGOMARSINO

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