IN THE SUPREME COURT OF THE STATE OF NEVADA

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BANK OF AMERICA, N.A.; AND THE BANK OF NEW YOUR MELLONG, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OFCWALT, INC., ALTERNATIVE LOAN TRUST 2006 J-8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J8, Appellants, vs. NV EAGLES, LLC, Respondent.	CASE NO. 84552 (Appeal from 8th Judicial District Court Case No. A-13-685203-C)

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and/or entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusals.

Attorney John Henry Wright, Esq., and NV EAGLES, LLC, state that:

1. NV EAGLES, LLC is a Nevada Limited Liability Company and there is no parent corporation. I certify that there are no publicly held companies owning 10% or more stock or other interest in NV EAGLES, LLC;

2. The undersigned counsel is the only counsel expected to appear in this Court;

3. Respondent NV EAGLES, LLC is not using a pseudonym.

DATED this 13th day of October, 2022.

Respectfully submitted by:

THE WRIGHT LAW GROUP, P.C.

/s/John Henry Wright, Esq.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES:

STATUTES:

COURT RULES:

OTHER:

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I. RELEVANT FACTS AND PROCEDURAL HISTORY:

A. Pertinent Facts as Determined by Judge Bare:

In the lead up to an HOA foreclosure auction authorized pursuant to NRS 116, on behalf of Bank of America ("BANA"), the first deed of trust holder, on or about April 1, 2011, Miles, Bauer, Bergstrom & Winters, LLP ("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." (AA0462)

However, Miles Bauer miscalculated the super-priority amount as the actual nine-month super-priority amount was $540.00. (AA 0904)*; see also AA0458 and AA0539*). Thus, the Miles Bauer check in the amount of $486.00 did not satisfy the actual super-priority amount of $540.00. (AA0905), *Recorder's Transcript of Hearing Re: Bench Trial-Day 3 (Decision) Page 8, 13-15. See also*, Nevada Supreme Court Order of Remand at p.2, establishing tender was insufficient, (AA0963).

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.

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. (AA 0372). Underwood then conveyed its interest in the Subject Property to NV Eagles.

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.

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. 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.

B. Pertinent Conclusions of Law Reached by Judge Bare at Trial:

The trial in this case was held on February 5, 2020, before district court judge Robert Bare, who made the following conclusions of law regarding the issues presented:

> The Nevada Supreme Court, in *Bank of America, N.A. v. SFR Investments Pool 1*, 427 P.3d 113 (2018) ("*Diamond Spur"*)

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established that a "lien may be lost by. . . payment or tender of the proper amount of the debt secured by the lien." *id.* Furthermore, on January 23, 2020, the Nevada Supreme Court confirmed its holding in *Diamond Spur* in its published 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.*

In Nevada, "[t]he burden of demonstrating that the delinquency was cured pre-sale, 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 super-priority 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.

Here, BNYM failed to carry its burden as the check delivered to NAS by Miles Bauer did not satisfy the super-priority amount of the HOA lien. Thus, under Nevada law, the tender was invalid and insufficient to cure the super-priority portion of the HOA lien. *See Diamond Spur, Resources Group and Marathon.*

(AA0927, Conclusions of Law 7-9)

C. Pertinent Portions of This Court's Order of Vacating and Remand:

On May 27, 2021, Bank of New York Melon filed a Notice of Appeal. On appeal a three justice panel of this Court found and ruled as follows:

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. *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

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> of NAS's testimony from previous cases—to show NAS had a "known business practice to systematically reject any check tendered for less than 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 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 Cransbill 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*.

(AA0963, emphasis added).

The Panel declined to consider any arguments with respect to futility of tender because it was not addressed by Judge Bare. However, the Panel did take notice, and in fact agreed with Judge Bare, that the bank's check was insufficient to constitute a valid tender because it was not sufficient to cure the super-priority default. The Panel vacated [1]the judgment and remanded the case back to the district court, directing the district court to consider the futility argument in light of *Perla Trust.*

---

[1]BANA inaccurately asserts that this Court "reversed" Judge Bare's decision. The Court did not disagree with Judge Bare's decision. This Court only vacated and remanded with instructions for the court to consider BANA's futility arguments in light of *Perla Trust* given that Judge Bare did not have the benefit of the case at the time of his decision. *See* OB at 2:2-3.

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D. Findings of Fact and Conclusions of Law Determined By Judge Jones After Remand:

Upon remand the district court directed the parties to file supplemental briefs concerning the bank's futility defense in light of a failed tender and the possible application of *Perla Trust* to the facts of this case. After the parties filed their respective briefs Judge David M. Jones made the following Findings of Fact, Conclusions of Law and Entered the following Order:

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

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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.

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 meant to excuse a tender which was never sent because it was known to be futile - not excuse a tender that was insufficient.

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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 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.

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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, 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,

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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 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/Counter-claimant 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.

(AA1258-1264).

Thus, Judge David M. Jones did what this Court directed the district court to do. He considered BANA's futility arguments in light of *Perla Trust* and found them unpersuasive given the particular facts found in this case.

II. SUMMARY OF THE ARGUMENT

Perla Trust does not provide authority or justification for excusing an insufficient tender that was rightfully rejected. Rather, *Diamond Spur* is the controlling authority.

III. ARGUMENT:

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A. Standard of Review

It has been long held that the district court's conclusions of law are reviewed de novo. *Lopez v. Corral*, 367 P.3d 745 (Nev. 2010). However, this Court gives deference to its factual findings unless they are clearly erroneous or not supported by substantial evidence. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. Adv. Op. 74, 426 P.3d 593, 596 (2018).

B. *Perla Trust* is Inapplicable and Does Not Resurrect a Failed Tender:

"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 Trust* to this case,

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BANA relied on endless hours of transcripts from this case and others. However, the most important testimony is noticeably lacking. There is no testimony by any BANA representative or its attorney at 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 claiming 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 was even confirmed by BANA's in its own brief in the district court:

> 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.

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(AA0981).

Reliance on the "futility" defense necessarily 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 Trust* simply does not apply here. In fact, the District Court found that "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." (AA1264, at Conclusion of Law #9)

It is implicit when establishing a futility 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 this Court in defining the futility defense all acknowledged that the obligor was **prevented** from tendering by the words or conduct of the creditor. In *Jessup I*, this Court stated:

> Alternatively, the Bank contends that its obligation to tender the superpriority amount was excused because ACS stated in its fax that

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> 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 this Court in recognizing the futility defense.

In the case of *Guthrie v. Curnutt*, 417 F.2d 764, 765 (10th Cir. 1969), cited by this Court, 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

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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 the case of *In Re Pickel,* 493 B.R. 258, 271 (Bankr. D.N.M. 2013), cited by ths Court, 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 "[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), cited by this Court, 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

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> 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 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. And that conduct or policy was known to the obligor and directed its course of conduct

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 *Strausbourger* 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 here, there was a tender, 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.

The trial testimony by both BANA's representative and the attorney from Miles Bauer bares these truths out. Diane Deloney, the representative from BANA, when asked what BANA's policies and procedures were with respect to HOA foreclosures testified as follows:

> Q. Okay. As a consequence of testifying on behalf of Bank of America in roughly 40 Nevada HOA cases, have you become familiar with the policies, practice, and procedure of Bank of America as it relates to foreclosure notices in roughly 2010 to 2013.
> A. Yes.
> Q. Briefly tell the Judge what that policy and practice was.
> A. Basically, we would receive the notice of sale, it would be routed to what we call our litigation group, who then would hire local counsel to reach out to the HOA, or their collection agency, to obtain the super-priority portion to protect our lien. We would then wire funds to counsel in order for them to pay that lien amount.
> Q. And, have you reviewed documents related to the HOA's foreclosure in this case?
> A. I have.
> Q. And, to what extent did bank of America follow that policy, practice, and procedure here?
> A. According to my review of the documents, we followed it as normal.

(AA0817)

There is nothing in this testimony to remotely suggest that BANA relied in any

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manner on the policies of any HOA or their respective collection agents during the relative times between 2010 and 2013. Rather, BANA's policy was 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 they 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:

> Q. Okay. Was NAS a collection agent with whom you dealt often during you time at Miles Bauer?
> A. Yes they were. If I had to say – if I had to estimate, I believe they were the HOA trustee or collection agent I dealt with the most.
> Q. Okay. And through your dealings with them, did you become familiar with NAS's policies and practices for handling your requests?
> A. Yes, I did.

(AA0838)

> Q. Okay. And, do you recall during your years at Miles Bauer, or since, testifying in depositions and trial, ever seeing NAS sign one of these?
> A. 99 percent of the time, they did not sign it because they

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claimed it wasn't for the full amount. So, NAS, the powers that be, instructed their receptionist or front desk person to turn away our legal runner at the door. I say 99 percent because there were very few instances where we did pay the full amount, such as our client was – had a junior or second deed of trust which they wished to protect. So, we would pay the full amount.

(AA0841)

Q. And, as you – I mean, how many – roughly, how many do you think, while you were there, that you handled these trying to pay off super-priorities? A thousand, two thousand?
A. Right, my best estimate was five to six thousand.
Q. Wow, that you were handling?
A. Correct, during the entire – during the course of my entire four-and-a-half-year employment there.

(AA0845)

Q. Okay. So, in the course of your four years, if you did about five to six thousand of these, do you remember was it Legal Wings that would always do the delivery of the letters and checks?
A. Correct, but just to be clear, when I testified that I handled approximately five to six thousand during the course of four and a half years –
Q. Mm-hmm.
A. – that doesn't translate to five or six thousand checks being delivered because there were a lot of times where we didn't have the –
Q. Right.
A. – information –
Q. Right.
A. – to calculate in the –
Q. Right.
A. – first place.
Q. But, any – how many, roughly, do you think were when checks were delivered – attempted to be delivered, roughly, that you handled?
A. My best estimate, it's probably be around half the number of files I handled.
Q. So, like 2,000 you think?
A. Sure, 2,000 to –

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Q. Okay.
A – 2,000 to 2,500 –
Q. Okay.
A. – is my best estimate.

(AA0847-0848)

This testimony clearly reveals that it did not matter in the least 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. And, as noted, when it was in BANA's best interest, in its opinion, to tender the full amount, it did, and NAS accepted those payments.

However, in this case, the amount tendered by Miles Bauer was simply insufficient to cure the super-priority default. Again, the District Court found that "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." (AA1264, Conclusion of Law #9)

C. This Court Has Recognized There Must Be a Causal Connection:

The requirement to establish a causal connection is the norm. In nearly every HOA foreclosure 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 low price + irregularities

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= 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 this Court in *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d. 641 (Nev. 2017), wherein this 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 this Court has to date adhered to the principle that there must be a causal connection between the action complained of and the actual result, *cause and effect*. 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 do not impose meaningless requirements. Learning of the policy after the time to perform would still not change

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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 this Court, as it has by others and those courts cited by this Court, but for clarity's sake and to ensure the exception does not become the rule, *Perla Trust* 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 if 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. To apply *Perla Trust* to this case would have the effect of making the exception now the rule regardless of whether or not a tender was made. The facts of this case simply do not meet the criteria for the application of *Perla Trust.*

Perla Trust cannot be used to overcome an inadequate tender- there is simply no

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authority therein to suggest otherwise. The bank has produced no authority in any form to overcome an inadequate tender.

This Court remanded this case in order for the district court to consider whether *Perla Trust* fits this factual scenario where an insufficient amount was actually tendered and rejected. This is a completely new and unique fact pattern to which no case directly applies because this Court has not ever considered it. This case presents facts wherein the district court had the opportunity to consider the reasoning behind the futility defense and the impracticability of applying *Perla Trust* in a rubber stamp manner. There is nothing in *Perla Trust* to support the bank's inadequate tender. The District Curt did exactly as directed.

Further, when the reasoning behind the futility defense is considered, the answer becomes clearer. 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. Applying a blanket defense and excusing the duty to tender would eviscerate the creditor's right to reject insufficient tenders, in contradiction to *Diamond Spur* and *Resources,* and set an unruly precedent whereby a theory based on arguments formulated a decade after the events took place, that was never in the contemplation of the parties at the time of those events, becomes the rule. Reliance on the knowledge that the tender would be futile, if made, is a necessary component of the futility

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defense.

D. *Perla Del Mar* Does Not Apply To The Facts of this Case - *Diamond Spur* Applies:

1. The Trial Court Determined That Rejection Was Proper Because The Tender Was Insufficient to Cure The Super-priority Default and This Court Agreed.

When rendering his decision in open court at the end the trial, Judge Bare actually made a factual finding that the reason for rejection was that the tender did not satisfy the entirety of the super- priority portion of the lien:

> So, the bottom line, Mr. Garner, the reason why I think Mr. Hong's client does not take the property subject to the bank's lien is because as I look at it, the -- I'll just say it because I always say it the way I think it, I think Mr. Jung made a mistake. That's what I really think. And he, on behalf of the bank, sent the wrong amount, it was off by not a lot of money, but it was below what it needed to be. And, I think that mainly *Diamond Spur* sends a clear message that it has to be at least up to the minimum.

(AA0901-0902, emphasis added)

> And so, I end up agreeing and I make a Finding of Fact that I agree with the Plaintiff's side of it that the actual nine-month superpriority assessment amount was 540. So, Miles Bauer sent a check for 486, which was less than that and so that's what happened.

(AA0904, emphasis added)

> That's not determinative of the whole case, but I want to make a finding that that is solid evidence that a primary reason for rejecting was that it wasn't a sufficient payment. Although, the Court, of course, does accept and knows it to be true, that there was a general pattern of rejecting these, anyway. But, here we do have affirmative evidence that a primary reason was it wasn't the right amount.

(AA0905, emphasis added)

> So, there's a passage that I think gives the best guidance. And that

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> is, again, the Supreme Court answers this question, does it have to be payment in full, or could it be close, or could it be less? I think *Diamond Spur* does stand for the proposition that it has to be payment in full in order to be a valid tender, and that's not what we have here. And so, that's what wins the day for Mr. Hong's client in this spot, because it's clear to me it wasn't payment in full, and I said the bank's lawyer made a mistake, because I think they did.

(AA0907)

Thus, the trial court actually found that the tender was rejected because it was insufficient to cure the super-priority default. This Court agreed: "Initially, we agree with the district court's conclusion that appellant's check was insufficient to constitute a valid tender because it did not satisfy the full amount of the super-priority portion of the lien" (AA0963). Rejection, in this case, was NOT based upon some policy of rejecting every tender that failed to pay the entire lien. Upon remand, the District Court found that "[t]he futility exception cannot apply in a case where a failed tender was made and rightfully rejected." (AA1263, Conclusion of Law #6). As provided in *Resources Group,* 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. Thus, the trial court made the correct finding.

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Perla Trust 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..." *Perla Trust*, 136 Nev. Adv. Op. 6 at page 2. (emphasis added). What *Perla Trust* 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 such payments." *Id*. This Court expressly pointed out that "excused tender" is based on the specific facts and specific evidence. *Id*. The facts in *Perla Trust* and the instant case are far from similar.

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E. It Was Not NAS' Policy of Rejecting Anything Less Than The Full Amount of the Lien:

On remand this Court stated that BANA presented evidence----including the 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 full lien amount." This is not an accurate account of the testimony from NAS at trial in this case. Rather, Susan Moses testified that it was the conditions stating that the amount tendered was sufficient to satisfy the bank's obligations to the HOA in full:

> Q. Okay. And, during that same timeframe, 2010 to 2013, did Miles Bauer ever through runners deliver checks with letters?
> A. Yes.
> Q. And, how was – how did NAS typically handle those

deliveries?

A. If there were conditions on the checks, the NAS would not accept them.
Q. Okay, And, was a copy made of the letters and checks?
A. No.
Q. Okay. Was notation made in the log that those things were delivered?
A. No.
Q. Okay. Was it usually someone at reception who would analyse it and return it?
A. I don't know how that process happened.
Q. Okay. And the typical Miles Bauer letter that you've probably seen in depositions and trials, I call it the second letter; are you familiar with that letter?
A. Yes.
Q. Okay. And that's the letter that NAS believed has impermissible conditions?
A. Correct.
Q. Okay. So, if a check came for any amount that was less than full payoff, with that letter, what was NAS's policy?
A. It's the fact that there were conditions, that's what would – that's what would cause NAS to reject the payment were the conditions.

(AA0827-0828, emphasis added)

Thus, the only policy on the part of NAS that would trigger a rejection of the tender was the conditions that Miles Bauer put on the acceptance of the payment. Specifically, the following:

> 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, 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 toward the HOA in regards to the real property located

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at 2184 Pont National Drive have now been "paid in full."

(AA0462).

While BANA can undoubtedly point to an opinion from this Court stating that these conditions were reasonable if the amount tendered was the full amount required to cure the super-priority default, that is not the case here and BANA would be very hard-pressed to find a case that says offering an amount that is ***less than*** the amount due is sufficient to satisfy the bank's financial obligation to the HOA or that the same has been "paid in full." There is no case that supports the proposition that an insufficient tender would be considered payment in full, and the Supreme Court's remand in this instance does not remotely suggest otherwise.

F. BANA Should Have Taken Measures To Protect Itself and Failed To Do So:

Even if *Perla Trust* could be applied in this case, the trial court rightfully noted that once the tender was rejected for being insufficient to cure the super-priority default, BANA should have taken additional steps to protect itself. The trial court stated in open court:

> They should have sent the right amount, but even if they didn't, I'm going to cover something else I found and I -- it's going to, I think, be in *Jessup*, actually.

(AA0907)

> And, I think that's important. I think it's important to say that there was plenty of opportunity to cure any problems with the defective tender. And, for whatever reason in addition to making the initial mistake they, I think, compounded it by not doing anything further

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> once they knew the thing got rejected. And so, it becomes a insufficient tender.

(AA0908)

> I am specifically finding that there was -- again, there was plenty of time to cure that problem and send over the right amount or otherwise deal with it, which the bank didn't do. So they made -- I think the bank made two mistakes that now equate to invalid tender, one: wrong amount, two: never fixed it once they knew it was rejected and had plenty of opportunity to do that.

(AA909)

The trial court's opinion is consistent with this Court's prior holdings in *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014) and *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc*. 366 P.3d 1105 (2016).

In *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014), this Court held that a bank must do more to prevent the loss of its security:

> [N]othing appears to have stopped the 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. *Cf . In re Medaglia, 52 F.3d 451 455 (2d Cir. 1995)* (**"[I]t is well established that due process in not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."**)

(*SFR* at 418, emphasis added). This holding was reinforced two years later in *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc*. 366 P.3d 1105 (2016) wherein the bank actually tendered the nine months of assessments, but the agent for the association demanded additional assessments, fees and costs and the

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bank refused and did nothing more to prevent the sale of the property. This Court in *Shadow Wood* held that the bank is required to do more to protect its security interest:

> Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed.

Shadow Wood. at 1114. When it is apparent, despite its attempted tender, that the foreclosure sale is going forward, the bank cannot simply sit back and do nothing. This Court said that if there is an active dispute, the bank must be proactive in protecting its security interests.

Thus, this Court has made it clear that a bank must take action to protect its interests. Today, however, if the lower courts are required to blindly apply *Perla del Mar*, a bank could take any position it wants at the time of the actual foreclosure by the HOA, but can later rely on a discovered misunderstanding of the law by the collection agency as an excuse for paying an insufficient amount, or in some instances, not even trying to pay the super-priority portion of the HOA lien.

/ / /

IV. CONCLUSION

For the foregoing reasons, Appellant's arguments all fail. This Court should affirm the District Court's ruling that Bank of America, N.A.'s Deed of Trust was

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extinguished by the HOA foreclosure sale and that NV Eagles holds title to the Property free and clear of any claims by Bank of America, N.A., or Bank of New York Mellon.

DATED this 13th day of October, 2022.

Respectfully submitted by:
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP Rule 32 (a)(4), the typeface requirement of NRAP Rule 32(a)(5) and the type style requirement of NRAP Rule 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP Rule 32(a)(7) because excluding the parts of the brief that are exempted by NRAP Rule 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 9,039 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP Rule 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is found.

I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 13, 2022, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

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

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