**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

NV EAGLES, LLC,

Respondent.



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

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# APPELLANTS' REPLY BRIEF

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## ARGUMENT

This Court should reverse the district court's judgment in favor of NV Eagles and render judgment for Appellants. NV Eagles' arguments in support of affirmance are misplaced for three reasons.

***First***, the district court's factual findings establish that NAS's known tender-rejection policy excused BANA and Miles Bauer from tendering under *7510 Perla Del Mar Ave. Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 458 P.3d 348 (2020) (***Perla Trust***). ***Second***, the district court made a legal error to hold tender was not excused by reading a non-existent "reliance" element into *Perla Trust*'s tender-futility test. ***Third***, BANA was not required to take additional steps to protect the deed of trust after tender was excused.

### I. THE DISTRICT COURT'S FACTUAL FINDINGS, BASED ON UNCONTROVERTED EVIDENCE, ESTABLISH EXCUSED TENDER UNDER *PERLA TRUST*.

*Perla Trust* provides a two-element test for excused tender: (1) the HOA collection agent's tender-rejection policy; and (2) the senior lender, its servicer, or its servicer's attorneys' knowledge of that policy. *See* 136 Nev. at 63. Appellants established both elements at trial with uncontroverted evidence consisting of NAS employee Susan Moses' testimony that NAS rejected every one of Miles Bauer's superpriority tenders, and Miles Bauer attorney Rock Jung's testimony that NAS's owner, David Stone, told him that NAS would not accept such tenders, and that NAS

rejected thousands of his tenders. (*See* 4AA 826:9–828:19 (Moses testimony); *see also* 4AA 844:6-12, 853:14-22, 856:11–857:5 (Jung testimony)).

The district court reviewed this evidence and found that even though BANA and Miles Bauer knew that NAS "typically reject[ed] anything less than the full [HOA lien] amount," they "nonetheless tendered as many as twenty-five hundred (2500) [superpriority] checks" to NAS. (6AA 1277, ¶ 6). This finding shows that Appellants satisfied the two-element *Perla Trust* test for excused tender. *See* 136 Nev. at 63 (A "formal [superpriority] tender is excused when evidence shows that the [HOA's agent] had a known policy of rejecting such" tenders.). As a result, NAS's "foreclosure" of Madeira Canyon Community Association's lien "did not extinguish [BoNYM's] first deed of trust." *See id.*

## II. THE DISTRICT COURT MADE A LEGAL ERROR BY HOLDING THAT NAS'S KNOWN TENDER-REJECTION POLICY DID NOT EXCUSE TENDER UNDER *PERLA TRUST*.

Despite its factual findings that support excused tender, the district court concluded that tender was not excused under *Perla Trust*. (*See* 6AA 1278–1279). To get there, the district court made two legal errors: (1) it held that Jung's slight miscalculation of the superpriority amount was relevant under *Perla Trust*; and (2) it grafted a third "reliance" element onto *Perla Trust*'s two-element test, holding that 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[.]" (*See* 6AA 1276, ¶ 4). These erroneous legal conclusions are entitled to no deference. *County of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003) (A "district court's conclusions of law are reviewed *de novo*.").

### A. Jung's slight miscalculation of the superpriority amount is irrelevant under *Perla Trust.*

Whether Jung's tender check itself was sufficient to protect the deed of trust under *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (***Diamond Spur***) has not been at issue since this Court vacated the district court's initial judgment. (*See* 5AA 963 ("Initially, we agree with the district court's conclusion that [Jung's] check was insufficient to constitute a valid tender [under *Diamond Spur*] because it did not satisfy the full amount of the superpriority portion of the lien.")). But despite this Court's clear instruction "to consider the tender futility argument in light of *Perla Trust*" on remand, the district court, at NV Eagles' urging, remained laser-focused on the tender check's sufficiency. (*See, e.g.*, 6AA 1275, ¶ 2 ("*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.") (citing *Resources Group, LLC v. Nevada Ass'n Servs., Inc.*, 135 Nev. 48, 50, 437 P.3d 154, 156 (2019)).

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On remand, the district court held that Jung's nominal, good-faith miscalculation[1] of the superpriority amount renders *Perla Trust* inapplicable because Jung "fully intended to tender, did in fact attempt to tender, but made an inadequate tender[.]" (6AA 1276, ¶ 4). While the district court held that NAS had "a right to reject" Jung's tender because it was for slightly less than the superpriority amount, it did not make a factual finding that NAS rejected Jung's tender for that reason. (*See* 6AA 1273–1279).

NV Eagles contends otherwise, claiming that when the district court judge "render[ed] his decision in open court at the end of trial," he "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." *See* AB at 24. This oral "factual finding," which preceded the district court's initial written judgment that this Court vacated, is meaningless as a matter of law.

A "district court's oral pronouncement from the bench" is "ineffective for any purpose[.]" *Rust v. Clark Cnty. School Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). Before a "court reduces its decision to writing, signs it, and files it with the clerk," the "decision is impermanent" because the court "remains free to

[1] During closing arguments, NV Eagles' (prior) counsel admitted that Jung's miscalculation was simply a "mistake" caused by the sheer number of superpriority payments Jung was tendering. (*See* 4AA at 872:11-18 ("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.")).

reconsider the decision and issue a different written judgment." *Division of Child & Family Servs. v. Eighth Jud. Dist. Ct.*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004). Thus, "[i]f there are differences between the findings and conclusions issued during the hearing and those recorded in the order, **the written order controls**." *Smith v. State*, 135 Nev. 719, 433 P.3d 267 (table), 2019 WL 295686, at *2 (Nev. Jan. 17, 2019) (citing *Rust*, 103 Nev. at 689) (emphasis added).

The initial "written order" here – the findings of fact, conclusions of law, and judgment entered on April 30, 2020 – contains no "finding" regarding the reason NAS rejected Jung's tender check. (*See* 4AA 923–929). Even if it had, this Court **vacated** that judgment on June 16, 2021. (5AA 962–964). And like the original written judgment, the operative findings of fact, conclusions of law, and judgment entered on remand do not contain a factual finding that NAS rejected Jung's tender because it was for slightly less than the superpriority amount. (*See* 6AA 1273–1279).

No evidence could support such a finding. *See Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007) (Findings of fact "will be upheld unless they are not supported by substantial evidence or are clearly erroneous."). Moses testified that NAS rejected every one of Miles Bauer's checks that was for less than the full amount of an HOA's lien and accompanied by Miles Bauer's familiar cover letter. (*See* 4AA 826:14–828:19). She provided the same testimony regarding NAS's

global tender-rejection policy in *Perla Trust*. *Compare id.* (Q: "So, if a [Miles Bauer] check came for any amount … less than full payoff [of an HOA's lien], with [the Miles Bauer cover letter], what was NAS's policy?"; A: "It's the fact that there were conditions [in the Miles Bauer cover letter] … that's what would cause NAS to reject the payment were th[ose] conditions."), *with Perla Trust*, 136 Nev. at 64 ("Moses … testified to the fact that NAS systematically rejected checks if it was for less than the entirety of the [HOA] lien amount."). And as this Court made clear in *Perla Trust*, Miles Bauer's cover letter was not "impermissibly conditional," as it simply tracked "the plain language of NRS 116.3116(2)." *See* 136 Nev. at 67 n.4.

Jung also provided the same testimony that he provided in *Perla Trust* regarding his knowledge of NAS's tender-rejection policy. *Compare* (4AA 856:23–827:5 (Q: "[W]hat did NAS do with [Miles Bauer's tender] checks?"; A: "[T]rue with their policy, they would reject it, unless it was for the full amount listed in their payoff statement.")), *with Perla Trust*, 136 Nev. at 67 ("Jung … provided testimony that NAS had a known business practice to systematically reject any check tendered for less than the full lien amount."). The fact that Jung attempted to tender despite knowing that NAS would reject it is the only fact that distinguishes this case from *Perla Trust*.

The district court held that Jung's slight miscalculation of the superpriority amount was fatal. (6AA 1276, ¶ 9). But Jung's slight miscalculation is irrelevant

under *Perla Trust*, as uncontroverted evidence at trial proved that "even if [Jung] had tendered a check for the [actual] superpriority portion of the lien, NAS would have rejected it" under "NAS's business policy to have its receptionist reject any check for less than the full lien amount[.]" *See* 136 Nev. at 67.

Further, even if Jung's nominal miscalculation in a futile, excused tender check were relevant under *Perla Trust*, the common law of tender has specific rules to prevent BANA from being punished for NAS's failure to understand NRS 116.3116.[2] A creditor's "objection to [a] tender" is waived unless the creditor specifies "the grounds for" and makes the objection "at or near the time of the tender[.]" 74 Am. Jur. 2d *Tender* § 9 (2012); *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.").[3] By failing to object to Jung's tender based on his slight miscalculation, NAS waived that objection. (*See* 4AA 852:1-15; *see also* 4AA 843:1–844:18).

[2] This Court has adopted the common law rules of tender that have developed in other jurisdictions in both *Perla Trust*, 136 Nev. at 65–67, and *Diamond Spur*, 134 Nev. at 606–611.

[3] Further, in *Perla Trust*, this Court quoted several cases which stated that a creditor's "refusal [to] cooperat[e]" with a debtor which prevents the debtor from actually curing a default cannot prevent a valid tender. *See Perla Trust*, 136 Nev. at 65–66 (citing *Cochran v. Griffith Energy Serv., Inc.*, 191 Md. App. 625, 993 A.2d 153, 166 (2010) ("A tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation *would be immediately satisfied*." (emphasis in original), and *Graff v. Burnett*, 226 Neb. 710, 414 N.W. 2d 271, 276 (1987) (same)). Here, NAS's refusal to cooperate with Miles Bauer by informing Jung of his nominal miscalculation prevented Jung from tendering the correct amount.

Jung testified that if NAS had notified him of his miscalculation, he would have been "happy to" tender the minimal additional amount. (*See* 4AA 856:11–857:5). But it would have been futile for him to tender another check for the correct superpriority amount because NAS would have rejected it under its global tender-rejection policy. (*See* 4AA 826:14–828:19). Such a "re-tender" was excused under *Perla Trust* for the same reason Jung's initial tender was excused – Jung knew NAS would reject it. *See* 136 Nev. at 66 ("An actual tender is unnecessary where it is apparent the other party will not accept it. The law does not require one to do a vain and futile thing.") (quoting *Schmitt v. Sapp*, 71 Ariz. 48, 223 P.2d 403, 406–07 (1950)).

### B. *Perla Trust*'s tender-futility test does not contain a "reliance" element.

The district court recognized that BANA and Jung knew of NAS's tender-rejection policy, but nonetheless held that tender was not excused under *Perla Trust* because "regardless of any policy on the part of NAS, BANA fully intended to tender" and "did in fact tender[.]" (*See* 6AA 1278, ¶ 9). The district court believed this was legally relevant because it grafted a third element of "reliance" onto *Perla Trust*'s two-element test. (*See* 6AA 1276, ¶ 4). It concluded that "employment of the [*Perla Trust*] 'futility' defense, an affirmative defense, requires the bank to establish that futility is the reason Miles Bauer did not tender," as "[t]here must be some nexus between" Miles Bauer's "'know[ledge]'" of the collection agent's tender-

rejection policy "and the inaction on the part of Miles Bauer." (*See id.*, ¶ 5 (emphasis in original)). NV Eagles claims this "reliance" element "is the one glaring reality that is continuously overlooked by the banks and many courts involving failed tenders by [BANA] to [NAS]." AB at 11.

This third "reliance" element is not "continuously overlooked." *See id.* It is non-existent. This Court has reiterated that the tender-futility test has two elements in unpublished opinions following *Perla Trust*. *See, e.g., TRP Fund VI, LLC v. PennyMac Loan Servs., LLC*, 494 P.3d 903 (table), 2021 WL 4238275, at *1 (Nev. Sep. 26, 2021) (Under "*Perla's* 'known policy of rejection' standard, … respondents did not sufficiently demonstrate that ACS's policy during the relevant time frame was to reject superpriority tenders or that Miles Bauer knew of this policy."). So has the Ninth Circuit. *See Bank of Am., N.A. v. Pacific Legends Green Valley Owners' Ass'n*, 849 Fed. Appx. 693, 694 (9th Cir. June 10, 2021) (The *Perla Trust* analysis "queries solely whether [the HOA's collection agent] had a known policy of rejecting tender.").

Reviewing *Perla Trust*'s facts is enough to show its tender-futility test does not have a "reliance" element. There, Jung sent Miles Bauer's standard "first letter" to NAS, where he "requested that NAS identify the superpriority portion of the lien—i.e., the amount the Bank may rightfully pay to preserve its deed of trust—and offered to pay that sum upon proof of the same." *See Perla Trust*, 136 Nev. at 63;

(*see also* 2AA 455–456 (Miles Bauer's form "first letter" from this action)). NAS simply ignored Jung's letter (rather than providing an account statement as it did in response to Jung's first letter here). *See id.* Without the information he needed to calculate the superpriority amount, Jung could not send a superpriority check. *See id.* at 63–64. Thus, it was NAS's failure to provide a statement of account that prevented Jung from tendering a superpriority check. *See id.* Nothing in *Perla Trust* indicates that Jung decided not to tender a superpriority check because he knew NAS would reject it. *See id.*

This shows the district court was wrong to conclude that *Perla Trust* requires "some nexus between" Miles Bauer's knowledge of NAS's tender-rejection policy "and the inaction on the part of Miles Bauer."[4] (*See* 6AA 1276, ¶ 5 (emphasis in original)). There was no such nexus in *Perla Trust* itself. *See* 136 Nev. at 63–64.

Rather than analyzing this Court's on-point, controlling precedent, *Perla Trust*, NV Eagles attempts to rely on this Court's decision in *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217 (2020) (***Jessup I***). *See*

[4] NV Eagles goes further than the district court in its Answering Brief, claiming "*Perla Trust* simply does not apply here" because "futility cannot be applicable if Miles Bauer and BANA had their own policy of actually tendering." AB at 13. This is also easily disproven by *Perla Trust*, where this Court recognized that "Miles Bauer and BANA had their own policy of actually tendering" (*id.*). *See Perla Trust*, 136 Nev. at 64 ("Jung testified that by the time he sent the letter to NAS in the instant action, he had already sent around 1,000 nearly identical letters to NAS inquiring about HOA common assessment amounts owed on other properties in order to calculate the superpriority portion of the lien on those properties.").

AB at 13–14. NV Eagles claims *Jessup I*, not *Perla Trust*, is where this Court "defin[ed]" the tender "futility defense." *See id.* at 13. NV Eagles fails to mention that this Court vacated *Jessup I* on *en banc* reconsideration. *See id.*; *see also Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 462 P.3d 255 (table), 2020 WL 2306320, at *1 (Nev. May 7, 2020) (***Jessup II***) (vacating *Jessup I*).

Instead, NV Eagles claims the foreign cases cited in *Jessup I* "reveal that there must be a nexus between the alleged [tender-rejection] policy and a failure to tender," AB at 17, and thus support the district court's legal conclusion that tender-futility requires the debtor's reliance on the creditor's tender-rejection policy, *id.* at 14. According to NV Eagles, in "*every*" one of these cases, "the obligating party would have tendered but for the words or conduct of the other party," and "there was a direct link between the party's failure to tender and the conduct of the [other] party due to the tender." *See id.* at 16 (emphasis in original).

That is false. In reality, the "obligating party" **did** tender in "*every*" one of these cases. *See id.* (emphasis in original).

In *Guthrie v. Curnutt*, the debtor's agent met the creditor's agent and presented him with the full amount due, which the defendant's agent rejected. 417 F.2d 764, 765 (10th Cir. 1969). The Tenth Circuit held that the defendant's agent "wrongfully rejected a timely and sufficient tender." *Id.* at 766. Similarly, in *In re Pickel*, the debtor "tendered" the full amount due to the creditor and the creditor's attorney, "who

refused to accept it." 493 B.R. 258, 271 (Bankr. D.N.M. 2013). The court held that the creditor's "[w]rongful rejection of [this] cure tender d[id] not allow the [creditor] to proceed with default." *See id.*

Both *Guthrie* and *Pickel* accord with *Diamond Spur*'s holding that a valid tender that is wrongfully rejected cures a default. *See Diamond Spur*, 134 Nev. at 612. But tender sufficiency is not at issue in this appeal. Tender excuse is, and neither *Guthrie* nor *Pickel*'s underlying facts required addressing when a tender is excused because it would be futile. *See Guthrie*, 417 F.2d at 766; *see also Pickel*, 493 B.R. at 270.

However, it is worth noting that this Court quoted the following sentence from *Pickel* in the vacated *Jessup I* decision: "Tender is unnecessary if the other party has stated that the amount due would not be accepted." *See Jessup I*, 135 Nev. at 46 (quoting *Pickel*, 493 B.R. at 271). That accords with the rule this Court stated in *Perla Trust*, which remains good law: "[F]ormal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments." *See* 136 Nev. at 63. A creditor's "state[ment]" to a debtor "that the amount due would not be accepted," *Pickel*, 493 B.R. at 271, is equivalent to a debtor's "know[ledge]" of a creditor's "policy of rejecting" payments for the amount due, *Perla Trust*, 136 Nev. at 63. Either way, the debtor knows any tender will be rejected, so the futile act of formally tendering is excused. *See Perla Trust*, 136 Nev.

at 66 ("A formal tender is not necessary where a party has shown **by act or word** that it would not be accepted if made.") (quoting *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 350 N.W.2d 1, 5 (1984)) (emphasis added). Since Jung knew tendering a superpriority payment to NAS was futile, tender was excused here. *See id.*

Likewise, the final *Jessup I* case NV Eagles discusses, *Mark Turner Props., Inc. v. Evans*, accords with *Perla Trust* and supports Appellants' argument, not NV Eagles'. *See* AB at 15–16 (citing 274 Ga. 547, 554 S.E. 2d 492 (2001)). In *Evans*, the debtor was trying to redeem his property from a tax-sale purchaser. 274 Ga. at 493. The debtor sent a letter to the purchaser "asserting its desire to redeem the property for the amount required by law and asking her to provide the dollar amount necessary to redeem the property[.]" *Id.* The purchaser did not respond to the letter and avoided the debtor's other attempts to determine the amount due. *Id.*

The debtor brought suit and paid into the court registry the amount it believed to be sufficient to redeem the property. *Id.* The Georgia Supreme Court held that the purchaser "waived the requirement of tender" by "failing to name the amount she claimed to be due her," and that the debtor's miscalculation of the amount due did "not prevent it from redeeming the property" because it was "ready, willing, and able to pay" the actual amount due. *See id.* at 550–551.

That is exactly what happened here. NAS failed to identify the actual superpriority amount, and Jung made a good faith but mistaken calculation of the superpriority amount and tendered payment for the miscalculated amount. Jung was "ready, willing, and able to pay" more, *see Turner*, 274 Ga. at 551, but NAS failed to identify the actual superpriority amount. (4AA 856:11–857:5). Even if it had, NAS would have rejected a tender for that amount under its global tender-rejection policy, as discussed in Section II(A) above.

At bottom, neither *Turner*, *Pickel*, nor *Guthrie* controls here. *Perla Trust* does. Under that controlling authority, BoNYM's deed of trust survived. *See Perla Trust*, 136 Nev. at 67 ("[BANA] was excused from making a formal tender … because, pursuant to NAS's known policy, even if [Jung] had tendered a check for the superpriority portion of the lien, NAS would have rejected it.").

### C. NV Eagles' weak policy arguments in favor of adding a "reliance" element to *Perla Trust* fail.

NV Eagles next argues that "the reasoning behind the [tender] futility defense" shows it "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." AB at 23. If *Perla Trust* is "appl[ied] as a blanket defense" to "excus[e] the duty to tender," NV Eagles claims it would "eviscerate the creditor's right to reject insufficient tenders, in contradiction to *Diamond Spur* and [*Resources Group*], 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." *Id.*

This weak policy argument rests on several faulty premises. ***First***, NV Eagles misunderstands the "reasoning behind the [tender] futility defense[.]" *See id.* The first principle underlying the tender-futility doctrine is that "[t]he law does not require one to do a vain and futile thing." *See Perla Trust*, 136 Nev. at 66 (quoting *Schmitt*, 223 P.2d at 406–07). That is why "[a]n actual tender is unnecessary where it is apparent the other party will not accept it." *See id.* (quoting *Schmitt*, 223 P.2d at 406–07 ); *accord id.* ("If a demand for a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with the tender requirement.") (quoting *Shields v. Harris*, 312 Utah Adv. Rep. 24, 934 P.2d 653, 655 (Utah Ct. App. 1997)).

***Second***, there is no risk of *Perla Trust* becoming an "unruly precedent" by applying it here, as Appellants' theory is not "based on arguments formulated a decade after the events took place" that were "never in the contemplation of the parties at the time of those events[.]" *See* AB at 23. Uncontroverted evidence proves the futility of tendering to NAS was "in the contemplation of" BANA, Miles Bauer, and NAS "at the time of" Jung's interactions with NAS here. *See id.*

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Jung sent his first letter regarding Madeira's lien to NAS on February 22, 2011, and NAS provided its vague statement of account the same day. (*See* 2AA 451–467). Less than a month before, BANA had filed suit against NAS and dozens of other collection agents and HOAs, seeking a declaration regarding the priority and scope of HOA superpriority liens. (*See* 3AA 692–701). In its complaint, BANA explained its policy of "tender[ing] payment of the super-priority amount" of HOA liens "[t]o fulfill its obligations to protect deeds of trust," and NAS's policy of "wrongfully reject[ing]" such tenders. (*See* 3AA at 698, ¶¶ 54–57).

NAS moved to dismiss BANA's complaint just over a week before Jung tendered a check to NAS for the Madeira lien here. (*See* 4AA 728–744). In its motion, 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 a "Super Priority Lien is **triggered** by foreclosure of the first deed of trust." (4AA 731 (emphasis in original)). And NAS made clear it would not accept BANA's superpriority tenders through Miles Bauer: "[BANA's] allegations that" NAS has "incorrectly rejected [Miles Bauer's] tender of certain payments are simply incorrect," because "[p]rior to [BANA's] foreclosure" of a relevant deed of trust, "there is no application of NRS § 116.3116, as the event triggering [BANA]'s interest in a property has not yet taken place and the calculation of the Super Priority Lien is not yet possible." (*See* 4AA 736).

BANA's 2011 lawsuit against NAS clearly shows NV Eagles' contention that "BANA's futility claims are simply arguments of sheer convenience contrived more than a decade after the events in this case" is wrong. *See* AB at 12. And this Court has held that BANA's declaratory judgment lawsuit alone "is sufficient to demonstrate that NAS had a 'known policy of reject[ion]' sufficient to excuse formal tender under [*Perla Trust*]" in cases involving BANA. *See U.S. Bank, N.A., as Tr. v. SFR Investments Pool 1, LLC*, 464 P.3d 125 (table), 2020 WL 3003017, at *1 (Nev. June 4, 2020) ("The necessary implication of [NAS's pleadings] is that NAS would not accept a superpriority tender before the first deed of trust was foreclosed.").

***Third***, applying *Perla Trust* here would not "eviscerate [a] creditor's right to reject insufficient tenders." *See* AB at 23. *Perla Trust* simply prevents a debtor that has a tender policy from being punished for a creditor's "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.*

While NV Eagles tries to make it seem like NAS rejected Jung's tender because it was for slightly less than the superpriority amount, Moses' testimony confirms that was not the reason. (*See* 4AA 826:14–828:19). Jung's tender here was

rejected for the same reason NAS rejected thousands of others – it was not for the full amount of the HOA's lien. (*See id.*; *see also* 4AA 853:14-22, 856:11–857:5).

## III. BANA WAS NOT REQUIRED TO "DO MORE" TO PROTECT THE DEED OF TRUST AFTER TENDER WAS EXCUSED BY NAS'S TENDER-REJECTION POLICY.

Finally, NV Eagles contends that "[e]ven if *Perla Trust* could be applied to 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." *See* AB at 28. Again, the district court did not find that NAS "rejected" Jung's tender because it was "insufficient to cure the super-priority default," and if it had, that finding would have no evidence, much less "substantial evidence," to support it. *See supra* Section II(A).

To defend the district court's "note[ ]" that "BANA should have taken additional steps to protect itself," AB at 28, NV Eagles 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). NV Eagles claims *SFR I* "held that a bank must do more to prevent the loss of its security," AB at 29, 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.

NV Eagles ignores this Court's post-*SFR I* decisions that make clear that a senior lender does not have to pay "the entire amount" of an HOA's lien to protect its deed of trust. *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 if a senior lender has a policy of tendering superpriority payments, but knows such tenders are futile due to a collection agent's policy of rejecting anything less than the full lien amount, there is a case directly on-point: *Perla Trust*. 136 Nev. at 67. In that situation, the deed of trust survives. *Id.* That is the situation here.

NV Eagles turns next to *Shadow Wood*, describing it as a case where "the bank actually tendered the nine months of assessments, 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." AB at 29–30. This Court "held that the bank is required to do more to protect its security interest," at least according to NV Eagles. *Id.* at 30.

NV Eagles' description of *Shadow Wood* is highly misleading at best. The "bank" in *Shadow Wood* had no "security interest" because it was not a deed of trust beneficiary. *See id.* Instead, it owned the subject property. *See* 132 Nev. at 61 (noting "NYCB" – the entity NV Eagles refers to as "the bank" – was "the owner of

the property"). That is a critically important distinction when determining the amount a "bank" must pay to protect its interest from an HOA's foreclosure. If the "bank" is the beneficiary of a senior deed of trust, it must pay the superpriority amount to protect its deed of trust. NRS 116.3116 (2). If the "bank" is the title owner, as in *Shadow Wood*, it must pay the entire amount of the HOA's lien to protect its title interest. 132 Nev. at 61.

So yes, this 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 interest from the HOA's foreclosure. *See* AB at 30. But that is irrelevant to what actions Appellants had to take to protect the deed of trust from NAS and Madeira's foreclosure here. As this Court has repeatedly held, a "bank need not take further action" to protect its deed of trust "in cases of … tender futility." *See, e.g.*, *U.S. Bank, N.A., as Tr. v. Thunder Props., Inc.*, 138 Nev. Adv. Op. 3, 503 P.3d 299, 307 n.4 (2022); *accord id.* at 307 ("[A]n HOA foreclosure … *does not*" extinguish a senior deed of trust "if tender was excused" under *Perla Trust*.) (citing *Perla Trust*, 136 Nev. at 63) (emphasis in original).

Next, NV Eagles turns back to the district court's oral "findings" that preceded the written judgment this Court vacated. It claims the district court found from the bench that BANA and Miles Bauer "had plenty of time to cure the problem and send over the right amount or otherwise deal with it, which [BANA] didn't do." AB at

28–29 (quoting 4AA 909). But when this Court vacated the original judgment in NV Eagles' favor, it explained that Appellants had presented "evidence—including testimony from [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.'" (5AA 963 (quoting *Perla Trust*, 136 Nev. at 67)).

NAS's tender-rejection policy meant BANA could not "cure the problem" with Jung's mistakenly miscalculated check. Moses testified unequivocally that NAS would never accept a superpriority tender from Miles Bauer. (4AA 827:19–828:19). 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; (*see also, e.g.*, 4AA 853:14-22, 856:11–857:5). NV Eagles thus "purchased the property subject to [BoNYM's] deed of trust" under *Perla Trust*.

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## CONCLUSION

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

DATED this 28th day of November, 2022.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) as modified by this Court's order because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 5,069 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of November, 2022.

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## CERTIFICATE OF SERVICE

I certify that I electronically filed on November 28, 2022, the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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

*/s/ Esther Ibarra*
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