IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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RULES:

OTHER:

I. STANDARD FOR EN BANC RECONSIDERATION

Respondent, NV EAGLES, LLC, (hereinafter "EAGLES") hereby Petitions the Supreme Court for En Banc Reconsideration of the Panel Opinion released on March 3, 2023.

Pursuant to NRAP 40A(a) the Court may grant a Petition for En Banc Reconsideration by the full panel of justices when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.

The Panel entirely failed to address the District Court's analysis of *Perla Del Mar* to this case and instead, focused exclusively on dicta by the District Court judge concerning the issue of 'reliance' - which was *not* the District Court's reason for making its determination - yet it is the only issue addressed by the Panel. After considering the facts of this case, the District Court correctly determined that *Perla Del Mar* simply does not apply.

The District Court followed the instructions of the remanding Court, to examine the particular facts of this case, which included a failed and rightfully rejected, insufficient tender, and determine how *Perla Del Mar* would apply to such a scenerio, if at all. The District Court then went on to discuss how reliance should

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also have been a factor, but did not base its decision thereon, but rather, on the fact that the HOA had every right to reject the tender. Therefore, futility is not an issue. As such, this Court has still not addressed the core issue in this case and, until then, a remand will not produce a different result.

II. ARGUMENT

A. The Panel Should Have Affirmed The District Court's Judgment Based On The Undisputed Fact That a Tender Was Made In An Amount Insufficient To Cure The Default and Therefore, Rightfully Rejected.

It is uncontested that BANA made a tender that was insufficient to cure the super-priority default. The issue of reliance upon a policy of rejection was only secondarily discussed by the District Court on remand. It is not the basis of the District Court's decision. This fact was overlooked by the Panel as the reliance issue is the only issue discussed in the Panel's most recent order. EAGLES requests En Banc reconsideration and reexamination of the District Court's findings.

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 Del Mar* to the facts of this case. After the parties filed their respective briefs Judge David M. Jones made the following relevant Findings of Fact, Conclusions of Law and Entered the following Order:

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FINDINGS OF FACT

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

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

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

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

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

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

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.** (Emphasis added).

Thus, Judge David M. Jones did what the prior appellate panel directed the District Court to do. He considered BANA's futility arguments in light of *Perla Del Mar* and found them unpersuasive given the particular facts found in this case and the Court should have affirmed the judgment. The District Court found that *Perla Del Mar* does not apply to a case where a tender, which was insufficient, was rightfully rejected.

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B. *Perla Del Mar* Should Not Be Applied To Resurrect a Failed Tender.

It is a well-established fact in this case, as well as many others, that regardless of any policy on the part of NAS, BANA acted according to its own policy and made thousands of tenders to NAS and never believed tendering would be futile. BANA did in fact make a tender in this case what was inadequate and NAS had every right to reject it.

BANA's futility claims are, and have always been, simply arguments of sheer convenience contrived more than a decade after the events in this case. It is only recently that BANA has started arguing that any amount would have been futile. In reality however, the facts reveal that at the time in question, neither BANA nor Miles Bauer ever even considered any NAS policy when determining whether and in what amount to tender. It was consistently 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 did, in fact, make thousands of tenders based on their own interpretation of the law.

The District Court properly concluded that *Perla Del Mar* 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

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fact tender, but made an inadequate tender that NAS had every right to reject." (AA1264, at Conclusion of Law #9). The holding of *Perla Del Mar* cannot be applied to this case because there is no factual correlation to the respective cases.

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:

> 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.

(AA0817)

Rock Jung, Esq., 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. 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.

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(AA0845)

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

(AA0847-0848)

It was error for the Panel to disregard this testimony, as it 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.

In this case, the amount tendered by Miles Bauer was obviously insufficient to cure the super-priority default. NAS' policy had nothing to do with the inadequate tender. 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,

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Conclusion of Law #9).

C. NAS' Did Not Have A Policy of Rejecting Anything Less Than The Full Amount of the Lien.

It is further error to conclude that NAS had a policy of rejecting any and all tenders. The trial testimony of NAS's representative presented in this case, Susan Moses, reveals that NAS did *not have a policy of rejecting all tenders*, rather 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**

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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 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.

If the lower courts are required to blindly apply *Perla del Mar*, a bank could

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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.

The District Court has now, on two separate occasions, found that the tender in this case was rejected because it was insufficient to cure the super-priority default, and the previous Appellate Court agreed. [1] Therefore, rejection of the tender was proper and the deed of trust was extinguished. It was the bank's policy, in this case, to tender less than the amount due.

The only futile act in *this case*, is the bank's insufficient tender of an amount less than what was due and expecting that to protect its lien.

The District Court properly found that this is just a case of Miles Bauer making an insufficient tender. The March 3, 2023 Panel opinion ignores this fact. Miles Bauer and BANA were simply not reasonable stewards of their own common interest. District Courts should not be required to blindly apply *Perla Del Mar*, when the substantial evidence reflects that Miles Bauer did, in fact, make an inadequate tender.

The District Court, when speaking of the issue of reliance, had already made

[1]In its prior Order Vacating and Remanding, dated June 16, 2021, the three justice panel stated, "[i]nitially, 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 fo the lien."

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a determination that the tender was rightfully rejected and therefore *Perla del Mar* did not apply. One need not speculate about the reason this tender was rejected- or would have been rejected if never made. One need only determine, as the District Court did, that the tender was insufficient and therefore rightfully rejected.

D. Blindly Applying *Perla Del Mar* Creates Absurd Results.

This Court should go further and state that reliance is a factor, even if not a factor in this case. 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 such knowledge is meaningless. Learning of the policy after the time to perform would still not change the fact that the policy existed and the tender was rejected. The obvious reason to require knowledge at the time of required tender is that the courts are attempting to narrow the rule to only those occasions where the knowledge of the policy had an impact on the outcome – meaning the policy is what caused the party not to tender. This has not been explicitly stated by 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 Del Mar* needs to be narrowly applied so that the rule only applies to situations where the knowledge of the policy of rejection actually had an impact on the parties' conduct.

This Court remanded this case in order for the District Court to consider

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whether *Perla Del Mar* fits this factual scenario where an insufficient amount was actually tendered and rejected. The District Court did exactly as directed, it applied the facts of this case and determined that *Perla Del Mar* cannot apply. There is nothing in *Perla Del Mar* to excuse an inadequate tender that was actually made.

In its March 23, 2023, opinion the Court states:

> *Perla Trust* does not contain an explicit reliance requirement. Nor does it imply one by basing its application of the futility doctrine in that case on the Bank's reliance on the known policy of rejection.

What the Court appears to be saying is that there is a rule without a rationale and because *Perla Del Mar* does not require reliance there should be no other factors to be considered in determining the futility doctrine. However, the reliance factor has always been an important part of the rationale behind the futility doctrine. When the reasoning behind the futility defense is properly considered, it becomes abundantly clear 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. Applying a blanket defense and excusing the duty to tender would eviscerate the creditor's right to reject insufficient tenders, in contradiction to *Bank of America, N.A. v. SFR Investments Pool 1*, 427 P.3d 113 (2018) ("*Diamond Spur"*) and *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019) ("*Resources Group*"), and set an unruly precedent whereby a theory

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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.

The original trial court found that the tender was rejected because it was insufficient to cure the super-priority default. 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, particularly in light of this Court's concurrence with the conclusion that the amount paid was insufficient to constitute a valid tender.

E. This Court Has Recognized There Must Be a Causal Connection.

It has long been held that there must be evidence that there was a causal connection between the futility of tender and the failure to tender. The tender would have been made <u>but for</u> the policy of rejection.

> [T]here must be what shall be called an actual offer of the actual money; it must amount to that. "Mere readiness and willingness to

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> pay the debt amount to nothing without an offer or tender of payment, and a refusal by the creditor." *25 Am. & Eng. Enc. Law*, 916; *Moore v. Harnsberger's Ex'rs*, 26 Gratt. 667; *Moynahan v. Moore*, 77 Am. Dec. 474. Though it is claimed in this case that the parties entitled to the money at the time of this alleged tender refused to allow a redemption, and that such refusal dispenses with the production of actual money, yet it must be clear that the offer to pay was an actual offer, with money present on the person of the tenderer, though not presented to sight. If the party had not the money, and his proposals to pay were a mere pretense, surely it would be no good tender. **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 Court has followed the same principles. In *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 435 P.3d 1217 (referred to hereafter as "*Jessup I*") the authorities cited by this Court in defining the futility exception 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 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

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> 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 - the known policy. Thus, even though *Perla Del Mar* may not contain an *explicit* reliance requirement, there must still be a nexus between the alleged policy and failure to tender. But still, there was a tender in this case, in an insufficient amount.

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 tendered. Thus, the exception cannot apply in a case where a failed tender was made and rightfully rejected.

III. CONCLUSION

The Court ignored the District Court's findings of fact that there was a tender made by Bank of America, N.A. ("BANA") that was insufficient to cure the Super

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Priority default that was rightfully rejected by Nevada Association Services, Inc. ("NAS"), regardless of whether BANA believed tender would have been futile in the correct amount. After considering the facts of this case, the District Court correctly determined that *Perla Del Mar* does not apply. This decision is not hinged upon whether or not BANA relied on NAS's policy. To construe the ruling as such, as this Court has, is incorrect.

The issue of reliance upon a policy of rejection was only secondarily discussed by the District Court on remand. It is not the basis of the District Court's decision. This fact was overlooked by this Court as the reliance issue is the only issue discussed in this Court's most recent order.

However, *Perla Del Mar* needs to be narrowly applied so that the rule is only employed where the knowledge of the policy of rejection actually had an impact on the parties' conduct. Here, there is zero evidence that any policy on the part of NAS had any impact on the decision making process between BANA and Miles Bauer, who made thousands of tenders. But, in this case, the tender made was insufficient to cure the super-priority default.

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Based on all the foregoing, appellant NV EAGLES, LLC requests that the Court grant its Petition for En Banc Reconsideration.

DATED this 8th day of May, 2023.

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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 4,405 words.

3. Finally, I hereby certify that I have read this Petition for En Banc Reconsideration, 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 accompanying brief is not in conformity with the requirements of the Nevada Rules

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of Appellate Procedure.

DATED this 8th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on May 8, 2023, the foregoing **RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION** 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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