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 CERTIFICATEHOLDERS OFCWALT, INC., ALTERNATIVE LOAN TRUST 2006 J-8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J8, Appellants, vs. NV EAGLES, LLC, Respondent.	CASE NO. 81239 (Appeal from 8th Judicial District Court Case No. A-13-685203-C)

RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. STANDARD FOR EN BANC RECONSIDERATION 1

II. ARGUMENT 2

A. BANA Should Be Required to Show Reliance on A Rejection Policy to Establish Futility and Excused Tender 2

B. BANA And Miles Bauer Have Never Believed Tendering Would Be Futile and Could Not Have Relied on a "Known Policy" of Rejection 6

C. The District Court's Judgment Was Based On The Undisputed Fact That a Tender Was Made In An Amount Insufficient To Cure The Default of The Super-Priority Component of The Association's Lien 6

D. The Tender Was Rejected Because It Did Not Cover The Super-Priority. The District Court Stated Such As A Finding of Fact On The Record 7

E. Futility Was Addressed By The District Court and Determined, As A Factual Matter, Not To Be Applicable In This Case 8

F. Perla Del Mar Should Not Be Applied To This Case 11

1. This Court Reversed *Jessup I* While Considering *Perla Del Mar* 12

III. CONCLUSION 14, 15

CERTIFICATE OF COMPLIANCE 16, 17

CERTIFICATE OF SERVICE 18

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TABLE OF AUTHORITIES

CASES:

Bank of America, N.A. v. Thomas Jessup, LLC Series VII,
135 Nev. Adv. Op., (March 7, 2019)("*Jessup I")*. 4, 9, 12

Bank of America, N.A. v. Thomas Jessup, LLC Series VII,
(*en banc* reconsideration), on May 7, 2020 ("*Jessup II*"). 3, 12

7510 Perla Del Mar Ave. Tr. v. Bank of America, N.A. ("*Perla Del Mar"*),
136 Nev. 62, 458 P.3d 348 (2020). . . . . *en passim*

Resources Group, LLC v. Nevada Association Services, Inc.,
437 P.3d 154 (Nev. 2019) 8, 9, 10, 11

Shank v. Groff,
32 S.E. 248, 249 (1898). 4

RULES:

NRAP 28(e)(1) 16

NRAP 32 (a)(4) 16

NRAP 32(a)(5) 16

NRAP 32(a)(6) 16

NRAP 32(a)(7) 16

NRAP 32(a)(7)(c) 16

NRAP 40A(a) 1

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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 June 16, 2021.

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.

EAGLES submits that the Panel misapprehended material questions of fact and law in determining that the district court's judgment should be vacated and the case remanded in order that the district court can apply *7510 Perla Del Mar Ave. Tr. v. Bank of America, N.A.* ("*Perla Del Mar"*), 136 Nev. 62, 458 P.3d 348 (2020) to the facts of the case. Further, the panel made incorrect findings of fact regarding the reason for rejection of the tender and whether the district court considered BANA's futility arguments. The ruling by the panel is inconsistent with other rulings by this Court and would clearly have the effect of disrupting existing public policy.

/ / /

II. ARGUMENT

A. BANA Should Be Required to Show Reliance on A Rejection Policy to Establish Futility and Excused Tender.

In this case, and many others involving Nevada Association Services, Inc. ("NAS") and Miles Bauer Bergstrom & Winters ("Miles Bauer") the Bank of America ("BANA") and its successors have been able to show, through depositions from multiple cases spanning several years, that NAS, at various times, had a policy of rejecting super-priority tenders. And the banks have shown that BANA and Miles Bauer were aware of the policies of NAS during specific time periods. However, the banks have never shown that BANA or Miles Bauer ever relied on any such policy of rejection on the part of NAS as a reason for not making a super-priority tender. To the contrary, as shown herein, BANA, through Miles Bauer, has acknowledged making several thousand tenders in spite of any policy on the part of NAS. But, even if BANA or Miles Bauer could honestly have relied on NAS's policies as a reason for not tendering, one cannot reasonably assert that reliance on NAS's policy is the reason they nonetheless *actually tendered*. And, in this instance, one surely cannot justifiably claim reliance on NAS's policy as an excuse for tendering an amount insufficient to cure the super-priority default.

Applying *Perla Del Mar* to cases such as this, where tender was actually made, is making the exception the rule. This Court has not fully expressed the proper parameters of when the futility exception applies, and thus, it is being applied, as in

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the Panel's decision, far too broadly, to the point where the exception has become the rule. While the Court has stated the policy has to be known by the obligor, this Court has never explained why that "knowledge" is an element. The only logical reason is because the obligor would have to rely on that knowledge in not tendering and that theory is borne out in the authorities cited to by this Court in expressing the futility rule.

In *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, (*en banc* reconsideration), on May 7, 2020 ("*Jessup II*"), this Court again held that there must be evidence that establishes a known policy of rejection before tender will be excused. While the district court did not specifically address the issue of *reliance* on a known policy as the basis for failing to tender, it is implicit when establishing a rule which requires knowledge of a policy that in fact that knowledge had some role in why the tender was not made. Otherwise, the knowledge element has no useful purpose in the analysis and it should be removed from same.

This is not a futility case. This is a case of Miles Bauer making an insufficient tender. Miles Bauer and BANA were simply not reasonable stewards of their own common interest. The district court should not be required to blindly apply *Perla Del Mar*, when the substantial evidence reflects that Miles Bauer did, in fact, tender.

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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. In other words, the tender would have been made but for 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 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*, 135 Nev. Adv. Op., (March 7, 2019)("*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

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> 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 - the known policy. Thus, there must be a nexus between the alleged policy and failure to tender. But, there was a tender in this case, just 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.

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B. BANA And Miles Bauer Have Never Believed Tendering Would Be Futile and Could Not Have Relied on a "Known Policy" of Rejection.

BANA's futility claims are simply arguments of sheer convenience contrived more than a decade after the events in this case. While BANA suggests that any amount would have been futile, the facts reveal that 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. In fact, BANA hired Miles Bauer to pay the super-priority lien in this case. This clearly begs the question that if it were futile to tender, why did BANA hire Miles Bauer to pay the super-priority amount, albeit in an insufficient amount?

C. The District Court's Judgment Was Based On The Undisputed Fact That a Tender Was Made In An Amount Insufficient To Cure The Default of The Super-Priority Component of The Association's Lien.

Despite being provided with uncontested evidence that BANA actually made a tender that was insufficient to cure the super-priority default, the Panel nonetheless determined that this case should be remanded so that the district court could reconsider the facts under *Perla Del Mar*. This decision makes the exception to tendering (futility) now the rule. The facts of this case simply do not justify vacating nor remand. In its opinion, the Panel provided the following footnote:

> *n2.* The district court found, and the parties do not dispute, that appellants' check was $54 short of the superpriority amount.

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Based on this finding alone, by both the district court and the Panel, all analysis should have ended, because this finding clearly reveals that a tender was in fact made and it was insufficient to cure the super-priority component of the prior owner's default.

D. The Tender Was Rejected Because It Did Not Cover The Super-Priority. The District Court Stated Such As A Finding of Fact On The Record.

When rendering its decision in open court, the district court 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.

(RA 901-902)

> 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.

(RA 904, 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

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> affirmative evidence that a primary reason was it wasn't the right amount.

(RA-905, emphasis added)

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

(RA 907)

Thus, a finding by the Panel that the reason for rejection of the tender was because it was not for the full amount of the lien is incorrect. [1] The district court actually found that the tender was rejected because it was insufficient to cure the super-priority default and the deed of trust ("DoT") was extinguished.

E. Futility Was Addressed By The District Court and Determined, As A Factual Matter, Not To Be Applicable In This Case.

The Panel further erred when it concluded that the district court made no findings concerning futility. The district court actually addressed this issue when discussing both *Resources Group, LLC v. Nevada Association Services, Inc*., 437

[1] It is important that the Panel's finding is corrected because its Order, if the case is remanded, becomes law of the case and the judge who heard the case is no longer on the bench. Thus, it is imperative that the record on remand correctly reflect the prior proceedings and that the replacement judge apply the facts in that lens. A remand, after having had a trial on the merits, should not be an opportunity for a party to change the facts as determined by the fact finder who presided over the trial.

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P.3d 154 (Nev. 2019) ("*Resources Group*") and *Jessup I*. The district court judge stated:

> Now, going back to the Bank's brief. . . part of the argument the bank had in the case was look, yeah -- and this is my way of paraphrasing it, you know, yeah, we see that we might have sent less than what was required, we sent 486 instead of 540, but that's insignificant because the practice was to reject anyway, so basically they were going to reject it even if it was the right amount. I see that. But, I'm going to tell you there's evidence in the case to suggest something different than that and that is at 141.There is an exhibit in here that I think tells a bit of a story on this and that is Exhibit 9, page 141, and if you look at that exhibit you can see that there's a notation on this slip that gives us insight as to why the item was rejected. And, what it says there, again on page 141 of Exhibit 9 at the bottom, on this little slip: won't accept, not paid in full, per Carly. So, that's evidence that the reason the 486 is not accepted is because it's not enough. And, that's -- that is evidence of that. 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.

(RA 904-905)

> But, looking at the *Jessup* case -- all right, we have the Rock Jung scenario, the key to our situation, again, not using *Jessup* as controlling authority but getting some, you know, message from the Court. On page four of *Jessup*, it gets into something I want to make a finding on, separate and distinct from even this guidance that I get from *Jessup*. But, *Jessup* does say on page four, that following the facts, neither Miles Bauer nor the bank took any actions to protect the first deed of trust.
>
> So, that -- just by way of some guidance, does say that here Mr. Jung sent the letter, he gets back the rejection, and we look at all the evidence in the case and it's clear that there was plenty of time now to deal with that rejection to, you know, maybe re-look at the page -- what we have in here as page 134 of Exhibit 9, or to

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> do something to further inquire or otherwise deal with the fact that the thing got rejected, at least as I said, primarily because it wasn't the right amount. 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 once they knew the thing got rejected. And so, it becomes a insufficient tender.

RA 907-908

While the district court did not have the benefit of *Perla Del Mar* or *Jessup 2*- it did have *Jessup 1* and considered it. The district court considered the futility arguments and rejected them because of the fact that the case law has two different fact patterns: 1) invalid tender and thus the DoT was extinguished, and 2) failure to tender because of a known policy of rejection rendering duty to tender relieved. We have fact pattern one in this case, a failed tender. The analysis ends here unless the court wishes to address the missing element of the futility exception, which is, reliance on the policy of rejection in deciding not to tender. Because if the analysis does not require reliance the policy of rejection has <u>no impact</u> on the actions of the parties, yet it controls the outcome, *ex post facto*, will rule the day. Sound logic dictates that this is an absurd result. Reliance must be required to 1) create consistency between *Resources Group* and *Jessup*, and 2) to avoid a policy that has no impact on the parties' action or contemplation, ending up ruling the day - the proverbial tail wagging the dog.

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F. Perla Del Mar Should Not Be Applied To This Case.

Even if *Perla Del Mar* could be applied here, the legal principle of "excused tender" as provided in *Perla Del Mar* is overwhelmingly fact/evidence-dependent because if applied as a broad sweeping principle, "excused tender" would conflict with existing and controlling Nevada law. 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 district court made the correct finding.

Perla Del Mar confirms *Resources Group,* "[w]e conclude that an offer to pay the superpriority amount in the future once that amount is determined, does not constitute tender sufficient to preserve the first deed of trust..." *Perla Del Mar*, 136 Nev. Adv. Op. 6 at page 2. (emphasis added). 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*. This Court expressly points out that

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"excused tender" is based on the specific facts and specific evidence. *Id*. The facts in *Perla Del Mar* and the instant case are far from similar.

Reliance on the "futility" argument requires the bank to establish that futility is the reason Miles Bauer did not tender. There must be a nexus between the "knowing" and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles Bauer actually tendered. *Perla Del Mar* simply does not apply here.

1. This Court Reversed *Jessup I* While Considering *Perla Del Mar*:

As noted above, the district court relied on *Jessup I* and concluded that futility was not applicable. However, *Jessup I* was subsequently overturned by this Court on reconsideration. In *Jessup II*, this Court held that there must be evidence in the record of a known policy of rejecting a super-priority tender such that a formal tender should have been excused. In fact, this Court in *Jessup II* cited to *Perla Del Mar* stating "[f]ormal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments," but nonetheless ruled against the bank. The Court stated:

> Although appellants argue that ACS intentionally refused Miles Bauer's superpriority tender, Miles Bauer did not make such a tender, and as noted above, we perceive no clear error in the district court's finding that appellants did not demonstrate that ACS had a known policy of rejecting superpriority lien tenders such that Miles Bauer's failure to formally tender should be excused.

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Id at 4-5.

The bank must demonstrate a "known" policy, upon which the tendering party was aware before tender will be excused. Inherent in the requirement that the creditor "had a known policy" of rejection are two elements that must be proven by the bank. The use of the word "had" means that the policy was in existence at the time that the tender was due. "Known" means that the policy was understood by person withholding tender. Why does the Court require that the person withholding tender to have known that the creditor had a policy of rejecting tender? The only logical explanation is to require the person withholding tender to prove that the *reason* it withheld tender was *because* it knew tendering payment would be rejected and thus the act was futile. The law does not make one engage in futile acts. The law also does not reward those who fail to protect themselves with windfalls by uncovering facts years later of which they never relied. To do so would be to relieve one party of its duty to act in good faith, encourage bad behaviour, breaches or tortious conduct in the hopes of later redeeming oneself through protracted litigation or chance. Clearly, the reason to require proof that the creditor "had a <u>known</u> policy" is to require the one claiming futility to prove reliance on the belief that making payment would be futile. This, the bank has failed to do in this case.

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III. CONCLUSION

This Court and others having adopted a futility exception to the duty to tender payment, have all required that the non-tendering party establish that there was a policy of rejection, known by the non-tendering party, at the time of performance. Unless reliance upon the policy is required to be established, then whether the policy was known or unknown is irrelevant and the requirement of establishing same meaningless. Whether a policy was known to the party charged with tender, or unknown to him, the tender would still be rejected so long as the policy existed. Thus, the question is why must the policy be known by the party charged with tender- at the time of performance. Learning of the policy after the time to perform would still not change the fact that the policy existed and the tender was rejected. So, why then does this Court and all other adopting a futility exception require the non-tendering party to show it knew of this policy at the time, and did not learn about it later? The obvious reason 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 other, but for clarity's sake and to ensure the exception does not become the rule, *Perla Del Mar* needs to be narrowly applied

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so that the rule only applies to situations where the knowledge of the policy of rejection actually had an impact on the parties' conduct.

Appellant NV EAGLES, LLC requests that the Court grant its Petition for En Banc Reconsideration and Affirm the district court judgment. In the alternative, the direction on remand should not be to apply *Perla Del Mar,* but rather, to first determine whether *Perla Del Mar* applies to the facts of this case in light of the lack of any reliance upon a policy of rejection.

DATED this 12th day of October, 2021.

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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 4,179 words.

3. Finally, I hereby certify that I have read this Petition for Rehearing, 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.

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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 of Appellate Procedure.

DATED this 12th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 12, 2021, 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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