IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: Manhattan West Mechanic's Lien Litigation

APCO CONSTRUCTION, A NEVADA CORPORATION; ACCURACY GLASS & MIRROR COMPANY, INC.; BUCHELE, INC.; BRUIN PAINTING CORPORATION; CACTUS ROSE CONSTRUCTION; FAST GLASS, INC.; HD SUPPLY WATERWORKS, LP; HEINAMAN CONTRACT GLAZING; HELIX ELECTRIC OF NEVADA, LLC; INTERSTATE PLUMBING & AIR CONDITIONING; SWPPP COMPLIANCE SOLUTIONS, LLC; AND WRG DESIGN, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE,

Respondents,

and

SCOTT FINANCIAL CORPORATION, A NORTH DAKOTA CORPORATION; AHERN RENTALS, INC.; ARCH ALUMINUM AND GLASS CO.; ATLAS CONSTRUCTION SUPPLY, INC.; BRADLEY J. SCOTT; CABINETEC, INC.; CELLCRETE FIREPROOFING OF NEVADA, INC.; CAMCO PACIFIC CONSTRUCTION CO., INC.; CLUB VISTA FINANCIAL SERVICES, LLC; CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC; CUSTOM SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.;

No. 61131

District Court No. 08A571228
Consolidated with:
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08A577623
09A579963
09A580889
09A583289
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09A587168
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A-09-589677-C
A-09-590319-C
A-09-592826-C
A-09-596924-C
A-09-597089-C
A-09-606730-C
A-10-608717-C
A-10-608718-C

SCOTT FINANCIAL CORPORATION'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; HYDROPRESSURE CLEANING; INQUIPCO; INSULPRO PROJECTS, INC.; JEFF HEIT PLUMBING, CO., LLC; JOHN DEERE LANDSCAPE, INC.; LAS VEGAS PIPELINE, LLC; NEVADA PREFAB ENGINEERS; NOORDA SHEET METAL COMPANY; NORTHSTAR CONCRETE, INC.; PAPE MATERIAL HANDLING; PATENT CONSTRUCTION SYSTEMS; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, INC.; REPUBLIC CRANE SERVICE, LLC; STEEL ENGINEERS, INC.; SUPPLY NETWORK, INC.; SUNSTATE COMPANIES, INC.; THARALDSON MOTELS II, INC.; THE PRESSURE GROUT, COMPANY; TRI CITY DRYWALL, INC.; UINTAH INVESTMENTS, LLC; AND ZITTING BROTHERS CONSTRUCTION, INC.,

Real Parties in Interest

SCOTT FINANCIAL CORPORATION'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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CASE LAW

Scott Financial Corporation ("SFC") submits the following answer to petitioner's petition for rehearing *en banc*.

INTRODUCTION

Petitioners claim to speak for Nevada workers on the issue of how multiple lien claimants should be treated for priority purposes. They do not. They speak only for themselves. The result they urge this Court to adopt would devastate this claimed constituency.

This Court need not grant *en banc* reconsideration in this case because the panel properly settled the important precedential question of which subordination rule is best for Nevada as a matter of essential public policy. Our local businesses, contractors and workers depend on the ability of developers to finance the initiation and completion of major construction projects, often with multiple lenders. The importance of this major policy consideration cannot be overstated. The complete subordination rule urged by petitioners would seriously restrict the willingness of construction lenders to infuse new capital into these projects. No lender would provide supplemental infusions of capital into a real estate development without effective subordination agreements that preserve the status quo of lien priorities as between lienholders, which includes other lenders, contractors and workers. Stated differently, no supplemental lender would infuse

capital into a project knowing that it could not assume the initial priority position of an existing first lien holder and would be automatically wiped out in favor of a second position lienholder in the event of a default.

The rule proposed by petitioners would correspondingly create a systemic nightmare for the very constituency of contractors and workers petitioners claim to represent. As stated, petitioner's proposed total subordination rule would chill the ability to finance major projects and effectively restrict the industry's ability to start and complete them. Before the second financing package in this case came on board, no one wanted it more than the mechanic's and materialman lienholders. Without the ability to subordinate on a partial basis, the job would have been over. The partial subordination rule adopted by the Panel makes these projects possible. As to the claimed constituency of contractors and workers on failed projects that find themselves in second position to the extent of the original financing, they have lost nothing because their priority to collect remains unaffected.

This is not a case of mechanic's lienholders versus other creditors. The rights of mechanic's lienholders are neither advanced nor prejudiced by the decision of the Panel.

The core issue in this case involves the contractual rights of lenders to reorder their lien priority through assignments and thereby create credit

opportunities that would otherwise not exist. The rights of lienholders who are not participants in such contractual assignments are unaffected. The happenstance in this case that the junior lienors are mechanic's lienholders need not weigh into this Court's decision.

The Panel recognized that its ruling on whether to adopt the majority position of partial subordination or the extreme minority position of complete subordination was divorced from whether or not petitioners' claims were based on work performed on the premises. Therefore, the Panel correctly decided the pivotal issue–which is relevant to all claims regardless of their character –independently of any mechanic's lien issue. Having determined that Nevada should embrace the enlightened majority view adopting partial subordination, the Panel turned to the question of application of this ruling to mechanic's liens. The Panel recognized that this ruling does not impact mechanic's liens.

Petitioners voluntarily came into the project knowing their priority position was second to SFC's. For the benefit of petitioners and to save the project, SFC brought in new investment capital. As a condition of that capital contribution, SFC agreed to allow the new investors to step into its priority position, but only in the amount of the priority debt owed to it. The rest of the new debt took its rightful place in the line of priority–behind petitioners. Petitioners were not

prejudiced by this arrangement, and no one leapfrogged over them. That petitioners will not be fully compensated for their work is the result of the failure of the project and their second place priority position. SFC's contractual rearrangement of the order in which its investors will be paid has cost petitioners nothing.

Finally, the rule proposed by petitioners is at complete odds with Nevada laws governing the formation of contracts, as will be explained below. Moreover, while it would help these particular lienholders, the rule they propose would have a devastating economic effect on workers and contractors seeking work and, thus, would have a devastating effect on the ability of the State to recover from the national economic disaster that caused these defaults in the first place.

DISCUSSION

I. Standard of Review

The standard of review for a petition for rehearing *en banc* requires this Court to consider whether reconsideration by the full court is warranted to maintain uniformity of its decisions, or to consider a substantial precedential or public policy issue. NRAP 40A. Whether to grant reconsideration lies within this Court's discretion.

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II. Subordination

In its opinion, the Panel set forth the matter as follows:

> In this writ proceeding, we must determine whether a subordination agreement that subordinates a lien for original land financing to a new construction deed of trust affects the priority of a mechanic's lien for work performed after the date of the original loan but before the date of the construction deed of trust.

This accurate statement of the matter provides a jumping off point for discussion of what this case is and is not about. The two actual legal issues presented to and decided by the Panel were as follows: (1) complete versus partial subordination; and (2) whether a different result is required for mechanic's liens. The non-issue petitioners want to interject into this case is equitable subrogation. In district court, in their petition and now again on rehearing, petitioners conflate the real issues with this non-issue. The Panel, however, carefully separated the issues in order to not confuse its rulings based on considerations irrelevant to the mechanic's lien question.

A. The Core Issue–Complete Versus Partial Subordination.

Addressing the core issue–complete versus partial subordination–the Panel joined the clear majority of states embracing partial subordination. *See Tomar Dev., Inc. v. Friend*, Colo. Ct. App. 73, ¶¶ 22-23 (2015) ("We believe that the partial subordination approach . . . promotes the intent of the parties and is less

likely to impact the security interests of the intermediary lienholders, either positively or negatively, than the complete subordination approach."); *VCS, Inc. v. Countrywide Home Loans, Inc.*, 2015 UT 46, ¶ 4, 349 P.3d 704, 706 (applying partial subordination in reliance on *Caterpillar Fin. Servs. Corp. v. Peoples Nat. Bank, N.A.*, 710 F.3d 691, 692 (7th Cir. 2013), in a mechanic's lien case); *Co-All., LLP v. Monticello Farm Serv., Inc.*, 7 N.E.3d 355, 356-57 (Ind. Ct. App. 2014) (adopting partial subordination which "is the majority approach to subordination agreements.").

Importantly, the contractual subordination issue itself has nothing to do with mechanic's liens. The Panel was called upon to decide whether Nevada should join the majority of states embracing partial subordination, or should follow two minority opinions that, without addressing policy concerns, have insisted that any subordination results in complete subordination. The issue has to do with priority of claims when a first creditor enters into an agreement with a third creditor regarding the priority of their claims, and there exists a second creditor whose claim is originally junior to the claim of the first creditor. The question is whether an agreement between first creditor and third creditor that subordinates any portion of first creditor's claim to third creditor's claim necessarily as a matter of law subordinates all of both first and third creditor's claims to the claim of the

second creditor, who then leapfrogs[1] into first position (complete subrogation), or whether first creditor can subordinate its claim to third creditor, allowing third creditor to step into the priority position of first creditor to the extent of first creditor's priority claim, leaving second creditor in the same position it always enjoyed (partial subordination). In this analysis, the character of second creditor, whether an investor, lender or mechanic's lienholder, is entirely irrelevant; the result is the same. Indeed, although contractual subordination is frequently used to create availability of credit, rarely is the second creditor a mechanic's lienor.

In resolving this issue, the Panel relied on the sound reasoning of Judge Posner in *Caterpillar Fin. Servs. Corp. v. Peoples Nat. Bank, N.A.*, 710 F.3d 691, 692 (7th Cir. 2013). Because the holding of *Caterpillar* has been consistently followed by other courts, never having been criticized in a published opinion, and because Judge Posner's reasoning for adopting partial subordination is so cogent and persuasive, in contrast to the pedantic, semantic and non-policy based reasoning that supports complete subordination arguments, petitioner's approach on rehearing is a desperate attempt to distinguish this case from *Caterpillar*, which

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[1]It is ironic that petitioners continue to insist that SFC is leapfrogging in front of them, when it is actually petitioners who want to leapfrog from second position to first based on the anomalous argument that a contract that does not affect them and was not intended to benefit them should nevertheless be construed to their benefit.

petitioners do on the only basis they can conjure up; that this case involves mechanic's liens and *Caterpillar* involved secured transactions under the Uniform Commercial Code. Petitioners complain bitterly that the principles regarding mechanic's liens differ from the principles underlying the commercial code. This superficial line of analysis raises only distinctions without differences.

It is true that many of the issues considered in *Caterpillar* were peculiar to secured transactions and discussion of those issues has no direct application in this case. It is equally true that the discussion of whether to apply partial or complete subordination in *Caterpillar* was divorced from any concern specific to the commercial code, as was this Panel's decision with respect to the mechanic's liens in this case. The first issue requires a determination of which doctrine of subordination to apply, and that issue is not tied to the character of the liens held by the parties. The second issue is whether any statute or consideration particular to the types of interests involved requires a departure from application of the general subordination policy adopted. In both this case and in *Caterpillar*, the parties' priority interests in collateral depended on the order of perfecting the liens. In *Caterpillar*, the order of priority was determined by the filing of financing statements; in this case, the order of priority is determined by the recording statute. As far as the issue of subordination is concerned, that is the end

of the difference between the two cases. The determination of which priority prevails is the same in both cases.

That is why Judge Posner in *Caterpillar* first addressed policy considerations to determine generally whether to adopt partial or complete subordination for the construction of a subordination agreement, and then turned to questions specific to secured transactions to see whether they required a different result. That is also why the Panel in this case carefully separated the subordination question from the issues of application of the mechanic's lien statute. The Panel first discussed the distinctions between the competing doctrines of subordination and determined that partial subordination promotes multiple public policies while complete subordination gives allegiance to a dictionary. Only after adopting partial subordination did the Panel address whether the mechanic's lien statute required a different result in the narrow context of this case.

B. The Secondary Issue–Application to Mechanic's Liens.

The second issue is whether NRS 108.225, the statute that gives priority to mechanic's liens over all claims "which attached to the property after the commencement of construction of a work of improvement," requires that subordination agreements result in complete subordination in all cases where the

junior lienholder is a mechanic's lienholder. In other words, based on NRS 108.225, are mechanic's lienholders afforded more protection than all other junior lienholders? The Panel decided that the statute does not apply to the construction of a subordination agreement because partial subordination does not affect the priority position of the mechanic's lienholders. The mechanic's lienholders' claims remain superior to all debts that attach to the property after the work of improvement commences. Thus, junior lienholders whose interests are not affected by a subordination agreement between other creditors are not afforded a windfall. Instead, they remain in their original priority position, which they readily accepted in the first place, regardless of whether their claim is a mechanic's lien or some other form of debt. The Panel properly determined that partial subordination does not run afoul of the mechanic's lien statute because it neither favors nor burdens mechanic's liens. Interests prior to the mechanic's liens remain prior. Interests created after the mechanic's liens attached remain junior. The mechanic's liens are unaffected.

Petitioners complain that the Panel did not liberally construe the mechanic's lien statute in the tradition of Nevada jurisprudence. The Panel neither liberally nor strictly construed the mechanic's lien statute. It merely determined the statute is not implicated by the subordination analysis.

III. Subrogation: The Non-Issue.

Concepts of contract based subordination and equitable subrogation are easily confused, as petitioners demonstrate. But the concepts are separate and distinct. As one commentator has stated, "Courts sometimes confuse substitution principles with the concept of equitable subrogation." *See* Patrick A. Randolph, Jr., Edwin F. Pierson. Professor of Law, *Mortgage Modification and Alteration of Priorities Between Junior and Senior Lienholders*, University of Missouri, Kansas City School of Law, http://dirt.umkc.edu/alterationofpriorities.htm. Despite the Panel's careful distinguishing of these two concepts, on rehearing, petitioners again conflate the two issues and make confusing and structurally unsound arguments.

In *In re Fontainebleue Las Vegas Holdings, LLC*, 128 Nev., Adv. Op. 53, 289 P.3d 1199, 1209-12 (2012), this Court held that a claimant cannot obtain priority over a mechanic's lienholder's interest under the doctrine of equitable subrogation. In order to take advantage of this decision, petitioners conflate or purposely confuse the doctrine of contractual subordination with the doctrine of equitable subrogation, hoping to take advantage of separate but inapplicable statutory protections for mechanic's lienholders.

The Panel recognized the invalidity of petitioner's argument, which netted only a footnote:

> To be sure, contractual partial subordination differs from equitable subrogation, which we addressed in *In re Fontainebleue Las Vegas Holdings, LLC*, 128 Nev., Adv. Op. 53, 289 P.3d 1199, 1209-12 (2012) (concluding that NRS 108.225 precludes the application of equitable doctrines that would advance the priority of a junior lienholder above the priority of a mechanic's lien). We note that *Fontainebleau*'s distinguishing factor is that the mechanic's lien claimants there were *parties* to the subordination agreement and attempted to subordinate their priority positions despite NRS 108.225's constraints. *Id.* at 1208. Unlike *Fontainebleau*, APCO is not a party to the subordination agreement and the subordination agreement has not changed APCO's priority *position*. Here, the contractual partial subordination arises as a result of a subordination agreement, not equity principles. *See, e.g., Bratcher v. Buckner*, 109 Cal. Rptr. 2d 534, 539-40 (Ct. App. 2001) (court relied on subordination agreement, not equitable principles, "to enforce the objective intent of the parties").

Panel Opinion at note 7 (emphasis in original).

It is really this footnote that petitioners challenge on rehearing. Desperate to find a way to improve the priority position they originally accepted, *i.e.*, second position, petitioner's grasp for the only lifeline available: the incorrect but persistent insistence that SFC's position ahead of theirs is the result of the application of equitable principles. Thus, petitioners complain that the Panel "characterized partial subordination as contractual." Petition at 4. Petitioners repeat the mantra that "the result of equitable subrogation and partial

subordination is the same (i.e., junior lienholders are permitted to leap-frog intervening lienholders to take senior position)." And petitioners make the incorrect assertion that "the recognition that the loans were refinanced would bring this case into an 'equitable subrogation' situation." Pet at 4. Petitioner are desperate to make equitable subrogation the equivalent of contractual subordination because without that lynchpin, their arguments are nonsensical. But equitable subrogation is not contractual subordination, either in theory or result.

Partial subordination is contractual, and the priorities determined by the district court and affirmed by the Panel are based exclusively on construction of a contract and on contractual principles. Neither the district court nor the Panel based any part of their decisions on the doctrine of equitable subrogation, which occurs in the absence of a contract where one party pays off the debt of a creditor in priority position and then steps into the priority position of that creditor by operation of equitable principles implied at law. That did not happen in this case.

Petitioner's arguments about refinance are wrong.[2] The finding of the first district judge that the mezzanine note refinanced the prior deeds of trust was factually wrong, and was rejected in the second order on summary judgment. The Panel correctly determined that the district court had jurisdiction and authority to

[2]They are also not properly before this Court. Panel Opinion at 6, note 2.

reconsider the first order on summary judgment. Panel Opinion at 7-8. notes 3 & 4. In light of the circumstances surrounding the entry of the first summary judgment, as set forth in detail in the answer to the petition, it is no mystery why the order was factually inaccurate. In any event, having been superseded, that first order is a nullity, and petitioners' reliance thereon is misplaced. *See* NRCP 54(b).

Further, the mezzanine note brought in new money and did not retire the existing debts, as established in the briefing of this petition. SFC's transactions were not refinances of prior loans. The district court correctly found that none of the deeds of trust were refinance transactions. 36 App. 1151-1152 ¶¶ 6, 7,10 and 11. None of the deeds of trust were released or reconveyed, 34 App. 1134-1135, lines 25-1, and they all remain unsatisfied.

More importantly, if the district court had concluded on the basis of the doctrine of equitable subrogation that SFC as holder of the construction loan trust deed stepped into the shoes of itself as holder of the original trust deed as a matter of equity, then the doctrine of equitable subrogation might be implicated. But the district court concluded based on contract construction that SFC subordinated its first priority position with respect to the amount of the original deeds to itself by contract. Therefore, the doctrine of equitable subrogation is not implicated by the

ruling.[3] It is a straight forward contract analysis.

And the result of equitable subrogation is not the same as the result of contractual subordination. In equitable subrogation, the original party in first priority position is satisfied, is no longer part of the equation, and has released its lien. The party who pays the debt and removes the prior interest is allowed based on equitable considerations to leapfrog the party in second position to assume the position of the party whose debt it satisfied. In contractual subordination, the party in first position allows (by contract) another party to assume its position in return for whatever consideration is appropriate.[4] The new party does not leapfrog the party in second position; by contract it assumes the position of the party already in first position, whose interest has not been satisfied. The party in second position remains in second position with no prejudice to its rights. NRS 108.255

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[3] Although SFC held both the original trust deed and the construction financing trust deed, and therefore technically contracted with itself regarding the order in which these debts would be paid, the investors providing the funds were not the same with respect to the disparate deeds. The analysis would be no different if the holder of the first trust deeds and the holder of the construction financing deed were unrelated parties. Either way, the party in first position merely transferred by contract its right of priority payment to another without affecting the rights or interests of the party in second position. The character of the party in second position is irrelevant, because that party suffered no loss.

[4]Incidentally, this is precisely what happens thousands of times each day when loans are sold and liens are assigned.

and *Fontainebleau* do not allow a mechanic's lien to be defeated based on an interest that post-dates the work done based on equitable principles. They do not operate to preclude a party in first priority position from selling its interest, allowing a third party to step into its shoes to the degree agreed, not to exceed the full amount of the obligation already in first place. This type of arrangement is consistent with this state's public policy favoring the right of contract. It does not interfere with this state's laws regarding priority of interests based on recordation. And it does not prejudice any junior lienholder, including a junior lienholder whose claim happens to be a mechanic's lien.

Assignments by way of contract are done everyday. When such an assignment is made, no rights of the first lienholder are released. They are simply contractually assigned. No one in this state or any other questions the contractual right of a lender to assign its loan to another.

In contractual subordination, what is assigned is the lien rights, not the underlying loan. Equitable subrogation relies on equity to treat a released lien as having been revived and assigned to a later lender, when no actual assignment took place. Equitable subrogation is based on an assignment that is implied as a matter of equity. Partial subordination, on the other hand, relies on an actual contractual assignment of rights which have at all times been senior.

IV. Other Issues and Non-Issues.

Petitioners next argue that this Court should grant rehearing because the Panel based its opinion on the assumption that the subordination agreement was silent as to whether it intended complete or partial subordination. Petitioners insist that the Panel overlooked the phrase in the agreement stating that the lien priorities would be "as though the Mezzanine Deeds of Trust has been recorded subsequent to the recordation" of the new deed. Petitioners grasp the proverbial straw when they suggest that the Panel overlooked this line in the agreement. This line was the focal point of the petition and the answer, was quoted multiple times, and formed the basis of both the arguments and the decision. Petitioners are wrong about the Panel's determination. It was not based on any assumption that the agreement is silent as to its intent regarding subordination. The Panel based its decision on the fact that the agreement does not state any intent with respect to how the agreement will affect the rights of non-party junior lienholders. Had the document directly spoken to this issue, it would have been a simple thing to apply the plain language of the document.

Relying on this argument, petitioners take umbrage over the Panel's citation to a law review article, George A Nation, III, *Circuity of Liens Arising From Subordination Agreements; Comforting Unanimity No More, B.U. L. Rev.* 591,

(2003), insisting that in that article, the author suggested a manner in which parties may protect themselves from having to litigate this issue. The article suggests that parties should incorporate into any subordination agreement language expressly addressing whether complete or partial subordination is intended. Petitioners cry foul because SFC could have but did not included such language in its agreement. This argument gets petitioner's nowhere. Admittedly, SFC could have anticipated this issue and could have written a clear subordination choice into its agreement.[5]

Nevertheless, not foreseeing this issue, SFC did not include any language in the subordination agreement, one way or the other. The lack of such language made it incumbent on the district court, and then on the Panel, to construe the contract pursuant to general canons of construction, which it did. The Panel considered the language of the contract and found it silent on the issue of subordination. The Panel then considered the intent of the parties to the contract, and adopted the legal policy that would best effect that intent. Having concluded that partial subordination is the only construction of the agreement that makes sense from both policy and intent perspectives, the Panel considered whether the mechanic's lien statute required frustration of the contractors' intent and a windfall

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[5]Inclusion of such language would not have avoided this litigation. Petitioners would then have argued that the language is not binding on them as non-parties to the agreement.

to the mechanic's lienholders. The Panel concluded the statute has no application under the facts of this case. The Panel decision is undoubtedly correct.

Petitioners complain that the Panel guessed at the intent of SFC in entering into the subordination agreement, and implied a partial subordination clause in the contract. They suggest that if the contract is ambiguous, the parties should have had more of an opportunity to provide testimony regarding the intent of the language. Petitioners are wrong. The Panel joined the vast majority of jurisdictions in adopting partial subordination as a policy when a contract has no express direction to the contrary. It did not imply any clause into SFC's contract. There is nothing left for the district court to litigate on this score.

As a last ditch effort–assuming they cannot convince this Court that the Panel's decision is not the best policy for Nevada–petitioners argue that the district court should not have granted summary judgment, and the Panel should not have considered the merits of the claim, because factual issues regarding the intent of the parties remained and should have been the subject of discovery below. This is quite disingenuous in light of the fact that petitioners sought summary judgment below, arguing that the question of whether the contract at issue created complete or partial subordination could be resolved as a matter of law. Cross-motions for summary judgment were filed making the same assertion. After this issue was

decided in favor of SFC, petitioners brought this petition. Petitioners argued to this Court, and SFC agreed, that construction of this contract was a matter of law appropriate for extraordinary adjudication by this Court on a writ petition. Now, having lost the policy argument (by relying on a dictionary rather than any policy arguments), petitioners advocate for the first time that summary judgment should not have been granted based on the existence of factual issues. Petitioners should not be allowed to change their position at this juncture of the case.

Undoubtedly, whether Nevada should adopt a general policy of complete or partial subordination is a question of law that must ultimately be settled by this Court. Two members of the Panel felt that issue should be addressed now because of the importance of the issue to all Nevadans.[6] The issue would have come up to this Court without further discovery had this petition not been entertained, and this Court would have determined the construction of the contract as a matter of law. The question here is one of timing, not one of ripeness. The question of what policy to adopt for Nevada was properly presented and decided by the Panel.

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[6]The dissent by Justice Cherry did not suggest that the issue was not ripe for adjudication on the merits. His dissent argued that it would have been better as a matter of judicial administration to have allowed the matter to proceed to a final judgment. All three justices would have denied the petition. The case then would have proceeded to final judgment without further discovery based on the district court's ruling on the summary judgment motion.

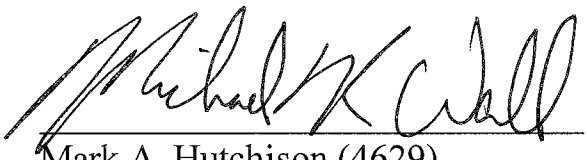
While the question of whether to entertain the petition in the first instance may have been differently decided by a different Panel, the Panel has now entertained the petition and has provided needed guidance to the bar on an issue properly before it. There is no inconsistency between this case and other Nevada law. Therefore, this Court should allow the decision to stand.

CONCLUSION

The Panel decision is correct. Rehearing *en banc* should be denied.

DATED this 21 day of January, 2016.

HUTCHISON & STEFFEN, LLC.



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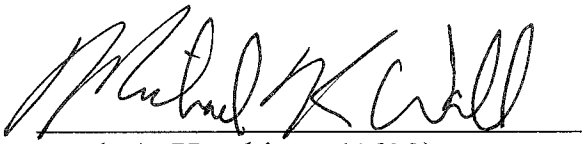
CERTIFICATE OF COMPLIANCE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the page and/or type-volume limitations of NRAP 40 or 40A because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 4667 words.

DATED this 21 day of January, 2016.

HUTCHISON & STEFFEN, LLC.



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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **SCOTT FINANCIAL CORPORATION'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 21st day of January, 2016.

An employee of Hutchison & Steffen, LLC

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Pursuant to NRAP 25(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 21st day of January, 2016, I caused the document entitled **SCOTT FINANCIAL CORPORATION'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION**, to be served as follows:

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- ☐ via electronic mail;

to the attorneys listed below at the address, email, and/or facsimile number indicated below:

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Eighth Judicial District Court
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