Case No. 73785

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellants,

vs.

THOMAS JESSUP, LLC SERIES VII; FOXFIELD COMMUNITY ASSOCIATION; AND ABSOLUTE COLLECTION SERVICES, LLC,

Respondents.

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BRIEF OF AMICUS CURIAE SFR INVESTMENTS POOL 1, LLC, IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus SFR Investments Pool 1, LLC ("SFR") certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

SFR is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

Amicus SFR is represented by Jacqueline A. Gilbert, Esq., and Karen L. Hanks, Esq. of Kim Gilbert Ebron.

DATED this 16th day of May, 2019.

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INTEREST OF THE AMICUS CURIAE

SFR Investments Pool 1, LLC ("SFR") buys properties at association non-judicial foreclosure sales. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408, 409-10 (2014). Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

SFR has a strong interest in the subject matter of the Panel's Opinion because it addresses the legal effect when a bank takes the bare minimum step i.e. asks for information, and then disingenuously claims it did all it could do, while doing nothing more. The legal effect, at least at it stands now, will allow debtor's to manufacture narrow excuses enabling them to avoid paying their debt, and avoid any consequences associated with that failure.

This issue permeates hundreds of cases SFR still has pending before this court on appeal and in the lower state and federal courts.

DATED this 16th day of May, 2019.

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I. THE LAW IN NEVADA SHOULD REMAIN NO DELIVERY OF PAYMENT, NO TENDER.

None of the cases relied on by the Panel stand for the proposition that a party can simply ask for information, literally do nothing after that, and then be legally excused from delivering payment.[1] This is especially true where ACS proffered BANA with a simple, cost-free solution for BANA to protect the deed of trust, but which BANA elected to ignore. Due to this simple fact, BANA cannot feign excuse. In all of the cases relied on by the Panel, the paying-party actually delivered physical payment. They also exercised additional diligence, such as making several attempts to pay, making several contacts, and filing suit. In reality, none of these cases ever excused actual delivery of payment; instead, it excused the paying-party from the harm that normally would result from the lack of payment.

Essentially, the courts in those cases recognized the paying-party cannot be held accountable for the rejecting-party's failure to take the payment, deposit the payment and/or apply the payment. But this Court already addressed this issue in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113 (Nev. 2018)

[1] In the present case, in August 2011, Miles Bauer sent a letter asking for the nine-month assessment amount, and then after being told what it needed to do to obtain this information, ignored ACS's response, and then for the next ten months, sat back and watched the property go to foreclosure. (AA765-772.)

("*SFR III*") by finding if a bank does in fact deliver unconditional payment of the full superpriority amount, and proves such delivery, that payment will be deemed a valid tender. *SFR III*, 427 P.3d at 118.

In carving out the exception of excuse, the Panel focused on the wrong part of rejection. The only question is whether ACS (or any other collection company) would have rejected actual delivery of the money by itself, not whether ACS (or any collection company for that matter) would have rejected "a 'paid in full' condition,"[2] (or any other condition). In that regard, while the Panel used the word "excuse" it appears it was really talking about futility. But futility is defined "serving no useful purpose." *Consedine v. Penn Treaty Network America Ins. Co.*, 63 A.3d 368, 446 (Pa. 2012). But in light of *SFR III*, how could it possibly be argued it served no useful purpose to still deliver the check with conditions, when this very Court has found that was enough to protect the deed of trust? What is more, every collection company, including ACS, have all testified in countless cases, had the bank delivered a check, in any amount, they would have accepted the check and applied the funds to the account. Thus, it certainly was not useless to deliver money. BANA strategically created the "excuse," and now this court has condoned it. If a collection

[2] Decision, at p. 8.

company would have accepted money (in any amount and in whatever form), then there can never be excuse/futility on the part of the bank.

II. NO BANK SHOULD BE REWARDED FOR ITS INACTION.

Limiting the analysis to delivery of money also ignores the other means available to BANA to protect the deed of trust, one of which included foreclosure. ACS specifically told BANA it would hold off on the Association sale, and in fact did, so BANA could foreclose first.[3] BANA did not act, so after nearly a year of inaction by BANA and no payment by the homeowner toward the ever increasing delinquent dues, the Association exercised its statutory right of foreclosure. It can hardly be argued it was of no useful purpose for BANA to proceed to foreclosure to protect the deed of trust. Of course, there were countless other means by which BANA could have protected the deed of trust as acknowledged by this Court in *SFR*,[4] and all of these steps would have equally served a useful purpose. In addition to these means, BANA could have attended the sale and out-bid all other bidders at no increased cost to itself; all excess proceeds would be paid to BANA under NRS 116.31164. BANA could have advised bidders it would not contest the sale, thereby

[3] The record reflects the Bank issued an NOD and NOS long before the Association sale occurred.

[4] *SFR*, 334 P.3d at 414.

informing bidders the property would be debt-free and litigation-free. Most importantly, BANA could have filed an action against ACS at the time of the inquiry letter rather than plant a legal landmine, and then lie in wait as an unwitting buyer purchased the property. All told, BANA only found itself in its so-called "futile" position because of its own cascading series of inaction and ignorance.

Leaving the exception as the Panel carved it out, invites abuse by banks to argue this Court will rewarded inaction, at the expense of an unknowing third party. Since release of the Decision, banks are using it as a means to side-step evidentiary issues and arguing it never had to send a check because the given collection company would have refused it. Yet, we know this is not true, and we also know many collection companies reached a resolution with Miles Bauer whereby the collection company, one of which was ACS, accepted the check even with the conditional letter. In other instances, Miles Bauer finally agreed to send just the check to Alessi, and Alessi agreed to accept it.

This Court already acknowledged an instance where a bank is excused from having payment applied in *SFR III*. *SFR III*, 427 P.3d at 118. In *SFR III*, this Court, like that in *Guthrie*,[5] *Pickel*[6] and *Evans*,[7] excused BANA from the Association's

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[5] *Guthrie v. Curnutt*, 417 F.2d 746 (10th Cir. 1969).
[6] *In re Pickel*, 493 B.R. 258 (Bankr. D.N.M. 2013).
[7] *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492 (Ga. 2001).

rejection of the delivered payment and gave legal effect to the payment as if it had been accepted when it was delivered. *Id.* There is no need to extend this concept any further, and there are no sources supporting such an extension.

Because the Panel misapplied the cases and secondary sources it relied on in its Decision on the issue of excuse, it should grant Respondent, Thomas Jessup, LLC Series VII's ("Jessup") petition for en banc reconsideration, and affirm the judgment in favor of Jessup keeping in tack this Court's finding that an offer to pay is not sufficient to constitute a valid tender.

III. BANA NEVER PRESENTED PAYMENT, AND ACS NEVER REJECTED PAYMENT.

A. None of the Cases Relied on by the Panel Support that BANA Was Excused From Delivery of Payment.

All four cases cited by the Panel do not support this Court's holding that a party may be excused from tender. All of the cases (with the exception of *Cladianos*, which did not involve tender-payment) involve the party's actual physical delivery of payment. More importantly, the cases stand for the proposition that the party delivering payment is protected from the harsh consequences of non-tender when its tender is wrongfully rejected. But again, this Court already addressed this issue in *SFR III*.

The first case the Panel relied on was *Guthrie v. Curnutt*, 417 F.2d 746 (10th Cir. 1969). In *Guthrie*, Guthrie filed suit to enforce her statutory right to redeem

property seized by the IRS. *Id.* at 765. The purchaser at the IRS sale purposefully avoided Guthrie in an effort to prevent her redemption. *Id.* at 766. Likewise, the IRS officer interfered with her attempts to redeem by wrongfully rejecting actual payment which Guthrie's agent presented in person in two forms, cash and cashier's check. *Id.* at 765. In light of these facts, the Court found Guthrie's tender was timely and sufficient. *Id.*

Despite these facts, the Panel relied on *Guthrie* as standing for the proposition that in the absence of delivery of payment on the part of the party required to tender, delivery of payment is excused, if the party offering to pay is told the payment will be refused. (Opinion at p. 7.) However, the context of *Guthrie* shows it does not stand for this over simplified proposition, and neither do the cases cited by *Guthrie*. In all the cases cited by *Guthrie,* each one deals with actual presentment/delivery of payment and an unequivocal rejection of that payment. *Shaner v. West Coast Life Ins. Co.*, 73 F.2d 681, 684 (10th Cir. 1934); *National Labor Relations Board v. Murphy's Motor Freight, Inc.*, 231 F.2d 654, 655 (3rd Cir. 1956); *Taylor v. Mutual Ben. Health & Accident Ass'n*, 133 F.2d 279, 282 (8th Cir. 1943); *Servel v. Jamieson*, 255 F. 892, 894 (9th Cir. 1919).

The second case the Panel relied on was *In re Pickel*, 493 B.R. 258 (Bankr. D.N.M. 2013). This case involved payment being sent to two different addresses, the address specified in the Note and plaintiff's counsel's office. *Id.* at 270. Counsel

rejected the payment. *Id.* The *Pickel* court concluded defendant's timely delivery of payment cured the default under the contract, and was sufficient to avoid termination of the agreement based on a breach. *Id.* at 270-71. In this regard, *Pickel* mirrors more this Court's decision in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113 (Nev. 2018) ("*SFR III*"). *Pickel* does not stand for the proposition that no delivery of payment cures a default. Yet, the Panel misapplied *Pickel* and found it supports excusing a party from delivering payment and doing nothing after doing nothing in the first place.

The third case the Panel relied on was *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492 (Ga. 2001). In *Evans*, Mark Turner attempted to redeem property sold at a tax sale to Ms. Evans. *Id.* at 493. Mark Turner sent a certified letter to Ms. Evans asserting its desire to redeem the property and asked what amount it needed to pay. *Id.* Mark Turner then left several telephone messages regarding its desire to redeem and attempted to redeem the property in person at Ms. Evans residence. *Id.* Ms. Evans, however, refused to speak to Mark Turner. *Id.* As a result, Mark Turner filed suit and deposited with the court the amount it contended was payable for redemption. *Id.* While the Court found Ms. Evan waived her right to tender due to her conduct, the Court still found Mark Turner was obligated to pay the correct redemption amount. *Id.* at 495. The Court also found Mark Turner's allegation it was

ready, willing and able to pay based on its deposit of funds with the court was sufficient. *Id.*

In the analysis of *Evans*, Ms. Evans refused *any* information and all contact. In this case, however, ACS responded and expressly offered a statement of account acceptable to BANA, which was "…adequate proof of [the amount due] by the HOA…"[8] BANA, having full command of NRS Chapter 116 (where ACS did not), knew of its absolute requirement to tender/cure to save the deed of trust, but instead leveraged and took advantage of ACS's lack of knowledge to create an excuse of non-payment. BANA even went so far as to further allege at trial an implied waiver of the superpriority payment. As the trial court found in *equity*, BANA should not be rewarded for their inaction under these circumstances.

Of course, the waiver found by the *Evans* court and argued by BANA can never exist in the context of an association in Nevada because NRS 116.1104 prohibits an association from waiving its superpriority rights. *See SFR*, 334 P.3d at 419. Additionally, NRS 116.1108 dictates various principles of law and equity, including, but not limited to "mistake" supplement the provisions of NRS Chapter 116. All told, none of the cases relied on by the Panel nor the current law in Nevada support the Panel's Opinion.

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[8] Opinion, at p. 3.

Finally, the Panel relied on *Cladianos v. Friedhoff*, 69 Nev. 41, 240 P.2d 208 (1952). This case is even more tenuous support for the Panel's holding as *Cladianos* deals with tender of services in a contract action and as such deals with an entirely different definition of tender; the court even acknowledged it was not dealing with tender in the sense of payment. *Id.* at 210. In fact, in several unpublished dispositions pre-dating the Panel's Opinion in this matter, this Court rejected Bank of America's reliance on *Cladianos,* distinguishing the case because it dealt with when a party's performance of a contractual condition is excused by virtue of the other contracting party having already breached the contract. There is no reason to deviate from this line of reasoning now.

In *Cladianos*, Cladianos was the owner of a hotel, hired Friedhoff, a contractor, to perform construction work. *Id.* at 209. Construction work was halted for a period of time and when it resumed, Cladianos never notified Friedhoff; instead, Cladianos proceeded with the sub-contractors on his own. *Id.* Later, Friedhoff sued for payment under the contract. *Id.* But in order for Friedhoff to rely on breach of the contract he was required to tender his services to Cladianos. *Id.* In light of the fact Cladianos had continued with construction without notice to Friedhoff, and Friedhoff learned this after driving by the property, this Court found Cladianos breached the contract, which prevented performance on the part of Friedhoff and thus any tender of services by Friedhoff was excused. *Id.* at 211.

B. The Secondary Sources Do Not Support That BANA Was Excused From Delivery of Payment.

The Panel also relied on 74 Am. Jur. 2d *Tender* § 4 (2012), but this section cites to *Evans* discussed above, so it provides no additional support for the Panel finding BANA was excused from delivering actual payment of the superpriority portion. The Panel also relied on 86 C.J.S. Tender § 5 (2017), but this section cites *Pickel,* discussed above, so it likewise provides no additional support for the Panel's decision.

CONCLUSION

This Court should grant Jessup's petition for en banc reconsideration.

DATED this 16th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify this brief contains 2,330 words.
3. I hereby certify I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 29.

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

Dated this 16th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Respondent's Petition for En Banc Reconsideration** was made on May 16, 2019 pursuant to the Master Service List.

Dated this 16th day of May, 2019.

/s/ Karen L. Hanks
An employee of KIM GILBERT EBRON