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



BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC.; and THE BANK OF NEW YORK MELLON;

Appellants,

vs.

THOMAS JESSUP, LLC SERIES VII;

Respondent.

**Case No. 73785**

**APPEAL**
from the Eighth Judicial District Court, Department VII
The Honorable Linda Marie Bell, District Judge
District Court Case No. A-13-693205-C

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# ANSWER TO RESPONDENT'S PETITION FOR *EN BANC* RECONSIDERATION

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## NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

> Bank of America, N.A. is 100% owned by BANA Holding Corp., which is 100% owned by BAC North America Holding Company. BAC North America Holding Company is 100% owned by NB Holdings Corp., which is in turn 100% owned by Bank of America Corporation, whose shares are publicly traded on the New York Stock Exchange under the ticker symbol BAC. Bank of America Corporation does not have any parent corporations, and no publicly held company has an ownership interest of 10% or more.
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> Mortgage Electronics Registrations Systems, Inc., is a wholly owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc., is a subsidiary of Intercontinental Exchange, whose shares are publicly traded on the New York Stock Exchange under the ticker symbol ICE. Intercontinental Exchange does not have any parent corporations, and no publicly held company has an ownership interest of 10% or more.
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> The Bank of New York Mellon is a wholly-owned subsidiary of The Bank of New York Mellon Corporation, whose shares are publicly traded on the Nasdaq Stock Market under the ticker symbol BK. The Bank of New York Mellon Corporation does not have any parent corporations, and no publicly held company has an ownership interest of 10% or more.
>
> Akerman LLP served as counsel for the appellants before the district court and is now serving as appellate counsel.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## INTRODUCTION

Thomas Jessup, LLC Series VII's requests this court rule that a tendering party must—despite no knowledge of the precise superpriority amount and absolutely certain knowledge that the payment will be refused—still perform the futile exercise of delivering a check. This argument ignores universally recognized exceptions within the principles of the general law of tender that guarantee protection for a party seeking to preserve its property where the lienholder prevents or refuses to accept the tender. Such a ruling would empower any lienholder to frustrate or reject any tender without consequence, while simultaneously requiring that the tendering party perform futile acts.

The court should deny Jessup's request for *en banc* reconsideration. The panel ruled correctly in favor of Appellants Bank of America, N.A. (**BANA**), Mortgage Electronic Registrations Systems, Inc. (**MERS**), and The Bank Of New York Mellon (**BONY**) (jointly **Appellants**), reversing the trial court's judgment that the deed of trust on the subject property was extinguished by the HOA's foreclosure sale. The panel correctly applied controlling law to conclude that BANA's obligation to tender was excused after the homeowner's association's (**HOA**) agent Absolute Collection Services (**ACS**) told BANA that no superpriority lien existed and that it was not possible for the superpriority lien to be paid off unless BANA first foreclosed on the deed of trust.

Jessup also criticizes the panel's application of the correct standard of review. It claims that the panel should have been upheld trial court's ruling under the substantial evidence standard. The panel's holding is correct under either a substantial evidence or *de novo* standard of review. It is undisputed that when Miles Bauer made an offer to pay the superpriority portion of the HOA's lien, ACS sent Miles Bauer a fax indicating that no such superpriority lien existed unless and until BANA foreclosed on the deed of trust. As the panel opinion correctly reasoned, the only reasonable interpretation of that statement was that ACS would not accept payment for a lien it did not believe existed.

When ACS told BANA that it would not provide a "9 month super priority lien amount" until the beneficiary conducted a deed of trust foreclosure, ACS indisputably indicated that it was refusing to disclose the amount of the superpriority portion of the lien. Ms. Mitchell's testimony (years after the fact) indicated that ACS had an unwritten policy of accepting tender payments, it was directly contrary to what ACS communicated to BANA in this case—in writing at the time of the response. Thus, it has no bearing on the excuse doctrine.

## ARGUMENT

### I. Standard of Review

A petition for *en banc* reconsideration "is not favored and ordinarily will not be ordered except 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." NRAP 40A(a).

A petition for rehearing must "state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended." NRAP 40(a)(2). The petitioner may not reargue matters presented in briefs and oral arguments, "and no point may be raised for the first time on rehearing." NRAP 40(c)(1). The petitioner must identify a material fact or question of law that this court overlooked or misapprehended, or "a statute, procedural rule, regulation or decision directly controlling a dispositive issue" that this court "overlooked, misapplied, or failed to consider." NRAP 40(c)(2).

## II. The Panel Correctly Applied the Excuse Doctrine.

### A. Excuse is a recognized principle of the long-established law of tender.

This court confirmed that the law of tender applies to association liens under NRS 116. *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113, 117-120 (2018). Based on that decision's recognition of tender, the panel noted that the excuse of tender doctrine is "a generally accepted exception" to the obligation to tender. *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. Adv. Op. 7, 435 P.3d 1217, 1219 (2019).

Two widely recognized applications of the excuse doctrine apply in this case. **First**, as the panel discussed, tender is excused when the offerree indicates that it will not accept a superpriority tender. The case law and treatises cited in the panel's decision make this clear. *See* 435 P.3d at 1220 (citing *Guthrie v. Curnutt*, 417 F.2d 764 (10th Cir. 1969); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013); *Mark Turner Props., Inc. v. Evans*, 274 Ga. 547, 554 S.E.2d 492 (2001); 74 AM. JUR. 2D *Tender* § 4 (2012); 86 C.J.S. *Tender* § 5 (2017); *Cladianos*, 69 Nev. 41, 240 P.2d 208).[1]

**Second**, excuse of tender also applies when the offerree prevents the tendering party from learning the amount due. 74 AM. JUR. 2D *Tender* § 4 (tender is excused when "the amount depends on the balance shown by accounts that are

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[1] In its amicus brief, SFR Investments Pool 1, LLC (**SFR**) asserts that the authorities cited by the panel actually concern rejected tender, not excuse of tender. SFR's Amicus Br. at 5-10. SFR's arguments miss the mark. Each of the two treatise sections cited by the panel is specifically and entirely devoted to the excuse doctrine. 74 AM. JUR. 2D *Tender* § 4 (2012) (titled "Excuses and justifications for failure to make"); 86 C.J.S. *Tender* § 5 (2017) (titled "Excuses for nontender").

SFR apparently miscomprehends the *Bank of America* decision as "an instance where a bank is excused from having payment applied." SFR's Amicus Br. at 4. In *Bank of America*, the HOA's agent refused to accept a tendered check. 427 P.3d at 116-120. As the Court rightly concluded, the refusal to accept the tender was inconsequential, as the tender was completed when it was made. *See id.* at 118 ("The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property."). Nothing in the decision spoke of "excuse[] from having payment applied," as there was nothing to "excuse."

inaccessible to the party from whom the tender would otherwise be required … and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor[.]"); 86 C.J.S. *Tender* § 5 ("[t]ender of an amount due is therefore waived when the party entitled to payment... in any other way obstructs or prevents a tender"); *Mark Turner*, 274 Ga. at 550, 554 S.E.2d at 495 (tender excused where creditor "refused... to name the amount she claimed to be due her").[2] The panel did not focus on that application of the excuse of tender doctrine. However, it also fits the facts of this appeal. The excuse of tender doctrine applies to this case because ACS prevented BANA from learning the amount due and told BANA's counsel at Miles Bauer that it would reject a BANA superpriority tender.

[2] *See also In re Campbell*, 105 F.2d 197, 200 (9th Cir. 1939) (tender excused because of the creditor's "failure to inform the debtor as to the net amount which had accrued under the agreement."); *Spinks v. Jordan*, 66 So. 405, 406 (Miss. 1914) ("it was not necessary for [debtors] to make a tender" in a case where the balance owed "could only be ascertained from the books of [the lender]."); *Barnett v. O'Neal*, 116 So. 2d 375, 377-78 (Ala. 1959) (tender excused when the amount due could not be ascertained by the offering party); *Isaacson v. House*, 119 S.E.2d 113, 703 (Ga. 1961) (tender excused when "defendant refused to divulge the information [about the amount owed] to the plaintiff and thus prevented a tender of the amount due"); *Diamond v. Sandpoint Title Ins., Inc.*, 968 P.2d 240, 246 (Idaho 1998) (holding that creditor's misrepresentation about the amount owed and refusal to provide wiring instructions excused delivery of tender funds); *Kriegel v. Scott*, 439 S.W.2d 445, 448 (Tex. Ct. App. 14th Dist. 1969) (holding tender was excused by creditor's refusal to provide the amount owed; "[a]ppellee could hardly tender payment of a sum whose total could not be determined").

### B. The anti-waiver rule of NRS 116.1104 does not apply.

Jessup argues that the panel's holding is inconsistent with NRS 116.1104, which states, "[e]xcept as expressly provided in this chapter [*i.e.*, NRS 116], its provisions may not be varied by agreement, and rights conferred by it may not be waived." Pet. at 12. Jessup failed to raise this argument in its briefing—waiving the argument. *see* Answering Br.; NRAP 40(c)(1) ("no point may be raised for the first time on rehearing."). This argument was waived and should not be considered.

The argument also fails on the merits. This court discussed NRS 116.1104 in *SFR Investments Pool 1 v. U.S. Bank*, holding that it prevented an association's CC&Rs from subordinating the superpriority portion of its liens to first deeds of trust. 130 Nev. 742, 757-58, 334 P.3d 408, 418-19 (2014). As explained in *SFR Investments*, "[t]he mortgage savings clause thus does not affect NRS 116.3116(2)'s application." *Id*.

That holding does not affect operation of the excuse of tender doctrine. In *Bank of America*, this court held that a tender "cure[s] cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law." *Bank of America*, 427 P.3d at 120. By necessary implication, when tender of the superpriority portion is excused by operation of law, the default as to the superpriority portion is also cured by operation of law, just as if the deed of trust holder had been able to tender. The superpriority lien does not become junior to the

deed of trust; rather, it no longer exists as an encumbrance on the property. NRS 116.1104 does not conflict with the excuse of tender doctrine.

### C. Equitable considerations cannot revive a lien that has been cured by an excused tender.

Jessup also errs in arguing that "a court analyzing a challenge to an NRS 116 sale . . . sits in equity, not in law," and thus ACS's response to BANA should have been evaluated as a form of "fraud, unfairness or oppression" and subject to equitable balancing. Pet. at 12-16.[3] This court has expressly rejected that argument in several cases. While BANA continues to believe that ACS's conduct also could be viewed as constituting the "fraud, unfairness or oppression" required in order to set aside the sale in equity, the panel was correct in understanding excuse of tender as a doctrine of law, not one of equity.

In *Bank of America*, this court held that tender cured the default "by operation of law," thus rendering any foreclosure on the superpriority portion of the lien "void." 427 P.3d at 120-21. This court expressly ruled that whether or not a party is a bona fide purchaser for value was "irrelevant when a defect in the foreclosure proceeding renders the sale void." *Id.* at 121; *see also Sage Realty LLC Series 2 v. The Bank of New York Mellon*, No. 73735, 2018 WL 6617730, at *2 (Nev. Dec. 11, 2018) (unpublished); *SFR Investments Pool 1, LLC v. Mortg. Elec.*

[3] The amicus briefs filed in support of Jessup's petition make this same argument. None of the amici present any authority to establish that excuse of tender is an equitable factor, rather than a branch of the legal doctrine of tender.

*Reg. Sys., Inc.*, 431 P.3d 55 (Table), 2018 WL 6433003, at *1 (Dec. 4, 2018) (unpublished); *BAC Home Loans Servicing, LP v. Aspinwall Court Trust*, 422 P.3d 709 (Table), 2018 WL 3544962, at *1 (Nev. July 20, 2018) (unpublished).

The very point of a superpriority tender is to protect the deed of trust. *Bank of America*, 427 P.3d at 121 ("after **tendering** the superpriority portion of an HOA lien **to preserve its interest as first deed of trust holder**, a party is not required to pay the amount into court..." (emphasis added)). As part of the law of tender, excuse of tender results in the same outcome.[4]

## III. The Panel Did Not Overlook or Misunderstand Any Material Facts.

Jessup also fails to show any errors in the panel's consideration of the facts. It argues that the panel erroneously applied a *de novo* standard to factual findings from the trial court. There are no material factual disputes here: two written documents in the record establish the excuse of tender doctrine. The meaning of ACS's fax is subject to *de novo* review. Even if reviewed under a more deferential

[4] SFR's amicus brief also argues that the deed of trust was lost on the ground that BANA did not take other actions like purchasing the Property outright or seeking an injunction of the HOA's foreclosure of the Property (even though the HOA had already told BANA that no superpriority lien existed). SFR's Amicus Br. at 3-5. This Court has established that tender is sufficient to protect the lender's deed of trust and that additional actions are not required. *See Bank of America*, 427 P.3d at 121 ("after tendering the superpriority portion . . . [the deed of trust holder] need only be ready and willing to pay to keep the tender good."). SFR gives no authority that an excused tender requires anything more than a completed tender to cure the default as to the superpriority portion.

standard, the trial court's interpretation was untenable, because it ignored plain language indicating that ACS would reject a superpriority tender.

Jessup also contends that the panel misunderstood relevant trial testimony and overlooked other portions. These allegations are incorrect. The panel understood the testimony. There was no testimony that called into question if ACS would have rejected an adequate and valid tender of the superpriority portion.

### A. The panel applied the correct standard of review.

Jessup asserts that the panel erred by applying a *de novo* standard of review to findings of fact that should have been reviewed for substantial evidence. Pet. at 3-6. As the panel recognized, only two facts were required to establish excuse of tender in this case: that BANA "offer[ed] to pay the superpriority portion of [the HOA's] lien" and ACS "reject[ed] that offer[.]" 435 P.3d at 1220. It is undisputed that BANA's counsel at Miles Bauer sent a letter offering to pay the superpriority portion. It is also undisputed that ACS responded to Miles Bauer with a fax. The fax plainly shows that it stated that no superpriority lien existed, and that ACS would only provide a "9 month super priority lien amount" if BANA first foreclosed on the deed of trust.

Jessup wishes to characterize the trial court's gross misinterpretation of the fax as a factual finding subject to deferential review. Jessup describes its objection to the panel's ruling as, "the Panel determined that its interpretation of the [HOA's]

response to Bank of America's [offer letter] was the only reasonable way the letter could be read." Pet. at 1.

This court has previously held that interpretation of a written document is subject to *de novo* review so long as the court was not required to consider conflicting extrinsic evidence. *See, e.g., Am. Fire & Safety, Inc. v. City of N. Las Vegas*, 109 Nev. 357, 360, 849 P.2d 352, 354 (1993) ("The trial court's interpretation of the bid documents did not depend upon weighing the credibility of conflicting extrinsic evidence. This court may review the bid documents *de novo*."). The trial court's interpretation of ACS's fax should be subject to *de novo* review, not substantial evidence.

### B. ACS's fax can only be interpreted as refusing BANA's offer to pay.

Jessup specifically faults the panel for its review of the trial court's interpretation of ACS's response to Miles Bauer's offer. Jessup claims the panel erred by not "giv[ing] deference to the trial court, who interpreted the ACS fax as nothing more than a request for a $50 fee prior to furnishing a payoff statement[.]" Pet. at 7. The trial court's interpretation of the fax should be reviewed *de novo*, since interpretation of that written document did not require the court to weigh extrinsic evidence. Even if reviewed under the more deferential standard of substantial evidence, an interpretation of the fax "as nothing more than a request for a $50 fee" is untenable because it ignores large portions of the fax.

ACS took issue with BANA's "position of paying for 9 months of assessments and no late fees, collection costs, etc. all occurring ***before*** foreclosure by your client." (2AA 253 (emphasis original)). It told Miles Bauer, "without the action of foreclosure, a 9 month Statement of Account is not valid" and that the "super priority lien Statement of Account" could only be provided if BANA foreclosed on the deed of trust." *Id*. The trial court is not entitled to deference for simply ignoring substantial portions of ACS's fax and mischaracterizing it "nothing more than a request for a $50 fee," as Jessup contends. Pet. at 7. The panel's decision correctly noted that the trial court "failed to address" that language from the fax (as well as Mr. Jung's interpretation of the fax). 435 P.3d at 1220. The trial court's failure to consider the full fax is indefensible.

Although Jessup wishes to focus the Court's attention solely on ACS's demand for a fee, the panel correctly understood that the fax from ACS also implicitly stated that it would reject a tender of nine months of assessments. That interpretation was supported by testimony from Ms. Mitchell.

### C. The trial testimony does not undermine the panel's holding.

Jessup asserts that the panel failed to understand the significance of testimony from Ms. Mitchell and Mr. Jung, which, according to Jessup, supported the trial court's decision.

*1. Ms. Mitchell's trial testimony confirms that ACS would not have accepted Miles Bauer's check for nine months of assessments and that BANA had no way to learn the amount due.*

Ms. Mitchell's trial testimony about what she and ACS believed at the time of BANA's tender cannot control the question at hand. BANA's only understanding of ACS's position on the tender came from the fax that ACS sent to Miles Bauer's offer to pay the superpriority portion of the lien. It is undisputed that ACS never corresponded subsequently with Miles Bauer about the lien and tender offer. (3AA 630:22-631:6). If ACS ever intended to accept a superpriority tender from Miles Bauer, that intent was never conveyed. To the extent any of Ms. Mitchell's testimony could be interpreted to indicate that ACS had a undisclosed policy of accepting tender checks, the trial court should have disregarded that testimony in considering whether tender was excused.[5]

Jessup is incorrect in its claims that the panel misunderstood Ms. Mitchell's trial testimony. It claims that she did not actually testify that ACS would have

[5] The principle that an unexpressed intent to accept a tender cannot negate a refusal of the offer follows from the same logic as the rule that objections to a tender must be expressed at the time of tender. *See, e.g., First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983) ("A person to whom a tender is made must, at the time, specify the objections to it, or they are waived."); *accord Hossom v. City of Long Beach*, 83 Cal. App. 2d 745, 750, 189 P.2d 787, 791 (Cal. App. 1948) ("the creditor is required to specify his objections to a tender and if he fails to do so he is precluded from objecting afterwards.") (internal punctuation omitted). A party whose tender is rejected should not lose its property interest on the basis of some private mental state of the lienholder that was never expressed.

rejected a superpriority tender. Pet. at 9-10. In reality, Ms. Mitchell's testimony established that a check from Miles Bauer for the actual superpriority amount would have been rejected. Jessup selectively quotes the following portion of Ms. Mitchell's testimony:

> Q. Well, I'm not talking about opinions. I'm talking about positions. You knew that you could have accepted nine months as the super priority, correct?
>
> A. And we would, had it been paid.

(3AA 667:20-22). This was an offhand remark that was not relevant to the line of questioning at that time, which focused on how ACS had come to its erroneous conclusion that the superpriority portion of the lien included collection costs and fees. (*See* 3AA 666:7-668:21).

Ms. Mitchell's testimony as a whole is consistent with the panel's conclusion that ACS would have rejected a check from Miles Bauer. Ms. Mitchell testified that ACS would reject any check from Miles Bauer for nine months of assessments that included the note "paid in full." (3AA 628:19-629:5; 629:14-23). She confirmed that ACS took the position "that there wasn't a nine-month superpriority [lien] to be paid until the bank foreclosed." (A.A. 631:24-632:2). It was only "after a foreclosure sale" on the deed of trust that ACS "would then provide a nine-month statement, and then [the deed of trust holder] could pay that and that would be paid in full." (3AA 629:16-18). Before the foreclosure sale, "[ACS] couldn't accept the

paid in full. And in Miles Bauer letter[s], in case if we signed the checks, then we were in agreement with their position." (3AA 629:19-22).

In *Bank of America*, this court confirmed that BANA "had a legal right" to insist that "acceptance of the tender would satisfy the superpriority portion of the lien." 427 P.3d at 118. Including the phrase "paid in full" on the check would have similarly been permissible because the enclosed letter sent by Miles Bauer made it clear that BANA was only seeking to pay the superpriority portion of the HOA's lien, "specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment." (1AA 156). If ACS rejected a check for the correct amount solely based on the phrase "paid in full," it would have been rejecting a legally valid tender.[6]

Even assuming Ms. Mitchell's testimony supported the conclusion that ACS would have accepted the check that Miles Bauer intended to send, this still would

[6] Las Vegas Development Group, LLC, LVDG, LLC, Airmotive Investments, LLC, and Thunder Properties, Inc. argue in their amicus brief that ACS "did not object to language which might indicate that the ***superpriority portion*** of the HOA Lien was paid in full, but rather language that stated that the ***HOA Lien in its entirety*** had been paid in full." Amicus Br. at 7 (emphasis in original). That is patently false in this case, given that Miles Bauer repeatedly stated in its letter to ACS that it was attempting to pay off the superpriority portion. (*See* 1AA 155-156). Additionally, Ms. Mitchell confirmed at trial that she understood that Miles Bauer was only asking for information on the nine months of delinquent assessments. (A.A. 624:22-25; 625:9-13). The amicus brief cites testimony from other cases, but that evidence was not before the trial court. In any event, it cannot refute the unambiguous evidence in **this case** that ACS would have rejected a check from Miles Bauer based on its misunderstanding of the superpriority portion.

not defeat the excuse of tender doctrine's applicability. Tender was also excused because BANA had no way to calculate the superpriority amount. The unrebutted testimony from Ms. Mitchell established that the quarterly assessment rate was never identified in any document available to BANA or any communication from ACS. (3AA 627:1-5; 667:23-668:2). As discussed previously, the obligation to tender is excused when the amount due can only be learned from the lienholder's accounts, and the lienholder refuses to disclose that amount. The fact that BANA was never able to learn the superpriority amount despite its express request to ACS was enough to excuse its obligation to tender.

*2. Mr. Jung's testimony confirmed that BANA was attempting to fulfill its obligations under NRS 116.3116.*

Mr. Jung's testimony supports the panel's holding. Jessup focuses on Mr. Jung's testimony regarding BANA's—correct—understanding of the superpriority portion of the lien. Jessup characterizes BANA's accurate interpretation of the superpriority lien as giving it "superior knowledge that the mortgage interest was at risk of being lost." Pet. at 8. This reasoning is entirely backwards.

BANA had a correct understanding that the superpriority lien was composed of nine months of assessments and could be paid off without a foreclosure on the deed of trust. It attempted to pay the full superpriority amount and even provided a thorough and accurate explanation of the superpriority lien's composition in its

letter to ACS. ACS not only grossly misunderstood the superpriority lien statute, it refused to tell BANA's counsel the amount of the delinquent assessments despite knowing BANA was "offering to pay nine months of delinquency measured from the July 15th, 2011 [recording of the notice of delinquent assessment lien]." (3AA 627:14-16). To characterize BANA as being at fault because of the actions it took to attempt to comply with the superpriority lien statute is inappropriate.

## CONCLUSION

Jessup requests the court ignore the universally established exceptions under the tender doctrine and place the tendering party completely at the mercy of the lienholder's goodwill in providing information and accepting payment—even when it is made clear the lienholder will not accept the payment. This strips the tendering party of all protections under the very doctrines intended to protect its property interest when the other frustrates or otherwise prevents performance. It would also require the tendering party to make futile payments—despite actual knowledge that the lienholder would not accept them. This is the wrong result.

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The panel correctly described this doctrine in its opinion and applied it to the case at hand. Under any standard of review, the trial court erred by failing to recognize that tender was excused by ACS refusing to disclose the amount of the superpriority lien and by its refusal of the offer to pay the superpriority amount. There is no basis for *en banc* reconsideration of the panel's opinion.

DATED this 19th day of July 2019.

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## CERTIFICATE OF COMPLIANCE

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

I FURTHER CERTIFY that this answer to a petition for *en banc* reconsideration complies with the page or type-volume limitations of NRAP 40A(d) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,322 words.

FINALLY, I CERTIFY that I have read this **ANSWER TO RESPONDENT'S 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED this 19th day of July 2019.

**AKERMAN LLP**

*/s/ William S. Habdas*

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 19th day of July, 2019, I caused to be served a true and correct copy of the foregoing **ANSWER TO RESPONDENT'S PETITION FOR *EN BANC* RECONSIDERATION**, in the following manner:

**(ELECTRONIC SERVICE)** The above referenced document was electronically filed on the date hereof with the Clerk of the Court for the Supreme Court of the State of Nevada by using the Court's electronically filing system and served through the Court's Notice of electronic filing system automatically generated to those parties registered on the Court's Master E-Service List.

For those Parties not registered in the Court's electronic file and serve system, service was made in the following manner:

**(UNITED STATES MAIL)** By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, to the parties listed below at their last-known mailing addresses:

Anthony S. Noonan
2852 Loveland Drive #1847
Las Vegas, NV 89109

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/ Patricia Larsen*
An employee of AKERMAN LLP