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IN THE SUPREME COURT OF THE STATE OF NEVADA

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LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Appellant, vs. JAMES R. BLAHA, an individual; BANK OF AMERICA, NA, a National Banking Association, as successor by merger to BAC HOME LOANS SERVICING, LP; RECONTRUST COMPANY NA, a Texas corporation; EZ PROPERTIES, LLC, a Nevada limited liability company; K&L BAXTER FAMILY LIMITED PARTNERSHIP, a Nevada limited partnership; FCH FUNDING, INC, an unknown corporate entity, Respondents.	Supreme Court No. 79055 District Court Case No. A-15-715532-C

REPLY TO RESPONSE TO APPELLANT'S MOTION TO STAY APPEAL AND TO HOLD ALL DEADLINES IN ABEYANCE

COMES NOW, Appellant, LAS VEGAS DEVELOPMENT GROUP, LLC (*"LVDG"*), by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby presents its Reply to James R. Blaha and Noble Home Loans, Inc.'s, Response to Motion to Stay Appeal and to Hold all Deadlines

in Abeyance. This Reply is made and based upon the attached Memorandum of Points and Authorities and all papers and pleadings on file herein.

DATED this 1st day of November, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF THE FACTS

As discussed in the instant Motion, this appeal relates to real property that was the subject of a homeowners association lien foreclosure sale conducted pursuant to NRS Chapter 116. Specifically, at issue is real property commonly known as 7639 Turquoise Stone Court, Las Vegas, Nevada 89113 (*the "Property"*). The Property is located within a common interest community known as Nevada Trails II Community Association (*"HOA"*) and was the subject of a homeowners association lien foreclosure sale conducted by Absolute Collection Services, LLC (*"Absolute"*) on behalf of HOA (*"HOA Foreclosure Sale"*). Bank of America, N.A. (*"BANA"*) purports to have owned a loan secured by a deed of trust recorded against the Property at the time of the HOA Foreclosure Sale.

The Order appealed from herein is based almost entirely upon this Court's decision in the matter *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 2019 Nev. LEXIS 6, 435 P.3d 1217, 135 Nev. Adv. Rep. 7, 2019 WL 1087513. Indeed, the general factual circumstances of this case and *Jessup* are virtually identical.

However, the *Jessup* opinion is the subject of a petition for en banc rehearing. Said petition has been granted and oral argument is presently scheduled to take place on November 4, 2019. Interestingly, as discussed further below, testimony from this very case is contained in an amicus brief that was filed by LVDG in support of the *Jessup* petition for rehearing and upon which this Court presumably at least in part based its granting of the rehearing.

As the Court is no doubt aware, in *Jessup*, this Court carved out an exception to the general rule that a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender. Specifically, this Court held that BANA's "obligation to tender the superpriority amount was excused because [Absolute] stated in its fax that it would reject any such tender if attempted." *Jessup*, 2019 Nev. LEXIS 6, *8, 435 P.3d 1217, 135 Nev. Adv. Rep. 7, 2019 WL 1087513. The fax at issue was a part of correspondence exchanged between Absolute and BANA's attorneys, Miles Bauer Bergstrom & Winters, LLP (*"Miles Bauer"*).

In its amicus brief filed in support of Jessup's petition for en banc rehearing, LVDG provided this Court with unrebutted testimony from Absolute from this very case which proves that it was NOT futile for BANA or Miles Bauer to remit a payment because it was Absolute's policy to accept any payment that BANA or Miles Bauer might have made. Specifically, in the matter at bar, Kelly Mitchell, the principal of Absolute, could not have been more clear that Absolute would have accepted any payment that BANA and/or Miles Bauer might have provided in relation to the Property, testifying as follows:

> Q. During this 2010 to 2011 time frame, if a request was made by a secured lender for a superpriority payoff demand, what were the practices of Absolute Collections with respect to how to respond to that question?
>
> A. We'd advise them how to order a statement, and once they did that, we would provide the statement. And then as the superpriority amounts were in dispute, **we would accept the payment.**

See Bank of America, N.A. v. Thomas Jessup, LLC Series VII, No. 73785, Amicus Brief, Doc. No. 19-21689 at 6-8. Not liking this response, counsel sought clarification:

> Q. Say that again.
> A. As the superpriority amounts were in dispute, the banks believed one thing and we believed the other. **We would accept the payment, no matter what they paid.**

Id. Thus, Ms. Mitchell testified that no matter what amount of money Miles Bauer might have attempted to pay, Absolute would have accepted such payment. Moreover, because Absolute routinely accepted checks that it sent, Miles Bauer necessarily knew that it was not futile to remit one.

Appellant's Opening Brief is presently due herein on November 7, 2019. Obviously, the *Jessup* rehearing will not likely be fully resolved by that time. Because this Court's ultimate decision in *Jessup* will be highly relevant to the instant matter, this appeal should be stayed and briefing and other deadlines should be held in abeyance until after *Jessup* is resolved.

B. LEGAL ARGUMENT

As noted by Justice Gibbons on October 7, 2019, at the oral argument in Case No. 73908, *Jessup* is no longer citable as authority in Nevada while en banc reconsideration is pending. Under such circumstances, it is patently clear that the Appellant cannot intelligently brief this matter at this time. Indeed, how is it conceivably possible for the Appellant to prepare an Opening Brief without referring to the authority upon which the Order appealed from is almost singularly based?

The Appellees herein do not make much argument regarding the inherent difficulties associated with briefing an appeal of an Order that is based upon an opinion that is under reconsideration. Instead, they primarily wail incessantly about perceived dilatory conduct of LVDG – an issue that has already been decided against them by this very Court when it agreed with LVDG and concluded

that LVDG possessed a 5 year period of time in which to bring the instant action. *Las Vegas Dev. Grp., LLC v. Blaha*, 416 P.3d 233, 237, 2018 Nev. LEXIS 30, *9, 134 Nev. Adv. Rep. 33, 2018 WL 2090812.

While the Appellees complain that nothing prohibits the briefing of the Appellees' cross-appeal, they fail to note that – as discussed above – this Court has already more or less resolved it by finding that LVDG's claims herein were timely filed. Moreover, "[a] quiet title action is now considered to be one in law, not equity, and hence the doctrine of laches cannot apply. [Citations.]" *Connolly v. Trabue,* 204 Cal.App.4th 1154, 1167 (2012). In other words, the period established by the applicable statute of limitations for a quiet title action stands firm and is not shortened by acts or omissions that could be interpreted as an unreasonable delay. To the extent that laches could apply, especially strong circumstances must exist to sustain a defense of laches when the statute of limitations has not run. *Langir v. Ardent*, 82 Nev. 28, 409 P.2d 891 (1966).

While the Appellees do not care to admit it, the "harm" purportedly being suffered by Blaha is solely the result of his lack of sophistication and the incompetence of his title insurer and other advisors. Blaha purported to purchase the Property with record notice of the interest of LVDG. Indeed, LVDG's interest was of record for the entire world to see. Nonetheless, Blaha chose to purchase the Property subject to LVDG's interest. Similarly, Noble Home Loans, Inc. chose to lend money secured by an interest that was and is subordinate to LVDG's interest. The "harms" being suffered by the Appellees – to the extent that any exist – are of their own making and not the result of any action or inaction of LVDG. Indeed, it is LVDG that is suffering ongoing and continuing harm as a result of Blaha's continued unfettered exclusive use and possession of the Property that rightfully belongs to LVDG.

The Appellees further contend that judicial economy weighs against a stay. It is difficult to see how this could conceivably be the case. If briefing were to be

initiated at this time, at the very least, it would likely need to be supplemented or amended at a later date when the *Jessup* rehearing is resolved. This would benefit neither the parties nor the Court. The only intelligent means of proceeding is to stay this appeal until the authority upon which the Order appealed from is based is reconsidered. At that point, the parties will know the state of the law and they will be able to proceed accordingly.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that the instant appeal be stayed and that all deadlines be held in abeyance pending this Court's resolution of the petition for en banc reconsideration in the matter of *Jessup*.

DATED this 1st day of November, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 1st day of November, 2019, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's eflex e-file and serve system.

____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

____ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ *Timothy E. Rhoda*
An employee of ROGER P. CROTEAU & ASSOCIATES, LTD.