IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME,

Appellants,

v.

SABLES, LLC, A NEVADA LIMITED LIABILITY COMPANY, AS TRUSTEE OF THE DEED OF TRUST GIVEN BY VICENTA LINCICOME AND DATED 5/23/2007; FAY SERVICING, LLC, A DELAWARE LIMITED LIABILITY COMPANY AND SUBSIDIARY OF FAY FINANCIAL, LLC; PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A., AS LEGAL TITLE TRUSTEE; BANK OF AMERICA, N.A.; BRECKENRIDGE PROPERTY FUND 2016, A UTAH LIMITED LIABILITY COMPANY; NEWREZ, LLC, D/B/A SHELLPOINT MORTGAGE SERVICING, LLC,; 1900 CAPITAL TRUST II, BY U.S. BANK TRUST NATIONAL ASSOCIATION; AND MCM-2018-NPL2,

Respondents.

NEVADA SUPREME COURT
CASE NO.: 83261

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
Case No. 18-CV-01332

APPELLANTS' PETITION FOR EN BANC RECONSIDERATION

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, LYON COUNTY

THE HONORABLE LEON A. ABERASTURI
DISTRICT COURT CASE NO. 18-CV-01332

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I. INTRODUCTION

Albert Ellis Lincicome Jr. and Vicente Lincicome ("Appellants" or "Lincicomes") hereby respectfully petition the Court for *en banc* reconsideration of this matter pursuant to Rules 40(a)(1)-(2) and 40(c)(2) of the Nevada Rules of Appellate Procedure.

Reconsideration of the Panel's December 29, 2022 Order of Affirmance (Panel's Opinion") is necessary to prevent the opinion from frustrating the precedents set by this Court as to issues pertaining to mortgage modification and contract interpretation and enforcement that left unchanged may impact the rights of thousands of Nevada homeowners.

Reconsideration is also necessary to uphold the protections set forth in Chapter 107 of the Nevada Revised Statutes and to protect Nevadans from being deemed to have waived their future claims for wrongful foreclosure and violations of the Homeowners' Bill of Rights under NRS 107.400-560 ("HBOR").

In this case, the Panel misapprehended material facts and misapplied Nevada contract law, excused violations of public policy, and condoned the improper and wrongful foreclosure of the Lincicomes' home in violation of NRS 107.080. The Panel excused the foreclosing Respondents' wrongful foreclosure sale of the Lincicomes' home upon grounds that the Lincicomes had waived their rights to Chapter 107 protections even though the Panel found that Bank of America, N.A.

("BANA") repudiated and breached the mortgage agreement, and even when BANA and its successors never cured the breach.[1]

After concluding that formation of the 2009 Loan Modification Agreement ("LMA" or "Modified Mortgage") had occurred upon the Lincicomes' acceptance, the Panel also concluded that BANA "repudiated the LMA" and breached Modified Mortgage.[2] The Panel determined that the Lincicomes' breach of contract claim was not tolled because "BANA repudiated the LMA" by its rejection of the Lincicomes' payments and because "the Lincicomes knew or should have known that BANA was not going to perform in accordance with the LMA."[3] [4]

After BANA's breach, from October of 2009 through January 4, 2019 (date of foreclosure sale), BANA, U.S. Bank, N.A. ("US Bank), Fay Servicing, LLC ("Fay"), Shellpoint Mortgage Servicing, LLC ("Shellpoint"), and Sables, LLC ("Sables" or "Trustee") failed to provide the Lincicomes with a statement or demand

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[1] Panel 12/29/2022 Opinion, pp. 3-4.
[2] *Id*., p. 4.
[3] *Id*., p. 5.
[4]The Panel's 12/29/2022 Opinion incorrectly states that "the district court properly granted summary judgment to the Lincicomes on their breach of contract claims against BANA." In fact, the district court denied *Plaintiffs' Motion for Partial Summary Judgment* in its entirety in its 6/23/*2021 Order Denying Plaintiffs Motion for Partial Summary Judgment/Granting Motions for Summary Judgment filed by BANA, PROF-2013 M4 Legal Trust, US Bank and Fay Servicing, LLC*; AA03751-3768, Vol.XVI.

for payment reflecting the terms of the Modified Mortgage. Rather, the foreclosing Respondents only provided statements seeking payment under the superseded terms of the mortgage, as if the LMA did not exist.[5]

Instead of concluding that BANA and its successors' continued repudiation of the Modified Mortgage relieved the Lincicomes of the duty to perform until the breach and repudiation were cured, as required by contract law, the Panel concluded in error that the terms of the LMA permitted BANA and its successors to, in effect, disregard the LMA and enforce the original superseded terms of the mortgage, including the foreclosure of the Lincicomes' home.[6]

The Panel's conclusion that the superseded terms remain enforceable is contradicted by the language of the LMA.[7] The LMA provides that the "Borrower and Lender will be bound by, and comply with all terms and provisions [of the Note and Deed of Trust], as amended by this Agreement." [8]

Thus, the Deed of Trust and Note were amended and modified by the LMA and BANA and the Lincicomes had contractual duties to "comply with all terms . . . as amended by [the LMA]."[9]

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[5] AA02408-09, Vol.X; AA2508-2528, Vol.XI.
[6] Panel 12/29/2022 Opinion, pp 1-11; *Cain v. Price,* 134 Nev. 193, 415 P.3d 25.
[7] AA00087-92, Vol.I.
[8] Panel 12/29/2022 Opinion, pp 1-11; AA00088, Vol.I.
[9] AA00087-92, Vol.I.

Paragraphs 1 and 2 of the LMA amended and modified the material terms of the mortgage including the principal balance, the monthly payment, applicable interest rate, and the date that the mortgage would become due.[10]

Contrary to the Panel's determination, the LMA's terms do not support the conclusion that the original terms that were modified and amended by the LMA somehow survive unchanged and remain enforceable by BANA and its successors without BANA or its successors first curing the repudiation and breach of the agreement.[11]

The Panel's opinion sets a dangerous precedent contravening prior precedents of this Court. The Panel's Opinion in this case permits a breaching party to profit by way of forcing an unwarranted foreclosure by way of the lenders own breach to the detriment of the nonbreaching homeowner. Moreover, the Panel's opinion sets a precedent that provides lenders with the option of abandoning or repudiating modified mortgages in favor of the prior mortgage terms, at the lender's discretion, and thereafter asserting that the homeowner failed to make payments according to the original terms of the loan, for the purposes of causing the foreclosure sale of the homeowner's home.

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[10] *Id.*
[11] *Id.*

The Panel's conclusion is unworkable and stands in stark contrast to this Court's prior decisions as to the effect of one party's repudiation and breach of an agreement. Accordingly, the Panel's affirmation of the district court's summary judgment order must be corrected, not just for the sake of the Lincicomes, but all Nevada homeowners that have modified mortgages.

II. LEGAL ARGUMENT

A. Applicable Legal Standard

While *en banc* reconsideration of a panel decision is not favored and ordinarily will not be ordered, reconsideration by the full Court is appropriate when (1) it 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."[12]

Reconsideration or rehearing pursuant to NRAP 40(c)(2), is appropriate:

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
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> (B) When the court has overlooked, misapplied or failed to consider a statute ... directly controlling a dispositive issue in the case. [13]

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[12] NRAP Rule 40A(a); *Ronning v. State,* 116 Nev. 32, 33 (2000).
[13] NRAP40(c)(2).

As noted above and as established below, reconsideration is necessary in this case.

B. The Panel Misapprehended the Loan Modification Agreement

The correction of the Panel's failure to observe the basic rules of contract interpretation by its misinterpretation and misapplication of the 2009 Loan Modification Agreement is crucial to this matter.

The "cardinal rule" of contract construction is to ascertain the intention of the parties.[14]

In applying this basic rule "'[e]very word must be given effect if at all possible.'" [15]

As well, this Court has concluded that contracts "should be construed to give effect not only to the intention of the parties as demonstrated by the language used, but to the purpose to be accomplished and the circumstances surrounding the execution of the agreement."[16]

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[14] *Great American Airways, Inc. v. Airport Authority of Washoe County*, 103 Nev. 427, 429-430, 743 P.2d 628, 629-630 (1987)(*citing Barringer v. Gunderson*, 81 Nev. 288, 302, 402 P.2d 470, 477 (1965).

[15] *Musser v. Bank of America*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998)(*quoting Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)).

[16] *Bell v. Leven*, 120 Nev. 388, 90 P.3d 1286, 1288 (2004)(fn. 6. *quoting Shoen v. Amerco*, Inc., 111 Nev. 735, 743, 896 P.2d 469, 474 (1995)).

Here, the Panel's interpretation disregards nearly every provision of the LMA and does not consider the intentions of the parties to modify the loan. Further, the Panel's conclusion does not support the purposes underlying the LMA's formation.

The Panel focused upon two specific provisions of the LMA in concluding that "the LMA made clear that it did not wholly release [the Lincicomes] from their liability under the [original terms of the] Note and Deed of Trust."[17]

The Panel relied upon paragraphs 4 and 12 of the LMA to establish that the Lincicomes remained liable upon the original Note and Deed of Trust in addition to the terms of the LMA. The Panel is mistaken.

Paragraph 4 of the LMA provides as follows:

> Nothing in this agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. **Except as otherwise specifically provided in this Agreement**, the Note and Security Instrument will remain unchanged and the **Borrower and Lender will be bound by, and comply with** all terms and provisions thereof, **as amended by this Agreement.** [18]

Paragraph 12 of the LMA (last paragraph of Addendum to LMA) provides in pertinent part as follows:

> . . . the Borrower still owes amounts under the Note and Security Instrument, as amended by the Agreement and

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[17] Panel 12/29/2022 Opinion, p. 5.
[18] LMA AA00088, Vol.I; *see* Panel 12/29/2022 Opinion, p.5.

> this Addendum, the Borrower shall pay these amounts in full on the maturity date." [19]

When read in their entirety, both quoted paragraphs contradict the Panel's conclusion that the Lincicomes remained liable upon the original terms of the mortgage separately from the LMA.[20] Rather, paragraphs 4 and 12 irrefutably establish that the parties agreed to be "bound by, and comply with" the Note and Deed of Trust "**as amended**" by the LMA.[21]

The LMA dictates that both parties were "bound by, and [must] comply with all the terms . . . amended by [the LMA]."[22] Thus, after formation of the LMA was complete, a breach of the LMA constituted a breach of the whole mortgage including Note and Deed of Trust, because both of those instruments were modified by the LMA parties' adoption of the LMA.

No provision of the LMA supports the Panel's interpretation that somehow the Lincicomes remained liable upon both the original superseded terms of the Note and Deed of Trust as well as the modified material terms set forth in the LMA. Likewise, no provision of the LMA supports the conclusion that BANA and its

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[19] LMA AA00089, Vol.I.
[20] AA00087-92, Vol.1.
[21] *Id.*
[22] *Id.*

successors could breach the LMA, and later enforce the superseded terms in the Note and Deed of Trust as if the same had never been modified by the LMA.

As established above, it cannot be disputed that the principal balance, interest rate, monthly payment, and term of the loan were all modified by the LMA. Thus, the prior superseded terms of the mortgage were no longer applicable and could not be enforced by BANA or its successors, at any time, including after BANA rejected the Lincicomes' payment, and attempts to collect payment under the original superseded terms of the mortgage.[23]

Furthermore, because the language used in the LMA is not atypical or unique, as it pertains to modification agreements, this Court should be concerned with the implications that the Panel's Opinion could have in cases involving modified mortgages.

No homeowner wants to learn that their modified mortgage agreement is a nullity, because their modification includes statements such as those found in paragraphs 4 and 12 of the LMA.

The precedent set forth by this Court should not provide lenders with the power to declare previously established modifications null and void so that they can thereafter seek to enforce the original terms of a mortgage.

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[23] AA00087-92, Vol.1.

This Court therefore must conclude that the LMA did not permit the foreclosing Respondents to seek to enforce the original terms of the mortgage, and declare that the same had been breached, and thereby foreclose upon Appellants' home when BANA and its successors repudiated the mortgage agreement without cure.

C. The Panel Misapprehended and Misconstrued the Foreclosure Mediation Agreement

Reconsideration of the Panel's conclusion that the April 3, 2018 Foreclosure Mediation Agreement ("FMA") "settled all issues pertaining to the mortgage" is necessary because the Panel's conclusion is contradicted by the terms of the FMA and the terms of the DIL program incorporated into the FMA.

In order for the FMA to have settled all matters between the parties, the agreement must provide for the resolution of all material issues to extinguish all claims against the released parties.[24]

This Court has determined that when reviewing the scope of a release in a settlement agreement, it must endeavor to effectuate the intent of the contracting

[24] *Marder v. Lopez*, 450 F.3d 445, 452 (9th Cir. 2006).

parties and where the "release is unambiguous and clear," then "'we must construe it from the language contained within it."[25]

This Court, however, has determined that foreclosure mediation agreement has a much more limited scope which extends to the respective foreclosure mediation and waiving any "claim of noncompliance" regarding the requirement of NRS 107.086 and the Foreclosure Mediation Rules.[26]

The Panel determined that the FMA required the Lincicomes to provide a deed in lieu of foreclosure to Fay as the exclusive act to be performed under the agreement.[27] In so concluding the Panel interpreted "certificate date" of July 5, 2018 to be the date the deed in lieu would be provided.[28]

The Panel also concluded that because the Lincicomes "breached" the FMA by failing to provide a deed-in-lieu of foreclosure, in effect the Lincicomes waived any possible claim that they could have for Respondents' foreclosure of their home in violation of NRS 107.080 and HOBR.[29]

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[25] *In re* AMERCO, 127 Nev. 196, 211, 252 P.3d 681, 693 (2011).
[26] *Espanola v. One West Bank, FSB*, 381 P.3d 610 (Nev. 2012)(*citing Jones v. SunTrust Mortgage, Inc.*, 128 Nev. 188, 190, 274 P.3d 762, 764 (2012)); *see also Sherbino v. Select Portfolio Servicing, Inc.*, 381 P.3d 662 (2012).
[27] Panel 12/29/2022 Opinion, p.7.
[28] *Id*. (Determining that "the certificate date for the deed in lieu of foreclosure would be July 5, 2018").
[29] *See* Panel 12/29/2022 Opinion, p.10.

The plain and unambiguous language of the FMA along with Fay's DIL Program terms incorporated into the Agreement contradicts the Panel's conclusion that the FMA was a complete settlement resolving all issues of the mortgage.[30]

The Panel misinterpreted the meaning of "Certificate Date" in the FMA to mean the "certificate date" that the deed in lieu was to be provided.[31]

However, in Respondents' March 16, 2023 Answer to Petition for Rehearing filed on behalf of US Bank, Fay, and Shellpoint, said Respondents asserted that the Panel "committed an error" in finding that the "Certificate Date" pertained to the deed-in-lieu and asserted that "[t]he certificate date is the date when the foreclosure mediation certificate would issue . . . [and that] [t]here is no such date for when a certificate for a deed-in-lieu would issue."[32]

Respondents also noted that they would have been unable to foreclose without the certificate of mediation required by NRS 107.086(2)(e)(2).[33]

The meaning of "Certificate Date" also directly relates to and corresponds with the terms of Fay's DIL program. The terms of the DIL program establish that the Lincicomes were being given the opportunity to apply and qualify to provide Fay

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[30] AA02441-2456, Vol. X.
[31] Panel 12/29/2022 Opinion, p.7.
[32] Respondents 3/16/2023 Ans., p.4.
[33] *Id.*

a deed-in-lieu under its DIL program. The incorporated terms of the DIL program on page 6 of the 3/6/2018 TTP letter are summarized as follows: (1) the Lincicomes must cooperate with the completion of a BPO (the record does not reflect that Fay ordered a BPO); (2) that the Lincicomes continue to maintain their property; (3) that the Lincicomes provide a "Dodd-Frank Certification at least seven (7) days prior to [7/4/2018]" to receive relocation assistance; (4) that suspension of foreclosure will end "if you have not completed a DIL for the property by 7/4/2018"; (5) upon conveyance, a lien release "in full satisfaction of the mortgage" will be prepared; (6) approval of a deed-in-lieu is "subject to the written approval of the mortgage insurer or guarantor"; (7) duty to submit a hardship affidavit; (8) circumstances that may terminate Fay's obligations; (9) that the "proposed DIL transaction represents [Fay's] attempt to reach a settlement . . . [and that] there is no guarantee that the transaction will be successful": (10) notice regarding tax ramifications; and (11) notice regarding credit reporting.[34]

The DIL program terms provide that there is "no guarantee that the transaction will be successful" and further, that the suspension of foreclosure will end as of

[34] AA00462-463, Vol.II.

7/4/2018 if the Lincicomes did not qualify, or had failed to submit necessary paperwork.[35]

The terms of the DIL program do not establish that Fay had agreed to accept a deed in lieu unconditionally, nor do the program's terms establish that the Lincicomes had agreed to anything but the option to apply to the DIL program with resulting possible consequence of not applying or not being approved being the end to the suspension of the non-judicial foreclosure.[36] The Panel's determination that the Lincicomes agreed to more or less is contrary to the terms of the DIL Program and the FMA.[37]

Furthermore, Fay and the Lincicomes' correspondence in June of 2018, not reviewed or discussed by the Panel, establish that neither party believed that delivery of a deed in lieu was compulsory under the FMA.[38] In their 6/6/2018 CFPB Complaint, the Lincicomes complained that they were "pushed into committing to do a deed in lieu" and that "[w]e are not going to be bullied into signing our home over to them."[39]

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[35] AA00463, Vol.II; see also Panel 12/29/2022 Opinion, pp.8-9.
[36] AA00462-463, Vol.II.
[37] Panel 12/29/2022 Opinion, p.7.
[38] AA00473-475, Vol.II.; AA00483-484, Vol. II.
[39] AA00479, Vol.II.

Fay referenced the CFPB Complaint in its 6/20/2018 correspondence in which it asserted that it mailed the Lincicomes their 5/16/2018 notice asserting "that your eligibility to participate in the Deed in Lieu Program had been terminated."[40] At the end of the response Fay asserts that "[w]e trust that the information provided has addressed the questions and concerns outlined in your correspondence."[41]

These communications establish that neither Fay nor the Lincicomes believed that the Lincicomes were bound to deliver a deed-in-lieu of foreclosure on July 4, 2018.[42] Rather, the communications establish that the Lincicomes were determined not to provide a deed in lieu and that Fay believed and confirmed that the Lincicomes did not qualify for the program.[43]

What is noticeably different in the June 2018 communications over those occurring in May 2018, which are discussed in the Panel's Opinion, is that the Lincicomes' June CFPB Complaint to which Fay responds discusses that the Lincicomes had entered into an agreement at foreclosure mediation to provide a deed-in-lieu. Fay's response is therefore damning when it confirms again, as it did

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[40] AA00483-484, Vol.II.
[41] AA00484, Vol.II.
[42] *See* AA00479, AA00483-84 Vol. II.
[43] *See id.*

in its May correspondence that the Lincicomes did not qualify under the DIL Program.[44]

Thus, because no terms in the FMA assert a specific waiver of claims or rights to pursue future violations of law under Chapter 107, and because Fay retained the right to reject any deed-in-lieu that may have been provided, and also because it was agreed that a certificate of mediation would issue and the suspension of the non-judicial foreclosure would end on July 5, 2018, this Court must conclude that the agreement between Fay and the Lincicomes was only an agreement to resolve the foreclosure mediation by providing the Lincicomes the opportunity to apply to participate in Fay's DIL Program.

The Panel's determination that the overly simplistic form FMA was a complete waiver of claims pertaining to the mortgage and foreclosure is not supported by the agreement or the communications of the parties.

D. The Panel Misapprehended or Overlooked Controlling Precedent as to BANA's Breach and Repudiation of the Modified Mortgage

The Panel determined BANA's rejection of Appellants' 10/1/2009 payment and subsequent payments constituted a breach and repudiation of the LMA.[45]

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[44] *See id.*
[45] Panel 12/29/2022 Opinion, p.4.

However, the Panel concluded Appellants' breach of contract claim was time barred, and overlooked controlling Nevada precedent in concluding that BANA and its successors could enforce their security interest in the property even though the breached Modified Mortgage had not been cured.[46]

The Panel concluded that BANA's acceptance of the Lincicomes' first payment, but rejection of all others, constituted a breach and repudiation of the LMA.[47] The Panel concluded that the Lincicomes knew or should have known that BANA was not going to perform in accordance with the LMA."[48]

However, the Panel thereafter concluded that the Lincicomes remained liable upon the original terms of the LMA pursuant to paragraphs 4 and 12, addressed *supra*, without any legal analysis of issue.

This Court has determined that a "material breach" of contract "is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract ... ."[49]

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[46] *See e.g.* AA00976, Vol.IV (BANA "misrepresented and hid its acceptance of the modification agreement."); AA03120, Vol.XIII ("BANA made misrepresentations causing [Appellants] to believe that 'they did not have the Loan Modification Agreement'"); AA03122, Vol.XIII ("BANA misrepresented to the U.S. Federal Bankruptcy Court"); AA03680, Vol.XV (BANA "misrepresented ... that it was entitled to foreclose on the Lincicomes.")

[47] Panel 12/29/2022 Opinion, p.4.

[48] Panel 12/29/2022 Opinion, p.5.

[49] 109. Williston on Contracts § 63:3 (May 2016).

This Court has consistently upheld one of the basic tenets of contract law that "one party's material breach of its promise discharges the non-breaching party's duty to perform."[50]

This Court has never concluded that a breaching or repudiating party has the right to unilaterally un-modify or rescind certain provisions of an agreement.

Rather, this Court has previously concluded that only a non-breaching party has the right to choose the appropriate remedy upon breach of a partially performed contract.[51] On the contrary, this Court has concluded that only a non-breaching party has the right to either rescind the contract, or seek damages upon breach.[52]

Likewise, because only the non-breaching party choses the appropriate remedy to seek, a breaching party cannot enforce the breached contract at the detriment of the non-breaching party.[53] Rather, the breaching party has the duty to put the nonbreaching party "'in as good of position as if the contract were

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[50] *Cain*.

[51] *Bergstrom v. Estate of DeVoe,* 109 Nev. 575, 577-78, 854 P.2d 860, 861 (1993) (holding that a non-breaching party to a contract may either seek to rescind or seek damages from the breach, but not both) *see also Fuoroli v. Westgate Planet Hollywood Las Vegas, LLC*, No. 2:10-cv-2191-JCM, 2013 WL 431047, at *4 (D. Nev. Feb. 1, 2013).

[52] *Id.*

[53] *See Eaton v. J. H., Inc.*, 94 Nev. 446, 581 P.2d 14, (1978); C*ain* (holding that "one party's material breach of its promise discharges the non-breaching party's duty to perform.")

performed.'" [54] Simply put, the law does not permit a breaching party to retain the benefits of the contract when the breaching party's actions impede the other party's performance.[55]

Here, BANA's breach and repudiation relieved the Lincicomes of their duty to perform under the agreement until such time as the breach was cured.

Furthermore, even if each rejected payment would constitute a separate breach of the Modified Mortgage, this Court has previously concluded that where one party has previously failed to timely perform upon demand according to the terms of a contact "[o]f course, it would be futile for a party to make a demand 'if the other party has repudiated the contract or otherwise indicated [he] refuses to perform.'"[56]

Here, because "BANA was not going to perform in accordance with the LMA," as the Panel had concluded, it would have been futile for the Lincicomes to continue to tender payments to BANA and its successors.

This is especially true in light of the fact that BANA and its successors from October 2009 forward sought to exclusively enforce the original terms of the mortgage agreement.[57] The Lincicomes are not at fault for BANA and its successor

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[54] *Id.*
[55] *Turley v. Thomas,* 31 Nev. 181, 101 P. 568 (1909).
[56] *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362 (2008)
[57] AA02408-09, Vol.X; AA2508-2528, Vol.XI.

conduct. The Lincicomes performed in good faith, and were lied to. The lie and continued failure to incorporate the modified terms set forth in the LMA confirmed BANA and its successors' repudiation of the mortgage agreement.[58]

The Panel seems to believe that it was unreasonable for the Lincicomes to have believed BANA that the LMA was never received or missing. This was not a transaction of two guys on the street, but rather an agreement with a national bank during a foreclosure crisis.[59] Furthermore, the record reflects that BANA continued to inform the Lincicomes that it was working on the issues. [60]

It would be one thing if the breach was incidental or unintended, but after the LMA was signed and recorded in 2011, BANA and its successor are left without any good explanation.[61] BANA and its successors' actions were wrongful, deceitful, and manipulative.[62]

All BANA or its successor had to do was say sorry, and offer to take the Lincicomes' second payment. In other words, put the Lincicomes in the position

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[58] AA02247, Vol.IX.
[59] Appellants' 1/17/2023 Petition for Rehearing, p.21.
[60] AA00098-102, Vol.I.
[61] AA00087-92; Vol.I.
[62] Appellants' 1/17/2023 Petition for Rehearing, pp.19-21.

that they would have been in had BANA never rejected the second payment and incorporated the loan terms into its mortgage statements.[63]

However, because BANA's repudiation did not pertain to one payment but all future payments, and because BANA's successors did nothing to incorporate the terms of the LMA into their mortgage statements, or extend to the Lincicomes the opportunity to make payments under the LMA, this Court's precedents cited above require that the this Court determine that Lincicomes were not in default for failing to make payments under the Modified Mortgage. The Court must also conclude that foreclosing Respondents had no right to foreclose upon the Lincicomes under Nevada contract law, as they were the breaching party.

III. CONCLUSION

This case is difficult for sure. It is understandable that the district court or even the Panel did not want to unwind the foreclosure sale and ultimate resolution of this matter when Appellants lived in their home without payment of their mortgage for nearly10 years.

It would be improper for any court to find a resolution to this matter based solely upon how the Lincicomes may have benefitted rather than the law. This

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[63] See *Eaton,* 94 Nev. 446, 450, 581 P.2d 14, (1978).

Court's Opinion should not, on thorough review, lead anyone to believe that a desired result influenced its opinion.

The right thing to do is always the best thing. The Lincicomes' Modified Mortgage agreement should not be interpreted to say something it doesn't. Accordingly, BANA's breach of the Modified Mortgage should not be brushed aside while BANA and its successor were allowed to enforce the terms of the parties' prior agreement when no such justification in the law or under the agreement exists.

Likewise, the Foreclosure Mediation Agreement should not be interpreted in such a way to disregard the DIL Program terms so that the agreement can be the way this matter resolves, without forcing the parties to go back to the district court, as the law would otherwise demand. Furthermore, it is improper to conclude that the Foreclosure Mediation Agreement is an appropriate mechanism to wipe out all of the Lincicomes' claims including claims of wrongful foreclosure and violation of HOBR, when the conclusion violates public policy, is not supported by the agreements terms, and the result undermines the protections homeowners have under Chapter 107.

This Court should not reward Respondents' reprehensible conduct that is akin to fraud. Nor should this Court let a few checked boxes on a mediation agreement subvert Nevada law.

Therefore, based upon the foregoing, Appellants respectfully request that this Panel conclude that reconsideration of the Panel's Opinion is appropriate.

Dated this 3rd day of April, 2023.

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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
)ss.:
COUNTY OF DOUGLAS)

I, Michael G. Millward, Esq., hereby certify that this motion is filed in compliance with the formatting requirements of NRAP 32. The motion is prepared for 8 ½ by 11 inch paper, and the text is double spaced in compliance with NRAP 32(a)(4). The brief is written in 14-point Times New Roman font in the body and footnotes, and it fully complies with the formatting and style requirements of NRAP 32(a)(5) and NRAP 32(a)(6). While the petition exceeds 10 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 4,622 words. I further hereby certify that I have read this motion, and to the best of my knowledge, information and belief, it is not frivolous or interposed of any improper purpose. I understand that I may be subject to sanction in the event that the accompanying motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before
me this 3rd day of April, 2023.

Notary Public

Rebekah Higginbotham
NOTARY PUBLIC
STATE OF NEVADA
No. 18-3944-5
Appt. Exp. 10-10-2026
-Millward Law- 1591 Mono Ave, Minden, NV

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2023, I filed the foregoing APPELLANTS' PETITION EN BANC RECONSIDERATION, which shall be served via electronic service from the Court's eFlex system to:

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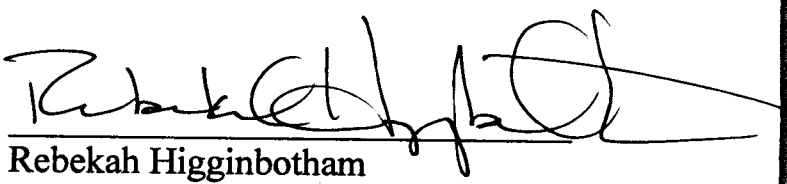

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