IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR; AND VICENTA LINCICOME,

Appellants,

v.

BRECKENRIDGE PROPERTY FUND 2016, LLC,

Respondent.

Supreme Court Case No: 86324
District Case No: 18-CV-01332

RESPONDENT'S APPENDIX OF EXHIBITS TO ANSWERING BRIEF

VOLUME 1 of 1

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CHRONOLOGICAL INDEX

Doc No.	Description	Date	Vo1.	Bates Range	
1	Order Partially Dismissing Appeal; Case No. 83261	01/19/22	1	RA 1	RA 3
2	Petition for Rehearing; Case No. 83261	01/17/23	1	RA 4	RA 30
3	Order Denying Rehearing; Case No. 83261	03/20/23	1	RA 31	RA 32
4	Petition for En Banc Reconsideration; Case No. 83261	04/03/23	1	RA 33	RA 61
5	Order Denying Petition for En Banc Reconsideration	04/14/23	1	RA 62	RA 63

ALPHABETICAL INDEX

Doc No.	Description	Date	Vo1.	Bates Range	
5	Order Denying Petition for En Banc Reconsideration	04/14/23	1	RA 62	RA 63
3	Order Denying Rehearing; Case No. 83261	03/20/23	1	RA 31	RA 32
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4	Petition for En Banc Reconsideration; Case No. 83261	04/03/23	1	RA 33	RA 61
2	Petition for Rehearing; Case No. 83261	01/17/23	1	RA 4	RA 30

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **RESPONDENT'S APPENDIX OF EXHIBITS TO ANSWERING BRIEF – Volume 1 of 1**was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

ALL COUNSEL ON SERVICE LIST

DATED this 26th day of February, 2024.

/s/ Madelyn B. Carnate-Peralta

_____

An employee of Hutchison & Steffen, PLLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.; AND VICENTA LINCICOME,
Appellants,
vs.
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, LLC, 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.

No. 83261

FILED
JAN 19 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER PARTIALLY DISMISSING APPEAL

Respondent Breckenridge Property Fund 2016, LLC has filed a motion to dismiss this appeal as it relates to it. Appellants oppose the motion, and Breckenridge has filed a reply.

Having considered the parties arguments and the documents before this court, we conclude that the June 23, 2021, "Order on Breckenridge Motion for Summary Judgment" is not appealable as it does not dispose of all the claims and issues raised by Breckenridge. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final

judgment). Although this order grants summary judgment in favor of Breckenridge and states that "Breckenridge is entitled to summary judgment regarding their claims to title of property," the order does not appear to resolve Breckenridge's claims for slander of title, writ of restitution, unjust enrichment, and rent or monies for possession of the subject property, or award any amount of damages for these claims.[1] *Cf. Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 90, 247 P.3d 1107, 1109 (2011) ("[A] judgment must confer some right that may be enforced without further orders of the court and which puts an end to the litigation." (alteration and internal quotation marks omitted)). And no other statute or court rule appears to authorize an appeal from this order. *See Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). Accordingly, Breckenridge's motion to dismiss is granted, and this appeal is dismissed as it relates to Breckenridge.

However this appeal may proceed as to the remaining respondents as the June 23, 2021, "Order Denying Plaintiffs Motion for Partial Summary Judgment/Granting Motions for Summary Judgement Filed by BANA, Prof-2013 M4 Legall Trust, US Bank and Fay Servicing LLC" appears to have been properly certified as final under NRCP 54(b).

Appellants' motion for an extension of time to file the opening brief and appendix is granted. The opening brief and appendix were filed on December 29 and 30, 2021. However, the opening brief is deficient as the certificate of compliance does not state the exact word count contained in the brief. *See* NRAP 28.2(a)(4); NRAP 32(a)(7)(A)(ii); NRAP Form 9.

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[1]Appellants' docketing statement did not mention these claims nor did it provide this court with a copy of the claims as required. *See* Docketing Statement items 23 and 27.

Accordingly, the clerk of this court shall strike the opening brief filed on December 29, 2021. Appellants shall have 14 days from the date of this order to file an opening brief that complies with this court's formatting rules and this order. Thereafter, briefing shall proceed as provided in NRAP 31(a)(1).

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Herndon

cc: Hon. Leon Aberasturi, District Judge
Clouser Hempen Wasick Law Group, Ltd.
Millward Law, Ltd.
Hutchison & Steffen, LLC/Las Vegas
Wedgewood, LLC
Wright, Finlay & Zak, LLP/Las Vegas
Akerman LLP/Las Vegas
ZBS Law, LLP
Third District Court Clerk

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 THIRD JUDICIAL DISTRICT COURT CASE NO.: 18-CV-01332

APPELLANTS' PETITION FOR REHEARING

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

REGULATIONS

APPELLANTS' PETITION FOR REHEARING

I. INTRODUCTION

Appellants respectfully request that this matter be reheard to address the overlooked impact of the Panel's finding that the lender, Bank of America, N.A. ("BANA"), materially breached the 2009 modified mortgage agreement as it pertains to BANA and its successors' right to foreclose, when the lender, and not the borrower, breached the agreement.

In the Panel's 12/29/2022 opinion, it overlooked Nevada statutes and primary authority that prohibit foreclosure where the lender refused payments from the borrower and failed to honor the terms of the current mortgage agreement.[1] Nevada law also prohibits the initiation of a non-judicial foreclosure, including participation in a foreclosure mediation, where the lender has prevented and impeded the borrower's performance.[2]

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[1] *See* NRS 107.080(2)(a)(2); NRS 107.080(5)-(5)(a) (sale made in violation of NRS 107.080(2)(a)(2) "must be declared void"); *Cain v. Price*, 134 Nev. 193, 415 P.3d 25 (2018) (holding that a non-breaching party is discharged from duty to perform upon the breach of other party).

[2] *See* NRS 107.080(2)(a)(2); NRS 107.086 (requiring "each party to the mediation act in good faith"); *See Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158, 2009 WL 1470032 (Nev. 2009) (*holding* that in the instances of mortgage contracts "the limitations statute [for breach of contract] begin to run only with respect to each installment, when due ...").

The Panel's opinion also overlooked facts pertaining to US Bank, N.A. ("US Bank") and BANA's continued breach of the 2009 Loan Modification Agreement ("LMA" or "modified 2007 DOT") modifying and superseding the original 2007 mortgage agreement ("2007 DOT"). Although the Panel found that "BANA and its successors in interest demanded payment under the original loan," the Panel did not also conclude that "BANA and its successors [demand] for payment," including seeking arrears and interest under the original terms, constituted a continued material breach of the LMA.[3]

In light of the overlooked facts and primary authority, a rehearing of the Panel's opinion is necessary.

II. LEGAL ARGUMENT

A. Standard for Rehearing

Pursuant to N.R.A.P. 40(c)(2), this Court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute ... directly controlling a dispositive issue in the case. Rehearing is necessary in this case.

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[3] *See id.*

B. Overlooked Continued Breach of Contract

The Panel overlooked facts and law that would entitle Appellants to damages for BANA, US Bank, and Fay's conduct for their continuous and material breach of the LMA.

The Panel determined BANA's rejection of Appellants' 10/1/2009 payment and subsequent payments constituted a breach of the LMA.[4] However, the Panel overlooked facts establishing an ongoing and continuous breach of contract by BANA, US Bank and Fay which are relevant to the issues of the running of the statute of limitations as well as the validity of the 4/3/2018 Mediation Agreement.[5]

The Panel stated that Appellants did not demonstrate "wrongful conduct on BANA's part" that prevented them from asserting their claim timely.[6]

Appellants argued that the continuous misrepresentation of payment amounts, interest rates, arrears, etc., concerning the modified 2007 DOT which occurred from

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[4] Panel 12/29/2022 opinion, p.4.
[5] *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.")
[6] *Id.* at p.6.

10/1/2009, through the date of foreclosure is wrongful conduct and constitutes an ongoing breach of contract.[7]

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 ... ."[8]

This Court has held that "one party's material breach of its promise discharges the non-breaching party's duty to perform."[9]

In regard to a continuous breach of contract as it pertains to installment contracts such as a mortgage, this Court has held:

> [W]here contract obligations are payable by installments, the limitations statute begins to run only with respect to each installment, when due ... [10]

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[7] AA01286, Vol.VI (statement does not reflect the LMA.); AA02255, Vol.X (Appellants "missed their first payment under the 2009 LMA"); AA01574, Vol.VII ("By failing to honor and apply the terms of the LMA ... US Bank has materially breached the terms of the LMA."); AA02246, Vol.IX ("BANA admits ... it did not update the Lincicomes'... mortgage account"); AA01572, Vol.VII (Appellants alleged that BANA's failure to process the LMA ... constituted a material breach); AA01574, Vol.VII (US Bank "continuously disregarded" the LMA).

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

[9] *Cain,* 134 Nev. 193, 415 P.3d 25.

[10] *Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) (citations omitted).

In this matter, Appellants sought damages for BANA, US Bank and Fay's continuous and material breach of the modified 2007 DOT.[11]

The following undisputed facts provided with the record establish liability for breach of the material terms of the modified mortgage loan:

1. After BANA's rejection of the second payment on 10/1/2009, BANA did not simply seek "the larger monthly payments due under the original note" of $2,435.43 as the Panel found, but rather BANA sought immediate payment of $42,143.00 for all arrears and accrued interest.[12]

2. BANA and its successors continued their breach of the LMA from October of 2009 through December of 2018; each and every statement sent to Appellants attempted to deceive Appellants into making "payment under the original loan" including interest and arrears.[13] For example: BANA's 10/29/2009 statement demanded $42,143.00; BANA's 3/1/2015 statement demanded $197,704.86; Fay's

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[11] AA01553, Vol.VII.
[12] AA00311-AA00312, Vol.II (2009 NOD); AA00096, Vol.I (Oct. 29, 2009 Statement); *cf.* Panel 12/29/2022 opinion, p.2; AA04025, Vol.XVII (11/20/2018 Hearing Transcript).
[13] AA00096, Vol.I.; AA02106-02114, Vol.IX (BANA 11/19/2018 Loan History - BANA never incorporated the LMA): AA00560-570, Vol.III (Fay 6/19/2018 Transaction Detail).

8/10/2015 statement demanded $207,599.70; and Fay's 12/10/2018 statement demanded $307,063.54.[14]

3. Even though BANA and its successors had agreed to be bound by RESPA under the modified 2007 DOT, all required annual RESPA escrow notices misrepresented the payment amounts and balances owed under the superseded terms of the 2007 DOT.[15]

4. BANA and its successors agreed that Section 22 of the modified 2007 DOT, provide Appellants "prior to acceleration" notice, including "the action required to cure the default."[16] In Fay's 12/15/2015, "Notice of Default and Intent to Accelerate" ("2015 Notice") to Appellants, Fay misrepresented that the "Total Monthly Payment Due" and the "TOTAL YOU MUST PAY TO CURE DEFAULT" was "$217.933.59."[17] Fay also misrepresented that the balance outstanding was "$381,150.00," that accrued interest upon the loan was "$197,140.53," and that the current interest rate was "6.88%."[18]

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[14] AA00096, Vol.I (BANA 10/29/2022 Statement); AA02517, Vol.XI (BANA 3/1/2015 Statement); AA03299, Vol.XIV (Fay 8/10/2015 Statement); AA02527, Vol.VI (Fay 12/10/2018 Statement).
[15] AA00025, Vol.I (2007 DOT, Sec. 3); 12 CFR 1024.17(i)(1)(i) (requiring annual accounting); AA00430, Vol.II (7/13/2017 Escrow Account Disclosure);
[16] AA00032, Vol.I (2007 DOT, Sec. 22 requiring notice of default).
[17] AA00330-00331, Vol.II (12/15/2015 Correspondence).
[18] *Id.*

5. The actual payment owed was "$2,272.62," principal owed remained at "$417,196.58," outstanding interest remained at zero, and the interest rate was "5.375%."[19] Nothing about Fay's 2015 Notice was accurate.[20]

6. BANA and its successors agreed in the modified 2007 DOT that notice of default be given as required by "Applicable Law."[21]

7. On 11/1/2017, Sables, LLC ("Sables"), executed its *Notice of Breach and Default and of Election to Sell the Real Property Under Deed of Trust* ("2017 NOD"), falsely reporting that the balance past due was "$265,572.39" and that the default of the mortgage occurred on "9/1/2008".[22]

8. The 2017 NOD breached Section 22 of the modified 2007 DOT and NRS 107.080 by falsely stating that Appellants were in default for nonpayment and by not providing accurate information pertaining to the loan.[23]

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[19] AA00184, Vol.I (BANA 7/11/2009 LMA Correspondence); AA00177-00181, Vol.I (LMA).
[20] *Cf.* AA00177-00181, Vol.I (LMA); AA00329-00331, Vol.II (2017 NOD).
[21] AA00032, Vol.I (2007 DOT, Sec. 22).
[22] *Cf.* AA00433, Vol.II; AA00184 (7/11/2009 Correspondence); AA00177-00181, Vol.I (LMA).
[23] AA00433, Vol.II (2017 Notice of Default, p.1); AA04085, lns.15-18, Vol.XVII (11/20/2018 Hearing Transcript, if US Bank wishes "to use a nonjudicial foreclosure, then it has to be based upon number of the ... 2009 [LMA]."

The Panel determined that BANA's rejection of Appellants' payment constituted a breach of contract.[24] However, the Panel did not make findings that the breach had been cured or that the original terms of the loan were now controlling.[25]

Even though Appellants had contended that BANA, US Bank, Fay, and Sables' conduct was wrongful and taken in bad faith, the Panel did not address the contention.[26] Thus Appellants must ask:

Was it not wrongful and in bad faith for BANA to deny the existence of the LMA to Appellants?

Was it not wrongful and in bad faith for BANA to conceal the existence of the LMA and misrepresent to the Federal Bankruptcy Court that Appellants had defaulted upon the original terms of the mortgage, even though BANA had refused

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[24] Panel 12/29/2022 opinion, p.4.
[25] *Cf.* Panel 12/29/2022 opinion, pp.1-10.
[26] *See* Appellants' 5/19/2022 Reply Brief, p.20 ("BANA and its successor in interest, and not Appellants, are culpable of wrongdoing."); AA03123, Vol.XIII ("BANA's representations ... amount to fraud"); AA.2247, Vol.IX ("BANA's failure to implement the terms of the 2009 LMA is the very essence of thwarting the purpose of the agreement."); AA03126, Vol.XIII (BANA "misrepresented ... the status of the loan"); AA00140, Vol.I ("improper conduct of the Defendants"); AA03691, Vol.XV ("BANA's conduct [was] wrongful"); AA02247 ("BANA deceived ... the Federal Bankruptcy Court."); AA03444, Vol.XIV ("[BANA] was committing fraud").

their payments and misrepresented to Appellants that arrears which had been added to the principal balance were immediately due?

Was it not wrongful and in bad faith for BANA to misrepresent the terms of the modified mortgage on each and every statement and escrow statement that BANA sent to Appellants?

Was it not wrongful and in bad faith for Fay on behalf of US Bank to continue BANA's scheme of providing patently false statements to Appellants?

Did not BANA and US Bank's wrongful and bad faith conduct undermine the essential purpose that Appellants had for entering into the LMA, which was to permit Appellants to be able to afford their mortgage payments and to cure the accrued arrears, and avoid foreclosure of their home?

The Panel only found that BANA and its successors told Appellants to "make the larger monthly payments due under the original note."[27]

Nevada law clearly establishes that BANA's initial breach of the LMA discharged Appellants' obligation to make the payment under the LMA, and no facts support a conclusion that BANA cured the breach. [28]

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[27] Panel 12/29/2022 opinion, p.2.
[28] *See Cain,* 134 Nev. 193, 415 P.3d 25.

Based upon the foregoing, the Panel should conclude that BANA and its successors' failure to implement the LMA also constitutes a continued breach of the LMA.[29] Likewise, the Panel should conclude that BANA, US Bank, Fay, and Sables' failure to abide by RESPA and Nevada law including NRS 107.0805 as required by the modified 2007 DOT are additional ongoing breaches.[30]

Appellants have asserted that BANA, US Bank, and Fay's deceptive actions were unlawful.[31] BANA, US Bank and Fay acted unlawfully as it pertains to Chapter 107 as well as it pertains to Nevada's applicable regulations of the mortgage industry.[32]

For example, BANA, US Bank and Fay have made material misrepresentations as to the terms of the modified 2007 DOT in every statement that

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[29] *See Clayton*, 107 Nev. at 470, 813 P.2d at 999.

[30] AA00819, Vol.IV ("Affidavit that does not comply with NRS 107.0805"); AA01565, Vol.VII ("Trustee's Deed was issued in violation of NRS 107.0805"); AA00025, Vol.I (2007 DOT providing that the "Lender shall give to Borrower, without charge, an annual accounting of the funds as required by RESPA"); 12 CFR 1024.17(i)(1)(i)) (RESPA annual accounting must include a correct statement of the monthly mortgage payment under the loan).

[31] Appellants' Opening Brief, pp.19-21; pp.48-53 (Violations of NRS 107.080; 107.0805; and HOBR); AA00819, Vol.IV (NRS 107.0805 for improper recording of a Notice of Default).

[32] Mortgage bankers and servicers have "a duty of good faith and fair dealing in the communications, transactions and course of dealings of the mortgage banker with each borrower in connection with the servicing of the mortgage loan of the borrower."[32]

has been issued since October of 2009 in violation of NRS 645B.670(1)(b)(5), NRS 645B.670(1)(c)(2), NAC 645F.980(4), and NAC 645E.500(2)(a).[33]

BANA, US Bank and Fay have used monthly statements to mislead Appellants as to the actual balance of their mortgage, their actual payment amount due, and the actual interest rate that should be applied in violation of NAC 645E.283(1)(c)(2) and NAC 645F.980(3).[34]

Based upon the overlooked facts and law presented above, the Panel should, upon rehearing of its opinion, determine that BANA, US Bank, and Fay's conduct was unlawful, wrongful, taken in bad faith and constituted a continuing breach of the LMA that continued through the date of foreclosure.

Therefore, the Panel should conclude that a rehearing is necessary to address BANA, US Bank, and Fay's conduct.

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[33] AA02105-AA02114, Vol.IX (loan payment history); [33] NRS 645B.670(1)(b)(5); see also NRS 645B.670(1)(c)(2); NAC 645F.980(4) (prohibiting engaging "in any unfair or deceptive practice to any person or misrepresent or omit any material information in connection with the servicing of a mortgage loan, including, without limitation, misrepresenting the amount, nature or terms of any fee or payment due or claimed to be due on a mortgage loan, the terms and conditions of the servicing agreement or the borrower's obligations under the mortgage loan."); NAC 645E.500(2)(a); NRS 598.0915(15) (in part defining "deceptive trade practice").

[34] AA02105-AA02114, Vol.IX (loan payment history).

C. The Panel Overlooked Facts and Law pertaining to the Efficacy and Terms of the Foreclosure Mediation Agreement.

The Panel overlooked facts and law that should have lead the Panel to conclude that the foreclosure mediation was conducted under the false pretenses that Appellants had defaulted upon their mortgage and that US Bank and Fay were entitled to seek to foreclose upon Appellants' home.[35]

The Panel overlooked facts and misconstrued the language of the Mediation Agreement to determine that Appellants had agreed to relinquish their home, when they had only agreed to apply through Fay's DIL Program, or, if they did not, or could not qualify, a foreclosure certificate would be issued to Fay.[36]

The Panel misconstrued the Mediation Agreement to include language that Appellants had agreed to waive all rights to the protections afforded by NRS 107, and release all claims against US Bank, Fay, and Sables, when no such waiver or release can be found explicitly stated in the agreement.[37]

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[35] AA00433, Vol.II (2017 NOD, p.1).
[36] AA00448-00463, Vol.II; AA00452, Vol.II (Mediator's Statement, p.5 "Part 3B").
[37] AA00448-00463, Vol.II.

Lastly, the Panel failed to apply NRS 40.453, which prohibits any interpretation of the Mediation Agreement that would waive Appellants' rights to the protections provided under NRS 107.080 or the Homeowners Bill of Rights.[38]

The Panel's opinion suggests that it overlooked the following facts:

9. Following Fay's recording of the 2017 NOD, Appellants believed that they had defaulted under the original terms of the loan as stated in the 2017 NOD.[39]

10. At the 4/3/2018 mediation, Appellants entered into an agreement to resolve the mediation believing that they "were essentially pushed into committing to do a deed in lieu."[40]

11. The Mediation Agreement, under "Part 3B: Relinquish the Home," has nine options of which the mediator had checked two.[41] The first checked check box indicates "1. Deed in Lieu of Foreclosure" and next checked check box states "9. Certificate Date: 7/5/2018." The Panel interpreted the first checked box to mean that Appellants had unequivocally agreed to "not only surrender possession of the property, but to relinquish all rights to the home."[42] The Panel interpreted the second

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[38] *See* NRS 40.453; *John Schleining, Inc., v. Cap One, Inc.*, 130 Nev. 323, 326 p.3d 4 (2014).
[39] AA00120, Vol.I.
[40] AA00479, Vol.II (6/5/2018 CFPB Complaint Detail, p.3 (last sentence before "Already Attempted to Fix this Issues with the Company")).
[41] AA00448-00463, Vol.II; AA00452, Vol.II (Mediator's Statement, p.5).
[42] Panel's 12/29/2022 opinion, p. 7.

checked box "Certificate Date" to mean that "[t]he parties indicated that the certificate date for the deed in lieu of foreclosure would be July 5, 2018."[43]

12. The mediator's "Comments" under the last check box provides "Pursuant to DIL Requirements on p. 6 of TTP Dated 3/6/2018 attached hereto."

13. Page 6 of the DIL Requirements attached to the Mediation Agreement provides that Appellants "will have until 7/4/2018 to complete the DIL for the property."[44]

14. On page 3 of the Mediation Agreement it provides as follows:

> Part 2B: DISPOSITION
> (Mediator must check one box below)
> □ The parties were unable to agree . . . and the mediation is terminated.
> □ The parties resolved this matter.

The Panel interpreted the x on the second box to mean that Appellants have fully resolved all matters which the Panel asserts "defeats the Lincicomes' wrongful foreclosure claim."[45]

15. Home Means Nevada, Inc., issued the foreclosure certificate on 7/6/2018.[46]

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[43] *Id.*
[44] AA00462, Vol.II (Fay 3/6/2018 Correspondence, p.6 "DIL Requirements").
[45] Panel's 12/29/2022 opinion, pp.7-10.
[46] AA00620, Vol.III (*State of Nevada Foreclosure Mediation Program Certificate* providing an "issue date of 7/6/2018").

16. After the 4/3/2018 Mediation, Fay sent Appellants a letter dated 5/15/2018, indicating that "eligibility to participate in the DIL Program has been terminated."[47]

17. On 6/20/2018, Fay sent a second letter indicating Appellants had not given proper notice to Fay and confirming that Fay had terminated Appellants' eligibility under the DIL Program. The Panel concluded that "while confusing," the 5/16/2018 letter was not a repudiation of the Mediation Agreement because the letter corresponds with the 3/6/2018 offer letter attached to the Mediation Agreement as Attachment B.[48]

18. On 7/12/2018, Fay sent another letter where it stated that Appellants were again "eligible for a Deed-in-Lieu of Foreclosure" and that "[i]f you fail to accept this offer by July 26, 2018 . . . foreclosure proceeding may continue and foreclosure sale may occur."[49]

19. On 7/16/2018, Fay sent another letter where it falsely states that Appellants' loan was due as of "August 1, 2008" and that "the unpaid principal

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[47] AA00576, Vol.III (Fay 5/16/2018 DIL Termination Letter).
[48] AA00483-00484, Vol.II (Fay 6/20/2018 CFPB Response Letter, last sentence AA00483-00484, Vol.II).
[49] AA00630, Vol.III (Fay 7/12/2018 DIL Offer Letter); cf. Panel 12/29/2022 opinion, p.7 (Contrary to the Panel's findings, Fay's 7/12/2018 letter indicates no agreement for Appellants "to relinquish all rights to the home" existed).

balance is $381,150.00" and that as of the date of the letter "$287,549.55" was overdue.[50] The 7/16/2018 letter also confirms that Appellants' eligibility to participate in the Deed in Lieu had been "terminated" but provides that Appellants could continue with a deed in lieu so long as Appellants "notify Fay of [their] intent no later than July 26, 2018."[51]

20. On 10/7/2018, Fay sent a letter offering an "amount up to $16,000.00" to be paid to Appellants five days after Appellants' "Deed in Lieu documents are received."[52]

1. Misconstrued and Overlooked Facts

Appellants believe the Panel misconstrued the terms of the Mediation Agreement.

Appellants contend that the explicit terms of the Mediation Agreement should control the Panel's interpretation, and that the Panel should not go beyond the four corners of the agreement unless it finds ambiguities in which admission of parole evidence is necessary to construe the meaning of the agreement.[53]

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[50] AA00628, Vol.III.
[51] AA00628-00629, Vol.III (Fay 7/16/2018 letter).
[52] AA00769-00770, Vol.III.
[53] *Margrave v. Dermody Properties, Inc.,* 110 Nev. 824, 829, 878 P.2d 291, 294 (1994) (*citations omitted*).

The Panel correctly found that Appellants had agreed that if they failed to provide a deed in lieu of foreclosure "by July 4, 2018, the noticed foreclosure would proceed."[54] However, the Panel misconstrued the meaning of "Certificate Date" to mean "the certificate date for the deed in lieu of foreclosure would be July 5, 2018" instead of the date the foreclosure certificate would issue as required by NRS 107.086.[55]

Appellants' interpretation is supported by Home Means Nevada, Inc.'s issuance of the foreclosure certificate on 7/6/2018, one day later than had been agreed to by the parties.[56]

The interpretation of "Certificate Date" is important because it is the basis for the Panel's incorrect understanding that the agreement was only for the relinquishment of Appellants' home.[57]

Appellants' interpretation is also supported by Fay's correspondence following the mediation. In the letters sent 5/16/2018, 6/20/2018, 7/12/2018,

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[54] Panel 12/29/2022 opinion, p.7 (The Panel's finding establishes that the parties understood that their agreement provided Appellants the option to surrender via deed-in-lieu, or the foreclosure certificate would issue. The finding contravenes the Panel's later finding to the contrary.

[55] Panel 12/29/2022 opinion, p.7; NRS 107.086(2)(e)(2) (providing for a certificate to be issued indicating that "mediation has been completed in this matter").

[56] AA00620, Vol.III (*State of Nevada Foreclosure Mediation Program Certificate* providing an "issue date of 7/6/2018").

[57] *See* Panel 12/29/2022 opinion, p.7.

7/16/2018, and 10/7/2018, Fay makes no statement whatsoever indicating that the parties had entered into a binding arrangement that fully resolved all issues pertaining to Appellants' mortgage. Rather, the letters indicate that Fay wanted Appellants to reconsider moving forward with a deed-in-lieu. Certainly, Fay would not have offered $16,000 to obtain a deed-in-lieu if it was entitled to compel the same as a matter of contract.

As well, the "2B Disposition" checked box indicating that a resolution does not provide any indication that the parties had resolved anything more than the mediation itself.[58] There is no general release or waiver stated in the agreement. The matter being resolved simply meant that the district court could move forward with the dismissal of Appellants' petition for foreclosure mediation.[59]

2. Mediation Agreement Entered Under False Pretenses

The Panel failed to take into account that Appellants were not in default of the LMA when the 2017 NOD was recorded or when the mediation took place. Appellants argued in their Opening Brief that the district court erred in determining that they were in default of the LMA.[60]

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[58] *See* AA00452, Vol.II.
[59] *See* NRS 107.086(8).
[60] This argument is addressed on page 30-31 of Appellants' Opening Brief, and pages 21-23 of their Reply Brief.

And because US Bank and Fay declared in the 2017 NOD that Appellants had breached the terms of the mortgage and were in default, Appellants believed that they were at risk of losing their home to foreclosure. [61]

However, BANA's breach of contract for refusing payments, and the deceit and misrepresentation of BANA, US Bank, and Fay by not adopting and incorporating the terms of the LMA resulted in the foreclosure mediation being conducted under false pretenses. [62]

Thus, the validity of the Mediation Agreement should be evaluated in favor of Appellants, given that their participation in the agreement was based on false statements made by US Bank and Fay.[63]

3. Waiver Prohibited by NRS 40.453

The Panel failed to consider or address Nevada law regarding the prohibition of waivers of protection under NRS 107.080 as stated in NRS 40.453.[64]

NRS 40.453 provides in pertinent part:

> 1. It is hereby declared by the Legislature to be against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or

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[61] AA00120, Vol.I.
[62] *See id.*; *see also* Appellants' Reply Brief, pp.21-23.
[63] NRS 107.080(1) (conferring the "power of sale . . . upon a trustee to be exercised after a breach of [payment upon] the obligation for which the transfer is security"); NRS 107.086.
[64] This argument is addressed on page 39-40 of Appellants' Opening Brief.

> the grantor of a deed of trust or a guarantor or surety of the indebtedness secured thereby, waives any right secured to the person by the laws of this state.
> 2. A court shall not enforce any such provision.[65]

Even though no such waiver exists or can be inferred to exist in the Mediation Agreement, Appellants were clearly entitled to the protections of NRS 107.080 by way of the prohibition of any such waiver afforded by NRS 40.453.[66]

Moreover, this Court has determined that if an agreement binds parties to do "something opposed to public policy of the state or nation, it is illegal."[67] Further, "a statute designed to conserve the public interest may not be waived by one for whose protection the statute is also designated."[68]

NRS 107.080 was established to protect homeowners from fraud and deceit, as is evident in the current case. The Panel should conclude that a rehearing is necessary to fully evaluate the misinterpreted terms of the Mediation Agreement and the disregarded law.

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[65] NRS 40.453.
[66] *John Schleining, Inc., v. Cap One, Inc.*, 130 Nev. 323, 326 p.3d 4 (2014).
[67] *Martinez v. Johnson*, 61 Nev. 125, 119 P.2d 880 (1941)(*quoting* 17 C.J.S., Contracts, § 211, p.563).
[68] *Id*. (*citing* 17.C.J.S., Contracts, § 207, p.559).

III. CONCLUSION

Even though this case is unique, complicated, and involves activities and conduct which may have been initially caused by the mortgage foreclosures crisis of more than a decade ago, Respondents' conduct in this matter has been reprehensible and akin to fraud, and should not be so easily hidden away by the conclusion that a few checked boxes on a mediation agreement meant that Nevada's protections from foreclosure by way of unlawful and deceitful behavior simply evaporated. Accordingly, rehearing is necessary to fairly address the facts and law overlooked by the Panel.

Therefore, based upon the foregoing, Appellants respectfully request that this Panel conclude that rehearing of its opinion is appropriate.

Dated this 17th day of January, 2023.

MILLWARD LAW, LTD

By: _____

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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 motion exceeds 10 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 4,436 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 17th day of January, 2023.

Ramona L. Moyle
NOTARY PUBIC in and for said COUNTY AND STATE

Ramona L. Moyle
NOTARY PUBLIC
STATE OF NEVADA
No. 93-1557-3
Appt. Exp. 8-18-2026
-Millward Law- 1591 Mono Ave, Minden, NV

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2023, I filed the foregoing APPELLANTS' PETITION FOR REHEARING, which shall be served via electronic service from the Court's eFlex system to:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.; AND VICENTA LINCICOME,
Appellants,
vs.
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.; 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.

No. 83261

FILED

MAR 20 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, J.
Cadish

_____, J.
Pickering

_____, Sr.J.
Gibbons

SUPREME COURT
OF
NEVADA

(O) 1947A

23-08458

cc: Hon. Leon Aberasturi, District Judge
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Third District Court Clerk

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

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
>
> (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

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[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.

MILLWARD LAW, LTD

By: _____

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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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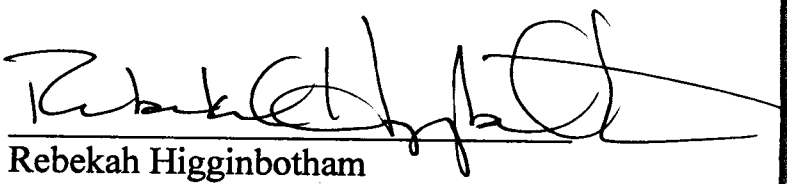

Rebekah Higginbotham

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.; AND VICENTA LINCICOME,
Appellants,
vs.
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.; 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.

No. 83261

FILED
APR 14 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

Stiglich, C.J.

Cadish, J.

Pickering, J.

Herndon, J.

Parraguirre, J.

Bell, J.

cc: Hon. Leon Aberasturi, District Judge
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Third District Court Clerk