**IN THE SUPREME COURT OF THE STATE OF MONTANA**
Supreme Court Case No. DA 22-0486

GILBERT R. JOHNSTON and JUDITH A. JOHNSTON; STEPHEN R. GIBBS; SCOTT SHONE; DONALD S. SMITH and BRENDA J. SMITH, individually and as Trustees of the DONALD S. SMITH AND BRENDA J. SMITH AB LIVING TRUST; RACHELLE AMBER McCRACKEN; MICHAEL ALLEN McCRACKEN; SEAN JUSTIN SMITH; GERALD B. WOODAHL and SUSAN A. WOODAHL; JEFFREY M. HOLLENBACK; JIM S. FERGUSON; ERIC W. SMART and STEPHANIE NICOLE SMART; NANCY CORDIAL; EDS INVESTMENTS, LLC, an Arizona limited liability company; NEWS DEVELOPMENT, LLC, a Montana limited liability company; and JCO PROPERTIES, LLC a Montana limited liability company,

Plaintiffs and Appellants,

vs.

FLYING S TITLE & ESCROW, INC. f/k/a FIRST AMERICAN TITLE COMPANY,

Defendant and Appellee.

On Appeal from the Fourth Judicial District
Missoula County Cause No. DV-14-570
Honorable Jason Marks

# APPELLEE'S RESPONSE OPPOSING PETITION FOR REHEARING

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Appellee Flying S Title & Escrow, Inc. ("Flying S"), pursuant to Mont.R.App.P. 20(2)(b), hereby responds and objects to Appellants' Petition for Rehearing ("Petition"). Appellants seek rehearing under Rule 20(1)(a)(i), arguing that the Court "overlooked some fact material to the decision." *Pet*., 1. The Court did not overlook any fact material to its decision in *Johnston v. Flying S Title & Escrow, Inc.*, 2024 MT 39 ("Opinion"), and the Petition should be denied.[1]

## Legal Standard

The Court considers petitions for rehearing only if one of the following circumstances is present: "[t]hat it overlooked some fact material to the decision; [][t]hat it overlooked some question presented by counsel that would have proven decisive to the case; or [][t]hat its decision conflicts with a statute or controlling decision not addressed by the supreme court." Mont.R.App.P. 20(1)(a)(i)–(iii). A "petition for rehearing is not a forum in which to rehash arguments in the briefs and considered by the Court." *State ex. rel. Bullock v. Philip Morris, Inc.*, 2009 MT 261, 352 Mont. 30, 45A, 217 P.3d 475, 486 (Order denying rehearing) (citing Mont.R.App.P. 20(1)(a)).

[1] Abbreviations used herein are: "Dkt"=docket number; "Op.Br."=Appellants' Opening Brief; "Resp.Br."=Appellee's Response Brief; "Reply.Br."=Appellants' Reply Brief.

## Argument

Appellants did not demonstrate that grounds for rehearing exist under Rule 20(1)(a)(i). In addition to rehashing arguments already considered by the Court, Appellants argue that the Court's ultimate holding is erroneous because the Court overlooked that they did not receive title insurance policies insuring title to the Lots they purchased ("Lot Policies"). Fundamentally, they make the same argument they did before: that the premium paid at the only closing they had—the "live" closing by which they took title to the extant *Lots*—was consideration for a policy to issue insuring title to the future *Tracts*.

### I. The Issuance of a Lot Policy is Immaterial to the Court's Holding and the Single Contract Claim at Issue in This Appeal.

Appellants contend that the Court overlooked that "Flying S did not issue title insurance to Appellants on either lots or parcels." *Pet.*, 1. They then argue that the Court misconceived "that Appellants had received title insurance on the lots as the basis for its decision to affirm the District Court's decision granting summary judgment to Flying S." *Pet.*, 2.[2] Their argument appears to be that, because no Lot Policy issued to them following their closings on the purchase of

[2] Appellants argue that Flying S sowed "confusion" and "inaccuracy" in the record concerning whether a Lot Policy was issued to the Appellants. *E.g.*, *Pet.*, 3–4. Yet, Appellants acknowledge that Flying S stated in its Response Brief that no paper Lot Policy issued despite payment of the premium. *Pet.*, 2–3. Appellants don't explain how the Court "overlooked" this.

Lots, then the premium paid at those closings is the requisite consideration for a contract to form to insure the non-existent Tracts. Appellants are wrong.

### A. Appellants' Contract Claim alleged a breach of the pro forma commitments, not the lot commitments.

At issue in this appeal is whether Flying S was entitled to summary judgment on Appellants' Contract Claim:

> Under Count VI, Appellants claimed that the Pro Forma commitment form was a contract for title insurance of the parcels that First American and Flying S breached by failing to issue a policy, resulting in damages.

*Opinion*, ¶ 9; *see also id.*, ¶ 23 ("Appellants are pursuing a claim of title insurance to the parcels, which is the only claim before the Court."). Appellants do not challenge these conclusions, nor did they argue otherwise in their briefs or dispute Flying S's argument that "Appellants do not allege a breach of either the closing instructions or the Lot Commitments." Resp.Br., 4. Thus, in light of the Court's holding that a contract was created to insure title to the Lots, *Opinion*, ¶ 19, even if the non-issuance of a Lot Policy was a "breach" of that contract, based on the only claim before this Court, it is still immaterial.[3]

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[3] The Court commented that "Flying S was not unjustly enriched by Appellants' premium payments because it provided, as it agreed, title insurance for the transaction completed by Appellants to purchase the lots." *Opinion*, ¶ 22. There is no unjust enrichment claim before the Court—which the Court recognized in the subsequent paragraph—and this conclusion appears to reaffirm that the premium was paid for a Lot Policy.

However, Appellants represent that they "pursued breach of contract claims because they paid premiums to Flying S and never received title insurance to **either *lots*** or parcels." *Pet*., 4 (emphases added). One could interpret this as Appellants claiming that the Court overlooked that Flying S breached a contract by not issuing a Lot Policy—immaterial because that is not the claim before the Court—but to the extent they are using a petition for rehearing as a vehicle to recast their Contract Claim and assert a different legal theory to include an alleged breach of the lot commitments, the Court should reject it.[4]

### B. The Court's determination that the pro forma documents were not contracts does not depend upon whether a Lot Policy issued.

Appellants argument is falsely premised in that they assume whether a Lot Policy issued was material to finding that the pro forma commitments were not contracts. Underpinning that argument is the contention that the premium paid at

[4] This is particularly so considering Appellants' prior representations. *E.g.*, Op.Br., 18, 20; Reply.Br., 5–6; Dkt. 346, 7–9 ("Damages Arising from the Breach of the Pro Forma Commitments"); Dkt. 352, 3–4 (asserting the pro forma commitments are the breached contract and stating they "further acknowledge that their claims are framed by the contractual commitments as provided within the Pro Forma Commitments"); *id*. at 5–6 (explaining their "breach of contract is premised upon the fact that [Flying S issued the Pro Forma Commitments]" and title did not vest in a Tract); Dkt. 361 ("Plaintiffs' contract claims are based upon the Pro Forma Commitments."); *see also* Resp.Br., 19–20 (Flying S explaining how Appellants characterized their Contract Claim).

closing was consideration for a policy to issue as "offered" in the pro forma commitments—which the Court rejected.[5]

The Court addressed the requisite elements of contract formation with respect to both an offer to issue title insurance insuring title to the Lots as well as Appellants' argument that a contract existed to provide them title insurance insuring title to the future Tracts. Four elements—contracting capacity, consent, lawful object, and consideration—must exist for contract formation. *Opinion*, ¶ 19. The Court held that a contract formed for title insurance to the Lots, but not the future Tracts. *Opinion*, ¶¶ 19–21. The only contract formed "between Appellants and Flying S" was "for the purpose of insuring the *lots*, for which Flying S never denied coverage." *Opinion*, ¶ 19. The consideration element was satisfied when the premium payment was made at closing—the only closing for the "'live' transaction for which Flying S, as it had offered, provided insurance for Appellants' title to the lots." *Id*. Appellants take issue with this conclusion, arguing that the premium paid was for a title policy for the future Tracts. *Pet*., 3–4. That is, Appellants' rehearing argument merely rehashes what they previously argued and the Court considered, *compare id. with, e.g.*, Reply.Br., 6–7, and rejected. *Opinion*, ¶ 19.

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[5] Appellants argued this before. Op.Br., 13, 19–21; Reply.Br., 6, 8–9.

The Court rejected Appellants' claim that a contract existed to provide title insurance for the future Tracts, but its holding was not based on lack of consideration. The Court found that the requirements (conditions precedent) were not satisfied. *Opinion*, ¶ 20 ("While Appellants regard the Pro Forma documents as a commitment to insure the parcels, it is clear the requirements for the issuance of such insurance were not finally identified by the documents.").[6] The Court recognized that the terms of the documents themselves disclaimed a commitment to provide insurance and that they were "appropriately titled Pro Forma because, according to their terms, Flying S had not yet agreed to insure the parcels." *Id*. The Court recognized that "Flying S could not yet have agreed to insure the parcels because the requirements or conditions for obtaining such insurance had not been finally determined or stated." *Opinion*, ¶ 21. Then the Court held: "Ultimately—even assuming all conditions for contracting had been established—the object of the proposed contract became impossible and failed, because the necessary actions by the third parties were not completed and the parcels never came into existence." *Opinion*, ¶ 21 (citation omitted).

Not one of the Court's reasons for holding that the pro forma documents did not, and could not, create a contract is dependent on issuance of a Lot Policy or

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[6] Appellants agree that it is "undisputed" that the conditions precedent were not satisfied. *Pet*., 6.

consideration being paid. Thus, whether a Lot Policy issued is not a "fact material to the decision" that was overlooked. Mont.R.App.P. 20(1)(a)(i); *see also Sell v. Sell*, 58 Mont. 329, 337, 193 P. 561, 563–64 (1920) (no entitlement to rehearing when purportedly overlooked fact was immaterial to decision or not overlooked).

### C. Whether a Lot Policy "issued" is immaterial for additional reasons.

Had there been a covered claim on a Lot Policy, nothing in the record indicates that the title insurer, First American, would not have honored it. *See Opinion*, ¶ 19 (regarding insuring title to the Lots, recognizing "Flying S has never denied coverage.").[7] And, as the Court recognized, all Plaintiffs, including Appellants, tendered a claim to First American but then refused to cooperate. *Opinion*, ¶ 9 n.7.

Regardless, whether a Lot Policy was "issued" is irrelevant. Resp.Br., 14 n.9 (citing *Goettler v. Peters*, 639 N.Y.S.2d 843, 846 (N.Y.App.Div.2 1996)); Resp.Br., 40–43 (Argument § II)(explaining, *inter alia*, that Flying S is not an insurance company and if there was coverage under any policy, it would obligate First American). Anyway, Appellants admitted they had no basis to make a claim on a Lot Policy. *See, e.g.*, Dkt. 283, 4 ("Plaintiffs have not argued they did not receive marketable title to the *Lots*. Instead, they argue they did not receive

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[7] Flying S is not an insurance company. *See* Resp.Br., 40–43.

marketable title to the entirety of their *Tracts*." (emphasis original)); Dkt. 245, 7 ("damages…were caused by their failure to provide Plaintiffs with title and title insurance to the Tracts that they anticipated."). Further, each Plaintiff, including Appellants, conveyed their lots back to Missoula County by warranty deed. *Opinion*, ¶ 19 ("Appellants later transferred, as the record title owners of the lots, their interests to the County in exchange for a settlement payment. Had they not been the record owner of the lots, they could not have done so."). And finally, each of the "Dismissed Plaintiffs" received a Lot Policy, yet none alleged breach of contract nor pursued a claim for coverage under those policies.

## II. The Court Should Reject Appellants' Attempt to Rehash Their Arguments Already Considered by the Court and to Challenge the Court's Analysis.

Rehashing of arguments and challenging the Court's analysis are not proper bases to grant rehearing.

### A. Appellants' rehashed arguments are almost identical to what they argued in briefing.

Appellants reargue their "timing" argument—that the pro forma commitments constituted offers that replaced the lot commitments, *Pet*., 5—which they argued below, (Dkt. 361, 2–3), not in their Opening Brief, but then in their

Reply Brief. Reply.Br., 4–5.[8] Not only was it considered and rejected, but the argument is flawed—the offer to insure title to lots is different than an offer to insure title to parcels. *See Opinion*, ¶ 20.

Appellants reassert their same rescission arguments, *Pet*., 5, as in their briefs, Op.Br., 19–21, 27–28; Reply.Br., 11–14, and argue that "the Opinion does not address the effect of Flying S' failure to rescind the Pro Forma Commitments." *Pet*., 5. However, the Court did address this issue, holding, "Appellants argue that Flying S should have rescinded the Pro Forma documents, but there was not yet a contract to rescind." *Opinion*, ¶ 21.

Appellants also reassert their waiver (of conditions precedent) arguments, *Pet*., 6, as argued in their briefs, Op.Br., 22–28; Reply.Br., 14, 18–19, which Flying S addressed. Resp.Br., 41–42. The Court also considered these arguments; its conclusion concerning rescission demonstrates how the waiver argument remains unavailing. *Opinion*, ¶ 21.

Appellants reargue that Flying S retained premiums without providing title insurance for the Tracts, *Pet*., 8–9, as they did in briefs, Op.Br., 29–31; Reply.Br., 20, which Flying S addressed, Resp.Br., 40–43, and the Court considered and

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[8] Appellants cannot raise an issue for the first time in a reply brief; failure to raise it in the opening brief waives the issue. *See Pengra v. State*, 2000 MT 291, ¶ 13, 302 Mont. 276, 14 P.3d 499 (citation omitted); Mont.R.App.P. 12(3). This rule should logically extend to petitions for rehearing.

rejected. Moreover, the Court concluded that the premium paid at closing—the only "live" closing the Appellants ever had—was for a Lot Policy, *Opinion*, ¶ 19.

### B. A petition for rehearing is not properly used to argue that the Court's decision is erroneous.

This Court "should not be asked to reconsider matters which have been already considered and determined[,]" *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 80 P. 1092, 1093 (1905), and will deny a petition for rehearing that "consist[s] chiefly of the loser's assertion of dissatisfaction over an adverse decision." *State ex. rel. Rankin v. Harrington*, 68 Mont. 1, 31, 217 P. 681, 689 (1923).

Appellants argue that the Court "suggests Flying S could not have agreed to insure the parcels. However, that is precisely what Flying S did," *Pet*., 9, and, as they did before, argue that with the pro forma documents, Flying S "extended" an offer "to insure something that did not yet exist." *Id*. Not only does this ignore the Court's holding, but it also contradicts the terms of the documents and the Court's conclusion about them. *Opinion*, ¶ 20. Appellants further ignore the Court's continued analysis on this point: "Ultimately—even assuming all conditions for contracting had been established—the object of the proposed contract became impossible and failed, because the necessary actions by the third parties were not completed and the parcels never came into existence." *Opinion*, ¶ 21 (citation omitted).

Appellants' use of the Petition to rehash their previous arguments and voice their dissatisfaction with the Court's Opinion are not grounds for rehearing.

## Conclusion

Appellants did not demonstrate the Court overlooked a "fact material to the decision" required by Appellate Rule 20(a)(i). The Petition should be denied.

DATED this 27th day of March, 2024.

CROWLEY FLECK PLLP

By: */s/ Jeffrey R. Kuchel*
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman typeface size 14-point font; is double-spaced; and the word count calculated by Microsoft Word is 2,466 words, excluding the Caption and Certificate of Compliance.

DATED this 27th day of March, 2024.

CROWLEY FLECK PLLP

By: */s/ Jeffrey R. Kuchel*
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## CERTIFICATE OF SERVICE

I, Jeffrey R. Kuchel, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 03-27-2024:

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