

**IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

ALBERT ELLIS LINCICOME, JR. and  
VICENTA LINCICOME,

Petitioners,  
v.

THE THIRD JUDICIAL DISTRICT  
COURT OF NEVADA, IN AND FOR  
COUNTY OF LYON; HONORABLE LEON A.  
ABERASTURI, DISTRICT  
COURT JUDGE,

Respondent,

and

SABLES, LLC,; FAY SERVICING, LLC;  
PROF-2013 M4 LEGAL TITLE TRUST by U.S.  
BANK, N.A.; and BANK OF AMERICA, N.A.  
and DOES 1-50,

Real Parties in Interest.

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**BANK OF AMERICA, N.A.'S RESPONSE  
TO PETITION FOR WRIT OF MANDAMUS**

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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel certifies the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Bank of America, N.A.

Bank of America Holding Corporation

BAC North America Holding Company

NB Holdings Corporation

Bank of America Corporation

Berkshire Hathaway Inc.

Akerman LLP

These representations are made so the justices of this court may evaluate possible disqualification or recusal.

DATED this 12<sup>th</sup> day of November, 2019.

**AKERMAN LLP**

/s/ Scott R. Lachman

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## **TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| NRAP 26.1 DISCLOSURE .....   | i           |
| TABLE OF CONTENTS.....   | ii          |
| TABLE OF AUTHORITIES .....   | iv          |
| ISSUE.....   | 1           |
| ROUTING STATEMENT.....   | 1           |
| STATEMENT OF THE CASE.....   | 1           |
| TIMELINE.....  | 3           |
| STATEMENT OF FACTS .....   | 4           |
| ARGUMENT .....   | 6           |
| I.    THIS COURT SHOULD CONSIDER THE TIMELINESS OF<br>PETITIONERS' COMPLAINT AS AGAINST BANA.....                    | 6           |
| II.   THE DISTRICT COURT ERRED IN DENYING BANA'S MOTION<br>TO DISMISS .....  | 9           |
| A.   The Six Year Statute Bars Petitioners' Claims Against BANA.....   | 9           |
| B.   The Six-Year Statute of Limitations Is Not Tolloed by NRS<br>11.200 or NRS 11.390.....                          | 11          |
| C.   The Statute Of Limitations Is Not Tolloed By The Application<br>Of The Discovery Rule Or Equitable Tolling..... | 13          |
| CONCLUSION .....   | 17          |
| CERTIFICATE OF COMPLIANCE.....   | 18          |
| CERTIFICATE OF SERVICE .....   | 20          |

## **TABLE OF AUTHORITIES**

|  | <b>Page(s)</b> |
|--|----------------|
| <b>Cases</b>   |                |
| <i>Alvarez-Machain v. United States</i> ,<br>107 F.3d 696 (9th Cir. 1996) .....  | 16             |
| <i>Bemis v. Estate of Bemis</i> ,<br>114 Nev. 1021, 967 P.2d 437 (1998).....   | 9, 10, 13      |
| <i>Cervantes v. City of San Diego</i> ,<br>5 F.3d 1273 (9 <sup>th</sup> Cir. 1993) .....   | 15             |
| <i>Cote H. v. Eighth Judicial Dist. Court</i> ,<br>124 Nev. 36, 175 P.3d 906 (2008).....   | 8              |
| <i>Dela Vera v. Fifth Judicial Dist. Court</i> ,<br>No. 77702, 2019 WL 2339540, at *1<br>(Nev. May 31, 2019) (unpublished disposition).....            | 7              |
| <i>Ford v. Showboat Operating Co.</i> ,<br>110 Nev. 752, 877 P.2d 546 (1994).....  | 1, 6, 7        |
| <i>Sierra Pacific Power Co. v. Nye</i> ,<br>80 Nev. 88, 389 P.2d 387 (1964).....   | 10             |
| <i>Smith v. Eighth Judicial Dist. Court</i> ,<br>113 Nev. 1343, 950 P.2d 280 (1997).....   | 8              |
| <i>Soper v. Means</i> ,<br>111 Nev. 1290, 903 P.2d 222 (1995).....   | 9              |
| <i>State Dep't of Transportation v. Eighth Judicial Dist. Court</i> ,<br>133 Nev. 549, 402 P.3d 677 (2017).....  | 7              |
| <i>Taylor Bean &amp; Whitaker Mortg. Corp. v. Vargas</i> ,<br>No. 70363, 2017 WL 6597161, at *1<br>(Nev. Dec. 22, 2017) (unpublished disposition)..... | 9, 10          |
| <b>Rules</b>   |                |
| NRAP 26.1 .....  | i              |
| NRAP 28(e)(1).....   | 18             |
| NRAP 30(b) .....   | 2, 9           |
| NRAP 32 .....  | 18             |

**Statutes**

|                 |        |
|-----------------|--------|
| NRS 11.190..... | passim |
| NRS 11.200..... | 11, 12 |
| NRS 11.390..... | 11, 13 |
| NRS 34.....     | 7      |

## **ISSUE**

Pursuant to *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994), real party in interest Bank of America, N.A. (**BANA**) raises the following issue presented in the district court's June 20, 2019 order: whether the district court erred in denying in part BANA's motion to dismiss premised on NRS 11.190(1)(b)'s six-year statute of limitations.

## **ROUTING STATEMENT**

This matter has been transferred to this court. This court is best suited to address the issues raised in this writ petition and this response brief since it can dispose of the issues in a timely manner. The case is not stayed below.

## **STATEMENT OF THE CASE**

Petitioners Albert Ellis Lincicome, Jr. and Vicenta Lincicome filed a complaint in November 2018 against BANA and other real parties in interest arising, in part, out of BANA's alleged 2009-2011 breach of contract. Petitioners' claims against BANA are time-barred under NRS 11.190(1)(b).

Petitioners file this writ challenging the district court's June 20, 2019 order, denying BANA's motion to dismiss in part, granting a declaration of nonmonetary status to the trustee under a deed of trust, Sables LLC, and denying petitioners leave to amend their complaint as to Sables. 3 PA 718-726. Petitioners request this court

instruct the district court to vacate portions of its orders as to Sables. BANA joins and incorporates herein the response of real party in interest Sables, LLC.

Though petitioners do not seek relief against BANA in its writ petition, they make a number of allegations against BANA pertaining to a 2009 loan modification agreement (**LMA**) between petitioner Vicenta Lincicome and BANA. Petitioners accuse BANA of breaching the LMA first by failing to implement it and then by refusing payments from October 2009 until December 2011. Writ at 12-13, 15-18. BANA denies the allegations. Not only does BANA deny the allegations, BANA now requests this court instruct the district court to dismiss petitioners' claims against BANA as time-barred by the six-year statute of limitations of NRS 11.190(1)(b).<sup>1</sup>

Petitioners allege BANA breached the LMA in 2009 and up until December 2011. 1 PA 12-14. Yet, petitioners waited until November 2018, almost 7 years later, to file an action against BANA for breach of contract, breach of the covenant of good faith and fair dealing, injunctive relief, and declaratory relief. 1 PA 1-125. Petitioners do not offer any valid legal basis to toll or delay enforcement of the

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<sup>1</sup> Petitioners should not be surprised by BANA's insistence this court address statute of limitations because petitioners included BANA's motion to dismiss briefing in its appendices. This briefing has no relation whatsoever to the issues involving petitioners and Sables. By including the dismissal briefs, petitioners essentially concede statute of limitations is "essential" to the issues presented in this writ. *See* NRAP 30(b).

statute of limitations as to their claims that BANA breached the LMA. Thus, petitioners' claims against BANA expired at the latest in December 2017.

Around the same time Sables filed its declaration of non-monetary value, BANA filed a motion to dismiss arguing all claims were time-barred under NRS 11.190(1)(b). 3 PA 537-545. The district court in the same June 20, 2019 order denied the motion as to the contract-based and declaratory relief claims. 3 PA 718-726. The district court erred because petitioners' remaining claims against BANA are time-barred. These untimely claims should be dismissed with prejudice.

### **TIMELINE**

| <b>Date</b>   | <b>Event<sup>2</sup></b>  |
|---------------|---|
| May 2007      | Vicenta Lincicome obtained a loan to purchase a home in Dayton, Nevada; the loan was secured by a deed of trust   |
| July 2009     | Vicenta executed a loan modification agreement with BANA  |
| December 2011 | The last date petitioners allege BANA refused to accept payment under the loan modification agreement   |
| April 2015    | Bank of America accepted a trial loan modification and petitioners made several trial loan payments   |
| November 2015 | The deed of trust was assigned to U.S. Bank   |
| November 2018 | Petitioners file a complaint against BANA premised on a breach of the July 2009 loan modification agreement based on refusal to accept payments at the very latest in December 2011 |

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<sup>2</sup> All citations to events are listed in the fact section below.



## **STATEMENT OF FACTS**

In May 2007, Vicenta Lincicome<sup>3</sup> financed the property known as 70 Riverside Drive, Dayton, Nevada 89403 with a loan in the amount of \$381,150.00, secured by deed of trust recorded on May 25, 2007. 1 PA 3, 21-33, 40-46. The deed of trust was assigned to BANA, and then to U.S. Bank in 2015. *See* 1 PA 117-118.

Vicenta Lincicome defaulted on the loan in 2008, less than one year after the loan originated. 1 PA 4. In 2009, Ms. Lincicome and BANA entered into a loan modification agreement (**LMA**). 1 PA 4, 87-92. Petitioners allege they complied with the terms of the LMA by signing it and returning the signed copy to BANA as instructed. 1 PA 4, 12. They also allege they tendered a payment pursuant to the LMA in September 2009. 1 PA 4-5, 12. Petitioners allege BANA refused to comply with the terms of the LMA by failing to acknowledge the agreement and failing to accept payments pursuant to the terms of the LMA. 1 PA 5.

According to petitioners, BANA refused to accept their attempted October 2009 payment, informed petitioners there was no record of a modification, and sent petitioners a loan statement in October 2009 that did not include the terms of the modification. 1 PA 5. Petitioners further allege they attempted to make payments

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<sup>3</sup> Albert Lincicome is not a borrower or trustor on the deed of trust.

pursuant to the LMA from October 2009 through December 2011, but BANA purportedly rejected each payment. 1 PA 13.

Petitioners allege BANA accepted a second loan modification in April 2015 and, in November 2015, the loan was assigned to U.S. Bank, with Fay Servicing, LLC acting as servicer. 1 PA 7, 117-18. After making trial payments pursuant to the terms of the April 2015 modification, petitioners allege Fay rejected a permanent modification in 2016, after BANA was out of the picture. 1 PA 7-9. Petitioners allege Sables initiated a non-judicial foreclosure sale in November 2017. 1 JA 9.

In an effort to block the foreclosure, petitioners brought a complaint against BANA, Fay Servicing, U.S. Bank, and Sables on November 7, 2018, more than six years after petitioners allege BANA breached the LMA. 1 PA 1-19. Petitioners asserted the following causes of action against BANA: injunctive relief, breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief. 1 PA 10-14. Petitioners assert no allegations against BANA in their injunctive relief and declaratory relief claims, likely because BANA has no interest in the loan or foreclosure sale. 1 PA 10-11. The remaining causes of action are premised on BANA's purported breach of the LMA, which as petitioners allege occurred at the very latest in December 2011. 1 PA 12-14.

BANA filed a motion to dismiss, arguing petitioners' complaint was untimely under 11.190(1)(b). 3 PA 537-45. Petitioners opposed the motion, and BANA

replied. 3 PA 546-576, 696-704.<sup>4</sup> The district court granted the motion in part as to the injunctive relief cause of action, but denied the motion as to causes of action for breach of contract, breach of the breach of the covenant of good faith and fair dealing, and declaratory relief. 3 JA 724.

## **ARGUMENT**

### **I. THIS COURT SHOULD CONSIDER THE TIMELINESS OF PETITIONERS' COMPLAINT AS AGAINST BANA**

BANA acknowledges the relief it seeks is procedurally unconventional. BANA had the option to file its own writ petition, but made the strategic decision to include this timeliness issue in this brief. Doing so allows this court to consider two issues at one time without voluminous briefing and delay to the below litigation.

This court may consider the timeliness of petitioners' claims under *Ford v. Showboat*, 110 Nev. 752, 877 P.2d 546 (1994). In that case, the Nevada Supreme Court held "[a] respondent may . . . without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." *Id.* at 755, 877 P.2d at 548. BANA, like a respondent, is answering petitioners' initial brief and advancing an argument the district court rejected before entry of final judgment.

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<sup>4</sup> Because this response brief mirrors BANA's dismissal briefing, BANA incorporates all arguments made therein. 3 PA 537-45, 696-704

Although *Ford v. Showboat* has yet to be utilized in the writ petition context, BANA submits that case logically extends to NRS 34 briefs, particularly those premised on statute of limitations. The Nevada Supreme Court has a history of intervening in litigation before final judgment where statute of limitations would bar a matter. See *State Dep't of Transportation v. Eighth Judicial Dist. Court*, 133 Nev. 549, 554, 402 P.3d 677, 683 (2017) (granting mandamus and holding a unilateral mistake claim is barred by the statute of limitations); *Dela Vera v. Fifth Judicial Dist. Court*, No. 77702, 2019 WL 2339540, at \*1 (Nev. May 31, 2019) (unpublished disposition) (granting mandamus and holding the statute of limitations bars prosecution of the matter). This case should be no different.

Due to the number of parties, issues surrounding the loan after the assignment to Fay Servicing, and brand new issues brought about by the recent sale of the property, BANA anticipates it will not have an opportunity to appeal final judgment until 2022 or 2023, after trial and years of discovery and motion practice. BANA should be dismissed now on statute of limitations grounds, rather than be dragged through a lawsuit involving the sale of a property it has no interest in. Sound judicial economy and administration militate in favor of granting BANA's requested relief.

BANA's requested relief also concerns an important issue regarding when a statute of limitations in a breach of contract claim accrues. Breach of contracts actions, subject to a six-year limitations period, are one of the most common type of

lawsuits filed in Nevada. A ruling on this issue has statewide appeal, not only in real property cases, but in business cases generally. If Nevada wants to be the Delaware of the west, this court must expand—or confirm its current, on-point—case authority so businesses know how long they can be sued after an alleged breach of contract. BANA did not expect to be dragged into litigation in November 2018, years after any alleged breach of the LMA, as a result of NRS 11.190(1)(b) and decisions interpreting the statute. BANA, and other like businesses, deserve certainty in the law and deserve to be dismissed if the law says so.

This court has complete discretion in deciding whether to entertain BANA's requested relief while considering petitioners' writ. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). BANA respectfully requests this court exercise such discretion and direct the district court to dismiss BANA from this lawsuit pursuant NRS 11.190(1)(b). *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) (recognizing writ relief may be warranted when clear authority obligates a district court to dismiss an action); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998) ("A court can dismiss a complaint for failure to state a claim upon which relief can be granted if the action is barred by the statute of limitations.").

## **II. THE DISTRICT COURT ERRED IN DENYING BANA'S MOTION TO DISMISS.**

### **A. The Six Year Statute Bars Petitioners' Claims Against BANA**

The remaining claims against BANA are based on BANA's alleged breach of the LMA. 1 PA 12-14. These claims are time-barred. As argued in its motion to dismiss the complaint, NRS 11.190 provides that a statute of limitations for "[a]n action upon a contract, obligation or liability founded upon an instrument in writing" is six years pursuant to NRS 11.190(1)(b). *See* 3 PA 536-545. A cause of action for breach of contract "accrues as soon as the plaintiff *knows or should know* of facts constituting a breach." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025-26, 967 P.2d 437, 440–41 (1998) (citing *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995); *Taylor Bean & Whitaker Mortg. Corp. v. Vargas*, No. 70363, 2017 WL 6597161, at \*1 (Nev. Dec. 22, 2017) (unpublished disposition)).

Petitioners are expected to exercise due diligence in determining whether they have a cause of action. *See Sierra Pacific Power Co. v. Nye*, 80 Nev. 88, 94, 389 P.2d 387, 390 (1964). Where evidence demonstrates that a party discovered, or should have discovered, facts giving rise to a cause of action, dismissal on statute of limitations grounds is appropriate. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440, 9; *Taylor Bean*, 2017 WL 6597161, at \*1 (complaint alleged date defendant failed to make required payment; thus plaintiff knew or should have known date cause of action accrued).

Petitioners allege BANA offered a LMA in July 2009. 1 PA 4, 87-92. They further allege they complied with the terms of the agreement – they signed it and returned it to BANA as instructed. 1 PA 4, 12. They allege they tendered a payment pursuant to the LMA in September 2009. 1 PA 4-5, 12. However, immediately thereafter, the petitioners concede they became aware that BANA would not accept the terms of the LMA. 1 PA 5. According to their allegations, BANA refused to accept the October 2009 payment, informed them there was no record of a modification, and sent petitioners a loan statement in October 2009 that did not include the terms of the modification. 1 PA 5. Petitioners further concede BANA would not accept payments the purportedly attempted to tender from October 2009 through December 2011. 1 PA 13.

Given the foregoing, petitioners knew, or should have known, they had a cause of action against BANA as early as October 2009. 1 PA 13. They certainly were aware they had a cause of action against BANA by December 2011, the last date they allege BANA refused to accept their tendered payment. Petitioners filed their complaint on November 7, 2018. 1 PA 1-125. Based on the facts alleged by petitioners and the evidence attached to the complaint, petitioners cannot overcome the statute of limitations for their claims against BANA.

**B. The Six-Year Statute of Limitations Is Not Tolloed by NRS 11.200 or NRS 11.390**

In their opposition to BANA's motion to dismiss, petitioners argued they had no reason to believe they could enforce the 2009 LMA, despite knowing BANA would not accept the payments and the statute was tolled because they tendered payments in 2015 (on a new and separate modification offer) and did not learn BANA implemented the modification until 2017. *See* 3 PA 587.<sup>5</sup> These arguments are unavailing.

Petitioners first relied on NRS 11.200 to avoid the statute. NRS 11.200 provides the limitation period of NRS 11.190 commences from the date the last payment or transaction is made upon an existing contract. Here, the breach of contract claim is premised wholly on BANA's breach of the 2009 LMA. Thus, the alleged breach occurred in December 2011 when BANA allegedly refused to accept the payments made towards the 2009 LMA. Petitioners allege they attempted to make payments toward the LMA from October 2009 to December 2011, but BANA refused to accept these payments. 1 PA 13. December 2011 is the last time petitioners allege they attempted to make a payment towards the 2009 LMA and BANA rejected this payment. Petitioners were on notice as late as December 2011

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<sup>5</sup> The LMA was recorded against the property in May 2011. 1 PA 6. Petitioners were on constructive and/or inquiry notice that the LMA was recorded.



that BANA had allegedly breached the 2009 LMA. Petitioners' action should have been brought by December 2017, if not sooner. *See* NRS 11.190 (six years statute of limitations on contract based claims).

Petitioners' argument NRS 11.200 extends the originating time to July 2015, the last time it made payments to BANA, is wholly unrelated to petitioners' breach of contract cause of action concerning the 2009 LMA. That cause of action is premised on BANA's failure to accept payments on the 2009 LMA. Petitioners concede the 2015 payments were made pursuant to an entirely new loan modification offer made in April 2015. That this was a new offer is conceded and supported by the allegations and exhibits.

The written 2009 LMA modified the loan by reducing the interest to a step rate interest (4.875% for the first five years and then 5.375% to maturity), increased the principal balance by \$36,046.58 for fees, interest and escrow, and reduced payments to \$2,272.62. 1 JA 87-94. The written April 2015 modification, in contrast, provided for an interest rate of 4.125%, and set payments at \$2,013.78 starting May 28, 2015, July 1, 2015 and August 1, 2015. 1 PA 7-8, 110. These are two separate agreements. BANA's acceptance of the 2015 trial plan payments has no impact on the claim that BANA breached that 2009 LMA. Petitioners do not allege BANA agreed to accept the 2015 payments as part of the payments due on the 2009 LMA. There is certainly no reason to think so. The 2015 payments are

lower than what was required in the 2009 LMA. 1 PA 87-82, 110. Additionally, BANA made the April 2015 offer in writing. 1 PA 110. This writing does not refer to the 2009 LMA or the terms in that modification.

Petitioners' argument the assignment of the deed of trust to U.S. Bank in 2015 extended the time to bring their action pursuant to NRS 11.390 is also misplaced. 3 PA 585-86. Again, the breach of contract cause of action alleges BANA breached the 2009 LMA in 2011. 1 PA 12-14. Petitioners are not parties to the assignment and there is no dispute concerning the validity and enforceability of the deed of trust. The transfer of the interest has no effect on when petitioners' claim for breach of the 2009 LMA accrues. It does not renew petitioners' claims concerning the alleged 2011 breach. Petitioners were on notice BANA allegedly breached the 2009 LMA at the very latest in December 2011. The written assignment does not toll the limitation period for bring the claim.

**C. The Statute Of Limitations Is Not Tolloed By The Application Of The Discovery Rule Or Equitable Tolling**

Petitioners claims the statute of limitations should be tolled by delayed discovery or equitable tolling are also unavailing. 3 PA 585-88. As BANA argued in its motion to dismiss and reply, a cause of action for breach of contract "accrues as soon as the plaintiff *knows or should know* of facts constituting a breach." *Bemis*, 114 Nev. at 1025-26, 967 P.2d at 440–41. 3 PA 537-45, 696-704.

There is no dispute petitioners discovered, or should have discovered, they had a claim for breach of contract in December 2011. 1 PA 13. They concede BANA refused to accept the payments and denied the existence of the 2009 LMA. 1 PA 13. Petitioners allege they complied with the terms of the agreement – they signed it and returned it to BANA as instructed. 1 PA 4, 12. They concede they tendered a payment pursuant to the LMA in September 2009. 1 PA 4-5, 12. However, immediately thereafter, petitioners became aware BANA would not accept the terms of the LMA. 1 PA 5. BANA allegedly refused to accept the October 2009 payment, informed petitioners there was no record of a modification, and sent petitioners a loan statement that did not include the terms of the modification. 1 PA 5. Petitioners further concede they were aware BANA would not accept payments from October 2009 through December 2011. 1 JA 13.

Petitioners argue they did not discover they had a cause of action because they did not know BANA had implemented the modification. 3 PA 587-88. However, whether BANA booked the modification or petitioners were aware of it is not relevant to the cause of action that BANA breached the agreement by failing to accept the payments in December 2011. *See* 1 PA 12-14. That is when petitioners were injured by the alleged breach of the agreement, when they attempted to comply with the terms and BANA purportedly prevented them from doing so.

Whether BANA booked the modification without petitioners' knowledge does not change the fact BANA purportedly did not accept the payments in December 2011. There is no dispute petitioners knew BANA would not accept the payments. They admit it. 1 JA 13. The evidence is incontrovertible that petitioners discovered the breach in December 2011, thus delayed discovery does not apply to save this cause of action with a six-year statute of limitation. Petitioners should have brought the claim by December 2017; they waited until November 2018. It is almost one year too late.

Finally, petitioners rely on *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9<sup>th</sup> Cir. 1993) (analysis of California law), for the proposition the statute of limitations should be equitably tolled because a reasonable person would not know they have a cause of action. 3 PA 587. Under the Ninth Circuit standard, courts allow equitable tolling in only two circumstances: where petitioners were prevented from filing timely claims due to (1) defendant's wrongful conduct, or (2) extraordinary circumstances. *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9<sup>th</sup> Cir. 1996). Petitioners allege neither.

Petitioners failed to demonstrate any basis to permit the district court to apply equitable tolling of any applicable statute of limitations. Petitioners contend BANA breached the 2009 LMA by failing to accept the payments in December 2011. 1 PA 12-14. Petitioners failed to sufficiently explain why or how they were prevented

from bringing their action sooner and fail to plead how the applicable statutes of limitations should be tolled from the date they were aware BANA refused to accept the payments. Petitioners allege in December 2011, BANA refused to accept the payments and the modification was not implemented. 1 JA 13. Moreover, they argued in their opposition to BANA's motion to dismiss that BANA prevented them from knowing the 2009 LMA had been implemented by sending statements that showed the modification had not been implemented and did not purportedly acknowledge the modification. *See* 3 PA 587-88. This is simply more evidence petitioners were on notice they had a claim for BANA's alleged breach of the 2009 LMA by failing to accept the payments in December 2011. 1 PA 13. Petitioners do not allege they continued to follow up with BANA regarding the modification, they attempted to make payments, or BANA continued to promise it was investigating.

The allegations show the last time the 2009 LMA was discussed was in December 2011. 1 PA 13. Petitioners' delay in filing this action is prejudicial to BANA. BANA was not on notice since December 2011 that the petitioners sought to enforce that 2009 LMA. Conclusory statements that a "reasonable person" would not know they had a claim does not establish a basis to support equitable tolling for the breach of contract cause of action. The contract-based claims against BANA are time barred under Nevada law.

## **CONCLUSION**

Petitioners' claims against BANA are untimely. This court should deny petitioners' writ should but in doing so should instruct the district court to enter judgment in favor of BANA.

DATED this 12<sup>th</sup> day of November, 2019.

**AKERMAN LLP**

*/s/ Scott R. Lachman*

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## **CERTIFICATE OF COMPLIANCE**

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

I FURTHER CERTIFY this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 3768 words.

FINALLY, I CERTIFY I have read this **Bank of America, N.A.'s Response to Petition for Writ of Mandamus**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED this 12<sup>th</sup> day of November, 2019.

**AKERMAN LLP**

*/s/ Scott R. Lachman*

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### **CERTIFICATE OF SERVICE**

I certify that I electronically filed on November 12, 2019, the foregoing **BANK OF AMERICA, N.A.'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court for the Court of Appeals of the State of Nevada by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena

An employee of AKERMAN LLP