

FILED

2021 JUL 19 AM 11:48

Case No: 18-CV-01332

Dept.: II

The undersigned affirms that this document does not
contain personal information, pursuant to NRS 603A.040

TANYA SOCRINE

COURT ADMINISTRATOR

Electronically Filed

Jul 23 2021 03:40 p.m.

Victoria Toman

Elizabeth A. Brown
Clerk of Supreme Court

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

* * * * *

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,

Plaintiffs,

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, substituted in for DOE 1; 1900
CAPITAL TRUST II, BY U.S. BANK TRUST
NATIONAL ASSOCIATION, substituted in
for DOE 2; MCM-2018-NPL2, substituted
in for DOE 3; and DOES 4-10.

Defendants.

BRECKENRIDGE PROPERTY FUND 2016,
LLC

Counterclaimant,

vs.

ALBERT ELLIS LINCICOME, JR., an
individual; VICENTA LINCICOME, an
individual; and DOE OCCUPANTS 1-5.

Counterdefendants.

NOTICE OF APPEAL

NOTICE OF APPEAL

PAGE 1 OF 3

Docket 83261 Document 2021-21365



1 **NOTICE IS HEREBY GIVEN** that Plaintiffs Albert Ellis Lincicome, Jr., and Vicenta
2 Lincicome, by and through their counsel of record, Michael G. Millward of Millward Law, Ltd.,
3 appeal to the Supreme Court of Nevada from the *Order Denying Plaintiffs Motion for Partial*
4 *Summary Judgment/Granting Motions for Summary Judgment* filed by BANA, Prof-2013 M4
5 *Legal Trust, US Bank and Fay Servicing, LLC* entered June 23, 2021.

6 The *Order Denying Plaintiffs Motion for Partial Summary Judgment/Granting Motions for*
7 *Summary Judgment* filed by BANA, Prof-2013 M4 Legal Trust, US Bank and Fay Servicing, LLC,
8 concerns the following motions:

- 9 1. Motion for Summary Judgment filed by Bank of America on March 17, 2021;
- 10 2. Motion for Summary Judgment filed by Shellpoint Mortgage Servicing on March 25,
- 11 2021; and
- 12 3. Motion for Summary Judgment filed by Prof-2013 M4 Legal Trust, U.S. Bank,
- 13 National Association of Legal Trustee and Fay Servicing, LLC, on March 25, 2021.

14 **NOTICE IS HEREBY GIVEN** that Plaintiffs Albert Ellis Lincicome, Jr., and Vicenta
15 Lincicome appeal to the Supreme Court of Nevada from the *Order on Breckenridge Motion for*
16 *Summary Judgment*, entered June 23, 2021.

17 The *Order on Breckenridge Motion for Summary Judgment* concerns the Motion for
18 Summary Judgment filed by Breckenridge Property Fund 2016, LLC, on March 18, 2021.

19 **NOTICE IS HEREBY GIVEN** that Plaintiffs Albert Ellis Lincicome, Jr., and Vicenta
20 Lincicome appeal to the Supreme Court of Nevada from the *Order* granting Sables, LLC, non-
21 monetary status entered May 30, 2019.

22 The Order concerns Sables, LLC's Declaration of Non-Monetary Status filed on or about
23 December 18, 2018.

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Respectfully submitted 16 day of July, 2021

By: [Signature]

Michael G. Millward, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Plaintiffs

Case Summary

FAY SERVICING LLC, BRECKENRIDGE PROPERTY FUND 2016 LLC, BANK OF AMERICA, N.A., ALBERT ELLIS LINCICOME JR., VICENTA LINCICOME, SABLES, LLC, PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A., NEWREZ, LLC dba SHELLPOINT MORTGAGE SERVICING, LLC ~ COMPLAINT

Case Number: 18-CV-01332

Agency: Third Judicial District Court

Type: Other Title to Property Case

Received Date: 11/7/2018

Status: Closed

Status Date: 6/23/2021

Involvements

Primary Involvements

NEWREZ, LLC dba SHELLPOINT MORTGAGE SERVICING, LLC

Defendant

BRECKENRIDGE PROPERTY FUND 2016 LLC Defendant

BANK OF AMERICA, N.A. Defendant

SABLES, LLC Defendant

FAY SERVICING LLC Defendant

PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A.

Defendant

LINCICOME, ALBERT ELLIS JR. Plaintiff

LINCICOME, VICENTA Plaintiff

Other Involvements

Wade, Shadd A. Esq. Defendant's Attorney

Clouser, Justin M. Esq. Plaintiff's Attorney

Schriever, Matthew K. Esq. Defendant's Attorney

Brenner, Darren T. Esq. Defendant's Attorney

Lachman, Scott Esq. Defendant's Attorney

Hernandez, Ramir Esq. Defendant's Attorney

Millward, Michael G. Esq. Plaintiff's Attorney

Third Judicial District Court (18-CV-01332)

Aberasturi, Leon A. - LAA Dept II - TJDC

[5. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[7. NRCP 5 ~ ANSWER](#)

Notes: Newrez LLC dva Shellpoint Mortgage

Lead/Active: False

[8. NRCP ~ RELATED PARTY](#)

Lead/Active: False

Other Title to Property Case

[1. NRCP 3 ~ COMPLAINT](#)

Lead/Active: True

Case Summary

[2. NRCP 3 ~ COMPLAINT](#)

Lead/Active: False

[3. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[4. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[6. NRCP 5 ~ ANSWER](#)

Notes: Sables, LLC First Appearance

Lead/Active: False

Case Status History

11/7/2018 4:49:00 PM | Open

6/23/2021 3:25:00 PM | Closed

Documents

11/7/2018 Complaint (Arbitration Exempt- Declaratory Relief).pdf - Filed

11/7/2018 Civil Cover Sheet.pdf - Filed

11/7/2018 Notice of Lis Pendens APN 29-401-17.pdf - Filed

11/7/2018 Affidavit of Counsel.pdf - Filed

11/7/2018 Application for Ex Parte Restraining Order, Preliminary Injunction & Permanent Injunction.pdf - Filed

11/8/2018 Certificate of Service (Complaint, Application, & Notice).pdf - Filed

11/8/2018 Certificate of Service.pdf - Filed

11/8/2018 Summons- Issued.pdf - Issued

Notes: 4 Originals Issued

11/8/2018 Order.pdf - Filed

11/14/2018 Certificate of Service (2).pdf - Filed

11/14/2018 Request for Submission (Corrected Order).pdf - Filed

11/14/2018 Corrected Order.pdf - Filed

11/15/2018 Notice of Appearance.pdf - Filed

11/15/2018 Declaration of Fay Servicing, LLC in Response to Application for Ex Parte Restraining Order.pdf - Filed

Notes: Preliminary Injunction and Permanent Injunction

11/15/2018 Response to Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction.pdf - Filed

11/20/2018 Notice of Entry of Order.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit List.pdf - For Court Use Only

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 1.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 2.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 3.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 4.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 5.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 6.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 7.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 8.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 9.pdf - Filed

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 10.pdf - Filed

Case Summary

11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 11.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 12.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 13.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 14.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 15.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 16.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 17.pdf - Filed
11/20/2018 Exhibits and Exhibit List from 11-20-18 Hearing\Plaintiff's Exhibit 18.pdf - Filed
11/29/2018 Answer to Complaint.pdf - Filed
12/6/2018 SR. Judge Request 18-CV-01332.pdf - For Court Use Only
12/10/2018 Summon on Return - Served 11-14-18.pdf - Filed on Return
12/10/2018 Memorandum of Temporary Assignment.pdf - Filed
Notes: Assignment of Judge McGee
12/11/2018 Summons-On Return-Sables LLC's Agent Svd 11-19-18.pdf - Filed on Return
12/14/2018 Three Day Notice of Intent to Take Default.pdf - Filed
Notes: SABLES, LLC
12/14/2018 Three Day Notice of Intent to Take Default .pdf - Filed
Notes: Bank of America
12/21/2018 Application for Entry of Default- Bank of America, N.A..pdf - Filed
12/21/2018 Application for Entry of Default- Sables, LLC.pdf - Filed
12/21/2018 Default- Sables, LLC.pdf - Filed
12/21/2018 Default- Bank of America, N.A..pdf - Filed
12/21/2018 Defendant Bank of America, N.A.'s Notice of Motion and Motion to Dismiss Plaintiffs' Complaint.pdf - Filed
12/21/2018 Notice of Appearance - Darren Brenner, Esq. and Scott Lachman, Esq. for BoA.pdf - Filed
12/24/2018 Declaration of Non-monetary Status.pdf - Filed
12/24/2018 Initial Appearance Fee Disclosure - Sables, LLC.pdf - Filed
12/31/2018 Order (2).pdf - Filed
1/8/2019 Notice of Entry of Order (Order filed 12-31-18).pdf - Filed
1/9/2019 Objection to Declaration of Non-Monetary Status.pdf - Filed
1/22/2019 Application for Entry of Default Judgment.pdf - Filed
1/23/2019 Default Judgment.pdf - Submitted
1/28/2019 Sables, LLC's Response to Objection to Its Declaration of Non-Monetary Status.pdf - Filed
1/28/2019 Sables, LLC's Motion to Set Aside Default.pdf - Filed
2/5/2019 Letter from Judge McGee.pdf - For Court Use Only
Notes: 2/5/19: Called Jackie Tucker - Ok to vacate settlement conference at this time.
2/8/2019 Opposition to Defendant Sables, LLC's Motion to Set Aside Default.pdf - Filed
2/8/2019 Response to Plaintiff's Application for Entry of Default Judgment Against Sables, LLC.pdf - Filed
2/8/2019 Joinder to Sables, LLC's Motion to Set Aside Default.pdf - Filed
2/11/2019 Order Setting Hearing (4-15-19).pdf - Filed
2/13/2019 Order Granting Telephonic Appearance- Shad Wade (4-15-19).pdf - Filed
2/21/2019 Sables, Joinder to Response Plntf's App Entry of Default Jdgmnt.pdf - Filed
3/1/2019 Supplemental Declaration of Shadd A. Wade in Support of Motion to Set Aside Default.pdf - Filed
3/4/2019 Ptf's MTN for Leave to File Amnd Complaint to Substitute Parties.pdf - Filed
3/4/2019 Stipulation & Order to Set Aside & Vacate Default of Defendant Bank of America.pdf - Filed
Notes: N.A. and to Permit Bank of America, N.A. to File a Response
3/15/2019 Motion for Rule 11 Sanctions Against Plaintiffs.pdf - Filed
3/15/2019 Declaration of Ramir M. Hernandez, Esq. in Support of.pdf - Filed
Notes: Motion for Rule 11 Sanctions Against Plaintiffs
3/15/2019 Notice of Entry of Stipulation & Order to Set Aside.pdf - Filed
3/22/2019 Defendant Bank of America - Motion to Dismiss Complaint.pdf - Filed
3/26/2019 Request for Submission (Order Granting Leave to File Amended Complaint).pdf - Filed
3/27/2019 Order Granting Leave to File Amended Complaint.pdf - For Court Use Only
Notes: Needs to file new order reflecting what ordered at 4/15/19 hearing--LA
3/28/2019 Opposition to US Bank's Motion for Rule 11 Sanctions.pdf - Filed
4/4/2019 Opposition to BofA Motion to Dismiss Complaint.pdf - Filed
4/9/2019 Order Granting Telephonic Appearance- Scott Lachman (4-15-19).pdf - Filed
4/9/2019 Telephonic Request - Scott Lachman - Ackerman.pdf - For Court Use Only
4/11/2019 Response to Declaration of Shadd A. Wade.pdf - Filed
4/12/2019 Deft Bank of America N.A.'s Reply to Ptf's Oppo to.pdf - Filed
Notes: Deft's Motion to Dismiss Plaintiffs' Complaint
4/12/2019 Request for Submission.pdf - Filed
4/12/2019 Order Granting Bank of America's Mtn to Dismiss.pdf - For Court Use Only
Notes: Set for 4-15-19
4/12/2019 Reply in Support of Mtn for Rule 11 Sancations.pdf - Filed
Notes: Against Plaintiffs

Case Summary

5/24/2019 Motion to Intervene & Expunge Lis Pendens.pdf - Filed
5/30/2019 Order .pdf - Filed
6/7/2019 Plaintiffs' Amended Motion for Leave to File Amended Complaint to Substitute Parties and Add Additional Claims for Relief.pdf - Filed
6/10/2019 Opposition to Motion to Intervene.pdf - Filed
6/19/2019 Oppo to Plt's Amended Motion for Leave to file Amnd Complaint.pdf - Filed
6/19/2019 Reply in Support of MTN to Intervene & Expunge Lis Pendens.pdf - Filed
6/19/2019 Request to Submit MTN to Intervene .pdf - Filed
6/20/2019 Sables, LLC's Opposition to Plaintiffs' Amended Motion to Amend.pdf - Filed
6/20/2019 Notice of Entry of Order - 5-30-19.pdf - Filed
6/21/2019 Application for Attorney's Fees and Costs.pdf - Filed
7/5/2019 Obejction to Application for Attorney Fees.pdf - Filed
7/9/2019 Reply to Breckenridge Property Fund 2016, LLC's Opposition to the Amended Motion.pdf - Filed
7/15/2019 Receipt for Documents (S.C.).pdf - Filed
7/22/2019 Documents From Millward Law Re Supreme Court Appendix to Writ of Mandamus.pdf - For Court Use Only
SEALED
7/22/2019 Reply to Obejction to Applcation for Attorney Fees.pdf - Filed
7/22/2019 Request for Submission-Atty Fees.pdf - Filed
8/5/2019 Notice of Transfer to Court of Appeals.pdf - Filed
8/19/2019 Order on Application for Attorneys Fees and Costs.pdf - Filed
8/22/2019 Email setting Telephone Conference 8 23 19.pdf - For Court Use Only
8/26/2019 Notice of Entry of Order (2).pdf - Filed
8/28/2019 Order Granting Plaintiffs' Leave to File Second Amended Complaint.pdf - Filed
9/12/2019 Plaintiffs' Motion for Leave to File Second Amended Complaint to Substitute Parties & Add Additional Claims for Relief.pdf - Filed
9/17/2019 Order Granting in Part and Denying in Part the Motion to Intervene and Expunge Lis Pendens.pdf - Filed
9/23/2019 Notice of Entry of Order Granting in Part and Denying in Part the Motion to Intervene.pdf - Filed
Notes: and Expunge Lis Pendens
9/27/2019 Plaintiffs' Motion for Leave to File Motion for Reconsideration of the Court's August 23, 2019 Order.pdf - Filed
Notes: Re Declaratory Relief
10/3/2019 Ex Parte MTN for OSC Temp Writ of Restitution Should Not be granted.pdf - Filed
10/3/2019 Intervenor's Counterclaim.pdf - Filed
10/3/2019 Ord to Show Cause Why Temp Writ Should not be Granted.pdf - Submitted
10/10/2019 Request to Submit.pdf - Filed
10/16/2019 Order-File Amended Complaint.pdf - Filed
10/18/2019 Plt's Oppo to MTN for OSC Re Writ of Restitution.pdf - Filed
10/23/2019 Answer to Counterclaim and Counterclaim Against Intervenor.pdf - Filed
10/24/2019 Order Denying ExParte Motion and Setting Hearing.pdf - Filed
10/24/2019 Certificate of Service (Answer to Counterclaim and Counterclaim).pdf - Filed
10/31/2019 Order Granting Telephonic Extension- Supreme Court.pdf - Filed
11/12/2019 Motion for a Hearing on Pending Motions and for Rule 16.1(b) Conference.pdf - Filed
11/12/2019 Notice of Entry of Order Denying Ex parte Motion & Setting Hearing.pdf - Filed
11/18/2019 Breckenridge's Answer to the Counterclaim Filed by Albert Ellis Lincicome, Jr & Vicenta Lincicome.pdf - Filed
11/21/2019 Request to Submit-.pdf - Filed
11/21/2019 Certificate of Mailing - Request to Submit.pdf - Filed
11/21/2019 Certificate of Mailing - Ptf's Oppo to MTN.pdf - Filed
11/21/2019 Oppo to Motion for Hearing on Pending Motions.pdf - Filed
11/22/2019 Order-Mtn for Leave to File Mtn for Reconsideration.pdf - Filed
12/2/2019 Petitioners' Reply to Response to Petition for Writ of Mandamus (Court of Appeals).pdf - For Court Use Only
SEALED
12/3/2019 Order Granting Telephonic Appearance - S Lachman.pdf - Filed
12/4/2019 Order Setting Hearing (2-4-20).pdf - Filed
12/6/2019 Order (on Motion to File Second Amended Complaint).pdf - Filed
12/13/2019 Motion for Reconsideration.pdf - Filed
12/20/2019 Second Amended Complaint.pdf - Filed
12/20/2019 Notice of Entry of Order - Reconsideration.pdf - Filed
12/20/2019 Notice of Entry of Order - Second Amended Complaint.pdf - Filed
1/7/2020 Answer to Second Amended Complaint (Prof-2013 M4-Legal Title Trust and Fay Servicing LLC).pdf - Filed
1/8/2020 Breckenridges Answer to Second Amended Complaint.pdf - Filed
1/17/2020 Summons for second Amended Complaint - Issued.pdf - Issued
1/21/2020 Notice of Association of Counsel.pdf - Filed
1/23/2020 Bank of America, N.A.'s Answer & Affirmative Defenses to Plaintiffs' Second Amended Complaint.pdf - Filed
1/24/2020 Order Denying Hearing (S.C.).pdf - Filed

Case Summary

2/4/2020 Demand for Jury Trial - Millward Law.pdf - Filed
2/11/2020 Order Denying Without Prejudice Ex Parte Motion for Order to Show Cause Why A Temp Writ of Resti Should not be Granted.pdf - Filed
2/12/2020 Certificate of Service (Demand for Jury Trial & Notice of Filing of Petition).pdf - Filed
2/12/2020 Notice of Filing of Petition for Review By the Supreme Court.pdf - Filed
3/6/2020 Notice of NRCP 16.1 Early Case Management Conference.pdf - Filed
Notes: March 16, 2020
3/19/2020 Answer to Second Amended Complaint - Newrez, LLC dba Shellpoint Mortgage Servicing LLC.pdf - Filed
3/27/2020 Motion for Order Requiring Plaintiff to Deposit Rental &-or Mortgage Payments With Court.pdf - Filed
4/3/2020 Joinder to Motion for Order -Deposit Rental Payments With Court.pdf - Filed
4/7/2020 Transcript Hearing 4-15-19.pdf - Filed
4/7/2020 proof of Service of summons & Complaint on Newrez.pdf - Filed
4/13/2020 Plaintiff's Opposition to Motion for Deposit of Payments.pdf - Filed
4/22/2020 Joint Case Conference Report.pdf - Filed
4/24/2020 Order Denying Petition for Review (S.C.).pdf - Filed
4/24/2020 Certificate of Mailing (JCCR).pdf - Filed
4/24/2020 Reply in Support of Motion for Order Requiring Plaintiff to Deposit Rental.pdf - Filed
4/24/2020 Request for Submission of Motion for Order Requiring Plaintiff to Deposit Rental.pdf - Filed
4/28/2020 Letter to Attorneys requesting trial dates (2).pdf - For Court Use Only
5/21/2020 Notice in Lieu of Remittitur- S.C..pdf - Filed
5/26/2020 Preparation of Scheduling Order.pdf - For Court Use Only
5/27/2020 Scheduling Order.pdf - Filed
5/28/2020 Ord Denying MTN for Ord Requiring Pltf to Deposit Rental Pmnts.pdf - For Court Use Only
6/24/2020 Returned Mail MCM.pdf - For Court Use Only
7/10/2020 Motion for Leave to File Crossclaim Against Prof-2013-M4.pdf - Filed
8/17/2020 Response to Breckenridge Property Fund 2016, LLC's Motion for Leave to File Crossclaim.pdf - Filed
Notes: Against Prof-2013-M4 Legal Title Trust, By U.S. Bank National Association as Legal Title Trustee
9/11/2020 Request for Submission of Motion for Leave to File Crossclaim.pdf - Filed
Notes: Against Prof-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee
9/11/2020 Breckenridge Property Fund 2016, LLC's Reply in Support of Motion.pdf - Filed
Notes: for Leave to File Crossclaim Against Prof-2013-M4 Legal Title Trust, By U.S. Bank National Association as Legal Title Trustee
9/21/2020 Order Granting Breckenridge's Motion for Leave to File Crossclaim Against Prof-2013-M4.pdf - Filed
Notes: in Part and Denying in Part
10/2/2020 Request for Admissions & Request for Admission of Genuineness of Documents.pdf - Filed
10/2/2020 Breckenridge Property Fund 2016 Crossclaim Against Prof 2013 By US Bank as Legal Title Trustee.pdf - Filed
11/2/2020 Answer to Breckenridge Property Fund Crossclaim Against Prof 2013-M4 Legal Title Trust by US Bank National.pdf - Filed
Notes: Association, as Legal Title Trustee
1/22/2021 2_18 Zoom Information_ Case No_ 18-CV-01332 _ Albert Ellis Lincicome, Jr. v. Sabes, LLC.pdf - For Court Use Only
Notes: Attorneys for Bank of America:
Melanie D. Morgan, Esq. & Jennifer Chatman

Attorneys appearing for Prof-2013, Fay, and Shellpoint:
Ramir M. Hernandez
Darren Brenner

Appearing for Fay and Prof-2013
Todd Visser

Appearing for Shellpoint:
Ernest Wagner
Amber Knight
2/9/2021 Bank of America Confidential Settlement Conf. Statement BRF [Lincicome, Albert] BANA_s.PDF - For Court Use Only
2/9/2021 Exhibits to Bank of America's Confidential Settlement Conf. Statement BRF [Lincicome, Albert].PDF - For Court Use Only
2/10/2021 Breckenridge Property Confidential Settlement Statement.pdf - For Court Use Only
2/12/2021 U.S. Bank Trust, et al Confidential Settlement Statement.pdf - For Court Use Only
2/12/2021 Plaintiffs (Lincicome) Settlement Conference Statement (2021-02-11).pdf - For Court Use Only
2/23/2021 Prof-2013 M4-Legal Title Trust by US Bank and Fay Servicing LLC's Confidential Settlement Brief.pdf - Sealed
SEALED
Notes: Prof-2013 M4-Legal Title Trust by US Bank, National Association, as Legal Title Trustee;s, New Rez, LLC dba Shellpoint MORTgage Servicing, LLC and Fay Servicing LLC's Confidential Settlement Brief
3/8/2021 Stipulation and Order Extending Dispositive Motion Deadlines and Continuing Trial Date and Related Deadlines.pdf - Filed

Case Summary

3/17/2021 Motion for Summary Jdgmnt (Bank of America).pdf - Filed
3/18/2021 Breckenridge Property Fund's Motion for Summary Judgment Against Plaintiff.pdf - Filed
3/19/2021 Motion for Partial Summary Judgment (Final).pdf - Filed
3/22/2021 Certificate of Service - Motion for Partial Summary Judgment.pdf - Filed
3/25/2021 Shellpoint Mortgage Servicing LLC's Motion for Summary Judgment.pdf - Filed
3/25/2021 Prof-2013 M4 Legal Title Trust, and Fay Servicing LLC's Motion for Summary Judgment.pdf - Filed
3/25/2021 Notice of Entry of Order (Order filed 3-6-21).pdf - Filed
3/25/2021 Request for Judicial Notice in Support of Defendant's Motions for Summary Judgment.pdf - Filed
3/25/2021 Shellpoint Mortgage Servicing, LLC's Undisputed Statement of Fact in Support of Motion for Summary Judgment.pdf - Filed
3/25/2021 Prof-2013 M4 Legal Title Trust, and Fay Servicing LLC's Undisputed Statement of Facts.pdf - Filed
Notes: in Support of Motion for Summary Judgment
3/29/2021 Breckenridge's Joinder to Other Defendant's Motion for Summary Judgment.pdf - Filed
4/2/2021 Bank of America's Joinder to Prof 2013 Motion for Summary Judgment.pdf - Filed
4/2/2021 Bank of America's Errata to Bank of America's Motion for Summary Judgment & Motion for Sanctions.pdf - Filed
4/2/2021 Bank of America's Joinder to Newrez's Motion for Summary Judgment.pdf - Filed
4/2/2021 Bank of America's Joinder to Breckenridge's Motion for Summary Judgment.pdf - Filed
4/13/2021 Stip & Order Re Deadlines For Pending Motions.pdf - Filed
4/14/2021 Bank of America's Opposition to Plaintiff's Partial Motion for Summary Judgment.pdf - Filed
4/15/2021 Plt's Oppo to Motions for Summary Judgment.pdf - Filed
4/15/2021 Plt's Oppo to Bana's Motion for Summary Jdgmnt.pdf - Filed
4/15/2021 Plt's Oppo to Breckenridge's MTN for Sum Jdgmnt.pdf - Filed
4/15/2021 Plt's Statement of Udisputed Material Facts.pdf - Filed
4/19/2021 Joinder to BofA's Motion for Summary Judgment, Breck Motion for Summary Judgment Against.pdf - Filed
Notes: Plaintiff, and Prof 2013 Motion for Summary Judgment
4/19/2021 Prof 2013 Opposition to Plaintiff's Motion for Partial Summary Judgment.pdf - Filed
4/19/2021 Joinder to BofA's Motion for Summary Judgment, Brek Motion for Summary Judgment, Shellpoin.pdf - Filed
4/26/2021 Certificate of Service (3).pdf - Filed
4/26/2021 Notice of Entry of Order - Stip and Order 4-13-21.pdf - Filed
5/3/2021 Breckenridge Property Fund 2016 LLC's Joinder to Other Defendants' Opposition to Plaintiffs' Motion for Summary.pdf - Filed
5/5/2021 Bank of America, N.A.'s Reply Supporting Motion for Summary Judgment.pdf - Filed
5/6/2021 Certificate of Service (Supplement, Reply, & Reply Filed 5-6-21).pdf - Filed
5/6/2021 Supplement to Plaintiffs' Statement of Undisputed Material Facts.pdf - Filed
5/6/2021 Reply to Bank of America, NA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.pdf - Filed
5/6/2021 Reply to US Bank & Fay Servicing, LLC's Opposition to Plaintiffs' Motion for Partial Summary Judgment.pdf - Filed
5/10/2021 Shellpoint Mortgage's Reply in Support of Motion for Summary Judgment.pdf - Filed
5/10/2021 Prof-2013 M4-Legal Title Trust, By US Bank, National Association, As Legal Title Trustee's, & Fay.pdf - Filed
Notes: Servicing LLC's Reply in Support of Motion for Summary Judgment
5/10/2021 Breckenridge Property Fund 2016 LLC's Reply in Support of Motion for Summary Judgment.pdf - Filed
Notes: Against Plaintiff
6/23/2021 Order on Breckenridge Motion for Summary Judgment.pdf - Filed
6/23/2021 Order Denying Plaintiff's Motion for Partial Summary Judgment-Granting Motions.pdf - Filed
Notes: for Summary Judgment Filed by BANA, Prof-2013 M4 Legal Trust, US Bank and Fay Servicing LLC
7/2/2021 Breckenridge's Memorandum of Costs.pdf - Filed
7/6/2021 Notice of Entry of Order - Order on Motion for Summary Judgment.pdf - Filed
7/6/2021 Notice of Entry of Order - Order Denying Plaintiff's Motion for partial Summary Judgment.pdf - Filed
7/6/2021 Notice of Entry of Order(Summary Jdgmnt).pdf - Filed
7/6/2021 Prof-2013 M4-Legal Title Trust and Fay Servicing LLC's Memorandum of Costs.pdf - Filed
7/6/2021 Newrez LLC's Memorandum of Costs.pdf - Filed
7/6/2021 Bank of America N.A.'s Memorandum of Costs.pdf - Filed
7/19/2021 Notice of Appeal.pdf - Filed
7/20/2021 Breckenridge Property Fund 2016's Motion for Attorney Fees and Costs.pdf - Filed
7/20/2021 Certificate of Service - Notice of Appeal.pdf - Filed

FILED

2021 JUN 23 PM 4:12

TANYA SCHEINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Toran DEPUTY

Case No.: 18-CV-01332

Dept. No.: II

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,

Plaintiffs,

vs.

SABES, 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; for BANK OF AMERICAN, N.A.;
BRECKENRIDGE PROPERTY FUND 2016, A Utah
limited liability company; NEWREZ, LLC, d/b/a
SHELLPOINT MORTGAGE SERVICING, LLC
substituted in for DOE 1; 1900 CAPITAL TRUST II,
BY U.S. BANK TRUST NATIONAL ASSOCIATION,
substituted in for DOE 2; MNCM-2018-NPL@,
substituted in for DOE 3; and DOES 4-10.

Defendants.

**ORDER DENYING
PLAINTIFFS MOTION FOR
PARTIAL SUMMARY
JUDGMENT/ GRANTING
MOTIONS FOR SUMMARY
JUDGMENT FILED BY
BANA, PROF-2013 M4
LEGALL TRUST, US BANK
AND FAY SERVICING LLC**

I. STATEMENT OF THE CASE

On March 19, 2021, the Plaintiffs filed a Motion for Partial Summary Judgment. On April 19, 2021, Defendants, Prof-2013M4-Legal Trust, by U.S. Bank, National Association, as Legal Title trustee ("U.S. Bank Trust") and Fay Servicing LLC filed an Opposition. On May 5, 2021,

1 Breckenridge Property Fund 2016, LLC joined the Opposition. On May 6, 2021, Plaintiffs filed a
2 Reply.

3 On March 25, 2021, Shellpoint Mortgage Servicing filed a Motion for Summary Judgment. On
4 the same date Prof-2013 M4 Legal trust, U.S. Bank, National Association as Legal Trustee ("U.S.
5 Bank Trust") and Fay Servicing LLC, filed a Motion for Summary Judgment. On April 15, 2021, the
6 Plaintiffs filed an Opposition. On May 6, 2021 Prof-2013 M4 Legal trust, U.S. Bank, National
7 Association as Legal Trustee ("U.S. Bank Trust") and Fay Servicing LLC, filed a Reply. On May 10,
8 2021 Shellpoint Mortgage filed a Reply.

9 On March 17, 2021, Bank of America, hereinafter "BANA," filed a Motion for Summary
10 Judgment and request for discovery sanctions. On April 15, 2021, the Plaintiffs filed an Opposition.
11 On May 5, 2021, BANA filed a Reply. Defendant Breckenridge Property Fund 2016, LLC
12 ("Breckenridge") joined in the Motion on March 29, 2021. Defendants Prof-2013 M4-Legal Title
13 Trust, by U.S. Bank, National Association, as legal Title Trustee (U.S. Bank Trust"), Defendant Fay
14 Servicing LLC ("Fay") and Shellpoint Mortgage Servicing, LLC ("Shellpoint") joined the Motion on
15 April 19, 2021.

16 II. ISSUE PRESENTED

17 Should the Court sanction the Plaintiffs for discovery violations?

18 Should the Court grant the Plaintiffs' Motion for Summary Judgment?

19 Should the Court grant the Defendants' Motions for Summary Judgment?

20 III. SUMMARY OF DECISION

21 The Court finds that the Plaintiffs violated NRCP Rule 16.1 and sanctions are appropriate.

22 The Court finds that no genuine material issues of fact exist and Plaintiffs are not entitled to
23 summary judgment as a matter of law.

24 The Court finds that no genuine material issues of fact exist and the Defendants are entitled to
25 summary judgment as a matter of law.

26 IV. PRINCIPLES OF LAW

1 A. Standard of Review

2 NRCp 56(c) requires a court to enter summary judgment in favor of a party when the
3 “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if
4 any, show that there is no genuine issue as to any material fact and that the moving party is entitled to
5 a judgment as a matter of law.” NRCp 56(c). A genuine issue of material fact exists where the
6 evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posada v. City*
7 *of Reno*, 109 Nev. 448 (1993).

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9 When reviewing a motion for summary judgment, the evidence and all reasonable inferences
10 drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *Richards*
11 *v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213 (2006). Summary judgment is appropriate and
12 “shall be rendered forthwith” when the pleadings and other evidence on file demonstrate that no
13 “genuine issue as to any material (remains) and that the moving party is entitled to a judgment as a
14 matter of law. *Wood v. Safeway, Inc.*, 106 Nev. 601, 603 (1990).

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16 B. Statutes of Limitation

17 NRS 11.190 states in relevant part:

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19 (1) Within 6 years:

20 (a) Except as otherwise provided in NRS 62B.420 and 176.275, an action upon a
21 judgment or decree of any court of the United States, or of any state or territory within
22 the United States, or the renewal thereof.

23 (b) An action upon a contract, obligation or liability founded upon an instrument in
24 writing, except those mentioned in the preceding sections of this chapter.

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26 C. Enforceability of FMA Agreement

27 The Supreme Court held in *Cain v Price*, 134 Nev. 193 195 (2018), that to be “legally
28 enforceable, a contract “must be supported by consideration.” In *Jones v SunTrust Mtg., Inc.* 128 Nev.

1 188, 191 (2012) the Nevada Supreme Court held that “Consideration is the exchange of a promise or
2 performance, bargained for by the parties.” The *Jones* Court held:

3 A party's affirmation of a preexisting duty is generally not adequate consideration to
4 support a new agreement. *See Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615
5 P.2d 939, 943 (1980). However, where a party's promise, offered as consideration,
6 differs from that which it already promised, there is sufficient consideration to support
7 the subsequent agreement. 3 *Williston on Contracts* § 7:41 (4th ed. 2008).

8 In *Jones*, the Nevada Supreme Court had to determine the validity of a signed agreement
9 resulting from Nevada’s Foreclosure Mediation Program. The *Jones* Court held that, “when an
10 agreement is reached as a result of an FMO mediation, the parties sign the agreement, and it otherwise
11 comports with contract principles, the agreement is enforceable under District Court Rule 16.”*id.*

12 District Court Rule 16 states:

13 No agreement or stipulation between the parties in a cause or their attorneys, in respect
14 to proceedings therein, will be regarded unless the same shall, by consent, be entered in
15 the minutes in the form of an order, or unless the same shall be in writing subscribed by
16 the party against whom the same shall be alleged, or by the party's attorney.

17 NRS 40.453 states:

18 Except as otherwise provided in NRS 40.495:

19 1. It is hereby declared by the Legislature to be against public policy for any
20 document relating to the sale of real property to contain any provision whereby a
21 mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness
22 secured thereby, waives any right secured to the person by the laws of this state.

23 2. A court shall not enforce any such provision.

24 In *Lowe Enterprise Residential Partners, L.P. v Eighth Judicial District Court ex rel. County*
25 *of Clark*, 118 Nev. 92, 104 (2002) the Nevada Supreme Court delved into the legislative history of
26 NRS 40.453. The Court held that a “review of the legislative history reveals that NRS 40.453 was
27 enacted to protect the rights created by Nevada's anti-deficiency legislation, not to protect the right to a
28 jury trial.” This statute does not prohibit parties from agreeing to provide a deed in lieu of foreclosure.

29 D. Claim Preclusion

1 The Nevada Supreme Court has adopted a three-part test to determine the availability of claim
2 preclusion: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the
3 subsequent action is based on the same claims or any part of them that were or could have been
4 brought in the first case." *G.C. Wallace, Inc. v Eighth Judicial District Court*, 127 Nev. 701, 706
5 (2011), citing to *Five Star*, 124 Nev. at 1054, 194 P.3d at 713 (footnote omitted).
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7 E. Repudiation/Renunciation/Anticipatory Breach

8 17B C.J.S. Contracts § 718, *Acts constituting renunciation or repudiation*, states:

9 In order that the rule permitting the immediate institution of a suit on the renunciation
10 or repudiation of a contract may apply, the renunciation or repudiation must be a
11 present one. It must also be entire, or total, covering the entire performance to which
12 the contract binds the promisor, or the refusal to perform must be of a covenant going
13 to the whole consideration. Furthermore, the renunciation or repudiation must be
14 absolute or unequivocal. It has also been said that in order to be effective for this
15 purpose, the renunciation or repudiation must be clear, strict, positive, definite, specific,
16 distinct, final, unqualified, or unconditional.

17 In order to constitute an absolute and unequivocal repudiation, no precise form of
18 words is necessary. Whether an anticipatory repudiation has occurred is determined on
19 a case-by-case basis, depending on the particular language used.

20 The repudiation or renunciation may be by language or act making it futile for the other
21 party to proceed. An intent to repudiate may be expressly asserted or circumstantially
22 manifested by conduct. However, a party's words and acts communicated to the other
23 party, not its intention, should control. Thus, a mere expression of intention not to
24 perform, or not to be bound, is not enough, nor is a mere threat to abandon, or a mere
25 assertion that the party will be unable, or will refuse, to perform the contract. At the
26 same time, a refusal to perform may itself be a repudiation of the contract, in spite of a
27 party's words seeking to reassure the other party of its intent to perform in the future.

28 17B C.J.S. Contracts § 722, *Elections of remedies upon renunciation of executory contract-*

Acceptance or rejection of renunciation states:

24 The party injured by an anticipatory breach has an election to accept or reject the
25 refusal of performance. For the doctrine of breach by anticipatory repudiation to be
26 applied, the nonrepudiating party must treat the repudiation as a breach. That is, it must
27 accept and act on it. Moreover, it must also act promptly and within a reasonable
28 time. However, the effect of an anticipatory repudiation is not nullified by the fact that
the nonrepudiating party attempts to enforce performance.

1 The renunciation of a contract by the promisor before the time stipulated for
2 performance is not effective unless such repudiation is unequivocally or affirmatively
3 accepted by the promisee. If the promisee declines to accept the renunciation and
4 continues to insist on the performance of the promise, as it may do, the contract remains
5 in existence for the benefit, and at the risk, of both parties, and is binding on them, and,
6 if anything occurs to discharge it from other causes, the promisor may take advantage
7 of such discharge. Where the contract thus remains in existence, no actionable claim for
8 damages arises until the time for performance expires. Furthermore, a repudiation not
9 treated as an anticipatory breach is immaterial in an action thereafter brought to enforce
10 the contract.

11 If, after the attempted renunciation by one party to the contract, the other party elects to
12 treat the contract as still binding and to await the time for full performance, it is
13 incumbent on the party making such election to perform such of the obligations as may,
14 in the meantime, fall on it under the terms of the contract.

15 F. Tender of Payments

16 § 47:1. Showing of readiness and willingness to perform, 15 Williston on Contracts § 47:1 (4th
17 ed.) states:

18 A party to a contract who complains that the other party has breached the terms of the
19 contract must prove performance of the contract on his or her own part or a valid and
20 unconditional tender of performance rejected by the other party. Tender of performance
21 in this regard combines readiness, willingness, and ability to perform. In order to be
22 valid, tender of payment on a contract must be: (1) timely; (2) made to the person
23 entitled to payment; (3) unconditional; (4) an offer to pay the amount of money due;
24 and (5) coupled with an actual production of the money or its equivalent. The rules that
25 govern tenders are strict and strictly applied; a tender must be one of full performance
26 and unconditional to be valid; moreover, the party alleging an offer of tender must
27 possess the ability to perform, and the tender must be made in good faith. Unlike the
28 situation where performance by one party is a condition precedent to performance by
the other, where conditions are concurrent, the allegation of tender need not be of
absolute tender. A tender conditional on contemporaneous performance by the
defendant is sufficient and necessary. It has sometimes been said that in such a case, an
allegation of readiness and willingness on the part of the plaintiff is sufficient or even
that this is not part of the plaintiff's case. However, while in suits for specific
performance a different rule prevails in many jurisdictions to maintain an action for
legal relief, the plaintiff must not only be ready and willing to perform but also must
have manifested this before bringing the action, by some offer of performance to the
defendant, for, otherwise, both parties might be ready and willing and each stay at
home waiting for the other to come forward. While the situation is possible that each of
two parties has a right to specific performance against the other, it is not possible that
each shall have a right to damages for a total breach of the contract.

1 (Citations omitted).

2 In *Bank of America, N.A. v SFR Investment Pool 1*, LLC 134 Nev. 604, 610-11 (2018) the
3 Nevada Supreme Court discussed the obligation of a tendering party. The Supreme Court stated:

4 Whether a tendering party must pay the amount into court depends on the nature of the
5 proceeding and the statutory and common law of the
6 jurisdiction. See Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R.
7 938 (1921) (“Generally, there is no fixed rule in equity which requires a tender to be
8 kept good in the sense in which that phrase is used at law.”); see
9 also Restatement (Third) of Prop.: Mortgages § 6.4 (Am. Law Inst. 1997) (“The tender
10 must be kept good in the sense that the person making the tender must continue at all
11 times to be ready, willing, and able to make the payment.”). Where payment into court
12 is not explicitly required, “avowment of a readiness and willingness to bring the money
13 into court, and pay the same on the order of the court, is sufficient.”
14 Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921). And,
15 “the necessity of keeping a tender good and of paying the money into court has no
16 application to a tender made for the purpose of discharging a mortgage lien.”
17 Annotation, *Unaccepted Tender as Affecting Lien of Real Estate Mortgage*, 93 A.L.R.
18 12 (1934) (explaining that such a tender would either immediately discharge the
19 mortgage lien or the lien would remain unimpaired by the tender).

20 (Citations omitted).

21 If a party seeks to reinstate a loan having alleged a wrongful foreclosure occurred in that the
22 party was not in default, then the party must still allege and prove the party performed and has the
23 ability to tender any amounts in contention and to continue performing. *Turner v Seterus, Inc*, 27
24 Cal.App 5th 516, 530-31 (Ct. App 3rd CA 2018).

25 G. Substantial Compliance and NRS 107.080

26 NRS 107.080 (5) through (8) states:

27 5. Every sale made under the provisions of this section and other sections of this
28 chapter vests in the purchaser the title of the grantor and any successors in interest
without equity or right of redemption. Except as otherwise provided in subsection 7, a
sale made pursuant to this section must be declared void by any court of competent
jurisdiction in the county where the sale took place if:

(a) The trustee or other person authorized to make the sale does not substantially
comply with the provisions of this section;

1 (b) Except as otherwise provided in subsection 6, an action is commenced in the
2 county where the sale took place within 30 days after the date on which the trustee's
3 deed upon sale is recorded pursuant to subsection 10 in the office of the county recorder
4 of the county in which the property is located; and

5 (c) A notice of lis pendens providing notice of the pendency of the action is
6 recorded in the office of the county recorder of the county where the sale took place
7 within 5 days after commencement of the action.

8 6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of
9 subsection 4 to the grantor, to the person who holds the title of record on the date the
10 notice of default and election to sell is recorded, to each trustor or to any other person
11 entitled to such notice, the person who did not receive such proper notice may
12 commence an action pursuant to subsection 5 within 90 days after the date of the sale.

13 7. Upon expiration of the time for commencing an action which is set forth in
14 subsections 5 and 6, any failure to comply with the provisions of this section or any
15 other provision of this chapter does not affect the rights of a bona fide purchaser as
16 described in NRS 111.180.

17 8. If, in an action brought by the grantor or the person who holds title of record in
18 the district court in and for the county in which the real property is located, the court
19 finds that the beneficiary, the successor in interest of the beneficiary or the trustee did
20 not comply with any requirement of subsection 2, 3 or 4, the court must award to the
21 grantor or the person who holds title of record:

22 (a) Damages of \$5,000 or treble the amount of actual damages, whichever is
23 greater;

24 (b) An injunction enjoining the exercise of the power of sale until the beneficiary,
25 the successor in interest of the beneficiary or the trustee complies with the requirements
26 of subsections 2, 3 and 4; and

27 (c) Reasonable attorney's fees and costs,
28 unless the court finds good cause for a different award. The remedy provided in this
subsection is in addition to the remedy provided in subsection 5.

In *Schleining v Cap One, Inc*, 130 Nev. 323, 327 (2014), the Supreme Court held that NRS
107.080 does not require strict adherence. The Court focused upon the "does not substantially comply
with" language. In *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018) the Nevada Supreme
Court held that substantial compliance is found when the title holder "had actual knowledge of the
default and the pending foreclosure sale" and "was not prejudiced by the lack of statutory notice." Id.
citations omitted.

1 This Court found one decision which stated that inaccurate numbers regarding a deficiency was
2 not grounds to find that a notice of default was not in substantial compliance. *Kehoe v Aurora Loan*
3 *Services LLC*, 2010 WL 4286331 (US Dst. Ct D. Nev 2010).

4 H. Computation of Damages-NRCP Rule 16.1

5 NRCP Rule 16.1 (a) (1) (iv) requires an initial disclosure regarding the Plaintiff's computation
6 of damages:

8 (iv) a computation of each category of damages claimed by the disclosing party--who
9 must make available for inspection and copying as under Rule 34 the documents or
10 other evidentiary material, unless privileged or protected from disclosure, on which
11 each computation is based, including materials bearing on the nature and extent of
injuries suffered;

12 In *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265 (2017), the Nevada Supreme Court
13 held that NRCP Rule 37 (c) (1) "provides the appropriate analytical framework for district courts to
14 employ in determining the consequence..." for a failure to comply with NRCP Rule 16.1. The party
15 in violation must show a "substantial justification" or that the failure is harmless to avoid sanctions
16 that include the exclusion of evidence. *Id.*

17 NRCP Rule 37 (b) (1) states:

18 (b) Sanctions for Failure to Comply With a Court Order.

19 (1) For Not Obeying a Discovery Order. If a party or a party's officer,
20 director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4)
21 — fails to obey an order to provide or permit discovery, including an order under Rule
22 35 or 37(a), the court may issue further just orders that may include the following:

23 (A) directing that the matters embraced in the order or other designated
24 facts be taken as established for purposes of the action, as the prevailing party claims;

25 (B) prohibiting the disobedient party from supporting or opposing
26 designated claims or defenses, or from introducing designated matters in evidence;

27 (C) striking pleadings in whole or in part;

28 (D) staying further proceedings until the order is obeyed;

(E) dismissing the action or proceeding in whole or in part;

(F) rendering a default judgment against the disobedient party; or

(G) treating as contempt of court the failure to obey any order except an
order to submit to a physical or mental examination.

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V. FINDINGS OF FACT

1. In May of 2007, Vicenta Lincicome financed a property known as 70 Riverside Drive, Dayton Nevada 89403 with a loan in the amount of \$381,150.00 secured by a recorded deed. The deed of trust identified Sierra Pacific Mortgage Company, Inc. as the lender and Mortgage Electronic Registration Systems, Inc. "MERS" as the beneficiary and nominee of the lender. Vicenta Lincicome executed the documents that created the deed of trust and note and understood she had a 30-year maturity date.
2. On August 15, 2011, MERS recorded an assignment of the deed of trust, transferring the interest in the deed of trust to BANA, Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP.
3. On November 25, 2015, BANA recorded an assignment of the deed of trust transferring its interest to U.S. Bank.
4. In mid-2008, the Plaintiffs defaulted on the loan making less than ten payments.
5. In January 2009, the trustee under the deed of trust at the time recorded a notice of default.
6. In July 2009, BANA offered the Plaintiffs a loan modification agreement "LMA." The new loan balance was \$417,198.58. The Plaintiffs were provided a post office box to send payments.
7. BANA accepted the first modified payment from the Plaintiffs in person at a BANA branch in Carson City on September 1, 2009. The Plaintiffs attempted to make the second payment at a BANA Branch but it was rejected as BANA's computer system did not recognize the LMA. The Plaintiffs believe the breach of LMA occurred in 2009 and their deposition testimony states they were aware of the breach at that time.

- 1 8. The Plaintiffs made no other attempts to mail the payments. BANA then notified the
2 Plaintiffs in October of 2009 stating that the loan had not been modified. However, then
3 BANA signed the LMA and recorded it in March of 2011.
- 4 9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the
5 property at \$381,000. The Plaintiffs made no payment at the time of bankruptcy filing or
6 during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.
- 7 10. BANA offered the Plaintiffs a modification in April of 2012 but the Plaintiffs made no
8 payment on the offer. BANA offered another modification on April 2015 but the loan was
9 service released to Fay Servicing prior to the final payment.
- 10 11. In January 2015, the Bankruptcy court terminated the automatic stay as to BANA. A final
11 decree was filed by the Bankruptcy Court in July of 2015.
- 12 12. On November 3, 2017, Sables, as trustee under the deed of trust, recorded a notice of
13 default.
- 14 13. On December 1, 2017, Vicenta Lincicome filed a petition for foreclosure mediation
15 assistance in the Third Judicial District Court, 17-CV-01346, naming Sables, U.S. Bank
16 and Fay Servicing as interested parties.
- 17 14. The Mediator's Statement indicates that Vincenta Lincicome was represented by Geoff
18 Giles, Esq. at the Mediation. The Plaintiffs agreed to a Deed in Lieu of Foreclosure. All
19 parties signed the statement on April 3, 2018. The Plaintiffs had the opportunity to make
20 three payments of \$2462.30 as an offered trial period plan. The payments had to be made
21 on April 1, 2018, May 1, 2018 and June 1, 2018.
- 22 15. The Plaintiffs decided not to make the payments. The Plaintiffs did not provide the deed in
23 lieu of foreclosure. A certificate for foreclosure was issued.
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- 1 16. The Plaintiffs did not place the required monthly payments in a bank account or escrow
2 account. Plaintiffs spent all of their income on either items. Plaintiffs do not have
3 sufficient funds to pay off what is owed under any theory as to what instrument controls the
4 computation of what is owed.
- 5 17. In depositions attached to the Motion for Summary Judgment, the Plaintiffs admitted that
6 they could not afford to make payments on the mortgage. The Plaintiffs have never averred
7 to the Court that they are ready, willing, and able to perform on the original mortgage or
8 subsequent modifications.
- 9 18. A Notice of Default and Notice of Sale was filed against the subject property.
- 10 19. On November 7, 2018, the Plaintiffs filed a complaint for injunctive relief, contractual
11 claims and declaratory relief regarding the foreclosure sale of the subject property.
- 12 20. On November 8, 2018, the Plaintiffs recorded a lis pendens on the subject property and
13 then filed an Application for Ex Parte Restraining Order, Preliminary Injunction and
14 Permanent Injunction with the Court.
- 15 21. On December 31, 2018, the Court entered an order enjoining the foreclosure sale if the
16 Plaintiffs posted a bond in the amount of \$172,610.67 and additional security in the amount
17 of \$2,105.10 per month thereafter. The Plaintiffs did not file the bond.
- 18 22. The foreclosure sale went forward on January 4, 2019, and Breckenridge purchased the
19 property for \$294,000.01.
- 20 23. On January 25, 2019, the Trustees Deed Upon Sale confirming Breckenridge's purchase of
21 the subject property was recorded.
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ANALYSIS

The gravamen of the Plaintiffs' causes of action is the alleged breach of the 2009 Loan

1 Modification Agreement by Defendant BANA. The Plaintiffs allege that Vincenta Lincicome executed
2 and mailed the application in July of 2009. The Court infers from these allegations that the Plaintiffs
3 believe that the mailing of the application constituted an acceptance and the LMA was from that point
4 on a binding contract between the parties.

5 After mailing the forms, BANA accepted a payment and informed the Plaintiffs that they
6 would investigate whether the LMA was accepted. In October of 2009, the Plaintiffs received a
7 mortgage statement indicating that BANA had not accepted the LMA and was using the terms of the
8 original agreement. From these alleged facts, the Court cannot find an offer and acceptance of the
9 LMA had occurred. BANA's conduct and statements clearly indicated the original agreement had not
10 been modified.
11

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13 If the original agreement was still in place, then the Plaintiffs were legally obligated to perform
14 as promised. No one argued that BANA had invited the Plaintiffs to apply for the modification which
15 could be rejected. The Plaintiffs never received any notice from BANA that BANA accepted the
16 LMA until March of 2011. It is unclear to the Court that the two year delay could constitute an
17 acceptance nunc pro tunc, but as explained herein, it makes no difference to the Court's analysis.
18

19 No issues of fact exist as to whether the Plaintiffs would have failed to make the required
20 payments under any of the purported offers and alleged agreements. The Plaintiffs, admittedly, had no
21 ability to pay and made no attempt to put any payments aside once BANA or other Defendants made a
22 demand for payment. The Plaintiffs also admitted that they entered into different modification plans
23 after the LMA based upon their inability to pay.
24

25 The Plaintiffs rely on a theory that their performance was permanently excused by the failure
26 of BANA to accept a single payment under the terms of the LMA. The Plaintiffs also rely on a theory
27 that their performance was excused by the failure of Fay to accept a payment under a modification on
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1 a subsequent modification. These theories fail under relevant law for several reasons.

2 If, as alleged, the LMA was effective upon mailing, then the breach occurred in 2009. If as
3 alleged the LMA was effective in 2011, then the breach occurred in 2011. The Plaintiffs were told that
4 BANA would not accept the modified payment in 2009. They understood BANA would not perform
5 under the LMA in October of 2009. They failed to bring an action against BANA until November 7,
6 2018. The six year statute of limitations in NRS 11.190 would apply. The date of the filing of the
7 LMA had no impact on the date of the breach.
8

9 Additionally, if the LMA or subsequent modification was effective, then the Plaintiffs' theory
10 of excuse of performance also fails as contract law requires a non-breaching party to elect a remedy in
11 a reasonable time. As stated in 17B C.J.S. Contracts § 722, the non-breaching party must accept the
12 repudiation and elect a remedy. The non-breaching party must also act promptly and within a
13 reasonable time. The Plaintiffs did nothing in either 2009 or 2011. Restitution to the lenders would
14 also apply if the Plaintiffs had chosen to accept the repudiations and end the agreement.
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16 The theory of excuse put forth by the Plaintiffs also ignores the materiality and order of the
17 performances under the agreement. A lender materially performs by providing the funds requested
18 under the loan. A borrower must then materially perform by making the monthly payments. Further,
19 the theory of excuse of performance may delay the need to perform but it does not discharge the duty
20 to pay once the performance was demanded. Performance could be demanded as the Plaintiffs did not
21 accept the repudiation.
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23 Contract and mortgage law would also require that the Plaintiffs remain ready, willing and able
24 to perform each month. The deposition testimony clearly indicated that the Plaintiffs could not
25 perform under any of the offers and modifications of the original agreement.
26

27 The Plaintiffs entered into a bankruptcy after their incomes went down and they had an
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1 unanticipated tax bill. The bankruptcy filing indicates that the Plaintiffs believed they were under the
2 original agreement and represented such to the bankruptcy court. The facts establish that the Plaintiffs
3 did not have the ability to make the payments under any of the offers or alleged agreements. They
4 have failed to pay for over a decade. The Plaintiffs had made no effort to tender the missed payments
5 under any of the agreements.
6

7 Additionally, as the Plaintiffs did not act upon the failure of BANA or its successors to accept
8 the payment and repudiate the LMA or modification in a reasonable time, then subsequent agreements
9 and the bankruptcy could act as an intervening event and excuse any breach of not accepting the
10 original LMA payments. The subsequent modifications and agreement to provide a deed in lieu of
11 foreclosure would have excused the original alleged breach.
12

13 The failure of the Plaintiffs to repudiate the agreement also allowed BANA or its successors to
14 demand at a later time that the Plaintiffs perform. Since their performance was merely delayed, the
15 Plaintiffs became the breaching party once BANA and its successors made a demand for payment and
16 payment did not occur. The Plaintiffs tendered very few payments over the course of a decade. The
17 Plaintiffs should have offered the payments under the LMA if they believed it was in effect. They
18 could have preserved any rights they believed they had under the LMA by making a tender after
19 receiving the notice of default.
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21 Claim preclusion would also apply. The Plaintiffs are not entitled to switch theories depending
22 upon what court they are in. BANA would be bound as well by any representations made in the
23 bankruptcy proceedings.
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25 Disturbing to the Court, the Plaintiffs seem to believe that they can game the system to avoid
26 repaying the money borrowed and to remain in a house rent free. Albert Ellis Lincicome, Jr.'s
27 testimony clearly establishes that the Plaintiffs want more time to continue their free ride. If they have
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1 to abuse a mediation program to get more time then so be it. The Plaintiffs' signatures affirming that
2 they would be bound by the agreement meant nothing. The Plaintiffs admit to engaging in bad faith.

3 Under *Jones*, the mediated agreement of deed in lieu of foreclosure is enforceable. The
4 Plaintiffs admitted that they chose not to enter into the offered terms. The agreement settled all claims
5 regarding the mortgage. The Plaintiffs have an obligation under the agreement to surrender the
6 property. NRS 40.453 does not apply as argued in other motions.
7

8 The foreclosing defendants substantially complied with NRS 107.080 notice requirements.
9 The Plaintiffs were clearly noticed that they were in default and when the foreclosure sale would
10 occur. The fact that they disputed the amount of the default did not create any prejudice to them as
11 they never intended to make a tender of any amount. The notice provided them the opportunity to file
12 an action to stop the foreclosure sale which they then did. They were given an opportunity to file a
13 bond and then perform under the agreement they argued was in effect, but then failed to do so.
14

15 Finally, the Court finds that the failure to provide a computation of damages as required by
16 NRCP Rule 16 has not been justified. The Plaintiffs failure to provide the computation cannot be
17 justified by their counsel's belief that to deal with damages at a later point in time is more economical.
18 The epidemic and the Plaintiffs' hectic schedule has no impact on Counsel's determination of
19 damages. The Plaintiffs had over two years to comply with the rule.
20

21 The Court also notes that the Plaintiffs were supposed to negotiate in good faith during a
22 settlement conference that was ordered. How they could do so without understanding their damages is
23 perplexing. Is this just more bad faith? The Court believes that the appropriate sanction is to strike all
24 allegations concerning monetary damages from the Complaint as the failure appears to be made in bad
25 faith and in an effort to prolong this matter further.
26

27 CONCLUSIONS OF LAW

28

Certificate of Mailing

I hereby certify that I, Quoc Thai, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

Michael G. Millward, Esq.
Millward Law, Ltd.
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Minden, NV 89423

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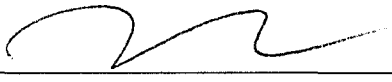
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Casey J. Nelson, Esq.
Wedgewood, LLC
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Las Vegas, NV 89146

Ramir M. Hernandez, Esq.
Wright, Finlay & Zak, LLP
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Las Vegas, NV 89117

DATED: This 23rd day of June, 2021.



Employee of Hon. Leon Aberasturi

FILED

2021 JUN 23 PM 4:07

Case No.: 18-CV-01332

Dept. No.: II

TANYA SOEBINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Toran

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON**

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,

Plaintiffs,

vs.

SABES, 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; for BANK OF AMERICAN, N.A.;
BRECKENRIDGE PROPERTY FUND 2016, A Utah
limited liability company; NEWREZ, LLC, d/b/a
SHELLPOINT MORTGAGE SERVICING, LLC
substituted in for DOE 1; 1900 CAPITAL TRUST II,
BY U.S. BANK TRUST NATIONAL ASSOCIATION,
substituted in for DOE 2; MNCM-2018-NPL@,
substituted in for DOE 3; and DOES 4-10.

Defendants.

**ORDER ON
BRECKENRIDGE MOTION
FOR SUMMARY
JUDGMENT**

I. STATEMENT OF THE CASE

On March 18, 2021, Breckenridge Property Fund 2016, LLC ("Breckenridge") filed a Motion for Summary Judgment. On April 15, 2021, the Plaintiffs filed an Opposition. On May 10, 2021,

1 Breckenridge filed a Reply.

2 **II. ISSUE PRESENTED**

3 Should the Court grant Breckenridge's Motion for Summary Judgment?
4

5 **III. SUMMARY OF DECISION**

6 The Court finds that no genuine material issues of fact exist and Breckenridge is entitled to
7 summary judgment as a matter of law.
8

9 **IV. PRINCIPLES OF LAW**

10 A. Standard of Review

11 NRCP 56(c) requires a court to enter summary judgment in favor of a party when the
12 "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if
13 any, show that there is no genuine issue as to any material fact and that the moving party is entitled to
14 a judgment as a matter of law. " NRCP 56(c). A genuine issue of material fact exists where the
15 evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posada v. City*
16 *of Reno*, 109 Nev. 448 (1993).
17

18 When reviewing a motion for summary judgment, the evidence and all reasonable inferences
19 drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *Richards*
20 *v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213 (2006). Summary judgment is appropriate and
21 "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no
22 "genuine issue as to any material (remains) and that the moving party is entitled to a judgment as a
23 matter of law. *Wood v. Safeway, Inc.*, 106 Nev. 601, 603 (1990).
24
25

26 B. NRS 40.010
27
28

1 NRS 40.010 states, "An action may be brought by any person against another who claims an
2 estate or interest in real property, adverse to the person bringing the action, for the purpose of
3 determining such adverse claim."

4 D. NRS 111.180

5 NRS 111.180 states:

6
7 1. Any purchaser who purchases an estate or interest in any real property in good
8 faith and for valuable consideration and who does not have actual knowledge,
9 constructive notice of, or reasonable cause to know that there exists a defect in, or adverse
10 rights, title or interest to, the real property is a bona fide purchaser.

11 2. No conveyance of an estate or interest in real property, or charge upon real
12 property, shall be deemed fraudulent in favor of a bona fide purchaser unless it appears
13 that the subsequent purchaser in such conveyance, or person to be benefited by such
14 charge, had actual knowledge, constructive notice or reasonable cause to know of the
15 fraud intended.

16 E. NRS 40.250

17 NRS 40.250 states:

18 A tenant of real property or a mobile home for a term less than life is guilty of an
19 unlawful detainer when the tenant continues in possession, in person or by subtenant, of
20 the property or mobile home or any part thereof, after the expiration of the term for
21 which it is let to the tenant. In all cases where real property is leased for a specified
22 term or period, or by express or implied contract, whether written or parol, the tenancy
23 terminates without notice at the expiration of the specified term or period.

24 **V. FINDINGS OF FACT**

25 1. In May of 2007, Vicenta Lincicome financed a property known as 70 Riverside Drive,
26 Dayton Nevada 89403 with a loan in the amount of \$381,150.00 secured by a recorded
27 deed. The deed of trust identified Sierra Pacific Mortgage Company, Inc. as the lender and
28 Mortgage Electronic Registration Systems, Inc. "MERS" as the beneficiary and nominee of
the lender. Vicenta Lincicome executed documents creating the deed of trust and note and
understood she had a 30-year maturity date.

- 1 2. On August 15, 2011, MERS recorded an assignment of the deed of trust, transferring the
2 interest in the deed of trust to BANA, Successor by Merger to BAC Home Loans
3 Servicing, LP FKA Countrywide Home Loans Servicing LP.
- 4 3. On November 25, 2015, BANA recorded an assignment of the deed of trust transferring its
5 interest to U.S. Bank.
- 6 4. In mid-2008, the Plaintiffs defaulted on the loan making less than ten payments.
- 7 5. In January 2009, the trustee under the deed of trust at the time recorded a notice of default.
- 8 6. In July 2009, BANA offered the Plaintiffs a loan modification agreement "LMA." The new
9 loan balance was \$417,198.58. The Plaintiffs were provided a post office box to send
10 payments.
11
- 12 7. BANA accepted the first modified payment from the Plaintiffs in person at a BANA branch
13 in Carson City on September 1, 2009. The Plaintiffs attempted to make the second
14 payment at a BANA Branch but it was rejected as BANA's computer system did not
15 recognize the LMA. The Plaintiffs believe the breach of LMA occurred in 2009 and their
16 deposition testimony states they were aware of the breach at that time.
17
- 18 8. The Plaintiffs made no other attempt to mail the payments. BANA then notified the
19 Plaintiffs in October of 2009 stating that the loan had not been modified. However, then
20 BANA signed the LMA and recorded it in March of 2011.
21
- 22 9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the
23 property at \$381,000. The Plaintiffs made no payments at the time of bankruptcy filing or
24 during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.
25
- 26
- 27
- 28

- 1 10. BANA offered the Plaintiffs a modification in April of 2012 but the Plaintiffs made no
2 payments on the offer. BANA offered another modification on April 2015 but the loan was
3 service released to Fay Servicing prior to the final payment.
- 4 11. In January 2015, the Bankruptcy court terminated the automatic stay as to BANA. A final
5 decree was filed by the Bankruptcy Court in July of 2015.
- 6 12. On November 3, 2017, Sables, as trustee under the deed of trust, recorded a notice of
7 default.
- 8 13. On December 1, 2017, Vicenta Lincicome filed a petition for foreclosure mediation
9 assistance in the Third Judicial District Court, 17-CV-01346, naming Sables, U.S. Bank
10 and Fay Servicing as interested parties.
- 11 14. The Mediator's Statement indicates that Vincenta Lincicome was represented by Geoff
12 Giles, Esq. at the Mediation. The Plaintiffs agreed to a Deed in Lieu of Foreclosure. All
13 parties signed the statement on April 3, 2018. The Plaintiffs had the opportunity to make
14 three payments of \$2462.30 as an offered trial period plan. The payments had to be made
15 on April 1, 2018, May 1, 2018 and June 1, 2018.
- 16 15. The Plaintiffs decided not to make the payments. The Plaintiffs did not provide the deed in
17 lieu of foreclosure. A certificate for foreclosure was issued.
- 18 16. The Plaintiffs did not place the required monthly payments in a bank account or escrow
19 account. Plaintiffs spent all of their income on either items. Plaintiffs do not have
20 sufficient funds to pay off what is owed under any theory as to what instrument controls the
21 computation of what is owed.
- 22 17. In depositions attached to the Motion for Summary Judgment, the Plaintiffs admitted that
23 they could not afford to make payments on the mortgage. The Plaintiffs have never averred
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1 to the Court that they are ready, willing, and able to perform on the original mortgage or
2 subsequent modifications.

3 18. The foreclosing party recorded a Notice of Default and Notice of Sale against the subject
4 property.

5 19. On November 7, 2018, the Plaintiffs filed a complaint for injunctive relief, contractual
6 claims and declaratory relief regarding the foreclosure sale of the subject property.

7 20. On November 8, 2018, the Plaintiffs recorded a lis pendens on the subject property and
8 then filed an Application for Ex Parte Restraining Order, Preliminary Injunction and
9 Permanent Injunction with the Court.

10 21. On December 31, 2018, the Court entered an order enjoining the foreclosure sale if the
11 Plaintiffs posted a bond in the amount of \$172,610.67 and additional security in the amount
12 of \$2,105.10 per month thereafter. The Plaintiffs did not file the bond.

13 22. The foreclosure sale went forward on January 4, 2019, and Breckenridge purchased the
14 property for \$294,000.01.

15 23. On January 25, 2019, the Trustees Deed Upon Sale confirming Breckenridge's purchase of
16 the subject property was recorded.

17
18
19
20 **VI. ANALYSIS**

21 The Court incorporates the legal findings, factual findings and analysis contained in its
22 separate "ORDER DENYING PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT/
23 GRANTING MOTIONS FOR SUMMARY JUDGMENT FILED BY BANA, PROF-2013 M4
24 LEGAL TRUST, US BANK AND FAY SERVICING LLC." As Breckenridge purchased the subject
25 property at the foreclosure sale, Breckenridge is entitled to summary judgment regarding their claims
26 to title of the property.
27
28

1 **VII. CONCLUSIONS OF LAW**

2 Breckenridge is entitled to a motion for summary judgment in its favor.
3

4 **ORDER**

5 Therefore, good cause appearing, **IT IS HEREBY ADJUDGED and ORDERED** that
6 Breckenridge's Motion for Summary Judgment is **GRANTED**.
7

8 **IT IS HEREBY FURTHER ORDERED** that the hearing on Motions set for July 28, 2021 is
9 **VACATED**. The Court found the pleadings sufficient to enter an order without argument.
10

11
12 DATED: This 23rd day of June, 2021.
13

14
15 
16 _____
17 HON. LEON ABERASTURI
18 DISTRICT JUDGE
19
20
21
22
23
24
25
26
27
28

Certificate of Mailing

I hereby certify that I, Guo Ther, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

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DATED: This 23rd day of June, 2021.



Employee of Hon. Leon Aberasturi

FILED

2021 JUL -6 AM 11:51

TANYA SCHEIDT
COUNT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

[Signature]

1 WRIGHT, FINLAY & ZAK, LLP

2 Darren T. Brenner, Esq.

3 Nevada Bar No. 8386

4 Ramir M. Hernandez, Esq.

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6 7785 W. Sahara Ave, Suite 200

7 Las Vegas, NV 89117

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9 rhernandez@wrightlegal.net

10 *Attorney for Defendants, Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as*
11 *Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC*

12 **THIRD JUDICIAL DISTRICT COURT**

13 **LYON COUNTY, NEVADA**

14 ALBERT ELLIS LINCICOME, JR. and
15 VICENTA LINCICOME,

16 Plaintiffs,

17 vs.

18 SABLES, LLC, a Nevada limited liability
19 company, as Trustee of the Deed of Trust, given
20 by Vicenta Lincicome and dated 5/23/2007 *et*
21 *al.*

22 Defendants.

23 and all related cases.

Case No.: 18-cv-01332

Dept. No.: II

NOTICE OF ENTRY OF ORDER

24 PLEASE TAKE NOTICE that an ORDER DENYING PLAINTIFFS MOTION FOR
25 PARTIAL SUMMARY JUDGMENT/GRANTING MOTIONS FOR SUMMARY JUDGMENT
26 FILED BY BANA, PROF-2013 M4 LEGALL TRUST, US BANK AND FAY SERVICING
27 LLC was entered in the above-entitled Court on the 23rd day of June, 2021. A copy of which is
28 attached hereto.

DATED this 29th day of June, 2021.

WRIGHT, FINLAY & ZAK, LLP

[Signature]

Ramir M. Hernandez, Esq.

Nevada Bar No. 13146

Attorneys for Defendants, Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal

1 Title Trustee, Fay Servicing LLC, and Shellpoint
2 Mortgage Servicing, LLC

3 **AFFIRMATION**

4 **Pursuant to NRS 239B.03/603A.040**

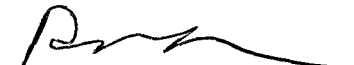
5 The undersigned does hereby affirm that the foregoing document does not contain any of
6 the following information governed by NRS 239B.030 and NRS 603A.040:

- 7 1. Social Security Number;
8 2. Driver License Number or Identification Card Number; or
9 3. Account number, credit card number or debit card number, in combination with any
10 required security code, access code or password that would permit access to the person's
11 financial account.

12 The term does not include any publically available information that is lawfully made
13 available to the general public.

14
15 DATED this 29th day of June, 2021.

16 WRIGHT, FINLAY & ZAK, LLP

17 
18 Ramir M. Hernandez, Esq.

19 Nevada Bar No. 13146

20 Attorneys for Defendants, Prof-2013 M4-Legal Title
21 Trust, by U.S. Bank, National Association, as Legal
22 Title Trustee, Fay Servicing LLC, and Shellpoint
23 Mortgage Servicing, LLC
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK,
3 LLP, and that on this 20th day of June, 2021, I did cause a true copy of the foregoing **NOTICE**
4 **OF ENTRY OF ORDER** to be served by depositing a true copy of same in the United States
5 Mail, at Las Vegas, Nevada, addressed as follows:

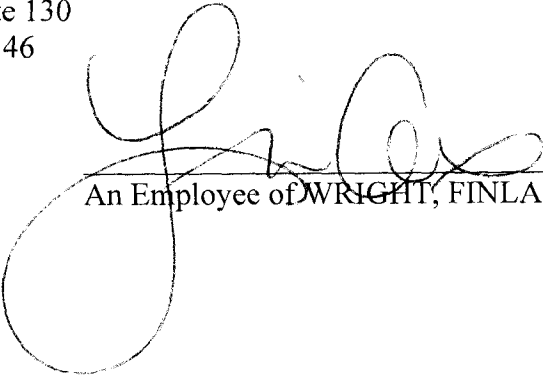
6 Michael G. Millward, Esq.
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9 Minden, NV 89423

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27 
28 An Employee of WRIGHT, FINLAY & ZAK, LLP

Case No.: 18-CV-01332

Dept. No.: II

FILED

2021 JUN 23 PM 4:13

TANYA SCOTT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

~~Victoria Tovar~~ DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

* * *

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,

Plaintiffs,

vs.

SABES, 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; for BANK OF AMERICAN, N.A.;
BRECKENRIDGE PROPERTY FUND 2016, A Utah
limited liability company; NEWREZ, LLC, d/b/a
SHELLPOINT MORTGAGE SERVICING, LLC
substituted in for DOE 1; 1900 CAPITAL TRUST II,
BY U.S. BANK TRUST NATIONAL ASSOCIATION,
substituted in for DOE 2; MNCM-2018-NPL@,
substituted in for DOE 3; and DOES 4-10.

Defendants.

**ORDER DENYING
PLAINTIFFS MOTION FOR
PARTIAL SUMMARY
JUDGMENT/ GRANTING
MOTIONS FOR SUMMARY
JUDGMENT FILED BY
BANA, PROF-2013 M4
LEGALL TRUST, US BANK
AND FAY SERVICING LLC**

I. STATEMENT OF THE CASE

On March 19, 2021, the Plaintiffs filed a Motion for Partial Summary Judgment. On April 19, 2021, Defendants, Prof-2013M4-Legal Trust, by U.S. Bank, National Association, as Legal Title trustee ("U.S. Bank Trust") and Fay Servicing LLC filed an Opposition. On May 5, 2021,

1 Breckenridge Property Fund 2016, LLC joined the Opposition. On May 6, 2021, Plaintiffs filed a
2 Reply.

3 On March 25, 2021, Shellpoint Mortgage Servicing filed a Motion for Summary Judgment. On
4 the same date Prof-2013 M4 Legal trust, U.S. Bank, National Association as Legal Trustee ("U.S.
5 Bank Trust") and Fay Servicing LLC, filed a Motion for Summary Judgment. On April 15, 2021, the
6 Plaintiffs filed an Opposition. On May 6, 2021 Prof-2013 M4 Legal trust, U.S. Bank, National
7 Association as Legal Trustee ("U.S. Bank Trust") and Fay Servicing LLC, filed a Reply. On May 10,
8 2021 Shellpoint Mortgage filed a Reply.

9 On March 17, 2021, Bank of America, hereinafter "BANA," filed a Motion for Summary
10 Judgment and request for discovery sanctions. On April 15, 2021, the Plaintiffs filed an Opposition.
11 On May 5, 2021, BANA filed a Reply. Defendant Breckenridge Property Fund 2016, LLC
12 ("Breckenridge") joined in the Motion on March 29, 2021. Defendants Prof-2013 M4-Legal Title
13 Trust, by U.S. Bank, National Association, as legal Title Trustee (U.S. Bank Trust"), Defendant Fay
14 Servicing LLC ("Fay") and Shellpoint Mortgage Servicing, LLC ("Shellpoint") joined the Motion on
15 April 19, 2021.

16 II. ISSUE PRESENTED

17 Should the Court sanction the Plaintiffs for discovery violations?

18 Should the Court grant the Plaintiffs' Motion for Summary Judgment?

19 Should the Court grant the Defendants' Motions for Summary Judgment?

20 III. SUMMARY OF DECISION

21 The Court finds that the Plaintiffs violated NRCP Rule 16.1 and sanctions are appropriate.

22 The Court finds that no genuine material issues of fact exist and Plaintiffs are not entitled to
23 summary judgment as a matter of law.

24 The Court finds that no genuine material issues of fact exist and the Defendants are entitled to
25 summary judgment as a matter of law.

26 IV. PRINCIPLES OF LAW

1 A. Standard of Review

2 NRCP 56(c) requires a court to enter summary judgment in favor of a party when the
3 “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if
4 any, show that there is no genuine issue as to any material fact and that the moving party is entitled to
5 a judgment as a matter of law. “ NRCP 56(c). A genuine issue of material fact exists where the
6 evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posada v. City*
7 *of Reno*, 109 Nev. 448 (1993).

9 When reviewing a motion for summary judgment, the evidence and all reasonable inferences
10 drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *Richards*
11 *v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213 (2006). Summary judgment is appropriate and
12 “shall be rendered forthwith” when the pleadings and other evidence on file demonstrate that no
13 “genuine issue as to any material (remains) and that the moving party is entitled to a judgment as a
14 matter of law. *Wood v. Safeway, Inc.*, 106 Nev. 601, 603 (1990).

16 B. Statutes of Limitation

17 NRS 11.190 states in relevant part:

19 (1) Within 6 years:

20 (a) Except as otherwise provided in NRS 62B.420 and 176.275, an action upon a
21 judgment or decree of any court of the United States, or of any state or territory within
22 the United States, or the renewal thereof.

(b) An action upon a contract, obligation or liability founded upon an instrument in
writing, except those mentioned in the preceding sections of this chapter.

24 C. Enforceability of FMA Agreement

25 The Supreme Court held in *Cain v Price*, 134 Nev. 193 195 (2018), that to be “legally
26 enforceable, a contract “must be supported by consideration.” In *Jones v SunTrust Mtg., Inc.* 128 Nev.
27
28

1 188, 191 (2012) the Nevada Supreme Court held that "Consideration is the exchange of a promise or
2 performance, bargained for by the parties." The *Jones* Court held:

3 A party's affirmation of a preexisting duty is generally not adequate consideration to
4 support a new agreement. See *Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615
5 P.2d 939, 943 (1980). However, where a party's promise, offered as consideration,
6 differs from that which it already promised, there is sufficient consideration to support
7 the subsequent agreement. 3 *Williston on Contracts* § 7:41 (4th ed. 2008).

8 In *Jones*, the Nevada Supreme Court had to determine the validity of a signed agreement
9 resulting from Nevada's Foreclosure Mediation Program. The *Jones* Court held that, "when an
10 agreement is reached as a result of an FMO mediation, the parties sign the agreement, and it otherwise
11 comports with contract principles, the agreement is enforceable under District Court Rule 16."id.

12 District Court Rule 16 states:

13 No agreement or stipulation between the parties in a cause or their attorneys, in respect
14 to proceedings therein, will be regarded unless the same shall, by consent, be entered in
15 the minutes in the form of an order, or unless the same shall be in writing subscribed by
16 the party against whom the same shall be alleged, or by the party's attorney.

17 NRS 40.453 states:

18 Except as otherwise provided in NRS 40.495:

19 1. It is hereby declared by the Legislature to be against public policy for any
20 document relating to the sale of real property to contain any provision whereby a
21 mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness
22 secured thereby, waives any right secured to the person by the laws of this state.

23 2. A court shall not enforce any such provision.

24 In *Lowe Enterprise Residential Partners, L.P. v Eighth Judicial District Court ex rel. County*
25 *of Clark*, 118 Nev. 92, 104 (2002) the Nevada Supreme Court delved into the legislative history of
26 NRS 40.453. The Court held that a "review of the legislative history reveals that NRS 40.453 was
27 enacted to protect the rights created by Nevada's anti-deficiency legislation, not to protect the right to a
28 jury trial." This statute does not prohibit parties from agreeing to provide a deed in lieu of foreclosure.

29 D. Claim Preclusion

1 The Nevada Supreme Court has adopted a three-part test to determine the availability of claim
2 preclusion: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the
3 subsequent action is based on the same claims or any part of them that were or could have been
4 brought in the first case." *G.C. Wallace, Inc. v Eighth Judicial District Court*, 127 Nev. 701, 706
5 (2011), citing to *Five Star*, 124 Nev. at 1054, 194 P.3d at 713 (footnote omitted).
6

7 E. Repudiation/Renunciation/Anticipatory Breach

8 17B C.J.S. Contracts § 718, *Acts constituting renunciation or repudiation*, states:

9 In order that the rule permitting the immediate institution of a suit on the renunciation
10 or repudiation of a contract may apply, the renunciation or repudiation must be a
11 present one. It must also be entire, or total, covering the entire performance to which
12 the contract binds the promisor, or the refusal to perform must be of a covenant going
13 to the whole consideration. Furthermore, the renunciation or repudiation must be
14 absolute or unequivocal. It has also been said that in order to be effective for this
15 purpose, the renunciation or repudiation must be clear, strict, positive, definite, specific,
16 distinct, final, unqualified, or unconditional.

17 In order to constitute an absolute and unequivocal repudiation, no precise form of
18 words is necessary. Whether an anticipatory repudiation has occurred is determined on
19 a case-by-case basis, depending on the particular language used.

20 The repudiation or renunciation may be by language or act making it futile for the other
21 party to proceed. An intent to repudiate may be expressly asserted or circumstantially
22 manifested by conduct. However, a party's words and acts communicated to the other
23 party, not its intention, should control. Thus, a mere expression of intention not to
24 perform, or not to be bound, is not enough, nor is a mere threat to abandon, or a mere
25 assertion that the party will be unable, or will refuse, to perform the contract. At the
26 same time, a refusal to perform may itself be a repudiation of the contract, in spite of a
27 party's words seeking to reassure the other party of its intent to perform in the future.

28 17B C.J.S. Contracts § 722, *Elections of remedies upon renunciation of executory contract-*

Acceptance or rejection of renunciation states:

29 The party injured by an anticipatory breach has an election to accept or reject the
30 refusal of performance. For the doctrine of breach by anticipatory repudiation to be
31 applied, the nonrepudiating party must treat the repudiation as a breach. That is, it must
32 accept and act on it. Moreover, it must also act promptly and within a reasonable
33 time. However, the effect of an anticipatory repudiation is not nullified by the fact that
34 the nonrepudiating party attempts to enforce performance.

1 The renunciation of a contract by the promisor before the time stipulated for
2 performance is not effective unless such repudiation is unequivocally or affirmatively
3 accepted by the promisee. If the promisee declines to accept the renunciation and
4 continues to insist on the performance of the promise, as it may do, the contract remains
5 in existence for the benefit, and at the risk, of both parties, and is binding on them, and,
6 if anything occurs to discharge it from other causes, the promisor may take advantage
7 of such discharge. Where the contract thus remains in existence, no actionable claim for
8 damages arises until the time for performance expires. Furthermore, a repudiation not
9 treated as an anticipatory breach is immaterial in an action thereafter brought to enforce
10 the contract.

11 If, after the attempted renunciation by one party to the contract, the other party elects to
12 treat the contract as still binding and to await the time for full performance, it is
13 incumbent on the party making such election to perform such of the obligations as may,
14 in the meantime, fall on it under the terms of the contract.

15 F. Tender of Payments

16 § 47:1. Showing of readiness and willingness to perform, 15 Williston on Contracts § 47:1 (4th
17 ed.) states:

18 A party to a contract who complains that the other party has breached the terms of the
19 contract must prove performance of the contract on his or her own part or a valid and
20 unconditional tender of performance rejected by the other party. Tender of performance
21 in this regard combines readiness, willingness, and ability to perform. In order to be
22 valid, tender of payment on a contract must be: (1) timely; (2) made to the person
23 entitled to payment; (3) unconditional; (4) an offer to pay the amount of money due;
24 and (5) coupled with an actual production of the money or its equivalent. The rules that
25 govern tenders are strict and strictly applied; a tender must be one of full performance
26 and unconditional to be valid; moreover, the party alleging an offer of tender must
27 possess the ability to perform, and the tender must be made in good faith. Unlike the
28 situation where performance by one party is a condition precedent to performance by
the other, where conditions are concurrent, the allegation of tender need not be of
absolute tender. A tender conditional on contemporaneous performance by the
defendant is sufficient and necessary. It has sometimes been said that in such a case, an
allegation of readiness and willingness on the part of the plaintiff is sufficient or even
that this is not part of the plaintiff's case. However, while in suits for specific
performance a different rule prevails in many jurisdictions to maintain an action for
legal relief, the plaintiff must not only be ready and willing to perform but also must
have manifested this before bringing the action, by some offer of performance to the
defendant, for, otherwise, both parties might be ready and willing and each stay at
home waiting for the other to come forward. While the situation is possible that each of
two parties has a right to specific performance against the other, it is not possible that
each shall have a right to damages for a total breach of the contract.

1 (Citations omitted).

2 In *Bank of America, N.A. v SFR Investment Pool 1, LLC* 134 Nev. 604, 610-11 (2018) the
3 Nevada Supreme Court discussed the obligation of a tendering party. The Supreme Court stated:
4

5 Whether a tendering party must pay the amount into court depends on the nature of the
6 proceeding and the statutory and common law of the
7 jurisdiction. *See* Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R.
8 938 (1921) (“Generally, there is no fixed rule in equity which requires a tender to be
9 kept good in the sense in which that phrase is used at law.”); *see*
10 *also* Restatement (Third) of Prop.: Mortgages § 6.4 (Am. Law Inst. 1997) (“The tender
11 must be kept good in the sense that the person making the tender must continue at all
12 times to be ready, willing, and able to make the payment.”). Where payment into court
13 is not explicitly required, “avertment of a readiness and willingness to bring the money
14 into court, and pay the same on the order of the court, is sufficient.”
15 Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921). And,
16 “the necessity of keeping a tender good and of paying the money into court has no
17 application to a tender made for the purpose of discharging a mortgage lien.”
18 Annotation, *Unaccepted Tender as Affecting Lien of Real Estate Mortgage*, 93 A.L.R.
19 12 (1934) (explaining that such a tender would either immediately discharge the
20 mortgage lien or the lien would remain unimpaired by the tender).

21 (Citations omitted).

22 If a party seeks to reinstate a loan having alleged a wrongful foreclosure occurred in that the
23 party was not in default, then the party must still allege and prove the party performed and has the
24 ability to tender any amounts in contention and to continue performing. *Turner v Seterus, Inc.*, 27
25 Cal.App 5th 516, 530-31 (Ct. App 3rd CA 2018).

26 G. Substantial Compliance and NRS 107.080

27 NRS 107.080 (5) through (8) states:

28 5. Every sale made under the provisions of this section and other sections of this
chapter vests in the purchaser the title of the grantor and any successors in interest
without equity or right of redemption. Except as otherwise provided in subsection 7, a
sale made pursuant to this section must be declared void by any court of competent
jurisdiction in the county where the sale took place if:

(a) The trustee or other person authorized to make the sale does not substantially
comply with the provisions of this section;

1 (b) Except as otherwise provided in subsection 6, an action is commenced in the
2 county where the sale took place within 30 days after the date on which the trustee's
3 deed upon sale is recorded pursuant to subsection 10 in the office of the county recorder
4 of the county in which the property is located; and

5 (c) A notice of lis pendens providing notice of the pendency of the action is
6 recorded in the office of the county recorder of the county where the sale took place
7 within 5 days after commencement of the action.

8 6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of
9 subsection 4 to the grantor, to the person who holds the title of record on the date the
10 notice of default and election to sell is recorded, to each trustor or to any other person
11 entitled to such notice, the person who did not receive such proper notice may
12 commence an action pursuant to subsection 5 within 90 days after the date of the sale.

13 7. Upon expiration of the time for commencing an action which is set forth in
14 subsections 5 and 6, any failure to comply with the provisions of this section or any
15 other provision of this chapter does not affect the rights of a bona fide purchaser as
16 described in NRS 111.180.

17 8. If, in an action brought by the grantor or the person who holds title of record in
18 the district court in and for the county in which the real property is located, the court
19 finds that the beneficiary, the successor in interest of the beneficiary or the trustee did
20 not comply with any requirement of subsection 2, 3 or 4, the court must award to the
21 grantor or the person who holds title of record:

22 (a) Damages of \$5,000 or treble the amount of actual damages, whichever is
23 greater;

24 (b) An injunction enjoining the exercise of the power of sale until the beneficiary,
25 the successor in interest of the beneficiary or the trustee complies with the requirements
26 of subsections 2, 3 and 4; and

27 (c) Reasonable attorney's fees and costs,
28 unless the court finds good cause for a different award. The remedy provided in this
subsection is in addition to the remedy provided in subsection 5.

In *Schleining v Cap One, Inc*, 130 Nev. 323, 327 (2014), the Supreme Court held that NRS
107.080 does not require strict adherence. The Court focused upon the "does not substantially comply
with" language. In *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018) the Nevada Supreme
Court held that substantial compliance is found when the title holder "had actual knowledge of the
default and the pending foreclosure sale" and "was not prejudiced by the lack of statutory notice." Id.
citations omitted.

1 This Court found one decision which stated that inaccurate numbers regarding a deficiency was
2 not grounds to find that a notice of default was not in substantial compliance. *Kehoe v Aurora Loan*
3 *Services LLC*, 2010 WL 4286331 (US Dst. Ct D. Nev 2010).

4 H. Computation of Damages-NRCP Rule 16.1

5 NRCP Rule 16.1 (a) (1) (iv) requires an initial disclosure regarding the Plaintiff's computation
6 of damages:
7

8 (iv) a computation of each category of damages claimed by the disclosing party--who
9 must make available for inspection and copying as under Rule 34 the documents or
10 other evidentiary material, unless privileged or protected from disclosure, on which
each computation is based, including materials bearing on the nature and extent of
injuries suffered;

11 In *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265 (2017), the Nevada Supreme Court
12 held that NRCP Rule 37 (c) (1) "provides the appropriate analytical framework for district courts to
13 employ in determining the consequence..." for a failure to comply with NRCP Rule 16.1. The party
14 in violation must show a "substantial justification" or that the failure is harmless to avoid sanctions
15 that include the exclusion of evidence. *Id.*
16

17 NRCP Rule 37 (b) (1) states:
18

19 (b) Sanctions for Failure to Comply With a Court Order.

20 (1) For Not Obeying a Discovery Order. If a party or a party's officer,
21 director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4)
— fails to obey an order to provide or permit discovery, including an order under Rule
22 35 or 37(a), the court may issue further just orders that may include the following:

23 (A) directing that the matters embraced in the order or other designated
24 facts be taken as established for purposes of the action, as the prevailing party claims;

25 (B) prohibiting the disobedient party from supporting or opposing
26 designated claims or defenses, or from introducing designated matters in evidence;

27 (C) striking pleadings in whole or in part;

28 (D) staying further proceedings until the order is obeyed;

(E) dismissing the action or proceeding in whole or in part;

(F) rendering a default judgment against the disobedient party; or

(G) treating as contempt of court the failure to obey any order except an
order to submit to a physical or mental examination.

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V. FINDINGS OF FACT

1. In May of 2007, Vicenta Lincicome financed a property known as 70 Riverside Drive, Dayton Nevada 89403 with a loan in the amount of \$381,150.00 secured by a recorded deed. The deed of trust identified Sierra Pacific Mortgage Company, Inc. as the lender and Mortgage Electronic Registration Systems, Inc. "MERS" as the beneficiary and nominee of the lender. Vicenta Lincicome executed the documents that created the deed of trust and note and understood she had a 30-year maturity date.
2. On August 15, 2011, MERS recorded an assignment of the deed of trust, transferring the interest in the deed of trust to BANA, Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP.
3. On November 25, 2015, BANA recorded an assignment of the deed of trust transferring its interest to U.S. Bank.
4. In mid-2008, the Plaintiffs defaulted on the loan making less than ten payments.
5. In January 2009, the trustee under the deed of trust at the time recorded a notice of default.
6. In July 2009, BANA offered the Plaintiffs a loan modification agreement "LMA." The new loan balance was \$417,198.58. The Plaintiffs were provided a post office box to send payments.
7. BANA accepted the first modified payment from the Plaintiffs in person at a BANA branch in Carson City on September 1, 2009. The Plaintiffs attempted to make the second payment at a BANA Branch but it was rejected as BANA's computer system did not recognize the LMA. The Plaintiffs believe the breach of LMA occurred in 2009 and their deposition testimony states they were aware of the breach at that time.

- 1 8. The Plaintiffs made no other attempts to mail the payments. BANA then notified the
2 Plaintiffs in October of 2009 stating that the loan had not been modified. However, then
3 BANA signed the LMA and recorded it in March of 2011.
- 4 9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the
5 property at \$381,000. The Plaintiffs made no payment at the time of bankruptcy filing or
6 during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.
- 7 10. BANA offered the Plaintiffs a modification in April of 2012 but the Plaintiffs made no
8 payment on the offer. BANA offered another modification on April 2015 but the loan was
9 service released to Fay Servicing prior to the final payment.
- 10 11. In January 2015, the Bankruptcy court terminated the automatic stay as to BANA. A final
11 decree was filed by the Bankruptcy Court in July of 2015.
- 12 12. On November 3, 2017, Sables, as trustee under the deed of trust, recorded a notice of
13 default.
- 14 13. On December 1, 2017, Vicenta Lincicome filed a petition for foreclosure mediation
15 assistance in the Third Judicial District Court, 17-CV-01346, naming Sables, U.S. Bank
16 and Fay Servicing as interested parties.
- 17 14. The Mediator's Statement indicates that Vincenta Lincicome was represented by Geoff
18 Giles, Esq. at the Mediation. The Plaintiffs agreed to a Deed in Lieu of Foreclosure. All
19 parties signed the statement on April 3, 2018. The Plaintiffs had the opportunity to make
20 three payments of \$2462.30 as an offered trial period plan. The payments had to be made
21 on April 1, 2018, May 1, 2018 and June 1, 2018.
- 22 15. The Plaintiffs decided not to make the payments. The Plaintiffs did not provide the deed in
23 lieu of foreclosure. A certificate for foreclosure was issued.
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- 1 16. The Plaintiffs did not place the required monthly payments in a bank account or escrow
2 account. Plaintiffs spent all of their income on either items. Plaintiffs do not have
3 sufficient funds to pay off what is owed under any theory as to what instrument controls the
4 computation of what is owed.
- 5 17. In depositions attached to the Motion for Summary Judgment, the Plaintiffs admitted that
6 they could not afford to make payments on the mortgage. The Plaintiffs have never averred
7 to the Court that they are ready, willing, and able to perform on the original mortgage or
8 subsequent modifications.
- 9 18. A Notice of Default and Notice of Sale was filed against the subject property.
- 10 19. On November 7, 2018, the Plaintiffs filed a complaint for injunctive relief, contractual
11 claims and declaratory relief regarding the foreclosure sale of the subject property.
- 12 20. On November 8, 2018, the Plaintiffs recorded a lis pendens on the subject property and
13 then filed an Application for Ex Parte Restraining Order, Preliminary Injunction and
14 Permanent Injunction with the Court.
- 15 21. On December 31, 2018, the Court entered an order enjoining the foreclosure sale if the
16 Plaintiffs posted a bond in the amount of \$172,610.67 and additional security in the amount
17 of \$2,105.10 per month thereafter. The Plaintiffs did not file the bond.
- 18 22. The foreclosure sale went forward on January 4, 2019, and Breckenridge purchased the
19 property for \$294,000.01.
- 20 23. On January 25, 2019, the Trustees Deed Upon Sale confirming Breckenridge's purchase of
21 the subject property was recorded.
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ANALYSIS

The gravamen of the Plaintiffs' causes of action is the alleged breach of the 2009 Loan

1 Modification Agreement by Defendant BANA. The Plaintiffs allege that Vincenta Lincicome executed
2 and mailed the application in July of 2009. The Court infers from these allegations that the Plaintiffs
3 believe that the mailing of the application constituted an acceptance and the LMA was from that point
4 on a binding contract between the parties.

5 After mailing the forms, BANA accepted a payment and informed the Plaintiffs that they
6 would investigate whether the LMA was accepted. In October of 2009, the Plaintiffs received a
7 mortgage statement indicating that BANA had not accepted the LMA and was using the terms of the
8 original agreement. From these alleged facts, the Court cannot find an offer and acceptance of the
9 LMA had occurred. BANA's conduct and statements clearly indicated the original agreement had not
10 been modified.
11

12 If the original agreement was still in place, then the Plaintiffs were legally obligated to perform
13 as promised. No one argued that BANA had invited the Plaintiffs to apply for the modification which
14 could be rejected. The Plaintiffs never received any notice from BANA that BANA accepted the
15 LMA until March of 2011. It is unclear to the Court that the two year delay could constitute an
16 acceptance nunc pro tunc, but as explained herein, it makes no difference to the Court's analysis.
17

18 No issues of fact exist as to whether the Plaintiffs would have failed to make the required
19 payments under any of the purported offers and alleged agreements. The Plaintiffs, admittedly, had no
20 ability to pay and made no attempt to put any payments aside once BANA or other Defendants made a
21 demand for payment. The Plaintiffs also admitted that they entered into different modification plans
22 after the LMA based upon their inability to pay.
23

24 The Plaintiffs rely on a theory that their performance was permanently excused by the failure
25 of BANA to accept a single payment under the terms of the LMA. The Plaintiffs also rely on a theory
26 that their performance was excused by the failure of Fay to accept a payment under a modification on
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1 a subsequent modification. These theories fail under relevant law for several reasons.

2 If, as alleged, the LMA was effective upon mailing, then the breach occurred in 2009. If as
3 alleged the LMA was effective in 2011, then the breach occurred in 2011. The Plaintiffs were told that
4 BANA would not accept the modified payment in 2009. They understood BANA would not perform
5 under the LMA in October of 2009. They failed to bring an action against BANA until November 7,
6 2018. The six year statute of limitations in NRS 11.190 would apply. The date of the filing of the
7 LMA had no impact on the date of the breach.
8

9 Additionally, if the LMA or subsequent modification was effective, then the Plaintiffs' theory
10 of excuse of performance also fails as contract law requires a non-breaching party to elect a remedy in
11 a reasonable time. As stated in 17B C.J.S. Contracts § 722, the non-breaching party must accept the
12 repudiation and elect a remedy. The non-breaching party must also act promptly and within a
13 reasonable time. The Plaintiffs did nothing in either 2009 or 2011. Restitution to the lenders would
14 also apply if the Plaintiffs had chosen to accept the repudiations and end the agreement.
15

16 The theory of excuse put forth by the Plaintiffs also ignores the materiality and order of the
17 performances under the agreement. A lender materially performs by providing the funds requested
18 under the loan. A borrower must then materially perform by making the monthly payments. Further,
19 the theory of excuse of performance may delay the need to perform but it does not discharge the duty
20 to pay once the performance was demanded. Performance could be demanded as the Plaintiffs did not
21 accept the repudiation.
22

23 Contract and mortgage law would also require that the Plaintiffs remain ready, willing and able
24 to perform each month. The deposition testimony clearly indicated that the Plaintiffs could not
25 perform under any of the offers and modifications of the original agreement.
26

27 The Plaintiffs entered into a bankruptcy after their incomes went down and they had an
28

1 unanticipated tax bill. The bankruptcy filing indicates that the Plaintiffs believed they were under the
2 original agreement and represented such to the bankruptcy court. The facts establish that the Plaintiffs
3 did not have the ability to make the payments under any of the offers or alleged agreements. They
4 have failed to pay for over a decade. The Plaintiffs had made no effort to tender the missed payments
5 under any of the agreements.

6
7 Additionally, as the Plaintiffs did not act upon the failure of BANA or its successors to accept
8 the payment and repudiate the LMA or modification in a reasonable time, then subsequent agreements
9 and the bankruptcy could act as an intervening event and excuse any breach of not accepting the
10 original LMA payments. The subsequent modifications and agreement to provide a deed in lieu of
11 foreclosure would have excused the original alleged breach.

12
13 The failure of the Plaintiffs to repudiate the agreement also allowed BANA or its successors to
14 demand at a later time that the Plaintiffs perform. Since their performance was merely delayed, the
15 Plaintiffs became the breaching party once BANA and its successors made a demand for payment and
16 payment did not occur. The Plaintiffs tendered very few payments over the course of a decade. The
17 Plaintiffs should have offered the payments under the LMA if they believed it was in effect. They
18 could have preserved any rights they believed they had under the LMA by making a tender after
19 receiving the notice of default.

20
21 Claim preclusion would also apply. The Plaintiffs are not entitled to switch theories depending
22 upon what court they are in. BANA would be bound as well by any representations made in the
23 bankruptcy proceedings.

24
25 Disturbing to the Court, the Plaintiffs seem to believe that they can game the system to avoid
26 repaying the money borrowed and to remain in a house rent free. Albert Ellis Lincicome, Jr.'s
27 testimony clearly establishes that the Plaintiffs want more time to continue their free ride. If they have
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1 to abuse a mediation program to get more time then so be it. The Plaintiffs' signatures affirming that
2 they would be bound by the agreement meant nothing. The Plaintiffs admit to engaging in bad faith.

3 Under *Jones*, the mediated agreement of deed in lieu of foreclosure is enforceable. The
4 Plaintiffs admitted that they chose not to enter into the offered terms. The agreement settled all claims
5 regarding the mortgage. The Plaintiffs have an obligation under the agreement to surrender the
6 property. NRS 40.453 does not apply as argued in other motions.
7

8 The foreclosing defendants substantially complied with NRS 107.080 notice requirements.
9 The Plaintiffs were clearly noticed that they were in default and when the foreclosure sale would
10 occur. The fact that they disputed the amount of the default did not create any prejudice to them as
11 they never intended to make a tender of any amount. The notice provided them the opportunity to file
12 an action to stop the foreclosure sale which they then did. They were given an opportunity to file a
13 bond and then perform under the agreement they argued was in effect, but then failed to do so.
14

15 Finally, the Court finds that the failure to provide a computation of damages as required by
16 NRCP Rule 16 has not been justified. The Plaintiffs failure to provide the computation cannot be
17 justified by their counsel's belief that to deal with damages at a later point in time is more economical.
18 The epidemic and the Plaintiffs' hectic schedule has no impact on Counsel's determination of
19 damages. The Plaintiffs had over two years to comply with the rule.
20

21 The Court also notes that the Plaintiffs were supposed to negotiate in good faith during a
22 settlement conference that was ordered. How they could do so without understanding their damages is
23 perplexing. Is this just more bad faith? The Court believes that the appropriate sanction is to strike all
24 allegations concerning monetary damages from the Complaint as the failure appears to be made in bad
25 faith and in an effort to prolong this matter further.
26

27 CONCLUSIONS OF LAW

28

1. Sanctions striking allegations the Plaintiffs have suffered monetary damages are appropriate as the Plaintiffs have not justified their failure to provide a computation of damages pursuant to NRCP Rule 16.1.
2. The Plaintiffs are not entitled to partial summary judgment.
3. The Defendants are entitled to summary judgment.

VI. ORDER

Therefore, based upon the above and good cause appearing, **IT IS HEREBY ADJUDGED and ORDERED** that BANA's request for sanctions is **GRANTED**. The Court strikes all allegations in the Complaint that the Plaintiffs have suffered monetary damages.

IT IS HEREBY FURTHER ADJUDGED and ORDERED that that Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

IT IS HEREBY FURTHER ADJUDGED and ORDERED that the Motions for Summary Judgment filed by BANA, Shellpoint Mortgage Servicing, Prof-2013 M4 Legal Trust, U.S. Bank, National Association as Legal Trustee (“U.S. Bank Trust”) and Fay Servicing LLC., are **GRANTED**.

IT IS HEREBY FURTHER ADJUDGED and ORDERED that BANA's request for NRCF Rule 54(b) certification as a final judgment is **GRANTED**. The Court finds no just reason for the delay.

IT IS HEREBY FURTHER ORDERED that the hearing on Motions set for July 28, 2021 is **VACATED**. The Court found the pleadings sufficient to enter an order without argument.

DATED: This 23rd day of June, 2021.

HON. LEON ABERASTURI
DISTRICT COURT JUDGE

Certificate of Mailing

I hereby certify that I, Quoc Thai, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

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DATED: This 23rd day of June, 2021.


Employee of Hon. Leon Aberasturi

FILED

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THIRD JUDICIAL DISTRICT

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11 *Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC*

12 **THIRD JUDICIAL DISTRICT COURT**

13 **LYON COUNTY, NEVADA**

14 ALBERT ELLIS LINCICOME, JR. and
15 VICENTA LINCICOME,

16 Plaintiffs,

17 vs.

18 SABLES, LLC, a Nevada limited liability
19 company, as Trustee of the Deed of Trust, given
20 by Vicenta Lincicome and dated 5/23/2007 *et*
21 *al.*

22 Defendants.

23 and all related cases.

Case No.: 18-cv-01332

Dept. No.: II

NOTICE OF ENTRY OF ORDER

24 PLEASE TAKE NOTICE that an ORDER ON BRECKENRIDGE MOTION FOR
25 SUMMARY JUDGMENT was entered in the above-entitled Court on the 23rd day of June,
26 2021. A copy of which is attached hereto.

27 DATED this 29th day of June, 2021.

28 WRIGHT, FINLAY & ZAK, LLP

Ramir M. Hernandez

Ramir M. Hernandez, Esq.

Nevada Bar No. 13146

Attorneys for Defendants, Prof-2013 M4-Legal Title
Trust, by U.S. Bank, National Association, as Legal
Title Trustee, Fay Servicing LLC, and Shellpoint
Mortgage Servicing, LLC

AFFIRMATION

Pursuant to NRS 239B.03/603A.040

The undersigned does hereby affirm that the foregoing document does not contain any of the following information governed by NRS 239B.030 and NRS 603A.040:

1. Social Security Number;
2. Driver License Number or Identification Card Number; or
3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

The term does not include any publically available information that is lawfully made available to the general public.

DATED this 29th day of June, 2021.

WRIGHT, FINLAY & ZAK, LLP



Ramir M. Hernandez, Esq.

Nevada Bar No. 13146

Attorneys for Defendants, Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK,
3 LLP, and that on this 30th day of June, 2021, I did cause a true copy of the foregoing **NOTICE**
4 **OF ENTRY OF ORDER** to be served by depositing a true copy of same in the United States
5 Mail, at Las Vegas, Nevada, addressed as follows:

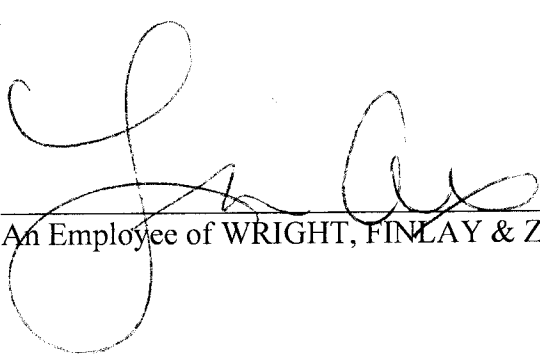
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TANYA SOEHN
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

USDA TA 44

DEPUTY

Case No.: 18-CV-01332

Dept. No.: II

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

* * *

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,

Plaintiffs,

vs.

SABES, 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; for BANK OF AMERICAN, N.A.;
BRECKENRIDGE PROPERTY FUND 2016, A Utah
limited liability company; NEWREZ, LLC, d/b/a
SHELLPOINT MORTGAGE SERVICING, LLC
substituted in for DOE 1; 1900 CAPITAL TRUST II,
BY U.S. BANK TRUST NATIONAL ASSOCIATION,
substituted in for DOE 2; MNCM-2018-NPL@,
substituted in for DOE 3; and DOES 4-10,

Defendants.

ORDER ON
BRECKENRIDGE MOTION
FOR SUMMARY
JUDGMENT

I. STATEMENT OF THE CASE

On March 18, 2021, Breckenridge Property Fund 2016, LLC ("Breckenridge") filed a Motion for Summary Judgment. On April 15, 2021, the Plaintiffs filed an Opposition. On May 10, 2021,

1 Breckenridge filed a Reply.

2 **II. ISSUE PRESENTED**

3 Should the Court grant Breckenridge's Motion for Summary Judgment?

5 **III. SUMMARY OF DECISION**

6 The Court finds that no genuine material issues of fact exist and Breckenridge is entitled to
7 summary judgment as a matter of law.

9 **IV. PRINCIPLES OF LAW**

10 A. Standard of Review

11 NRCP 56(c) requires a court to enter summary judgment in favor of a party when the
12 "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if
13 any, show that there is no genuine issue as to any material fact and that the moving party is entitled to
14 a judgment as a matter of law. " NRCP 56(c). A genuine issue of material fact exists where the
15 evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posada v. City*
16 *of Reno*, 109 Nev. 448 (1993).

18 When reviewing a motion for summary judgment, the evidence and all reasonable inferences
19 drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *Richards*
20 *v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213 (2006). Summary judgment is appropriate and
21 "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no
22 "genuine issue as to any material (remains) and that the moving party is entitled to a judgment as a
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1 NRS 40.010 states, "An action may be brought by any person against another who claims an
2 estate or interest in real property, adverse to the person bringing the action, for the purpose of
3 determining such adverse claim."

4 D. NRS 111.180

5 NRS 111.180 states:

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7 1. Any purchaser who purchases an estate or interest in any real property in good
8 faith and for valuable consideration and who does not have actual knowledge,
9 constructive notice of, or reasonable cause to know that there exists a defect in, or adverse
10 rights, title or interest to, the real property is a bona fide purchaser.

11 2. No conveyance of an estate or interest in real property, or charge upon real
12 property, shall be deemed fraudulent in favor of a bona fide purchaser unless it appears
13 that the subsequent purchaser in such conveyance, or person to be benefited by such
14 charge, had actual knowledge, constructive notice or reasonable cause to know of the
15 fraud intended.

16 E. NRS 40.250

17 NRS 40.250 states:

18 A tenant of real property or a mobile home for a term less than life is guilty of an
19 unlawful detainer when the tenant continues in possession, in person or by subtenant, of
20 the property or mobile home or any part thereof, after the expiration of the term for
21 which it is let to the tenant. In all cases where real property is leased for a specified
22 term or period, or by express or implied contract, whether written or parol, the tenancy
23 terminates without notice at the expiration of the specified term or period.

24 V. **FINDINGS OF FACT**

- 25 1. In May of 2007, Vicenta Lincicome financed a property known as 70 Riverside Drive,
26 Dayton Nevada 89403 with a loan in the amount of \$381,150.00 secured by a recorded
27 deed. The deed of trust identified Sierra Pacific Mortgage Company, Inc. as the lender and
28 Mortgage Electronic Registration Systems, Inc. "MERS" as the beneficiary and nominee of
the lender. Vicenta Lincicome executed documents creating the deed of trust and note and
understood she had a 30-year maturity date.

- 1 2. On August 15, 2011, MERS recorded an assignment of the deed of trust, transferring the
2 interest in the deed of trust to BANA, Successor by Merger to BAC Home Loans
3 Servicing, LP FKA Countrywide Home Loans Servicing LP.
- 4 3. On November 25, 2015, BANA recorded an assignment of the deed of trust transferring its
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9 loan balance was \$417,198.58. The Plaintiffs were provided a post office box to send
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17 Plaintiffs in October of 2009 stating that the loan had not been modified. However, then
18 BANA signed the LMA and recorded it in March of 2011.
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20 property at \$381,000. The Plaintiffs made no payments at the time of bankruptcy filing or
21 during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.
- 22 23 24 25 26 27 28

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11. In January 2015, the Bankruptcy court terminated the automatic stay as to BANA. A final decree was filed by the Bankruptcy Court in July of 2015.
12. On November 3, 2017, Sables, as trustee under the deed of trust, recorded a notice of default.
13. On December 1, 2017, Vicenta Lincicome filed a petition for foreclosure mediation assistance in the Third Judicial District Court, 17-CV-01346, naming Sables, U.S. Bank and Fay Servicing as interested parties.
14. The Mediator's Statement indicates that Vincenta Lincicome was represented by Geoff Giles, Esq. at the Mediation. The Plaintiffs agreed to a Deed in Lieu of Foreclosure. All parties signed the statement on April 3, 2018. The Plaintiffs had the opportunity to make three payments of \$2462.30 as an offered trial period plan. The payments had to be made on April 1, 2018, May 1, 2018 and June 1, 2018.
15. The Plaintiffs decided not to make the payments. The Plaintiffs did not provide the deed in lieu of foreclosure. A certificate for foreclosure was issued.
16. The Plaintiffs did not place the required monthly payments in a bank account or escrow account. Plaintiffs spent all of their income on either items. Plaintiffs do not have sufficient funds to pay off what is owed under any theory as to what instrument controls the computation of what is owed.
17. In depositions attached to the Motion for Summary Judgment, the Plaintiffs admitted that they could not afford to make payments on the mortgage. The Plaintiffs have never averred

1 to the Court that they are ready, willing, and able to perform on the original mortgage or
2 subsequent modifications.

3 18. The foreclosing party recorded a Notice of Default and Notice of Sale against the subject
4 property.

5 19. On November 7, 2018, the Plaintiffs filed a complaint for injunctive relief, contractual
6 claims and declaratory relief regarding the foreclosure sale of the subject property.

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8 then filed an Application for Ex Parte Restraining Order, Preliminary Injunction and
9 Permanent Injunction with the Court.

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11 Plaintiffs posted a bond in the amount of \$172,610.67 and additional security in the amount
12 of \$2,105.10 per month thereafter. The Plaintiffs did not file the bond.

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14 property for \$294,000.01.

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16 the subject property was recorded.

17 VI. ANALYSIS

18 The Court incorporates the legal findings, factual findings and analysis contained in its
19 separate "ORDER DENYING PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT/
20 GRANTING MOTIONS FOR SUMMARY JUDGMENT FILED BY BANA, PROF-2013 M4
21 LEGAL TRUST, US BANK AND FAY SERVICING LLC." As Breckenridge purchased the subject
22 property at the foreclosure sale, Breckenridge is entitled to summary judgment regarding their claims
23 to title of the property.
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1 VII. CONCLUSIONS OF LAW


2 Breckenridge is entitled to a motion for summary judgment in its favor.

3
4 ORDER

5 Therefore, good cause appearing, **IT IS HEREBY ADJUDGED and ORDERED** that
6 Breckenridge's Motion for Summary Judgment is **GRANTED**.

7
8 **IT IS HEREBY FURTHER ORDERED** that the hearing on Motions set for July 28, 2021 is
9 **VACATED**. The Court found the pleadings sufficient to enter an order without argument.

10
11
12 DATED: This 23rd day of June, 2021.

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14 
15
16 HON. LEON ABERASTURI
17 DISTRICT JUDGE
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28

Certificate of Mailing

I hereby certify that I, Quoc Tran, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

Michael G. Millward, Esq.
Millward Law, Ltd.
1591 Mono Ave.
Minden, NV 89423

Shadd A. Wade
Zieve, Brodnax & Steele, LLP
9435 W. Russel Rd., Ste. 120
Las Vegas, NV 89148

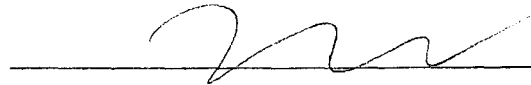
Scott R. Lachman, Esq.
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1635 Village Center Cir. Ste. 200
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Hutchison & Steffen, PLLC
10080 W. Alta Dr., Ste. 200
Las Vegas, NV 89145

Casey J. Nelson, Esq.
Wedgewood, LLC
2320 Potosi St., Ste. 130
Las Vegas, NV 89146

Ramir M. Hernandez, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117

DATED: This 23rd day of June, 2021.



Employee of Hon. Leon Aberasturi

ORIGINAL FILED

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TANYA SPOFFORD
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Kathy Thomas

John T. Steffen (4390)
Brenoch R. Wirthlin (10282)
HUTCHISON & STEFFEN, PLLC
10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086
bwirthlin@hutchlegal.com

Casey J. Nelson (12259)
WEDGEWOOD, LLC
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146
Telephone: (702) 305-9157
Facsimile: (310) 730-5967
caseynelson@wedgewood-inc.com

*Attorney for Defendant / Counterclaimant
Breckenridge Property Fund 2016, LLC*

**THIRD JUDICIAL DISTRICT COURT
LYON COUNTY, NEVADA**

ALBERT ELLIS LINCICOME, JR., and
VICENTA LINCICOME,

Case No.: 18-CV-01332

Dept No.: II

Plaintiff,

NOTICE OF ENTRY OF ORDER

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-MF LEGAL TITLE TRUST by U.S.
BANK, N.A., as Legal Title Trustee; for
BANK OF AMERICA, N.A.;
BRECKENRIDGE PROPERTY FUND
2016; NEWREZ LLC dba SHELLPOINT
MORTGAGE SERVICING, LLC; 1900
CAPITAL TRUST II, BY U.S. BANK
TRUST NATIONAL ASSOCIATION;
MCM-2018-NPL2 and DOES 1-50.,

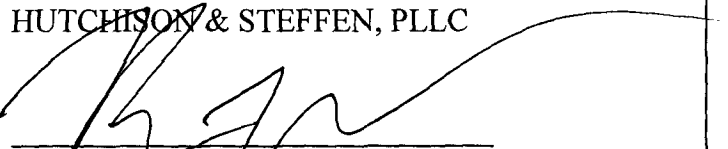
Defendants.

AND RELATED ACTIONS

1 Please take notice that an Order on Breckenridge Motion for Summary Judgment was
2 entered on the 23 day of June, 2021, a copy of which is attached hereto.

3 DATED this 30 day of June, 2021.

4 HUTCHISON & STEFFEN, PLLC

5 
6
7 John T. Steffen (4390)
8 Brenoch R. Wirginlin (10282)
9 10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145

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2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146

13 *Attorney for Defendant / Counterclaimant*
14 *Breckenridge Property Fund, LLC*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Hutchison & Steffen, and that on the date indicated below, I served a true and correct copy of the **NOTICE OF ENTRY OF ORDER** via U.S. Mail to the parties designated below.

Michael G. Millward, Esq.
MILLWARD LAW, LTD.
1591 Mono Avenue
Minden, NV 89423
Attorney for Plaintiffs

Justin M. Clouser, Esq.
1512 US Highway 395 N, Ste. 1
Gardnerville, NV 89410
Attorney for Plaintiff

R. Samuel Ehlers, Esq.
Ramir M. Hernandez, Esq.
WRIGHT FINLAY & ZAK, LLP
7785 W. Sahara Avenue, #200
Las Vegas, NV 89117
*Attorney for Prof-2013-M4 Legal Title Trust by
US Bank, National Association as Legal Title
Trustee; Fay Servicing, LLC, and Shellpoint
Mortgage Servicing, LLC*

Shadd A. Wade, Esq.
ZIEVE BRODNAX & STEEL
9435 W. Russell Road, #120
Las Vegas, NV 89148
Attorney for Sables, LLC

Melanie Morgan, Esq.
Scott R. Lachman, Esq.
ACKERMAN, LLP
1635 Village Center Circle, #200
Las Vegas, NV 89134
Attorney for Bank of America

Darren T. Brenner, Esq.
Ramir M. Hernandez, Esq.
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7785 W. Sahara Avenue, #200
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*Attorneys for Prof-2013-M4 Legal Title Trust
by US Bank, National Association as Legal
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Shellpoint Mortgage Servicing, LLC*

DATED this 18th day of July 2021.


An Employee of HUTCHISON & STEFFEN

2021 JUN 23 PM 4: 07

TANYA SOEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Tova

REPLY

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17 VI. ANALYSIS

18 The Court incorporates the legal findings, factual findings and analysis contained in its
19 separate "ORDER DENYING PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT/
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21 LEGAL TRUST, US BANK AND FAY SERVICING LLC." As Breckenridge purchased the subject
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23 to title of the property.

1 VII. CONCLUSIONS OF LAW

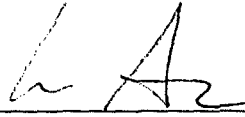
2 Breckenridge is entitled to a motion for summary judgment in its favor.

3
4 **ORDER**

5 Therefore, good cause appearing, **IT IS HEREBY ADJUDGED and ORDERED** that
6 Breckenridge's Motion for Summary Judgment is **GRANTED**.

7
8 **IT IS HEREBY FURTHER ORDERED** that the hearing on Motions set for July 28, 2021 is
9 **VACATED**. The Court found the pleadings sufficient to enter an order without argument.

10
11
12 DATED: This 23rd day of June, 2021.

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16 _____
17 HON. LEON ABERASTURI
18 DISTRICT JUDGE
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28

Certificate of Mailing

I hereby certify that I, Guo Ther, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

Michael G. Millward, Esq.
Millward Law, Ltd.
1591 Mono Ave.
Minden, NV 89423

Shadd A. Wade
Zieve, Brodnax & Steele, LLP
9435 W. Russel Rd., Ste. 120
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2320 Potosi St., Ste. 130
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Ramir M. Hernandez, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117

DATED: This 23rd day of June, 2021.



Employee of Hon. Leon Aberasturi

Case Summary

FAY SERVICING LLC, BRECKENRIDGE PROPERTY FUND 2016 LLC, BANK OF AMERICA, N.A., ALBERT ELLIS LINCICOME JR., VICENTA LINCICOME, SABLES, LLC, PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A., NEWREZ, LLC dba SHELLPOINT MORTGAGE SERVICING, LLC ~ COMPLAINT

Case Number: 18-CV-01332

Agency: Third Judicial District Court

Type: Other Title to Property Case

Received Date: 11/7/2018

Status: Closed

Status Date: 6/23/2021

Involvements

Primary Involvements

NEWREZ, LLC dba SHELLPOINT MORTGAGE SERVICING, LLC

Defendant

BRECKENRIDGE PROPERTY FUND 2016 LLC Defendant

BANK OF AMERICA, N.A. Defendant

SABLES, LLC Defendant

FAY SERVICING LLC Defendant

PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A.

Defendant

LINCICOME, ALBERT ELLIS JR. Plaintiff

LINCICOME, VICENTA Plaintiff

Other Involvements

Wade, Shadd A. Esq. Defendant's Attorney

Clouser, Justin M. Esq. Plaintiff's Attorney

Schriever, Matthew K. Esq. Defendant's Attorney

Brenner, Darren T. Esq. Defendant's Attorney

Lachman, Scott Esq. Defendant's Attorney

Hernandez, Ramir Esq. Defendant's Attorney

Millward, Michael G. Esq. Plaintiff's Attorney

Third Judicial District Court (18-CV-01332)

Aberasturi, Leon A. - LAA Dept II - TJDC

[5. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[7. NRCP 5 ~ ANSWER](#)

Notes: Newrez LLC dva Shellpoint Mortgage

Lead/Active: False

[8. NRCP ~ RELATED PARTY](#)

Lead/Active: False

Other Title to Property Case

[1. NRCP 3 ~ COMPLAINT](#)

Lead/Active: True

Case Summary

[2. NRCP 3 ~ COMPLAINT](#)

Lead/Active: False

[3. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[4. NRCP 5 ~ ANSWER](#)

Lead/Active: False

[6. NRCP 5 ~ ANSWER](#)

Notes: Sables, LLC First Appearance

Lead/Active: False

Case Status History

11/7/2018 4:49:00 PM | Open

6/23/2021 3:25:00 PM | Closed

Events

11/20/2018 2:30:00 PM | TPO Hearing | Dept II, Crtrm A 18-CV-01332 | Court Room A

Andersen, Andrea Deputy Clerk -

AANDERSEN

Staff - STAFF

Geurts, Patrick Bailiff - X004896

lawclerk2 - LAW2

John Kilgore

Lachman, Scott Esq.

Telephonic, obo Bank of America

Aberasturi, Leon A. - LAA (Dept II - TJDC)

Hernandez, Ramir Esq. (Defendant's Attorney)

obo Defendant, PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A. and FAY SERVICING LLC

LINCICOME, ALBERT ELLIS JR. (Plaintiff)

Plaintiff

LINCICOME, VICENTA (Plaintiff)

Plaintiff

Millward, Michael G. Esq. (Plaintiff's Attorney)

with Plaintiffs

Notes: Counsel does not feel there is a chance of settlement. Court proceeded with the hearing. Mr. Lachman advised the court he was just retained on behalf of Bank of America and it does not appear that Bank of America has an interest, but requested to stay on the phone. Court allowed requested. Plaintiff's Exhibits 1-18 were marked. Counsel stipulated to the admission of Plaintiff's Exhibits 1-18. Plaintiff's Exhibits 1-18 were admitted. All the exhibits as attached to Defendants Response to Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction were admitted. No objections to the facts within the Affidavit. Counsel argued the Application for Ex Parte

Case Summary

Restraining Order, Preliminary Injunction & Permanent Injunction. Court ruled in favor of the Plaintiff to extend due to the likelihood of success. Court ordered bond in the amount of the payments due, which is the monthly mortgage payment times twelve (12) times seven (7.) Bond is due within thirty (30) days. Payments are to be made each month starting December 20, 2018. Mediation is requested to be done by Washoe County Judge Hardy. Court will contact Judge Hardy and see if he is willing to preside over mediation. Court finds no statute of fraud. Mr. Millward to prepare Order and submit to opposing counsel. If counsel cannot agree on the Order in one (1) or two (2) emails, counsel is to submit their own orders. Order to be submitted December 10, 2018.

4/15/2019 1:30:00 PM | Motion Hearing | Shad A Wade telephonic dc Scott Lachman Telephonic | Court Room A

Thomas, Kathy Dep. Clerk - KTHOMAS

Staff - STAFF

Court Room A - CourtRmA

lawclerk2 - LAW2

Aberasturi, Leon A. - LAA (Dept II - TJDC)

Brenner, Darren T. Esq. (Defendant's Attorney)

telephonic

Hernandez, Ramir Esq. (Defendant's Attorney)

Millward, Michael G. Esq. (Plaintiff's Attorney)

Notes: Michael Millward, appearing on behalf of the Plaintiff. Ramir Hernandez, appearing obo Fay U.S Bank Trust, Shad Wade appearing telephonic obo Sables, LLC, Darren Brenner, obo Bank of America.

Counsel argued the Motion to set aside the Default Judgment.

Court granted the Motion to set aside default is granted. Counsel next argued the Motion for rule II Sanctions. Court granted the motion. Attorney fees were awarded.

Counsel argued the Motion to Dismiss is granted in part and denied in part. Any claims against BNA seeking injunctive relief are hereby dismissed. All other Claims will be allowed to remain. Sables Declaration of Non-Monetary Status is granted. Mr. Wade to provide Order. Motion for leave to file an Amended Complaint is granted leave to amend its claims as to Sables. Mr. Millard to file motion to Amend within 20 days. After filing of the Motion and oppositions the court will make a determination as to whether to grant leave to Plaintiff's to amend the Complaint.

Mr. Hernandez asked that a settlement conference be set. Court will not set at this time while motions are still being filed.

8/23/2019 11:30:00 AM | Telephonic Conference | Dept II - 18-CV-01332 | Court Room A

Staff - STAFF

Court Room A - CourtRmA

Tovar, Victoria Deputy Clerk - VTOVAR

lawclerk2 - LAW2

Schriever, Matthew K. Esq.

telephonic

Wade, Shadd A. Esq.

telephonic

Aberasturi, Leon A. - LAA (Dept II - TJDC)

Hernandez, Ramir Esq. (Defendant's Attorney)

telephonic

Millward, Michael G. Esq. (Plaintiff's Attorney)

telephonic

Notes: Mr. Schriever addressed Motion to Intervene. Court granted Breckenridge's Motion to Intervene. Court finds four (4) prongs satisfied, Mr. Millward to file second amended complaint within three (3) weeks, and court finds not cause of action for declaratory relief. Mr. Schriever to prepare order regarding motion to intervene and court to prepare order for remaining issues.

2/4/2020 9:30:00 AM | Motion Hearing | Dept II, Ctrm A 18-CV-01332 | Court Room A

Staff - STAFF

Court Room A - CourtRmA

Geurts, Patrick Bailiff - X004896

Tovar, Victoria Deputy Clerk - VTOVAR

lawclerk2 - LAW2

Aberasturi, Leon A. - LAA (Dept II - TJDC)

Case Summary

Brenner, Darren T. Esq. (Defendant's Attorney)

telephonic/obo Bank of America N.A.

Wade, Shadd A. Esq. (Defendant's Attorney)

telephonic/obo Sables, LLC

Hernandez, Ramir Esq. (Defendant's Attorney)

telephonic/obo Fay Servicing LLC

Schriever, Matthew K. Esq. (Defendant's Attorney)

telephonic/obo Breckenridge Property Fund 2016 LLC

LINCICOME, ALBERT ELLIS JR. (Plaintiff)

LINCICOME, VICENTA (Plaintiff)

Clouser, Justin M. Esq. (Plaintiff's Attorney)

obo plaintiffs

Millward, Michael G. Esq. (Plaintiff's Attorney)

obo plaintiffs

Notes: Court heard statements and argument from counsel. Mr. Millward requested his Motion for Reconsideration be withdrawn. No objections. Court ordered Motion for Reconsideration withdrawn. Court denied Ex Parte Motion filed October 3, 2019 without prejudice. 16.1 conference set for March 16, 2020 at 12:00 p.m. Court ordered Mr. Millward set up conference call and all counsel to contact Mr. Millward with their phone numbers. Court to prepare Order Denying Ex Parte Motion and Mr. Millward to issue notice of 16.1 conference.

3/16/2020 12:00:00 PM | 16.1 Conference | Dept II - 18-CV-01332 | Court Room A

Staff - STAFF

lawclerk2 - LAW2

Aberasturi, Leon A. - LAA (Dept II - TJDC)

Notes: Per Sherry at Millward Law. Conference Call # to be emailed to Court day of hearing. dg

2/18/2021 9:30:00 AM | Settlement Conference | Dept I , Crtrm B 18-CV-01332 | Court Room B

Staff - STAFF

Court Room B - CourtRmB

Geurts, Patrick Bailiff - X004896

lawclerk1 - LAW1

Schlegelmilch, John P. - JPS

Notes: <https://us02web.zoom.us/j/82853007945?pwd=U0pmS0xQWVp2VnVmbW9ZMS9TQStFdz09>

Meeting ID: 828 5300 7945

Passcode: 18CV01332