

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

ALBERT ELLIS LINCICOME, JR. and)
VICENTA LINCICOME,)

Appellants,)

v.)

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

Respondents.)

NEVADA SUPREME COURT Filed
CASE NO.: 83261 Dec 29 2021 06:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
THIRD JUDICIAL DISTRICT
COURT CASE NO.: 18-CV-01332

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Case No.: 18-CV-01332

Dept. No.: II

FILED

2021 APR 23 PM 4:13

CLERK OF COURT
JUDICIAL DISTRICT COURT
COUNTY OF LYON, NEVADA

Victoria Tovar

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; MNM-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:

18 (1) Within 6 years:

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

22 (b) An action upon a contract, obligation or liability founded upon an instrument in
23 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 *City 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:

The party injured by an anticipatory breach has an election to accept or reject the
refusal of performance. For the doctrine of breach by anticipatory repudiation to be
applied, the nonrepudiating party must treat the repudiation as a breach. That is, it must
accept and act on it. Moreover, it must also act promptly and within a reasonable
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

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, "avermment 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.

19 In *Schleining v Cap One, Inc*, 130 Nev. 323, 327 (2014), the Supreme Court held that NRS
20 107.080 does not require strict adherence. The Court focused upon the "does not substantially comply
21 with" language. In *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018) the Nevada Supreme
22 Court held that substantial compliance is found when the title holder "had actual knowledge of the
23 default and the pending foreclosure sale" and "was not prejudiced by the lack of statutory notice." *Id.*
24 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
11 each computation is based, including materials bearing on the nature and extent of
12 injuries suffered;

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

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

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)
22 — fails to obey an order to provide or permit discovery, including an order under Rule
23 35 or 37(a), the court may issue further just orders that may include the following:

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

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

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

(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.

22 ANALYSIS

23 The gravamen of the Plaintiffs' causes of action is the alleged breach of the 2009 Loan
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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
28

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

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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 NRCP 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 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:

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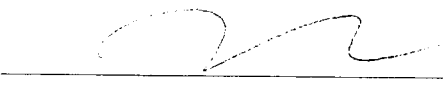
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DATED: This 23rd day of June, 2021.


Employee of Hon. Leon Aberasturi

FILED

2021 JUL -6 AM 11:51

TANYA STEINING
COURT ADMINISTRATOR
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:

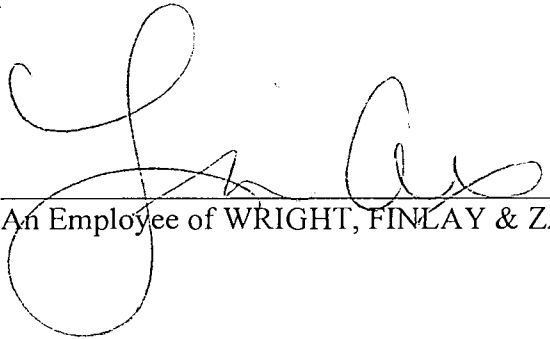
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28 An Employee of WRIGHT, FINLAY & ZAK, LLP

FILED

2021 JUN 23 PM 4:07

JANVA TEEBOW
CLERK, ADMINISTRATOR
THIRD JUDICIAL DISTRICT

U.S. DISTRICT COURT

LYON COUNTY, NEVADA

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).

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

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.

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.
8. The Plaintiffs made no other attempt to mail the payments. BANA then notified the Plaintiffs in October of 2009 stating that the loan had not been modified. However, then BANA signed the LMA and recorded it in March of 2011.
9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the property at \$381,000. The Plaintiffs made no payments at the time of bankruptcy filing or during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.

- 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 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.
24
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1 VII. CONCLUSIONS OF LAW

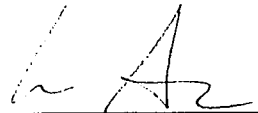
2 Breckenridge is entitled to a motion for summary judgment in its favor.

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.

13
14
15 
16 _____
17 HON. LEON ABERASTURI
18 DISTRICT JUDGE
19
20
21
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23
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25
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27
28

Certificate of Mailing

I hereby certify that I, Quoc Thew, 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

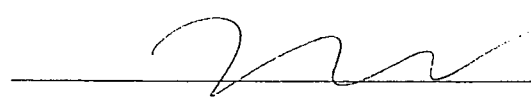
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7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117

DATED: This 23rd day of June, 2021.


Employee of Hon. Leon Aberasturi

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3 Nevada Bar No. 8386
4 Ramir M. Hernandez, Esq.
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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

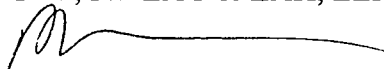
Dept. No.: II

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



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

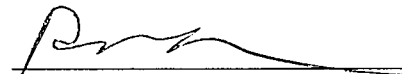
The undersigned does hereby affirm that the foregoing document does not contain any of the following information governed by NRS 239B.030 and NRS 603A.040:

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:

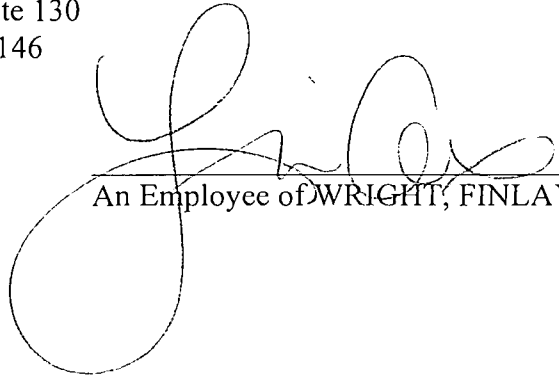
6 Michael G. Millward, Esq.
7 MILLWARD LAW, LTD.
8 1591 Mono Ave.
9 Minden, NV 89423

10 Justin M. Clouser, Esq.
11 1512 US Highway 395 N, Ste. 1
12 Gardnerville, NV 89410

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21 Las Vegas, NV 89145

22 Casey J. Nelson, Esq.
23 WEDGEWOOD, LLC
24 Office of the General Counsel
25 2320 Potosi Street, Suite 130
26 Las Vegas, Nevada 89146

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~~ CLERK

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.

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.

25 C. Enforceability of FMA Agreement

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

The party injured by an anticipatory breach has an election to accept or reject the
refusal of performance. For the doctrine of breach by anticipatory repudiation to be
applied, the nonrepudiating party must treat the repudiation as a breach. That is, it must
accept and act on it. Moreover, it must also act promptly and within a reasonable
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

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.

19 In *Schleining v Cap One, Inc*, 130 Nev. 323, 327 (2014), the Supreme Court held that NRS
20 107.080 does not require strict adherence. The Court focused upon the "does not substantially comply
21 with" language. In *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018) the Nevada Supreme
22 Court held that substantial compliance is found when the title holder "had actual knowledge of the
23 default and the pending foreclosure sale" and "was not prejudiced by the lack of statutory notice." Id.
24 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 (iv) a computation of each category of damages claimed by the disclosing party--who
8 must make available for inspection and copying as under Rule 34 the documents or
9 other evidentiary material, unless privileged or protected from disclosure, on which
10 each computation is based, including materials bearing on the nature and extent of
11 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

10 18. A Notice of Default and Notice of Sale was filed against the subject property.

11 19. On November 7, 2018, the Plaintiffs filed a complaint for injunctive relief, contractual
12 claims and declaratory relief regarding the foreclosure sale of the subject property.
13

14 20. On November 8, 2018, the Plaintiffs recorded a lis pendens on the subject property and
15 then filed an Application for Ex Parte Restraining Order, Preliminary Injunction and
16 Permanent Injunction with the Court.
17

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

21 22. The foreclosure sale went forward on January 4, 2019, and Breckenridge purchased the
22 property for \$294,000.01.
23

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

26 ANALYSIS

27 The gravamen of the Plaintiffs' causes of action is the alleged breach of the 2009 Loan
28

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
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
28

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
28

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.

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.

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.

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.

27 CONCLUSIONS OF LAW

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.

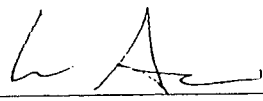
IT IS HEREBY FURTHER ADJUDGED and ORDERED that that Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

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 NRCP 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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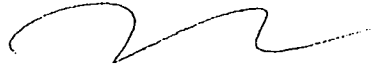
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DATED: This 23rd day of June, 2021.



Employee of Hon. Leon Aberasturi

ORIGINAL FILED

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CLERK OF DISTRICT COURT
THIRD JUDICIAL DISTRICT

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*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.,

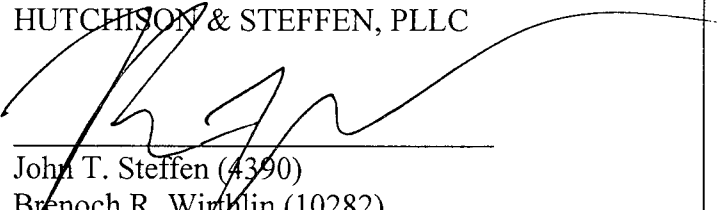
Defendants.

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. Wirthlin (10282)
9 10080 W. Alta Dr., Suite 200
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10 Casey J. Nelson (12259)
11 WEDGEWOOD, LLC
12 Office of the General Counsel
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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.

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Trustee; Fay Servicing, LLC, and Shellpoint
Mortgage Servicing, LLC*

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by US Bank, National Association as Legal
Title Trustee; Fay Servicing, LLC, and
Shellpoint Mortgage Servicing, LLC*

DATED this 18th day of July 2021.


An Employee of HUTCHISON & STEFFEN

FILED

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TANYA SOEHRKE
CLERK ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Vicenta Tovar

REPUTY

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).

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

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.

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.
8. The Plaintiffs made no other attempt to mail the payments. BANA then notified the Plaintiffs in October of 2009 stating that the loan had not been modified. However, then BANA signed the LMA and recorded it in March of 2011.
9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the property at \$381,000. The Plaintiffs made no payments at the time of bankruptcy filing or during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.

- 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 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.

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

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16 _____
17 HON. LEON ABERASTURI
18 DISTRICT JUDGE
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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
Las Vegas, NV 89148

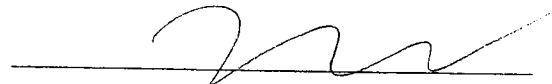
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Matthew K. Schriever, Esq.
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2320 Potosi St., Ste. 130
Las Vegas, NV 89146

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

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

Victoria Tovar

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



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: 

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

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,
Appellants,
v.
SABLES, LLC, a Nevada limited liability
company, as Trustee of the Deed of Trust
given by Vicenta Lincicome and dated
5/23/2007; FAY SERVICING, LLC, a
Delaware limited liability company and
subsidiary of Fay Financial, LLC; PROF-
2013-M4 LEGAL TITLE TRUST by U.S.
BANK, N.A., as Legal Title Trustee;
BANK OF AMERICA, N.A.;
BRECKENRIDGE PROPERTY FUND
2016, a Utah limited liability company;
NEWREZ, LLC, d/b/a SHELLPOINT
MORTGAGE SERVICING, LLC; 1900
CAPITAL TRUST II, by U.S. BANK
TRUST NATIONAL ASSOCIATION;
MCM-2018-NPL2.
Respondents.

APPELLANTS: The Appellants are ALBERT ELLIS LINCICOME, JR. AND VICENTA LINCICOME (together referred to as “Appellants” or “the Lincicomes”). Appellants are represented by retained counsel Michael G. Millward, Esq., of Millward Law, Ltd., 1591 Mono Avenue, Minden, Nevada

89423, and Justin M. Clouser, Esq., of Clouser Hempen Wasick Law Group, Ltd., 1512 US HWY 395 N, Ste. 1, Gardnerville, Nevada 89410. Appellants were not represented by appointed counsel before the District Court. Appellants' counsel, Michael G. Millward, Esq., and Justin M. Clouser, Esq., are licensed to practice law in Nevada. Appellants have not sought leave to proceed in forma pauperis.

This appeal concerns real property and claims pertaining to wrongful foreclosure and breach of contract. This appeal does not involve child custody or visitation. Appellants believe that settlement of the issues pertaining to this appeal are a possibility.

DISTRICT COURT JUDGE: HONORABLE LEON ABERASTURI of the Third Judicial District Court issued the Orders that are the subject of this appeal.

RESPONDENTS: The Respondents and respective counsel for each respondent are as follows:

1. SABLES, LLC, represented by Shadd A. Wade, Esq., of Zieve, Brodnax & Steel, 9435 W. Russell Road, Suite 120, Las Vegas, Nevada 89148;
2. FAY SERVICING, LLC, represented by Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq., of Wright, Finlay & Zak, LLP, 7785 W. Sahara Avenue, Suite 200, Las Vegas, Nevada 89117;

3. PROF-2013-M4 LEGAL TITLE TRUST by U.S. BANK, N.A., represented by Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq., of Wright, Finlay & Zak, LLP, 7785 W. Sahara Avenue, Suite 200, Las Vegas, Nevada 89117;
4. BANK OF AMERICA, N.A., represented by Scott R. Lachman, Esq., of Akerman, LLP, 1635 Village Center Circle, Suite 200, Las Vegas, Nevada 89134;
5. BRECKENRIDGE PROPERTY FUND 2016, LLC, represented by Hutchison & Steffen, PLLC, 10080 W. Alta Drive, Suite 200, Las Vegas, Nevada 89145, and Wedgewood, LLC, 2320 Potosi Street, Suite 130, Las Vegas, Nevada 89146;
6. NEWREZ, LLC, d/b/a SHELLPOINT MORTGAGE SERVICING, LLC, represented by Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq., of Wright, Finlay & Zak, LLP, 7785 W. Sahara Avenue, Suite 200, Las Vegas, Nevada 89117;
7. 1900 CAPITAL TRUST II, by U.S. BANK TRUST NATIONAL ASSOCIATION, represented by Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq., of Wright, Finlay & Zak, LLP, 7785 W. Sahara Avenue, Suite 200, Las Vegas, Nevada 89117; and

8. MCM-2018-NPL2 represented by Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq., of Wright, Finlay & Zak, LLP, 7785 W. Sahara Avenue, Suite 200, Las Vegas, Nevada 89117.

Appellants are informed and believe that the foregoing respective counsels for Respondents are licensed in Nevada.

DISTRICT COURT PROCEEDINGS: The Lincicomes initiated the proceedings before the Third Judicial District Court on November 7, 2018, by filing their Complaint and application for preliminary injunction.

NATURE OF ACTION AND RESULT: In 2007, the Lincicomes purchased their home in Dayton, Nevada. By late 2008, the Lincicomes had fallen behind on their mortgage payments, and in early 2009, the beneficiary of the Deed of Trust at the time, Defendant Bank of America, N.A. (hereinafter “BANA”) recorded a notice of default.

In July of 2009, BANA made an offer to the Lincicomes to modify their 2007 Deed of Trust. The Lincicomes accepted the offer to modify their mortgage and timely submitted the paperwork to BANA on July 31, 2009.

On September 1, 2009, BANA accepted the Lincicomes’ first payment on the modified loan, even though BANA was unable to locate the modification in its system. On October 1, 2009, BANA rejected the Lincicomes’ payment when

BANA's customer service agent again could not find a record of the modification in BANA's system.

Thereafter in May of 2011, without notice to the Lincicomes, BANA recorded the 2009 modification with the Lyon County Recorder's Office. The Lincicomes remained unaware that BANA had found the modification until 2017 when the recorded modification was disclosed at a foreclosure mediation.

Even though it is admitted by all parties to this matter that the modification exists, was recorded, and that it effectively modified the Lincicomes' mortgage, no beneficiary of the deed of trust, or servicer has abided by its terms. BANA, US Bank, and all subsequent beneficiaries of the modified Deed of Trust have failed to implement or provide the Lincicomes with the opportunity to make payment under its terms. The Trustee under the Deed of Trust was informed that the terms of the modified Deed of Trust have not been followed or honored by BANA or any other successor beneficiary under the Deed of Trust.

At a hearing upon the Lincicomes' application for temporary protective order, the District Court determined that the Lincicomes were likely to succeed upon the merits of their claims and were entitled to a preliminary injunction. However, the Lincicomes were unable to post the requisite bond by December 20, 2018.

In spite of the Court's findings, on January 4, 2019, Sables, LLC, conducted the foreclosure sale of the Lincicomes' home and sold the same to Breckenridge Property Fund 2016, LLC.

On May 30, 2019, the District Court entered an Order granting Sables, LLC's application for non-monetary status effectively dismissing Sables from the action.

On December 20, 2019, the Lincicomes were granted leave and filed their Amended Complaint seeking relief for claims of wrongful foreclosure, declaratory relief, quiet title, violation of the Homeowners' Bill of Rights, breach of contract, breach of duty of good faith and fair dealing, slander of title, and attorney's fees as special damages.

On June 23, 2021, the District Court entered its Order Denying Plaintiffs' Motion for Partial Summary Judgment/Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust, US Bank and Fay Servicing, LLC, and its Order on Breckenridge Motion for Summary Judgment.

The Lincicomes are appealing the District Court's May 30, 2019 Order effectively dismissing Sables, LLC, from the action and the District Court's two separate Orders entered June 23, 2021, granting the Defendants' respective motions for summary judgment and deciding all Plaintiffs' claims in Defendants' favor.

PRIOR APPEAL: This case has previously been the subject of an original writ proceeding in the Court of Appeals of the State of Nevada. A Petition for Writ of Mandamus was filed August 1, 2019, as Case No. 79152-COA, and captioned as Albert Ellis Lincicome, Jr. and Vicenta Lincicome, Petitioners, v. Third Judicial District Court of Nevada, in and for the County of Lyon; Honorable Leon Aberasturi, District Court Judge, Respondent and Sables, LLC, Fay Servicing, LLC, Prof-2012 –M4 Legal Title Trust by U.S. Bank, N.A., and Bank of America, N.A., Real Parties in Interest. Additionally, a Petition for Review filed before the Nevada Supreme Court on February 10, 2020, under the same case number and caption.

AFFIRMATION

The undersigned hereby affirms, pursuant to NRS 239B.030, that the foregoing does not contain the social security number of any person, or other personal information as defined by NRS 603A.040.

Respectfully submitted 30th day of July, 2021

MILLWARD LAW, LTD

By: 

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

CERTIFICATE OF SERVICE

I, Ashley Voss, hereby certify that I am an employee of Millward Law Ltd., and that on the 30th day of July, 2021, I deposited for delivery a true and correct copy of the **CASE APPEAL STATEMENT** for service by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in Minden, Nevada, on said date, following ordinary business practices to the following:

Shadd A. Wade, Esq.

Zieve, Brodnax & Steele, LLP
9435 West Russell Road, Suite 120
Las Vegas, Nevada 89148

Ramir M. Hernandez, Esq.
Christopher A. J. Swift, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
(702) 475-7964

Matthew K. Schriever, Esq.
Hutchison & Steffen, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

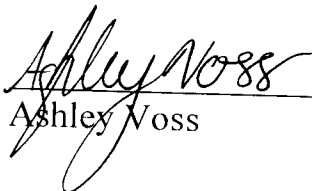
Casey J. Nelson, Esq.
Wedgewood, LLC
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, NV 89146

Darren T. Brenner, Esq.

Scott R. Lachman, Esq.

Akerman, LLP

1635 Village Center Circle, Ste. 200
Las Vegas, Nevada 89134



Ashley Voss

FILED

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TANYA C. BROWN
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

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.

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; 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; MNM-2018-NPL@,
substituted in for DOE 3; and DOES 4-10.

Defendants.


**ORDER REGARDING
PERMANENT WRIT OF
RESTITUTION**

On July 20, 2021, BRECKENRIDGE PROPERTY FUND 2016 filed a Permanent Writ of
Restitution with the Court. No Motion was filed with the Writ. The Court's file does not indicate
whether BRECKENRIDGE PROPERTY FUND 2016 provided notice of the filing to the other Parties

1 in this matter. The Court declines to treat the matter ex parte.

2 Therefore, good cause appearing, **IT IS HEREBY ORDERED** that BRECKENRIDGE
3 PROPERTY FUND 2016 will file a noticed motion requesting the Court to enter the proposed writ.
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5 DATED: This 19th day of August, 2021.
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HON. LEON ABERASTURI
DISTRICT JUDGE
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Certificate of Mailing

I hereby certify that I, Quor 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.
1591 Mono Ave.
Minden, NV 89423

Shadd A. Wade, Esq.
Zieve, Brodnax & Steele, LLP
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Las Vegas, NV 89146

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

DATED: This 19th day of August, 2021.



Employee of Hon. Leon Aberasturi

ORIGINAL

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caseynelson@wedgewood-inc.com

Attorney for Defendant, Counterclaimant, and Cross-Plaintiff
Breckenridge Property Fund 2016, LLC

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

ALBERT ELLIS LINCICOME, JR., and VICENTA
LINCICOME,

Plaintiff,

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 MATTERS.

Case No.: 18-CV-01332
Dept No.: II

**BRECKENRIDGE PROPERTY
FUND 2016'S MOTION FOR
ENTRY OF ORDER GRANTING
PERMANENT WRIT OF
RESTITUTION AND PAYMENT
OF OVERDUE RENTS**

COMES NOW Breckenridge Property Fund 2016, LLC ("Breckenridge"), by and through its
attorneys of record, Hutchison & Steffen, PLLC and hereby submits this motion for entry of an order

1 granting a permanent writ of restitution in favor of Breckenridge and payment of overdue rents pursuant
2 to this Court's summary judgment order. This motion is made and based upon the following points and
3 authorities, the pleadings and papers on file, the attached exhibits, and any oral argument this court may
4 entertain at a hearing on this matter

5 DATED this 8th day of September, 2021.

6 HUTCHISON & STEFFEN, PLLC

7 

8 John T. Steffen (4390)

9 Brenoch R. Wirthlin (10282)

10 Alex R. Velto (14961)

11 HUTCHISON & STEFFEN, PLLC

12 Peccole Professional Park

13 10080 West Alta Drive, Suite 200

14 Las Vegas, NV 89145

15 bwirthlin@hutchlegal.com

16 Casey J. Nelson, Esq. (12259)

17 Wedgewood, LLC

18 Office of the General Counsel

19 2320 Potosi Street, Suite 130

20 Las Vegas, Nevada 89146

21 caseynelson@wedgewood-inc.com

22 *Attorney for Breckenridge Property Fund 2016,*
23 *LLC*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This case pertains to the foreclosure of real property commonly known as 70 Riverside Drive, Dayton, Nevada 89403 ("Subject Property") that took place on or about January 4, 2019 at which time Breckenridge purchased the Subject Property for \$294,000.01.

Albert Ellis Lincicome, Jr. and Vicenta Lincicome ("Plaintiffs") formerly owned the Subject Property. Plaintiffs brought this lawsuit and argue that the foreclosure sale was improperly conducted but they ignore that the evidence uniformly confirms that they were in default and received actual notice of the same. No amount of distraction about the loan documents or issues of prior loan modification can change these facts. There is no dispute that the Plaintiffs were in default at the time of foreclosure and received both the Notice of Default and the Notice of Sale.

Plaintiffs had no viable claims against Breckenridge. The essence of Plaintiffs' Complaint is that the foreclosing lender did not have the ability to foreclose. Plaintiffs conceded that they executed the note and deed of trust and were in default of their loan obligations. Discovery proved that the foreclosure complied with NRS, that the Plaintiffs were in default of the loan obligations and received both the notice of default and the notice of sale.

As a result of the foreclosure sale, Plaintiffs have been divested of any ownership interest in the Subject Property. Consequently, there were no genuine issues of material fact in this case. This Court so found and granted Breckenridge's motion for summary judgment. Breckenridge now seeks an order for a permanent writ of restitution and payment of overdue rents pursuant to this Court's summary judgment order.

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///

II. Statement of Undisputed Facts.

1. On or about May 23, 2007, Plaintiffs executed a Note and Deed of Trust that was secured by the Subject Property. *See Exhibit #1.*

2. Plaintiffs subsequently defaulted on that loan obligation resulting in a Notice of Default and Notice of Sale being recorded against the Subject Property. *See Exhibits #2 and #3.*

3. On November 7, 2018, Plaintiffs filed a complaint for injunctive relief, contractual claims, and declaratory relief regarding the scheduled foreclosure sale of the Subject Property.

4. On November 8, 2018, Plaintiffs recorded a lis pendens on the Property and also filed an Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction.

5. On December 31, 2018, the Court entered an order enjoining the foreclosure on the Subject Property if the Plaintiffs timely posted of a bond in the amount of \$172,610.67 and additional security in the amount of \$2,105.10 per month thereafter.

6. Plaintiffs failed to post the bond and the Subject Property went to foreclosure sale on or about January 4, 2019, at which time Breckenridge purchased the Subject Property at the NRS 107 foreclosure sale for \$294,000.01, relying on the fact that the noticed foreclosure sale was valid because Plaintiff failed to post the requisite bond. *See Exhibit #4.*

7. On January 25, 2019, the Trustees Deed Upon Sale confirming Breckenridge's ownership of the Subject Property was recorded. *See Exhibit #5.*

8. The Plaintiffs were in possession of the Property at the time Breckenridge purchased the Property and have been in possession since that date. On or about January 28, 2019, Breckenridge served a Three-Day Notice to quit to the Plaintiffs ("Three-Day Notice"). *See Exhibit #6.*

9. Notwithstanding the Three-Day Notice, the Plaintiffs have remained in possession of the Subject Property up to and including the present time.

1 10. Breckenridge has made repeated demand on the Plaintiffs to vacate the Subject Property,
2 but Plaintiffs, without cause or reason, have refused to vacate the Subject Property.

3 11. The Plaintiffs continue in possession of the Subject Property notwithstanding the
4 termination of the tenancy by services of the aforesaid Three-Day Notice.

5 12. The Plaintiffs' actions are in violation of NRS § 40.250-255 and Breckenridge is entitled
6 to possession of the Subject Property as prescribed in NRS § 40.290-420.

7 13. On December 20, 2019, Plaintiffs filed their Second Amended Complaint, wherein they
8 brought claims against Breckenridge for Declaratory Relief and Quiet Title.

9 14. Breckenridge subsequently filed a Counterclaim against Plaintiffs through which it
10 claims ownership to the Subject Property, sought to quiet title in its favor, sought other monetary
11 damages, as well as possession of the Property through a claim for writ of restitution ("Restitution
12 Claim").

13 15. In addition, Breckenridge sought payment of "reasonable rents for the period of time
14 from service of the Three-Day Notice until such time as the [Plaintiffs] vacate the Subject Property."
15 See Breckenridge's Counterclaim on file herein, at ¶ 34.

16 16. Because the Plaintiffs remained in possession of the Subject Property even after service
17 of the Three-day Notice, Plaintiffs should be required to pay rent to Breckenridge from February 1,
18 2019, until the date they vacate the Subject Property.

19 17. Ultimately, this Court made a determination granting Breckenridge' counterclaims and
20 denying Plaintiffs' claims. The Plaintiffs have been and continue to reap a windfall by being able to
21 stay in the Subject Property without having to make any payments. To add to that windfall, the
22 Plaintiffs have an incentive to delay final resolution because every month of delay is another month of
23 living rent free.
24
25
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27
28

18. Based on the current rental market, a range of \$2,250.00 - \$2,500.00 is a fair market rental value for the Subject Property. *See Exhibit #7*. That rental range is consistent with the monthly security of \$2,105.10 per month that this court previously ordered to stay foreclosure.¹

19. Plaintiffs have been in the Subject Property from February 1, 2019, to the present, August, 2021, or a total of 31 months, which would equate to rent in the principal amount of not less than \$69,750 - \$77,500.

20. Accordingly, Breckenridge requests this Court issue an order and judgment against the Plaintiffs, in this range (and additional amounts due at this rate by entry of such an order) for rents due to Breckenridge due to the Plaintiffs' continued wrongful possession of the Subject Property.

21. On June 23, 2021, this Court entered its Order on Breckenridge's Motion for Summary Judgment ("MSJ Order") granting Breckenridge summary judgment on its claims against the Plaintiffs.

22. In its MSJ Order this Court made numerous findings of fact and conclusions of law, adopted herein by reference, including but not limited to the findings that Breckenridge purchased the Property at a proper foreclosure sale and is therefore entitled to summary judgment regarding its claims to title of the Property as against Plaintiffs.

III. Law and Argument

A. Based upon this Court's MSJ Order, Breckenridge is entitled to a permanent writ of restitution regarding the Property.

As noted above, on or about January 4, 2019, Breckenridge purchased the Subject Property at the NRS 107 foreclosure sale for \$294,000.01. The Three-Day Notice was served on the Plaintiffs on January 28, 2019. NRS § 40.255(1)(c) provides for removal of a person who holds over and continues in possession of real property after a 3-day written notice to surrender has been served upon the person:

¹ Plaintiffs did not dispute this amount when proffered as part of Breckenridge's motion requesting Plaintiff's post rental payments with the Court.

1 (c) Where the property or mobile home has been sold under a power of sale granted by
2 NRS 107.080 to the trustee of a deed of trust executed by the person, or by another person
3 under whom the person claims, and the title under such sale has been perfected;

4 Nev. Rev. Stat. Ann. § 40.255 (West). Breckenridge is the sole owner of the Property by virtue of
5 purchasing the Property at a valid foreclosure sale conducted pursuant to NRS Chapter 107 on January
6 4, 2019. Service of the Three-Day Notice terminated the Plaintiffs' right to remain in the Property.
7 Despite this, the Plaintiffs refused to vacate the Property within the three days as required by NRS 40.280
8 *et seq.* Rather, the Plaintiffs continued to squat in the Property without Breckenridge's permission or
9 consent. Plaintiffs have paid no rent to Breckenridge during the time they are illegally squatting in the
10 Property. Plaintiffs had no objective basis in law or fact to remain in the Property after foreclosure.
11 Breckenridge was vested with title to the Property and the foreclosure proceeded properly.

12 Plaintiffs' continued occupation of the Property was in clear violation of NRS § 40.255 and
13 Breckenridge is entitled to permanent possession of the Property as prescribed in NRS §§ 40.290 to
14 40.420. Breckenridge, as purchaser of the Property, is entitled to a permanent writ of restitution of the
15 Property.
16

17 **B. Breckenridge is entitled to rental payments during the time Plaintiffs have unjustly**
18 **remained in the Subject Property without making a single rental payment.**

19 "Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good
20 conscience belongs to another. Unjust enrichment is the unjust retention of a benefit to the loss of
21 another." *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 856 (1992); *Nevada Industrial Development v.*
22 *Benedetti*, 103 Nev. 360, 363 (footnote 2) (1987).
23

24 Plaintiffs have been unjustly enriched by being allowed to remain in the Subject Property without
25 paying rent or a mortgage payment since February, 2019. The foreclosure in this matter occurred over
26 two years ago and Plaintiffs were not making payments to their lender prior to that time either. The
27 Plaintiffs are squatting in the Subject Property without Breckenridge's permission. They are aware that
28

1 the Subject Property has been foreclosed. However, Plaintiffs continue to occupy the Subject Property
2 without paying fair market rent to Breckenridge's detriment.

3 NRS 40.385(3) provides, "A tenant who retains possession of the premises that are the subject of
4 the appeal during the pendency of the appeal shall pay to the landlord rent in the amount provided in the
5 underlying contract between the tenant and the landlord as it becomes due." This Court should follow
6 the guidance and rationale of NRS 40.385(3) – which has now been confirmed due to the MSJ Order –
7 and require the Plaintiffs to pay fair market rent for their years' long wrongful occupation of the Subject
8 Property.
9

10 Breckenridge has provided proof that the fair market rental value of the Subject Property is in the
11 range of \$2,250.00 to \$2,500.00. This rental range is consistent with the monthly security of \$2,105.10
12 per month that this Court previously ordered to stay foreclosure.
13

14 **IV. Conclusion.**

15 For all these reasons, Breckenridge respectfully requests that this Court grant its Motion for entry
16 of an order granting Breckenridge a permanent writ of restitution, as well as payment of all overdue rents
17 until the Subject Property is vacated, and to grant such and further relief as the Court deems appropriate.
18

19 Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding
20

21 ///

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23 ///

24 ///

25 ///

26 ///

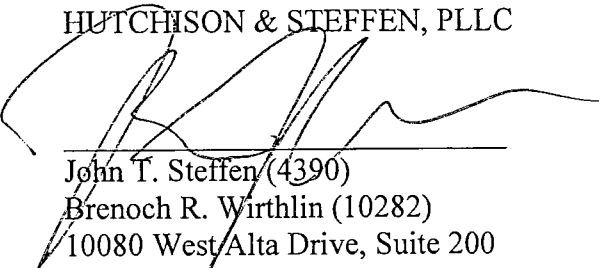
27 ///

28 ///

document filed in this court does not contain the social security number of any person

DATED this 8th day of September, 2021.

HUTCHISON & STEFFEN, PLLC



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Brenoch R. Wirthlin (10282)

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Wedgewood, LLC

Office of the General Counsel

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Las Vegas, Nevada 89146

E-mail: caseynelson@wedgewood-inc.com

Attorneys for Breckenridge Property Fund 2016, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a true and correct copy of the
**BRECKENRIDGE PROPERTY FUND 2016'S MOTION FOR ENTRY OF ORDER GRANTING
PERMANENT WRIT OF RESTITUTION AND PAYMENT OF OVERDUE RENTS** 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

Shadd A. Wade, Esq
ZIEVE BRODNAX & STEEL
9435 W. Russell Road, #120
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Darren T. Brenner, Esq.
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*Attorney for Fay Servicing, LLC and
US Bank Prof-2013-M4 Legal Title Trust*

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

DATED this 8th day of September, 2021.


An Employee of HUTCHISON & STEFFEN

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Assessor's Parcel Number
29-401-17

I hereby affirm that this document
submitted for recording does not
contain a social security number

/s/ LYNDA KLEIN
FUNDER

Recording Requested By
SIERRA PACIFIC MORTGAGE COMPANY, INC
280 BRINKBY STREET, SUITE 100
RENO, NV 89509
775-826-3700

DOC # 407150
05/26/2007 04 34 PM
Official Record

Requested By
STEWART TITLE OF NEVADA
Lyon County - HV
Mary C Milligan, Recorder
Page 1 of 28 Fee \$58.00
Recorded By DLW RPTT



Loan No 0000479436
[Space Above This Line For Recording Data]

DEED OF TRUST

MIN' 1000703-0000479436-5

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 8, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated MAY 23, 2007 together with all Riders to this document.
(B) "Borrower" is VICENTA LINCICOME, A MARRIED WOMAN

Borrower is the trustor under this Security Instrument
(C) "Lender" is SIERRA PACIFIC MORTGAGE COMPANY, INC.

Lender is a CORPORATION organized and existing under the laws of CALIFORNIA
Lender's address is 50 IRON POINT CIRCLE, STE 200, FOLSOM, CA 95630

(D) "Trustee" is GREENHEAD INVESTMENTS, INC., A CALIFORNIA CORPORATION

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(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P O Box 2020, Flint, Michigan 48501-2026, tel (888) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated MAY 23, 2007.

The Note states that Borrower owes Lender

THREE HUNDRED EIGHTY-ONE THOUSAND ONE HUNDRED FIFTY and NO/100 Dollars
(U S \$ 381,150.00) plus interest. Borrower has promised to pay this debt in regular periodic payments and to pay the debt in full not later than JUNE 1, 2037.

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]

- | | | |
|---|---|--|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input checked="" type="checkbox"/> Other(s) [specify] |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider | INTEREST ONLY RIDER |
| <input type="checkbox"/> V A Rider | | |

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for (i) damage to, or destruction of, the Property, (ii) condemnation or other taking of all or any part of the Property, (iii) conveyance in lieu of condemnation, or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

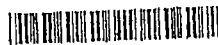
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

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TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY

of

LYON

[Name of Recording Jurisdiction]

[Type of Recording Jurisdiction]

LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A."

which currently has the address of 70 RIVERSIDE DRIVE [Street],
DAYTON [City], Nevada 89403 [Zip Code] ("Property Address")

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash, (b) money order, (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity, or (d) Electronic Funds Transfer. Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payment is insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is

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not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note, (b) principal due under the Note, (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property, (b) leasehold payments or ground rents on the Property, if any, (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items". At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.



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The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement, (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded, or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either (a) a one-time charge for flood zone determination, certification and tracking services, or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts

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All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

Borrower shall give prompt notice to the insurance carrier and Lender if Lender may make claim for the amount of loss. Borrower shall give prompt notice to the insurance carrier and Lender if Lender may make claim for the amount of loss. Borrower shall give prompt notice to the insurance carrier and Lender if Lender may make claim for the amount of loss. Borrower shall give prompt notice to the insurance carrier and Lender if Lender may make claim for the amount of loss.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2. If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and

If the restoration or repair is not completed within the time specified in the order provided for in Section 2, the proceeds shall be applied to the sums secured by this Security Instrument. If any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2. If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6 Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7 Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, neglect, or commit waste on the Property. Whether or not the Property is occupied, Borrower shall maintain the Property in good condition and shall not allow the Property to become a public nuisance or a hazard to the community. Lender may enter the Property at any time for the purpose of inspecting the Property and determining whether the Property is being maintained in good condition and whether the Property is being used as Borrower's principal residence. Lender's entry shall not be unreasonably withheld, and Lender shall not be liable for damages to the Property caused by its entry. If Lender determines that the Property is not being maintained in good condition or is being used for a purpose other than as Borrower's principal residence, Lender may take such action as it deems necessary to protect its interest in the Property, including the right to sell the Property without notice to Borrower.

Borrower's principal residence, which consent shall not be unreasonably withheld, or under the control of Borrower, beyond Borrower's control.

7 Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

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Lender or its agent may make reasonable entries upon and inspections of the Property If it has reasonable cause, Lender may inspect the interior of the improvements on the Property Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause

8 Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence

9 Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property Lender's actions can include, but are not limited to (a) paying any sums secured by a lien which has priority over this Security Instrument, (b) appearing in court, and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the equivalent Mortgage Insurance coverage previously in effect, from an alternate mortgage insurer selected by Lender If substantially the separately designated payments that were due when the insurance coverage ceased to be in effect Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note

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Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage Insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has, if any, with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11 Assignment of Miscellaneous Proceeds, Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

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If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstata as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer") (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument, (b) is not personally obligated to pay the sums secured by this Security Instrument, and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

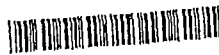
14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit, and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's

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acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action. Borrower might have arising out of such overcharge.

15. Notices All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender, (b) words in the singular shall mean and include the plural and vice versa, and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument, (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate, or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred, (b) cures any default of any other covenants or agreements, (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses.

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in one or more of the following forms, as selected by Lender (a) cash; (b) money order, (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity, or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note, Change of Loan Servicer, Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21 (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials, (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection, (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law, and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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NON-UNIFORM COVENANTS Borrower and Lender further covenant and agree as follows

22 Acceleration; Remedies Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25 Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U S \$ MAXIMUM ALLOWED BY LAW.

NEVADA--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 12 WPF (0101DOCS/DEEDS/CVL/NV_MERS CVL)

Loan No: 0000479436
Form 3029 1/01
(page 12 of 13 pages)

BRECK000042



407150

05/25/2007
013 of 20

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it

Vicenta Lincome (Seal)
VICENTA LINCOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

(Seal)
____ -Borrower

(Seal)
____ -Borrower

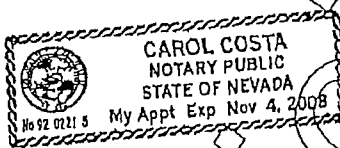
(Seal)
____ -Borrower

Loan No: 0000479436

STATE OF NEVADA, *Carson City*

County ss.

This instrument was acknowledged before me on

May 23 2007, by*Vicenta Lincome*My Commission Expires *11-4-08*

NEVADA-Single Family-Public Mac UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 13 WPR (01010GSDREDS CVL NV MERS CVL)

Form 3029 1/01
(page 13 of 13 pages)

WHEN RECORDED MAIL TO

MIP INSURING DEPARTMENT
SIERRA PACIFIC MORTGAGE COMPANY, INC.
50 IRON POINT CIRCLE, STE 200
FOLSOM, CA 95630
916-932-1700

BRECK000043

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05/25/2007
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ADJUSTABLE RATE RIDER
(1 Year LIBOR Index - Rate Caps)
(Assumable after Initial Period)

THIS ADJUSTABLE RATE RIDER is made this 23rd day of MAY 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure the Borrower's Adjustable Rate Note (the "Note") to SIERRA PACIFIC MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION (the "Lender") of the same date and covering the property described in the Security Instrument and located at RIVERSIDE DRIVE

70 RIVERSIDE DRIVE
DAYTON, NV 89403
(Property Address)

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT THE NOTE LIMITS THE AMOUNT BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows

A. **INTEREST RATE AND MONTHLY PAYMENT CHANGES**
The Note provides for an initial interest rate of 6.875

A. **INTEREST RATE AND MONTHLY PAYMENT CHANGES**
The Note provides for an initial interest rate of 6.875 % The Note provides for changes in the interest rate and the monthly payments, as follows

4 INTEREST RATE AND MONTHLY PAYMENT CHANGES

4 INTEREST RATE AND MONTHLY PAYMENT CHANGES
(A) Change Dates
The Interest rate I will pay may change on the first day of JUNE 2017, and may change on that day every 12th month thereafter. Each date on which my interest rate could change is called a "Change Date"

(B) The Index
Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the one-year London Interbank Offered Rate ("LIBOR") which is the average of interbank offered rates for one-year US

Loan No: 0000479436

Form 5131 3/04
(Page 1 of 4)

MULTISTATE ADJUSTABLE RATE RIDER-1 Year LIBOR BUCK (2000-2001)
DRAW 0304 MOX CVL ARM RIDER \$131 + WFF (P 10PSSHARE0101)DOCSRIDERS/CVLMOXPH5131 ARM)

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dollar-denominated deposits in the London market, as published in *The Wall Street Journal*. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index".

If the Index is no longer available, the Note Holder will choose a new Index which is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding percentage points (2.250 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 11.875 % or less than 2.250 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than TWO percentage points (2.000 %) from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 11.875 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER
1. UNTIL BORROWER'S INITIAL INTEREST RATE CHANGES UNDER THE TERMS STATED IN SECTION A ABOVE, UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT SHALL BE IN EFFECT AS FOLLOWS.

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, (those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER-1 Year LIBOR Index (Assumable after 1P)-Single Family Freddie Mac Uniform Instrument

Form 5131 3/04
(Page 2 of 4)

DRAW 0304 MX/CVL ARM RIDER 5131 2 WFF (P \QFSSHARE\0101\DOCS\RIDERS\CVL\MX\FH5131 ARM)

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Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

2 AFTER MY INITIAL INTEREST RATE CHANGES UNDER THE TERMS STATED IN SECTION 4 ABOVE, UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT DESCRIBED IN SECTION 11(A) ABOVE SHALL THEN CEASE TO BE IN EFFECT, AND UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT SHALL INSTEAD BE DESCRIBED AS FOLLOWS

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee, and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER-1 Year LIBOR Index (Assumable after IP)-Single Family Freddie Mac Uniform Instrument
Form 5131 3/04
(Page 3 of 4)

DRAW 0304 MX CVL ARM RIDER 5131 3 WFF (P:\OPSSHARE\0101\DOCS\RIDERS\CVL\MXCFH5131 ARM)

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05/25/2007
017 of 20

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable
Rate Rider

Vicenta Lincicome (Seal)
VICENTA LINCICOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

[Sign Original Only]

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER, Year LIBOR Index (Assumable after 1P)-Single Family Freddie Mac Uniform Instrument

DRAW 0304 MX CVL ARM RIDER 131 K WFE (P:\OPSSHARE\0101\DOCS\RIDERS\CVL\MXCFH6131 ARM)

Form 5131 3/04
(Page 4 of 4)

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INTEREST-ONLY ADDENDUM TO ADJUSTABLE RATE RIDER

Property Address 70 RIVERSIDE DRIVE
DAYTON, NV 89403

THIS ADDENDUM is made this 23rd day of MAY 2007
and is incorporated into and intended to form a part of the Adjustable Rate Rider (the "Rider") dated the same date
as this Addendum executed by the undersigned and payable to
SIERRA PACIFIC MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION (the "Lender")

THIS ADDENDUM supersedes Section 4(C) of the Rider. None of the other provisions of the Rider are changed
by this Addendum.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding
TWO AND ONE QUARTER percentage points (2.250 %) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

Loan No: 0000479436

INTEREST ONLY ADDENDUM TO ADJUSTABLE RATE RIDER S/I LIBOR ARM - MULTISTATE
DRAW MX C/L ARM IO ADNDM RIDER 1 WFF (0101DOCS\RIDERS\CVL\MXIO_ADN RID)

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(page 1 of 2 pages)

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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider

Vicente Lincicome (Seal)
VICENTA LINCICOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
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____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

[Sign Original Only]

Loan No: 0000479436

INTEREST ONLY ADDENDUM TO ADJUSTABLE RATE RIDER 5/1 LIBOR ARM - MULTISTATE
DRAW MX CVL ARM 10 ADNDM RIDER 2 WFF (01010005RIDERSCVLAMXIO_ADN RID)

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(page 2 of 2 pages)

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EXHIBIT "A"
LEGAL DESCRIPTION

Order No: 06041897-JA

The land referred to herein is situated in the State of Nevada,
County of LYON, described as follows:

LOT 42 AS SHOWN ON THE OFFICIAL MAP OF GOLD CANYON ESTATES,
PHASE 2, FILE IN THE OFFICE OF THE LYON COUNTY, NEVADA RECORDER,
ON OCTOBER 20, 2005, AS DOCUMENT NO. 365687.

EXCEPTING THEREFROM ALL THAT PORTION THEREOF, LYING BELOW THE
NATURAL ORDINARY HIGH WATER LINE OF THE CARSON RIVER.

ASSESSOR'S PARCEL NO. 029-401-17

Unofficial

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EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

APN: 029-401-17

WHEN RECORDED MAIL TO:

Sables, LLC
c/o Zieve Brodnax & Steele
3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169

DOC# 572258
11/03/2017 10:29AM

Official Record

Requested By
SERVICELINK TITLE AGENCY INC.

Lyon County - NV

Dawna L. Warr - Recorder

Page: 1 of 6

Recorded By BKC

Fee: \$288.00
RPT: \$0.00



0572258

TS No.: 16-42397

NOTICE OF BREACH AND DEFAULT AND OF ELECTION TO SELL THE REAL PROPERTY UNDER DEED OF TRUST

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five (5) business day prior to the date set for the sale of your property pursuant to NRS 107.080. No sale date may be set until three months from the date this Notice of Default may be recorded (which date of recordation appears on this notice). This amount is ~~\$265,872.39~~ as of 10/31/2017 and will increase until your account becomes current.

NOTICE IS HEREBY GIVEN THAT: SABLES, LLC, a Nevada limited liability company is either the original trustee, or the duly appointed substituted Trustee, or acting as agent for the Trustee or the Beneficiary under a Deed of Trust dated 6/23/2007, executed by VICENTA LINCICOME, A MARRIED WOMAN, as trustor to secure obligations in favor of Mortgage Electronic Registration Systems, Inc., as nominee for SIERRA PACIFIC MORTGAGE COMPANY, INC. its successors and assigns, as Beneficiary, recorded 5/25/2007, instrument no. 407150 The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 6/4/2011 of Official Records in the office of the County recorder of Lyon, County, Nevada securing, among other obligations including

One note(s) for the Original sum of \$381,150.00, that the beneficial interest under such Deed of Trust and the obligations secured hereby are presently held by Beneficiary; that a breach of and default in the obligations for which such Deed of Trust is security has occurred or that payment has not been made of:

The monthly installment which became due on 9/1/2008, along with late charges, and all subsequent monthly installments.

You are responsible to pay all payments and charges due under the terms and conditions of the loan documents which come due subsequent to the date of this notice, including, but not limited to; foreclosure trustee fees and costs, advances and late charges.

Furthermore, as a condition to bring your account in good standing, you must provide the undersigned with written proof that you are not in default on any senior encumbrance and provide proof of insurance.

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11/03/2017
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T.S. No.: 16-42397

Nothing in this Notice of Default should be construed as a waiver of any fees owing to the beneficiary under the Deed of Trust, pursuant to the terms and provisions of the loan documents.

That by reason thereof the present Beneficiary under such deed of Trust has executed and delivered to said duly appointed Trustee a written Declaration of Default and Demand for Sale and has deposited with said duly appointed Trustee such Deed of Trust and all documents evidencing obligations secured thereby and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

NOTICE

You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the Payment of the amounts required by that statutory section without requiring payment of that portion of principal and interest which would not be due had no default occurred. As to owner-occupied property, where reinstatement is possible, the time to reinstate may be extended to 5 days prior to the date of sale pursuant to NRS 107.080. The Trustor may have the right to bring a court action to assert the nonexistence of a default or any other defense of Trustor to acceleration and Sale.

To determine if reinstatement is possible and the amount, if any, to cure the default, contact:

PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee
c/o Fay Servicing, LLC
c/o SABLES, LLC, a Nevada limited liability company
3753 Howard Hughes Parkway, Suite 200
Las Vegas, NV 89169
Beneficiary Phone: 800-495-7166
Trustee Phone: (702) 664-1774

To reach a person with authority to negotiate a loan modification on behalf of the lender:

Lauren Jowers
800-495-7166

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

If you have any questions, you should contact a lawyer or the governmental agency that may have insured your loan. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

Attached hereto and incorporated herein by reference is the Affidavit of Authority in Support of Notice of Default and Election to Sell pursuant to NRS 107.080.

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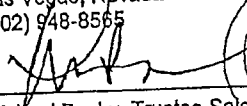
11/03/2017
3 of 6

T.S. No.: 16-42397

You may wish to consult a credit counseling agency to assist you. The Department of Housing and Urban Development (HUD) can provide you with names and addresses of local HUD approved counseling agency by calling their approved Local Housing Counseling Agency toll free number: (800) 669-4287 or you can go to HUD's website: <http://portal.hud.gov>.

Dated: 11/1/2017

SABLES, LLC, a Nevada limited liability company, as Trustee
Sables, LLC
c/o Zieve Brodnax & Steele
3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
(702) 948-8565


Michael Busby, Trustee Sale Officer

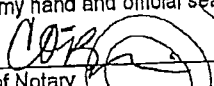
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

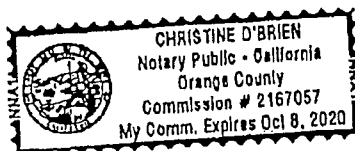
State of CALIFORNIA
County of ORANGE

On 11/1/2017, before me, Christine O'Brien, personally appeared Michael Busby who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.


Signature of Notary



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11/03/2017
4 of 6**Affidavit of Authority**

(Nevada Revised Statute §107.080 as amended effective June 1, 2013)

Re: TS# 16-42397
Borrower Name: VICENTA LINCICOME
Property Address: 70 RIVERSIDE DRIVE
DAYTON, Nevada 89403

I, Veronica Talley, am the Foreclosure Specialist at Pay Servicing, LLC, the current servicer for the beneficiary of the deed of trust described in the notice of default and election to sell to which this affidavit is attached ("Deed of Trust"). The following facts are based upon my personal review of documents that are of public record in the State of Nevada and personal knowledge acquired by my personal review of the business records of the beneficiary, which are within my custody and control. The business records of the beneficiary contain entries made in the ordinary course of business at or about the time the events reflected therein occurred.

- 1(a). The full name and business address of the current trustee of record for the Deed of Trust is Sables LLC, a Nevada Limited Liability Company, 3753 Howard Hughes Parkway, Suite 200, Las Vegas, Nevada 89169
- 1(b). The full name and business address of the current holder of the Note secured by the Deed of Trust is PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee 60 Livingston Ave EP-MN-WS3D St. Paul MN 55107, Attn: Structured Finance Services - PROF.
- 1(c). The full name and business address of the current beneficiary for the obligation or debt secured by the Deed of Trust is PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee 60 Livingston Ave EP-MN-WS3D St. Paul MN 55107, Attn: Structured Finance Services - PROF
- 1(d). The full name and business address of the current servicer for the obligation secured by the Deed of Trust is Pay Servicing, LLC, 440 S. LaSalle St, Suite 2000, Chicago, IL 60605
2. From my review of the documents of public record and the business records of the current beneficiary and a title guaranty or title insurance issued by a title insurer or title agent authorized to do business in this State pursuant to Chapter 692A of the NRS, the name of each assignee and each recorded assignment of the Deed of Trust.
- 2(a). Assignee Name: PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee
Instrument and Recording Information: Assignment of Deed of Trust recorded on 11/25/2016 Instrument No. 544042
- 2(b). Assignee Name: Bank of America, N.A. Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP
Instrument and Recording Information: Corporation Assignment of Deed of Trust recorded on 08/15/2011 Instrument No. 480360
- 2(c). Assignee Name: Bank of America, N.A. Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP
Instrument and Recording Information: Assignment of Mortgage recorded on 11/10/2010 Instrument No 467719
3. The current beneficiary under the Deed of Trust, the successor in interest of the beneficiary or the trustee is in actual or constructive possession of the note secured by the Deed of Trust.

4. From my review of the documents of public record and the business records of the current beneficiary, the current trustee has authority to exercise the power of sale with respect to the property



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5 of 6

encumbered by the Deed of Trust, pursuant to instruction from the current beneficiary of record and current holder of the note secured by the Deed of Trust.

5. From my review of the documents of public record and the business records of the current beneficiary, the beneficiary, servicer of the obligation, or an attorney of the beneficiary or servicer has sent to VICENTA LINCICOME, a written statement of: (I) the amount of payment required to make good the deficiency in performance of payment, avoid the exercise of the power of sale and reinstate the terms and conditions of the underlying obligation or debt existing before the deficiency in performance or payment, as of the date of the statement; (II) the amount in default; (III) the principal amount of the obligation or debt secured by the deed of trust; (IV) the amount of accrued interest and late charges; (V) a good faith estimate of all fees imposed in connection with the power of sale; and (VI) contact information for obtaining the most current amounts due and the local or toll-free telephone number that VICENTA LINCICOME may call to receive the most current amounts due and a recitation of the information in this affidavit.

6. The borrower or obligor of the loan secured by the Deed of Trust may call Pay Servicing, LLC at 800-495-7166 to receive the most current amounts due and a recitation of the information contained in this Affidavit.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct and that this Affidavit was executed on October 5, 2016.

By: Pay Servicing, LLC, its attorney in fact

Veronica Talley

(Print Name)

(Signature)

Foreclosure Specialist IV

(Title)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of Texas

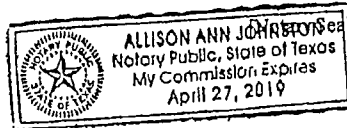
County of Denton

On October 5, 2016 before me, Allison Ann Johnston, Notary Public, personally appeared, Veronica Talley, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature





572258

11/03/2017
6 of 6

Declaration of Mortgage Servicer Pursuant to NR 107.510

T.S. Number: 16-42397
Borrower(s): VICENTA LINCICOME
Mortgage Servicer: Fay Servicing, LLC
Property Address: 70 RIVERSIDE DRIVE
DAYTON, Nevada 89403

The undersigned, as an authorized agent or employee of the mortgage servicer named below, declares that:

1. ☒ The mortgage servicer has contacted the borrower pursuant to NRS 107.510 (2), to assess the borrower's financial situation and to explore options for the borrower to avoid a foreclosure sale. Thirty (30) days, or more, have passed since the initial contact was made.
2. ☐ The mortgage servicer has exercised due diligence to contact the borrower pursuant to NRS 107.510 (5), to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure". Thirty (30) days, or more, have passed since these due diligence efforts were satisfied.
3. ☐ No contact was required by the mortgage servicer because the individual(s) did not meet the definition of "borrower" pursuant to NRS 107.410.
4. ☐ During the preceding annual reporting period, the Lender has foreclosed on 100 or fewer real properties located in this state and therefore, pursuant to NRS 107.460, the provisions of NRS 107.400 to 107.560, inclusive, do not apply.
5. ☐ The loan is not a "residential mortgage loan" as defined in NRS 107.450.

I certify that this declaration is accurate, complete and supported by competent and reliable evidence which the mortgage servicer has reviewed to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information.

Dated: 4-5-2016

By: 

Page 1

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EXHIBIT 3

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Doc #: 587470

10/12/2018 02:27 PM Page: 1 of 2

OFFICIAL RECORD

Requested By: SERVICELINK TITLE AGENCY INC

Lyon County, NV
Dawna L. Warr, Recorder

Fee: \$38.00 RPTT: \$0.00

Recorded By: mkassebaum

APN No.: 029-401-17

[Recording requested by:]

[When recorded mail to:]

Sables LLC
c/o Zieve Brodnax & Steele
9435 West Russell Road, Suite 120
Las Vegas, Nevada 89148

T.S. No. 16-42397

NOTICE OF TRUSTEE'S SALE

YOU ARE IN DEFAULT UNDER A DEED OF TRUST DATED 5/23/2007. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

A public auction sale to the highest bidder for cash, cashier's check drawn on a state or national bank, check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, or savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state will be held by the duly appointed trustee as shown below, of all right, title, and interest conveyed to and now held by the trustee in the hereinafter described property under and pursuant to a Deed of Trust described below. The sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by the Deed of Trust, with interest and late charges thereon, as provided in the note(s), advances, under the terms of the Deed of Trust, interest thereon, fees, charges and expenses of the Trustee for the total amount (at the time of the initial publication of the Notice of Sale) reasonably estimated to be set forth below. The amount may be greater on the day of sale.

TRUSTOR: VICENTA LINCICOME, A MARRIED WOMAN

Duly Appointed Trustee: **Sables LLC**, a Nevada Limited Liability Company
Recorded 5/25/2007, as Instrument No. 407150, The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011 Official Records in the office of the Recorder of Lyon County, Nevada, Described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:

Lot 42 as shown on the official map of **GOLD CANYON ESTATES, PHASE 2**, filed in the office of the Lyon County, Nevada Recorder, on October 20, 2005, as Document No. 365687.

EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Date of Sale: 11/9/2018 at 11:00 AM

BRECK000066

Place of Sale: 31 S. Main Street Yerington, Nevada 89447
Lyon County Courthouse

Estimated Sale Amount: \$666,632.22

Street Address or other common designation of real property: 70 RIVERSIDE DRIVE
DAYTON, Nevada 89403

A.P.N. No.: 029-401-17

The undersigned Trustee disclaims any liability for any incorrectness of the street address or other common designation, if any, shown above. If no street address or other common designation is shown, directions to the location of the property may be obtained by sending a written request to the beneficiary within 10 days of the date of first publication of this Notice of Sale.

Date: 10/11/2018

Sables LLC, a Nevada Limited Liability Company
c/o Zieve Brodnax & Steele
9435 West Russell Road, Suite 120
Las Vegas, NV 89148
Phone: (702) 948-8565
Sale Information: (714) 848-9272 www.elitepostandpub.com
For Non-Automated Sale Information, call: (702) 664-1774

Michael Busby, Trustee Sale Officer

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

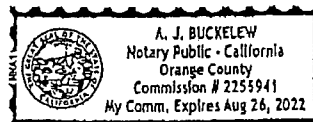
State of CALIFORNIA
County of ORANGE

On 10/11/2018, before me, A.J. Buckelew Notary Public, personally appeared Michael Busby who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

A.J. Buckelew
Signature of Notary



THIS FIRM IS ATTEMPTING TO COLLECT A DEBT AND
ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT PURPOSE.

BRECK000067

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

1 John T. Steffen (4390)
2 Matthew K. Schriever (10745)
3 Alex R. Velto (14961)
4 HUTCHISON & STEFFEN, PLLC
5 10080 West Alta Drive, Suite 200
6 Las Vegas, NV 89145
7 Tel (702) 385-2500
8 Fax (702) 385-2086
9 mschriever@hutchlegal.com

10 Casey J. Nelson, Esq. (12259)
11 Wedgewood, LLC
12 Office of the General Counsel
13 2320 Potosi Street, Suite 130
14 Las Vegas, Nevada 89146
15 Tel (702) 305-9157
16 Fax (310) 730-5967
17 caseynelson@wedgewood-inc.com
18 Attorney for Defendant, Counterclaimant, and Cross-Plaintiff
19 Breckenridge Property Fund 2016, LLC

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

22 ALBERT ELLIS LINCICOME, JR., and
23 VICENTA LINCICOME,

24 Plaintiff,

25 v.

26 SABLES, LLC, a Nevada limited liability
27 company, as Trustee of the Deed of Trust given
28 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 DOBS 1-50.,

Defendants.

AND RELATED MATTERS.

Case No.: 18-CV-01332
Dept No.: II

**DECLARATION IN SUPPORT OF
BRECKENRIDGE PROPERTY FUND 2016
LLC'S MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFF**

1 The undersigned, Jason Campbell declares under penalty of perjury that the following assertions
2 are true:

3 1. I am an authorized agent of Breckenridge Property Fund 2016, LLC ("Breckenridge").

4 2. I am competent to testify to the matters asserted herein, of which I have personal
5 knowledge, except as to those matters stated upon information and belief. As to those matters stated
6 upon information and belief, I believe them to be true. I make this declaration in support of
7 Breckenridge's motion for summary judgment against Plaintiffs.

8 3. On January 4, 2019, Breckenridge purchased real property located at 70 Riverside Drive,
9 Dayton, Nevada 89403 ("Subject Property") at a foreclosure sale conducted pursuant to NRS 107.
10 ("Foreclosure Sale").

11 4. Breckenridge was the highest bidder and paid \$294,000.01 to purchase the Subject
12 Property at the Foreclosure Sale.

13 5. Breckenridge relied on the fact that the noticed Foreclosure Sale was valid because
14 Plaintiffs failed to post the court-ordered bond.

15 6. Breckenridge had no role in this dispute prior to its purchase of the Subject Property at
16 the Foreclosure Sale.

17 7. Breckenridge is entitled to an order quieting title in its favor because there were no defects
18 in the Foreclosure Sale and any rights, title, or interest that Plaintiffs previously had in the Subject
19 Property has been terminated by way of the Foreclosure Sale.

20 8. I declare under penalty of perjury of the laws of the United States and the State of Nevada
21 that these facts are true to the best of my knowledge and belief.

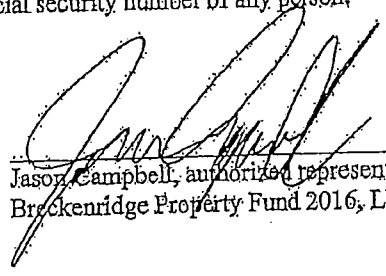
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Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding document filed in this court does not contain the social security number of any person.



Jason Campbell, authorized representative of
Breckenridge Property Fund 2016, LLC

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EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

70 RIVERSIDE DR

A.P.N.: 029-401-17

RECORDING REQUESTED BY:

AND WHEN RECORDED TO:
Breckenridge Property Fund, 2016, LLC
2320 Potosl St, Ste 130
Las Vegas, NV 89146

Forward Tax Statements to
the address given above

Recorded As An Accommodation
Only Without Liability

Doc #: 591393

01/26/2018 08:21 AM Page 1 of 2

OFFICIAL RECORD

Requested By: FIRST AMERICAN TITLE INSURANCE CO

Lyon County, NV
Margie Kassebaum, Recorder

Fee: \$38.00 RPTT: \$1,148.65
Recorded By: Inhumidad

SPACE ABOVE LINE FOR RECORDER'S USE

T.S. # 16-42397

Order #: 160069595-NV-VOO

TRUSTEE'S DEED UPON SALE

Transfer Tax: \$ 1148.65
The Grantee Herein WAS NOT the Foreclosing Beneficiary.
The Amount of the Unpaid Debt was \$671,249.37
The Amount Paid by the Grantee was \$294,000.01
Said Property is in the City of DAYTON, County of Lyon

SABLES, LLC, a Nevada limited liability company, as Trustee, (whereas so designated in the Deed of Trust hereunder more particularly described or as duly appointed Trustee) does hereby GRANT and CONVEY to

Breckenridge Property Fund, 2016, LLC

(herein called Grantee) but without covenant or warranty, expressed or implied, all rights, title and interest conveyed to and now held by it as Trustee under the Deed of Trust in and to the property situated in the county of Lyon, State of Nevada, described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:
Lot 42 as shown on the official map of GOLD CANYON ESTATES, PHASE 2, filed in the office of the Lyon County, Nevada Recorder, on October 20, 2005, as Document No. 365687.
EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

This conveyance is made in compliance with the terms and provisions of the Deed of Trust executed by VICENTA LINCICOME, A MARRIED WOMAN as Trustor, dated 5/23/2007 of the Official Records in the office of the Recorder of Lyon, Nevada under the authority and powers vested in the Trustee designated in the Deed of Trust or as the duly appointed Trustee, default having occurred under the Deed of Trust pursuant to the Notice of Breach and Election to Sell under the Deed of Trust recorded on 5/25/2007, as Instrument No. 407150, The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011, of official records.

BRECK0000025

A.P.N.: 029-401-17

RECORDING REQUESTED BY:

AND WHEN RECORDED TO:
Breckenridge Property Fund, 2016, LLC
2320 Potosi St. Ste 130
Las Vegas, NV 89146

Forward Tax Statements to
the address given above

Recorded As An Accommodation
Only Without Liability

SPACE ABOVE LINE FOR RECORDER'S USE

T.S. # 16-42397

Order #: 160069595-NV-VOO

TRUSTEE'S DEED UPON SALE

Transfer Tax: \$ 1148.55
The Grantee Herein WAS NOT the Foreclosing Beneficiary.
The Amount of the Unpaid Debt was \$671,249.37
The Amount Paid by the Grantee was \$294,000.01
Said Property is in the City of DAYTON, County of Lyon

SABLES, LLC, a Nevada limited liability company, as Trustee, (whereas so designated in the Deed of Trust hereunder more particularly described or as duly appointed Trustee) does hereby GRANT and CONVEY to

Breckenridge Property Fund, 2016, LLC

(herein called Grantee) but without covenant or warranty, expressed or implied, all rights, title and interest conveyed to and now held by it as Trustee under the Deed of Trust in and to the property situated in the county of Lyon, State of Nevada, described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:

Lot 42 as shown on the official map of GOLD CANYON ESTATES, PHASE 2, filed in the office of the Lyon County, Nevada Recorder, on October 20, 2005, as Document No. 365687.

EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

This conveyance is made in compliance with the terms and provisions of the Deed of Trust executed by VICENTA LINCICOME, A MARRIED WOMAN as Trustor, dated 5/23/2007 of the Official Records in the office of the Recorder of Lyon, Nevada under the authority and powers vested in the Trustee designated in the Deed of Trust or as the duly appointed Trustee, default having occurred under the Deed of Trust pursuant to the Notice of Breach and Election to Sell under the Deed of Trust recorded on 5/25/2007, as Instrument No. 407150, The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011, of official records.

BRECK000026

TRUSTEE'S DEED UPON SALE

T.S. #: 16-42397

Order #: 160069595-NV-VOO

Trustee having complied with all applicable statutory requirements of the State of Nevada and performed all duties required by the Deed of Trust including sending a Notice of Breach and Election to Sell within ten days after its recording and a Notice of Sale at least twenty days prior to the Sale Date by certified return receipt mail, postage pre-paid to each person entitled to notice in compliance with Nevada Revised Statutes 107.080.

All requirements per Nevada Statutes regarding the mailing, personal delivery and publication of copies of Notice of Default and Election to Sell under Deed of Trust and Notice of Trustee's Sale, and the posting of copies of Notice of Trustee's Sale have been complied with. Trustee, in compliance with said Notice of Trustee's sale and in exercise of its powers under said Deed of Trust sold said real property at public auction on 1/4/2019. Grantee, being the highest bidder at said sale became the purchaser of said property for the amount bid, being \$ \$294,000.01, in lawful money of the United States, in pro per, receipt there of is hereby acknowledged in full/partial satisfaction of the debt secured by said Deed of Trust.

In witness thereof, SABLES, LLC, a Nevada limited liability company, as Trustee, has this day, caused its name to be hereunto affixed.

Date: 1/15/2019

SABLES, LLC, a Nevada limited liability company

Geoffrey Neal, Trustee Sale Officer

Geoffrey
Neal

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of CALIFORNIA
County of ORANGE

On 1/15/2019 before me, the undersigned, J. Develasco Notary Public, personally appeared Geoffrey Neal who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

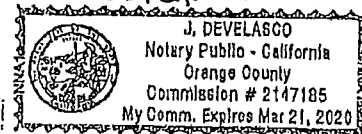
WITNESS my hand and official seal.

Signature

J. Develasco

(Seal)

J. Develasco



BRECK000027

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. Assessor Parcel Number(s)

a) 029-401-17

b)

c)

d)

2. Type of Property:

- | | |
|---|---|
| a) <input type="checkbox"/> Vacant Land | b) <input checked="" type="checkbox"/> Single Fam. Res. |
| c) <input type="checkbox"/> Condo/Townhse | d) <input type="checkbox"/> 2-4 Plex |
| e) <input type="checkbox"/> Apt. Bldg | f) <input type="checkbox"/> Comm'l/Ind'l |
| g) <input type="checkbox"/> Agricultural | h) <input type="checkbox"/> Mobile Home |
| <input type="checkbox"/> Other | |

FOR RECORDER'S OPTIONAL USE ONLY

Book: _____ Page: _____

Date of Recording: _____

Notes: _____

3. a. Total Value/Sales Price of Property

\$ 294,000.01

b. Deed in Lieu of Foreclosure Only (value of property)

\$ 294,000.01

c. Transfer Tax Value:

\$ 1148.56

d. Real Property Transfer Tax Due

4. If Exemption Claimed:

a. Transfer Tax Exemption per NRS 375.090, Section _____

b. Explain Reason for Exemption: _____

5. Partial Interest; Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____

Capacity AGENT

Signature _____

Capacity AGENT

SELLER (GRANTOR) INFORMATION
(REQUIRED)

Print Name: Sables, LLC, a Nevada
limited liability company
Address: 3753 Howard Hughes Parkway,
Suite 200, Las Vegas, NV 89169

BUYER (GRANTEE) INFORMATION
(REQUIRED)

Print Name: Breckenridge Property Fund,
2016, LLC
Address: 2320 Potosi St. Ste 130
Las Vegas, NV 89146

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Print Name: First American Escrow #: ACCU
Address: 1000 W. CHARLES ST
City: LAS VEGAS State: NV Zip: 89102

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

BRECK000028

AA03876

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

THREE-DAY NOTICE TO QUIT

TO: VICENTA LINCICOME
TENANT AND SUBTENANT AND ALL OCCUPANTS
70 RIVERSIDE DR.
DAYTON, NEVADA 89403

Or any occupants of the above-named property or any persons in possession of the above-mentioned property.

PLEASE TAKE NOTICE that the above-described real property has been sold at a foreclosure sale, pursuant to NRS 107 *et seq.*, and VICENTA LINCICOME is no longer the owner of the above-described real property. The new owner is BRECKENRIDGE PROPERTY FUND 2016, LLC.

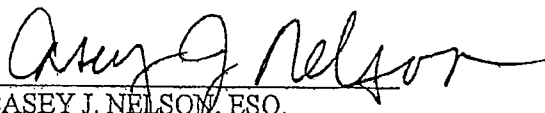
YOU ARE HEREBY NOTIFIED AND DEMAND IS MADE that you surrender possession of the property to the undersigned at or before noon of the third (3) day after receipt of this Notice pursuant to Sections 40.255, 40.280, and 40.290 to 40.420 of the Nevada Revised Statutes.

YOU ARE HEREBY NOTIFIED that if you are a tenant of the prior owner of the Property, you are to refer to the Notice to Tenant which is attached as Exhibit A to this Three-Day Notice to Quit. If you need another copy of the Notice to Tenant, please contact the undersigned below.

UPON YOUR FAILURE TO VACATE OR SURRENDER THE PREMISES AS DEMANDED, the undersigned may apply to the Dayton Township Justice Court or other court of appropriate jurisdiction, for an order from the Court granting BRECKENRIDGE PROPERTY FUND 2016, LLC possession of the property. Upon the Court granting such an order the Court may direct the Sheriff or Constable of the County or City to remove the occupant within twenty-four (24) hours after the receipt of the aforesaid order.

DATED this 25th day of January, 2019.

WEDGEWOOD, LLC


CASEY J. NELSON, ESQ.
Nevada Bar # 12259
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146

*Attorney for Plaintiff
Breckenridge Property Fund 2016, LLC*

EXHIBIT A

EXHIBIT A

NOTICE TO TENANT

TO: VICENTA LINCICOME
TENANT AND SUBTENANT AND ALL OCCUPANTS
70 RIVERSIDE DR.
DAYTON, NEVADA 89403

PLEASE TAKE NOTICE that the above-described real property has been sold at a foreclosure sale, pursuant to NRS 107 *et seq.*, and VICENTA LINCICOME is no longer the owner of the above-described real property. The new owner is BRECKENRIDGE PROPERTY FUND 2016, LLC.

YOU ARE HEREBY NOTIFIED OF A CHANGE OF OWNERSHIP. The new owner of the property is BRECKENRIDGE PROPERTY FUND 2016, LLC, 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146.

YOU MUST CONTACT US AND ESTABLISH YOUR BONA FIDE TENANCY in the property within three (3) business days of receipt of this Notice.

IN ORDER TO ESTABLISH YOUR TENANCY, within three (3) business days of receipt of this Notice you must furnish a copy of your fully executed, current lease or rental agreement and proof of all past payments to Breckenridge Property Fund 2016, c/o the owner's attorney, Casey J. Nelson, Esq., at 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146. Failure to produce valid documentation clearly demonstrating a bona fide tenancy will result in eviction proceedings immediately being brought against all occupants.

A LEASE OR TENANCY shall be considered bona fide only if:

- 1) The mortgagor/prior owner or the child, spouse, or parent of the mortgagor/prior owner under the contract is not the tenant or occupant;
- 2) The lease or tenancy was the result of an arms-length transaction; and
- 3) The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy

The new owner reserves the right to challenge the authenticity and validity of any purported lease or tenancy based upon other terms, conditions, or factors which appear fraudulent or which are not otherwise standard terms within residential leases in the geographic area.

YOU ARE HEREBY NOTIFIED that if you are a bona fide tenant or subtenant in the property, you must still vacate the property within either 1) 90 days of this notice; or 2) upon the expiration of the remainder of the term of your bona fide lease, whichever date is later.


YOU ARE HEREBY NOTIFIED that you must continue to pay rent to the new owner throughout the remainder of your tenancy in order to avoid eviction proceedings being brought against you for non-payment of rent.

Rent shall be remitted to BRECKENRIDGE PROPERTY FUND 2016, LLC at 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146. Your failure to pay rent to the new owner throughout the notice period or comply with any other term of the agreement or applicable law shall constitute a breach of the lease or rental agreement and may result in eviction proceedings.

YOU ARE HEREBY NOTIFIED that upon your failure to timely establish your tenancy or upon your failure to fully vacate or surrender the premises as demanded, the undersigned may apply to the Dayton Township Justice Court or other court of appropriate jurisdiction, for an order from the Court granting BRECKENRIDGE PROPERTY FUND 2016, LLC possession of the property. Upon the Court granting such an order the Court may direct the Sheriff or Constable of the County or City to remove the occupant within twenty-four (24) hours after the receipt of the aforesaid order.

DATED this 25th day of January, 2019.

WEDGEWOOD, LLC


CASEY J. NELSON, ESQ.

Nevada Bar # 12259

Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146

*Attorney for Plaintiff
Breckenridge Property Fund 2016, LLC*

Attorney or Party without Attorney: Wedgewood, LLC Casey J. Nelson, Esq. (SBN 12259) 2320 Potosi Street, Suite 130 Las Vegas, NV 89146 Telephone No: (702) 305-9157 Attorney For: Plaintiff				For Court Use Only	
				Ref. No. or File No.: 70 RIVERSIDE DR.	
Insert name of Court, and Judicial District and Branch Court:					
Plaintiff: BRECKENRIDGE PROPERTY FUND 2016, LLC Defendant: VICENTA LINCICOME; TENANT AND SUBTENANT AND ALL OCCUPANTS					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Dlv:	Case Number:

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the Three-Day Notice to Quit, Notice to Tenant
3. a. Party served: Vicenta Lincicome; Tenant and Subtenant and All Occupants
 b. Person served: Posted
4. Address where the party was served: 70 Riverside Drive, Dayton, NV 89403
5. I served the party:
 - a. By Posting. On: Mon, Jan 28 2019 (2) at: 02:20 PM by posting a copy of the documents in a conspicuous place on the property.
 - b. By Mailing. On: Mon, Jan 28 2019 by mailing a copy of the documents, addressed as shown in Item 4, via Certified Mail Issued by United States Post Office from: Las Vegas, NV.
6. Person Who Served Papers:
 - a. Toni Ruckman (R-052005, Washoe)
 - b. FIRST LEGAL
 2920 N. Green Valley Parkway, Suite 514
 Henderson, NV 89014
 - c. (702) 671-4002
 - d. The Fee for Service was:

Pursuant to NRS 53.045

7. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

01/29/2019

(Date)

Toni L Ruckman

(Signature)



AFFIDAVIT OF
SERVICE

3012509
(55105770)

1520 SOT 2000 DEPT 8102

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DAYTON, NV 89403

Certified Mail Fee	\$3.50
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<input type="checkbox"/> Return Receipt (hardcopy)	\$0.00
<input type="checkbox"/> Return Receipt (electronic)	\$0.00
<input type="checkbox"/> Certified Mail Restricted Delivery	\$0.00
<input type="checkbox"/> Adult Signature Required	\$0.00
<input type="checkbox"/> Adult Signature Restricted Delivery	\$0.00
Postage	\$0.55
Total Postage and Fees	\$6.85

Sent To: **VICENTA LINCICOME**
 Street or: **TENANT/SUBTENANT/ALL OCCUPANTS**
 City, State: **70 RIVERSIDE DR.**
DAYTON, NV 89403-9055

PS Form

OFFICIAL USE
 JAN 28 2019
 55105770

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EXHIBIT PAGE ONLY

EXHIBIT 7

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

1 John T. Steffen (4390)
2 Matthew K. Schriever (10745)
3 HUTCHISON & STEFFEN, PLLC
4 10080 W. Alta Dr., Suite 200
5 Las Vegas, NV 89145
6 Telephone: (702) 385-2500
7 Facsimile: (702) 385-2086
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11 Office of the General Counsel
12 2320 Potosi Street, Suite 130
13 Las Vegas, Nevada 89146
14 Telephone: (702) 305-9157
15 Facsimile: (310) 730-5967
16 caseynelson@wedgewood-inc.com

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

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

21 ALBERT ELLIS LINCICOME, JR., and
22 VICENTA LINCICOME,

23 Plaintiff,

24 v.

25 SABLES, LLC, a Nevada limited liability
26 company, as Trustee of the Deed of Trust
27 given by Vicenta Lincicome and dated
28 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.

Case No.: 18-CV-01332
Dept No.: II

**DECLARATION IN SUPPORT OF
MOTION FOR ORDER REQUIRING
PLAINTIFF TO DEPOSIT RENTAL
AND/OR MORTGAGE PAYMENTS
WITH COURT**

1 AND RELATED ACTIONS
2

3 The undersigned, Jason Campbell declares under penalty of perjury that the
4 following assertions are true:
5

6 1. I am the Director of Regional Operations for Wedgewood, LLC, which is
7 the managing member of Defendant / Counterclaimant Breckenridge Property Fund 2016,
8 LLC ("Breckenridge").

9 2. I am an authorized representative of Breckenridge.

10 3. Breckenridge is a limited liability company authorized to do business in
11 Nevada, that purchases real estate throughout the state of Nevada.
12

13 4. I am competent to testify to the matters asserted herein, of which I have
14 personal knowledge, except as to those matters stated upon information and belief. As to
15 those matters stated upon information and belief, I believe them to be true.
16

17 5. As the Director of Regional Operations for Wedgewood, LLC, the major
18 responsibilities and duties of my position include, among other, the following:

19 a. Daily analysis of upcoming properties scheduled to go to sale in
20 foreclosure;

21 b. Daily analysis of real property market conditions and property valuations;
22

23 c. Area Property Manager oversight, renovation direction, budgeting,
24 approval; and

25 d. Area real estate professional oversight including pricing, offer negotiation,
26 and repair negotiation.
27
28

1 6. Breckenridge purchased the real property located at 70 Riverside Drive,
2 Dayton, Nevada 89403 ("Subject Property") at a foreclosure sale that occurred on January
3 4, 2019.

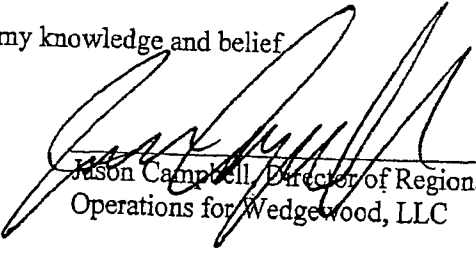
4 7. Breckenridge purchased the Subject Property at the foreclosure sale as an
5 independent, good faith purchaser.
6

7 8. I have reviewed the publicly available information available for the Subject
8 Property and compared that information with online rental availability of other real estate
9 available for rent in Dayton, Nevada and Fernley, Nevada.

10 9. Based on current available rental prices and rentals in those surrounding areas
11 I have determined that a fair market rental value for the Subject Property to be in the
12 \$2,250.00 to \$2,500.00 per month range.
13

14 10. The factors I utilized to determine that fair market rental range in comparing
15 the Subject Property with other properties for rent included year built, square footage,
16 bed/bath count, neighborhood, larger garage size, single story, lot size, availability, and
17 desirability.
18

19 I declare under penalty of perjury of the laws of the United States and the State of
20 Nevada that these facts are true to the best of my knowledge and belief.
21

22
23 
24 Jason Campbell, Director of Regional
25 Operations for Wedgewood, LLC
26
27
28

FILED

2021 SEP 15 AM 9:59

TANYA J. JONES
CLERK OF DISTRICT COURT
THIRD JUDICIAL DISTRICT

Victoria Tovar

Case No: 18-CV-01332

Dept.: II

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

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.)

**PLAINTIFFS' MOTION FOR STAY
PENDING APPEAL**

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.)



PLAINTIFFS' MOTION FOR STAY
PENDING APPEAL

PAGE 1 OF 9

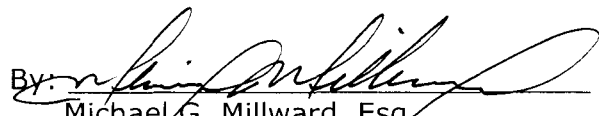
AA03888

1 COME NOW, Plaintiffs ELLIS LINCICOME and VICENTA LINCICOME by and through their
2 attorney, Michael G. Millward, Esq., of Millward Law, Ltd., and Justin M. Clouser, Esq., of Clouser
3 Hempen Wasick Law Group, Ltd., and hereby move this Court for an order staying all
4 proceedings in this matter pending appeal of the *Order Denying Plaintiffs Motion for Partial*
5 *Summary Judgment/Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4*
6 *Legal Trust, US Bank and Fay Servicing, LLC* and the *Order on Breckenridge Motion for*
7 *Summary Judgment*, both entered June 23, 2021.

8 This motion is made pursuant to NRCp 62(d), and is supported by the Memorandum of
9 Points and Authorities attached hereto, the documents previously admitted as evidence in this
10 Court, the supporting Exhibits attached hereto, and the pleadings and papers on file herein.

11 Respectfully submitted 14th day of September, 2021

12 **MILLWARD LAW, LTD.**

13
14 By: 
15 Michael G. Millward, Esq.
16 NSB: 11212
17 Attorney for Petitioner
18 1591 Mono Ave.
19 Minden, NV 89423
20 (775) 600-2776
21
22
23
24
25
26
27
28



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs ELLIS LINCICOME and VICENTA LINCICOME (hereinafter collectively the
4 "Plaintiffs" or the "Lincicomes") seek an order from this Court staying any action on the
5 underlying proceedings until such time as their appeal of this Court's summary judgment orders
6 is resolved.

7 On June 23, 2021, this Court entered its *Order Denying Plaintiffs Motion for Partial*
8 *Summary Judgment/Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4*
9 *Legal Trust, US Bank and Fay Servicing, LLC* and the *Order on Breckenridge Motion for*
10 *Summary Judgment*. On July 19, 2021, Plaintiffs appealed those orders to the Nevada Supreme
11 Court, and the appeal is currently pending.

12 Because the Court's orders which are the subject of the appeal concern the rights and
13 interest the Lincicomes have in their home located at 70 Riverside Drive, Dayton, Nevada
14 (hereinafter the "Property"), and because those interests may be affected by a decision of the
15 Nevada Supreme Court, a stay of the proceeding including an order on the request for Writ of
16 Restitution is necessary and appropriate to prevent serious and irreparable harm.

17 Therefore, the Lincicomes respectfully request that this Court issue a stay of all
18 proceedings pending appeal.

19 **II. A STAY IS APPROPRIATE PENDING APPEAL**

20 **A. Legal Standard.**

21 NRCP 62 (d)(2) provides the Court the authority to enter a stay pending appeal of the
22 district court's order to the Nevada Supreme Court.

23 When determining to issue a stay of proceedings pending appeal, courts are to consider
24 the following:

- 25 (1) whether the object of the appeal or writ petition will be defeated if the
26 stay or injunction is denied;
27 (2) whether the appellant ... will suffer irreparable or serious injury if the
28 stay or injunction is denied;

- 1 (3) whether respondent ... will suffer irreparable or serious injury if the stay
or injunction is granted; and
2 (4) whether appellant/petition is likely to prevail on the merits in the
appeal.
3

4 *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004). As established herein,
5 all of the factors weigh in favor of the issuance of a stay in this action.

6 **B. The object of the appeal will be defeated if the stay is not entered.**

7 The object of Plaintiffs' appeal will be defeated if a stay is not issued. Plaintiffs filed their
8 Second Amended Complaint on December 20, 2019, in order to set aside the Trustee's Deed
9 Upon Sale, recorded on January 25, 2019, to quiet title to the Lincicomes' residence in favor of
10 the Lincicomes, and to determine the parties respective duties and rights, including those under
11 the 2007 Deed of Trust as modified by the 2009 Loan Modification Agreement.

12 If the Court's *Order Denying Plaintiffs Motion for Partial Summary Judgment/Granting*
13 *Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust, US Bank and Fay*
14 *Servicing, LLC* and the Court's *Order on Breckenridge Motion for Summary Judgment* and
15 proceedings herein are not stayed, Plaintiffs will be evicted from their home, which will
16 undoubtedly defeat the primary object of their appeal, which seeks review of this Court's Orders
17 by the Nevada Supreme Court.

18 **C. Plaintiffs will suffer irreparable harm if the stay is not granted.**

19 Plaintiffs will suffer irreparable injury if the stay is denied. Nevada law is clear that the
20 loss of real property constitutes irreparable harm because real property is unique. *See Dixon v.*
21 *Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (1987) (holding that "real property and
22 its attributes are considered unique and loss of real property rights generally results in
23 irreparable harm").

24 The Lincicomes' residence sits in the balance of this Court's decision. This Court's
25 Summary Judgment Orders were decided narrowly on several issues including the validity of
26 actions taken by the Trustee and the beneficiary of the Lincicomes' mortgage loan. The acts of
27 Defendants related to the nonjudicial foreclosure have been the subject matter of this case prior
28 to the foreclosure of the Lincicomes' property.

1 Defendant Breckenridge Property Fund 2016, LLC (hereinafter "Breckenridge") was aware
2 or constructively aware, of the allegations in this case prior to purchasing the property at
3 foreclosure. Breckenridge has admitted that it knew of the issues pertaining to this case prior to
4 its purchase at foreclosure and knew that "Plaintiffs failed to post the court ordered bond," and
5 it chose to purchase the property out of foreclosure anyway. See Declaration in Support of
6 Breckenridge Property Fund 2016, LLC's Motion for Summary Judgment Against Plaintiff
7 attached hereto as **Exhibit 1**.

8 Money damages will be insufficient to replace the Lincicomes' home if they happen to
9 prevail upon any one of their claims that would result in the nullification of the foreclosure.
10 Furthermore, NRS 107.560(4) makes it clear that the validity of the sale is not affected only as
11 to a bona fide purchaser of the property "without notice." See NRS 107.560(4). Breckenridge
12 is not a bona fide purchaser of the property. See Exhibit 1.

13 Breckenridge had notice and therefore the sale of the property, under the alleged
14 violations of the Homeowners Bill of Rights, which the Court found the Lincicomes were likely to
15 prevail upon in its December 31, 2018 Order, remains subject to potential invalidation on
16 appeal.

17 **D. Defendants will not suffer irreparable or serious harm if the stay is**
18 **granted.**

19 The Defendants in this matter, including Breckenridge will not suffer irreparable or
20 serious harm if the stay is granted. With the growth of the value of the housing market, it may
21 be in Breckenridge's best interest not to oust Plaintiffs or proceed with the sale of the property.
22 Notably, Breckenridge purchased the property for \$294,000. At present Zillow.com provides
23 that the property is valued at \$537,500. See Zillow valuation attached as **Exhibit 2**.

24 The fact that Breckenridge may have to wait a little longer to evict the Plaintiffs from
25 their home is not irreparable harm sufficient to deny the requested stay. See *Wisconsin Gas Co.*
26 *v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (holding that "[m]ere injuries, however
27
28

1 substantial, in terms of money, time and energy necessarily expended in the absence of a stay"
2 are not irreparable harm (internal quotations omitted)).

3 **E. Review of Court Orders and Likelihood to Prevail.**

4 The Lincicomes' appeal is not brought in bad faith. I am sure the Court can agree that
5 the law and the facts of this case made it a difficult case to determine by way of summary
6 judgment. Accordingly, without any disrespect to the Court intended, the Lincicomes believe
7 that review of the Court's decision is warranted, especially as to the application of the unique
8 and novel facts and circumstances that arise in this case as applied to the law under Chapter
9 107 of the Nevada Revised Statutes.

10 If the Lincicomes are meritorious on any one of the close issues, such as the claim for
11 wrongful foreclosure or violation of the Homeowners Bill of Rights, the appropriate remedy
12 under Nevada law would be the declaration that the foreclosure sale was void. See NRS
13 107.080(5) or NRS 107.560(4).

14 The Court has admonished the Lincicomes in this case repeatedly that they will not get
15 their home for free. The Lincicomes have never sought such relief and do not seek that relief
16 now. It is appropriate that the Lincicomes be given the opportunity to have the Court's
17 summary judgment decision fully and finally reviewed. If this Court's decision is affirmed, then
18 the Lincicomes will be required to vacate their home and the Defendants in this matter will be
19 able to seek costs as is appropriate.

20 However, if the Court does not stay all pending matters, including Breckenridge's request
21 for writ of restitution, and the Supreme Court reverses this Court's decision on grounds
22 sufficient to declare the foreclosure void under NRS 107.080(5), or under NRS 107.560(4), then
23 the Lincicomes will be irreparably injured and the relief provided under NRS 107.080(5) and
24 NRS 107.560(4) will be unavailable to them.

25 The fact that the Lincicomes did not prevail before this Court does not mean that they will
26 not or cannot prevail before the Nevada Supreme Court. Moreover, when seeking a stay, "a
27 movant does not always have to show a probability of success on the merits," if there is a
28

1 "serious legal question involved" and the "balance of equities weighs heavily in favor of granting
2 the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987 (internal quotations omitted).

3 As set forth above, because denial of stay could result in irreparable harm to the
4 Lincicomes, the Court should find that the balance of equities as well as the applicable relief
5 under Nevada law weighs heavily in favor of granting the stay. Therefore, the Lincicomes
6 respectfully request that this Court stay summary judgment Orders and all proceedings pending
7 appeal.

8 **F. Defendants are Adequately Protected.**

9 Pursuant to NRCP 62 (d)(1), the Court may require a bond be issued when staying a
10 proceeding pending appeal. See, NRCP 62 (d)(1).

11 It is well accepted that the term "may" as used in NRCP 62 is permissive, not mandatory.
12 See, *State ex. rel. Pub Serv. Comm'n v. First Judicial Dist. Court ex. rel. Carson City*, 94 Nev.
13 42, 574 P.2d 272 (1978).

14 "The purpose of security for a stay pending appeal is to protect the judgment creditor's
15 ability to collect the judgment if it is affirmed by preserving the status quo and preventing
16 prejudice to the creditor arising from the stay." *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252,
17 (2005).

18 As to Breckenridge, there is simply no reason to require a bond where, as here, there is
19 no financial award to protect pending appeal and when Breckenridge is overprotected by its
20 interest in the Property. Furthermore, Breckenridge will retain its ability to evict the Plaintiffs
21 from the real property following the appeal if the Court's Orders are affirmed. As to the other
22 Defendants, the Lincicomes' Carson City property located at 2763 Carriage Crest, is not exempt
23 from execution and would be subject to any judgment lien recorded against it.

24 Therefore, Plaintiffs respectfully request that this Court issue a stay of all proceedings.

25 Alternately, Plaintiffs request that this Court enter an order allowing them to post their
26 interest in the real property located at 2763 Carriage Crest Drive, Carson City, Nevada, as
27 security to be subject to judgment as the Court determines appropriate upon remand.
28

1 Generally, the party seeking a stay is required to post a bond "that will permit full
2 satisfaction of the judgment." *McCulloch v. Jeakins*, 99 Nev. 122, 123, 659 P.2d 302, 303
3 (1983); *see also* *NRCP 62 (d)*; *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005)
4 (holding that "alternate security" can be substituted for a bond).

5 "A district court, in its discretion, may provide for a bond in a lesser amount, or may
6 permit security other than a bond, when unusual circumstances exist and so warrant. *Id.*; *see*
7 *also Athridge v. Iglesias*, 464 F. Supp. 2d 19, 24 (D.D.C. 2006) (holding that "courts have
8 discretion to approve other forms of security than a supersedeas bond").

9 To determine whether to accept alternate security, this Court considers:

- 10 (1) the complexity of the collection process;
- 11 (2) the amount of time required to obtain a judgment after it is affirmed on
12 appeal;
- 13 (3) the degree of confidence that the district court has in the ability of
14 funds to pay the judgment;
- 15 (4) whether the defendant's ability to pay the judgment is so plain that the
16 cost of a bond would be a waste of money; and
- 17 (5) whether the defendant is in such a precarious financial position that the
18 requirement to post a bond would place other creditors of the defendant in
19 an insecure position.

20 *Nelson*, 121 Nev. at 836, 122 P.3d at 1254 (internal quotations omitted). Again, these factors
21 all weigh in favor of accepting the Lincicomes' Property as security for the stay.

22 First, allowing the real property listed above to be security for the stay will not complicate
23 the collection process since the collection process would simply be allowing judgment to be
24 recorded against the Property.

25 Second, if the Lincicomes lose on appeal, the stay will end promptly upon remand, and
26 Breckenridge will be free to seek possession of 70 Riverside Drive in Dayton, and judgment may
27 be entered against the Lincicomes' Carson City property for payment of any awarded costs.

28 **V. CONCLUSION**

For the reasons stated above, Plaintiffs respectfully request a stay pending appeal be
issued until the Nevada Supreme Court has determined the issues on appeal. Further, Plaintiffs

1 respectfully request that no bond be required, or in the alternative their real property located in
2 Carson City serve as adequate security.

3 **AFFIRMATION**

4 The undersigned hereby affirms pursuant to NRS 239B.03 that the foregoing does not
5 contain the social security number of any person or other personal information as defined by
6 NRS 603A.040.

7 Dated this 14th day of September, 2021.

8
9 MILLWARD LAW, LTD

10 By: 

11 Michael G. Millward, Esq.

12 NSB# 11212

13 Attorney for Plaintiffs
14
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INDEX TO EXHIBITS

Exhibit 1	Declaration in Support of Breckenridge Property Fund 2016 LLC's Motion for Summary Judgment Against Plaintiff	3 pages
Exhibit 2	Zillow Valuation for 70 Riverside Drive, Dayton, Nevada	1 page

Exhibit 1

1 John T. Steffen (4390)
2 Matthew K. Schriever (10745)
3 Alex R. Velto (14961)
4 HUTCHISON & STEFFEN, PLLC
5 10080 West Alta Drive, Suite 200
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9 mschriever@hutchlegal.com

7 Casey J. Nelson, Esq. (12259)
8 Wedgewood, LLC
9 Office of the General Counsel
10 2320 Potosi Street, Suite 130
11 Las Vegas, Nevada 89146
12 Tel (702) 305-9157
13 Fax (310) 730-5967
14 caseynelson@wedgewood-inc.com
15 *Attorney for Defendant, Counterclaimant, and Cross-Plaintiff*
16 *Breckenridge Property Fund 2016, LLC*

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

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

16 Plaintiff,

17 v.

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; FAY
21 SERVICING, LLC, a Delaware limited liability
22 company and subsidiary of Fay Financial, LLC;
23 PROF-2013-MF LEGAL TITLE TRUST by U.S.
24 BANK, N.A., as Legal Title Trustee; for BANK
25 OF AMERICA, N.A.; BRECKENRIDGE
26 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.,

27 Defendants.

28 AND RELATED MATTERS.

Case No.: 18-CV-01332
Dept No.: II

**DECLARATION IN SUPPORT OF
BRECKENRIDGE PROPERTY FUND 2016
LLC'S MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFF**

1 The undersigned, Jason Campbell declares under penalty of perjury that the following assertions
2 are true:

3 1. I am an authorized agent of Breckenridge Property Fund 2016, LLC ("Breckenridge").

4 2. I am competent to testify to the matters asserted herein, of which I have personal
5 knowledge, except as to those matters stated upon information and belief. As to those matters stated
6 upon information and belief, I believe them to be true. I make this declaration in support of
7 Breckenridge's motion for summary judgment against Plaintiffs.
8

9 3. On January 4, 2019, Breckenridge purchased real property located at 70 Riverside Drive,
10 Dayton, Nevada 89403 ("Subject Property") at a foreclosure sale conducted pursuant to NRS 107.
11 ("Foreclosure Sale").

12 4. Breckenridge was the highest bidder and paid \$294,000.01 to purchase the Subject
13 Property at the Foreclosure Sale.
14

15 5. Breckenridge relied on the fact that the noticed Foreclosure Sale was valid because
16 Plaintiffs failed to post the court-ordered bond.

17 6. Breckenridge had no role in this dispute prior to its purchase of the Subject Property at
18 the Foreclosure Sale.
19

20 7. Breckenridge is entitled to an order quieting title in its favor because there were no defects
21 in the Foreclosure Sale and any rights, title, or interest that Plaintiffs previously had in the Subject
22 Property has been terminated by way of the Foreclosure Sale

23 8. I declare under penalty of perjury of the laws of the United States and the State of Nevada
24 that these facts are true to the best of my knowledge and belief.
25

26 ///

27 ///

28 ///

Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding document filed in this court does not contain the social security number of any person.

Jason Campbell, authorized representative of
Breckenridge Property Fund 2016, LLC

Exhibit 2



< Back to Your homes

SC 11

70 Riverside Dr
Dayton, NV 89403

Public View

Estimated: \$537,500

4 Beds • 2.5 Bath • 2,460 Sq. Ft.



EDIT FACTS



LIST HOME ▾



MORE ▾



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Zestimate

\$537,500



Zestimate range

\$495,000 - \$581,000

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Case No: 18-CV-01332

Dept.: II

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

Bayley Baptist

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.)

**OPPOSITION TO BRECKENRIDGE
PROPERTY FUND 2016'S MOTION
FOR ENTRY OF ORDER GRANTING
PERMANENT WRIT OF RESTITUTION
AND PAYMENT OF OVERDUE RENTS**

OPPOSITION TO MOTION FOR ENTRY
OF ORDER GRANTING PERMANENT
WRIT OF RESTITUTION

PAGE 1 OF 2

AA03904

1 COME NOW, Plaintiffs ELLIS LINCICOME and VICENTA LINCICOME by and through their
2 attorneys, Michael G. Millward, Esq., of Millward Law, Ltd., and Justin M. Clouser, Esq., of
3 Clouser Hempen Wasick Law Group, Ltd., and hereby submit their *Opposition to Breckenridge*
4 *Property Fund 2016's Motion for Entry of Order Granting Permanent Writ of Restitution and*
5 *Payment of Overdue Rents* (hereinafter "Opposition").

6 This Opposition is supported by and based upon *Plaintiffs' Motion for Stay Pending Appeal*
7 filed on September 15, 2021, which was filed in response to *Breckenridge Property Fund 2016's*
8 *Motion for Entry of Order Granting Permanent Writ of Restitution and Payment of Overdue Rents*
9 filed on or about September 8, 2021. *Plaintiffs' Motion for Stay Pending Appeal* is incorporated
10 herein by this reference as Plaintiffs' Opposition. This Opposition is additionally supported by
11 the documents previously admitted as evidence in this Court, and the pleadings and papers on
12 file herein.

13 Respectfully submitted 20th day of September, 2021

14 **MILLWARD LAW, LTD.**

15
16 By: 

Michael G. Millward, Esq.

NSB: 11212

Attorney for Petitioner

1591 Mono Ave.

Minden, NV 89423

(775) 600-2776

ORIGINAL

FILED

2021 OCT -1 AM 11:25

TANYA SOENNE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Lindsey McElreath

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Attorney for Defendant, Counterclaimant, and Cross-Plaintiff
Breckenridge Property Fund 2016, LLC

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

ALBERT ELLIS LINCICOME, JR., and
VICENTA LINCICOME,

Plaintiff,

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 MATTERS.

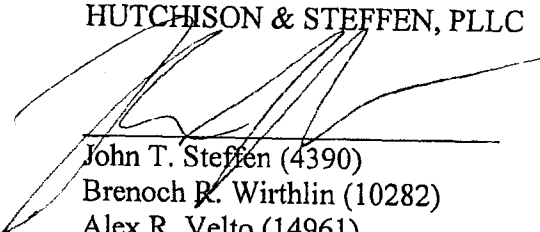
Case No.: 18-CV-01332
Dept No.: II

**DEFENDANT BRECKENRIDGE
PROPERTY FUND 2016, LLC'S
OPPOSITION TO PLAINTIFFS' MOTION
TO STAY PENDING APPEAL**

1 COMES NOW Breckenridge Property Fund 2016, LLC ("Breckenridge"), by and through its
2 attorneys of record, Hutchison & Steffen, PLLC and hereby submits this opposition to Plaintiffs' Motion
3 for Stay Pending Appeal ("Stay Motion"). This opposition is made and based upon the following points
4 and authorities, the pleadings and papers on file, the attached affidavits and exhibits, and any oral
5 argument this court may entertain.
6

7 DATED this 30th day of September, 2021.

8 HUTCHISON & STEFFEN, PLLC

9
10 
11 John T. Steffen (4390)

Brenoch R. Wirthlin (10282)

Alex R. Velto (14961)

HUTCHISON & STEFFEN, PLLC

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16 Casey J. Nelson, Esq. (12259)

Wedgewood, LLC

Office of the General Counsel

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Las Vegas, Nevada 89146

caseynelson@wedgewood-inc.com

19 *Attorney for Defendant, Counterclaimant, and*
20 *Cross-Plaintiff Breckenridge Property Fund 2016,*
21 *LLC*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As this Court is well aware, this case pertains to the foreclosure of real property commonly known as 70 Riverside Drive, Dayton, Nevada 89403 ("Subject Property") that took place on or about January 4, 2019 at which time Breckenridge purchased the Subject Property. Since that time the Plaintiffs Albert Ellis Lincicome, Jr. and Vicenta Lincicome ("Plaintiffs") have wrongfully been in possession of the Subject Property without making a single rental payment to Breckenridge, the rightful owner of the Subject Property. Ironically, the Plaintiffs recognize in this Stay Motion that this Court has correctly admonished them several times that they will not get their home for free. *See* Stay Motion at p. 6. Plaintiffs state that they are not seeking that relief (*id.*) but then proceed to argue throughout the entirety of their Stay Motion that they should receive exactly that: continued wrongful possession of the Subject Property – which they do not own – for free, to the detriment of Breckenridge.

Further, this Court has granted Breckenridge summary judgment on its claims and against Plaintiffs on their claims. Plaintiffs then continued to manipulate the Court system by filing an appeal which appears to lack any good faith basis and which will likely be dismissed. Not only that, Plaintiffs continue to request that this Court permit them to remain squatting in the Subject Property, paying no rent, and continuing to violate Breckenridge's rights with no consequences whatsoever. Given the current situation, there is no good faith basis for the Plaintiffs to continue – for years now – their ongoing violation of Breckenridge's rights through a stay pending their appeal.¹ Accordingly, Breckenridge respectfully requests that this Court deny the Plaintiffs' Stay Motion in its entirety.

¹ In addition, Breckenridge has filed a Motion for Entry of Order Granting Permanent Writ of Restitution and Payment of Overdue Rents which is set to be heard by this Court on October 13, 2021.

1 II. STATEMENT OF FACTS

2 1. On or about May 23, 2007, Plaintiffs executed a Note and Deed of Trust that was secured
3 by the Subject Property. *See Exhibit #1.*

4 2. Plaintiffs subsequently defaulted on that loan obligation resulting in a Notice of Default
5 and Notice of Sale being recorded against the Subject Property. *See Exhibits #2 and #3.*

6 3. On November 7, 2018, Plaintiffs filed a complaint for injunctive relief, contractual
7 claims, and declaratory relief regarding the scheduled foreclosure sale of the Subject Property.

8 4. On November 8, 2018, Plaintiffs recorded a lis pendens on the Property and also filed
9 an Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction.
10

11 5. On December 31, 2018, the Court entered an order enjoining the foreclosure on the
12 Subject Property if the Plaintiffs timely posted of a bond in the amount of \$172,610.67 and additional
13 security in the amount of \$2,105.10 per month thereafter.
14

15 6. Plaintiffs failed to post the bond and the Subject Property went to foreclosure sale on or
16 about January 4, 2019, at which time Breckenridge purchased the Subject Property at the NRS 107
17 foreclosure sale for \$294,000.01, relying on the fact that the noticed foreclosure sale was valid because
18 Plaintiff failed to post the requisite bond. *See Exhibit #4.*
19

20 7. On January 25, 2019, the Trustees Deed Upon Sale confirming Breckenridge's
21 ownership of the Subject Property was recorded. *See Exhibit #5.*

22 8. The Plaintiffs were in possession of the Property at the time Breckenridge purchased the
23 Property and have been in possession since that date. On or about January 28, 2019, Breckenridge
24 served a Three-Day Notice to quit to the Plaintiffs ("Three-Day Notice"). *See Exhibit #6.*
25

26 9. Notwithstanding the Three-Day Notice, the Plaintiffs have remained in possession of
27 the Subject Property up to and including the present time.
28

1 10. Breckenridge has made repeated demand on the Plaintiffs to vacate the Subject Property,
2 but Plaintiffs, without cause or reason, have refused to vacate the Subject Property.

3 11. The Plaintiffs continue in possession of the Subject Property notwithstanding the
4 termination of the tenancy by services of the aforesaid Three-Day Notice.

5 12. The Plaintiffs' actions are in violation of NRS § 40.250-255 and Breckenridge is entitled
6 to possession of the Subject Property as prescribed in NRS § 40.290-420.

7 13. On December 20, 2019, Plaintiffs filed their Second Amended Complaint, wherein they
8 brought claims against Breckenridge for Declaratory Relief and Quiet Title.

9 14. Breckenridge subsequently filed a Counterclaim against Plaintiffs through which it
10 claims ownership to the Subject Property, sought to quiet title in its favor, sought other monetary
11 damages, as well as possession of the Property through a claim for writ of restitution ("Restitution
12 Claim").

13 15. In addition, Breckenridge sought payment of "reasonable rents for the period of time
14 from service of the Three-Day Notice until such time as the [Plaintiffs] vacate the Subject Property."
15 See Breckenridge's Counterclaim on file herein, at ¶ 34.

16 16. Because the Plaintiffs remained in possession of the Subject Property even after service
17 of the Three-day Notice, Plaintiffs should be required to pay rent to Breckenridge from February 1,
18 2019, until the date they vacate the Subject Property.

19 17. Ultimately, this Court made a determination granting Breckenridge' counterclaims and
20 denying Plaintiffs' claims. The Plaintiffs have been and continue to reap a windfall by being able to
21 stay in the Subject Property without having to make any payments. To add to that windfall, the
22 Plaintiffs have an incentive to delay final resolution because every month of delay is another month of
23 living rent free.
24
25
26
27
28

18. Based on the current rental market, a range of \$2,250.00 - \$2,500.00 is a fair market rental value for the Subject Property. *See Exhibit #7*. That rental range is consistent with the monthly security of \$2,105.10 per month that this court previously ordered to stay foreclosure.²

19. Plaintiffs have been in the Subject Property from February 1, 2019, to the present, August, 2021, or a total of 31 months, which would equate to rent in the principal amount of not less than \$69,750 - \$77,500.

20. Accordingly, Breckenridge requests this Court issue an order and judgment against the Plaintiffs, in this range (and additional amounts due at this rate by entry of such an order) for rents due to Breckenridge due to the Plaintiffs' continued wrongful possession of the Subject Property.

21. On June 23, 2021, this Court entered its Order on Breckenridge's Motion for Summary Judgment ("MSJ Order") granting Breckenridge summary judgment on its claims against the Plaintiffs.

22. In its MSJ Order this Court made numerous findings of fact and conclusions of law, adopted herein by reference, including but not limited to the findings that Breckenridge purchased the Property at a proper foreclosure sale and is therefore entitled to summary judgment regarding its claims to title of the Property as against Plaintiffs.

III. LAW AND ARGUMENT

A. PLAINTIFFS' APPEAL IS MERITLESS. THEY SHOULD NOT BE PERMITTED TO CONTINUE TO UNLAWFULLY SQUAT IN THE SUBJECT PROPERTY, RENT FREE, DURING THE PENDENCY OF THEIR BASELESS APPEAL.

Plaintiffs' appeal lacks merit since, among other reasons, it is not an appeal from a final judgment. There has been no determination as to the rents owed Breckenridge, and additional issues remain pending which prevent the Plaintiffs' appeal from being heard at this time. Breckenridge

² Plaintiffs did not dispute this amount when proffered as part of Breckenridge's motion requesting Plaintiff's post rental payments with the Court.

1 intends to file a motion addressing this now that the settlement program was clearly a delay tactic.
2 Breckenridge will not go into specific details as to amounts or number but suffice it to say the Plaintiffs
3 did not participate in settlement negotiations in good faith and their request to enter the settlement
4 program appears to have merely been a bad faith tactic to continue to drag this out improperly.

5 Further, the Plaintiffs' motive for improper delay is transparent. As noted above, on or about
6 January 4, 2019, Breckenridge purchased the Subject Property at the NRS 107 foreclosure sale for
7 \$294,000.01. The Three-Day Notice was served on the Plaintiffs on January 28, 2019. NRS §
8 40.255(1)(c) provides for removal of a person who holds over and continues in possession of real
9 property after a 3-day written notice to surrender has been served upon the person:
10

11
12 (c) Where the property or mobile home has been sold under a power of sale granted by
13 NRS 107.080 to the trustee of a deed of trust executed by the person, or by another person
14 under whom the person claims, and the title under such sale has been perfected;

15 Nev. Rev. Stat. Ann. § 40.255 (West). Breckenridge is the sole owner of the Property by virtue of
16 purchasing the Property at a valid foreclosure sale conducted pursuant to NRS Chapter 107 on January
17 4, 2019. Service of the Three-Day Notice terminated the Plaintiffs' right to remain in the Property.
18 Despite this, the Plaintiffs refused to vacate the Property within the three days as required by NRS 40.280
19 *et seq.* Rather, the Plaintiffs continued to squat in the Property without Breckenridge's permission or
20 consent. Plaintiffs have paid no rent to Breckenridge during the time they are illegally squatting in the
21 Property. Plaintiffs had no objective basis in law or fact to remain in the Property after foreclosure.
22 Breckenridge was vested with title to the Property and the foreclosure proceeded properly.
23

24 Plaintiffs' continued occupation of the Property was in clear violation of NRS § 40.255.
25 Plaintiffs' Stay Motion is merely the next step in a continued pattern of requested delay and vexatious
26 litigation. Therefore, Breckenridge requests that the Stay Motion be denied.

27 ///

28 ///

1 B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM WITHOUT A STAY ANY MORE THAN
2 BRECKENRIDGE WILL SUFFER IRREPARABLE HARM IF A STAY IS GRANTED. EITHER
3 WAY, THIS FACTOR IS NEUTRAL. MOREOVER, THE OBJECT OF THE APPEAL WILL NOT BE
4 DEFEATED IF THE STAY MOTION IS DENIED.

5 Plaintiffs fail to mention that their requested relief continues to harm Breckenridge, who has now
6 been without possession of its Subject Property or even a single rental payment from Plaintiffs despite
7 their improper and unjust possession of the Subject Property, from the time it was purchased by
8 Breckenridge. "Unjust enrichment occurs whenever a person has and retains a benefit which in equity
9 and good conscience belongs to another. Unjust enrichment is the unjust retention of a benefit to the loss
10 of another." *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 856 (1992); *Nevada Industrial Development v.*
11 *Benedetti*, 103 Nev. 360, 363 (footnote 2) (1987).

12 Plaintiffs have been unjustly enriched by being allowed to remain in the Subject Property without
13 paying rent or a mortgage payment since February, 2019. The foreclosure in this matter occurred over
14 two and a half years ago and Plaintiffs were not making payments to their lender prior to that time either.
15 The Plaintiffs are squatting in the Subject Property without Breckenridge's permission. They are aware
16 that the Subject Property has been foreclosed. However, Plaintiffs continue to occupy the Subject
17 Property without paying fair market rent to Breckenridge's detriment.

18 Moreover, the object of the appeal will not be defeated by denial of the Stay Motion. If the
19 Plaintiffs prevail – and if their improper appeal survives a motion to dismiss – they will be able to seek
20 the relief they deem appropriate. The harm suffered by Breckenridge with a stay is at least equal to any
21 by Plaintiffs if a stay was not granted. At this point, there is no basis to reasonably conclude the Plaintiffs'
22 appeal will succeed, and in the interim, Breckenridge's right to possess the Subject Property and be paid
23 fairly for rent are being egregiously violated by Plaintiffs' improper and unreasonable delays.
24 Accordingly, these factors strongly favor denial of the Stay Motion.

1 C. WHILE PLAINTIFFS' STAY MOTION SHOULD BE DENIED IN ITS ENTIRETY, AT A MINIMUM
2 A BOND IN THE FULL AMOUNT OF THE APPROPRIATE JUDGMENT SHOULD BE REQUIRED.

3 In their Stay Motion, Plaintiffs correctly note that a party seeking a stay is required to post a bond
4 "that will permit full satisfaction of the judgment." NRCP 62(d); *McCulloch v. Jeakins*, 99 Nev. 122,
5 123, 659 P.2d 302, 303 (1983). However, Plaintiffs then unreasonably state that their continued wrongful
6 possession of the Subject Property during the pendency of their meritless appeal should be permitted with
7 no bond whatsoever. This is wholly improper, and also underscores the jurisdictional defects in the
8 Plaintiffs' appeal as the amounts owed by them for their improper failure to pay rents has not yet been
9 decided and is the subject of a pending motion by Breckenridge. Regardless, there is no basis to require
10 anything less than the full amount of a bond as required under Nevada law.
11

12 Further, while the property values may have increased recently, there is no guarantee that they
13 will not decrease, and often do so rapidly. Breckenridge has no protection from this likely event
14 happening and the longer Plaintiffs are allowed to delay the inevitable upholding of this Court's decisions
15 the more harm they will cause to Breckenridge. Accordingly, while the Stay Motion should be denied,
16 in the event that it is not the Plaintiffs should be required to post a bond in the full amount of the Subject
17 Property that they are wrongfully preventing Breckenridge from possessing, despite the Plaintiffs' lack
18 of any ownership interest in the Subject Property.
19

20 V. CONCLUSION
21

22 For all these reasons, Breckenridge respectfully requests that this Court deny the Plaintiffs' Stay
23 Motion in its entirety, and grant such other and further relief as the Court deems appropriate.

24 Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding
25
26
27
28

///

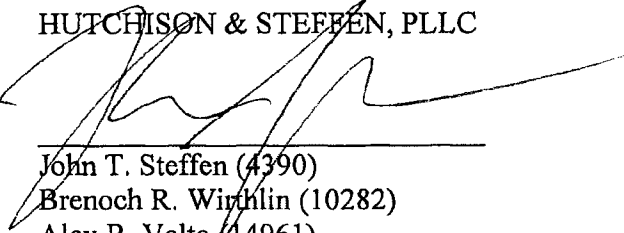
///

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1 document filed in this court does not contain the social security number of any person

2 DATED this 30th day of September, 2021.

3 HUTCHISON & STEFFEN, PLLC

4 
5 _____
6 John T. Steffen (4390)
7 Brenoch R. Wirthlin (10282)
8 Alex R. Velto (14961)
9 10080 West Alta Drive, Suite 200
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11 mschriever@hutchlegal.com

12 Wedgewood, LLC
13 Office of the General Counsel
14 Casey J. Nelson, Esq. (12259)
15 2320 Potosi Street, Suite 130
16 Las Vegas, Nevada 89146
17 E-mail: caseynelson@wedgewood-inc.com

18 *Attorneys for Defendant*
19 *Breckenridge Property Fund 2016 LLC*
20
21
22
23
24
25
26
27
28

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 **DEFENDANT BRECKENRIDGE PROPERTY FUND 2016, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO STAY PENDING APPEAL** 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 Plaintiffs

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

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

DATED this 30th day of September, 2021.


An Employee of HUTCHISON & STEFFEN

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Assessor's Parcel Number:
29-401-17

I hereby affirm that this document
submitted for recording does not
contain a social security number

/s/ LYNDA KLEIN
FUNDER

Recording Requested By
SIERRA PACIFIC MORTGAGE COMPANY, INC
280 BRINKEY STREET, SUITE 100
RENO, NV 89509
775-826-3700

DOC # 407150
05/25/2007 04:34 PM
Official Record

Requested By
STEWART TITLE OF NEVADA
Lyon County - NV
Mary C. Milligan, Recorder
Page 1 of 20 Fee \$55.00
Recorded By DLW RPTT



0407150

Loan No 0000479436

Space Above This Line For Recording Data

DEED OF TRUST

MIN 1000703-0000479436-5

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 8, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated MAY 23, 2007
(together with all Riders to this document)

(B) "Borrower" is VICENTA LINCICOME, A MARRIED WOMAN

Borrower is the trustor under this Security Instrument

(C) "Lender" is SIERRA PACIFIC MORTGAGE COMPANY, INC.

Lender is a CORPORATION organized and existing under the laws of CALIFORNIA
Lender's address is 50 IRON POINT CIRCLE, STE 200, FOLSOM, CA 95630

(D) "Trustee" is GREENHEAD INVESTMENTS, INC., A CALIFORNIA CORPORATION

NEVADA- Single Family- Yannie Mae/Freddie Mae UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 1 WFF (0101DOCS\DEEDS\CVL\NV_MERS CVL)

Form 3029 1/01
(page 1 of 13 pages)

BRECK000031

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407150

05/25/2007
002 of 28

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P O Box 2026, Flint, Michigan 48501-2026, tel (888) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated MAY 23, 2007. The Note states that Borrower owes Lender

THREE HUNDRED EIGHTY-ONE THOUSAND ONE HUNDRED FIFTY and NO/100 Dollars (U.S. \$ 381,150.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JUNE 1, 2037.

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

<input checked="" type="checkbox"/> Adjustable Rate Rider	<input type="checkbox"/> Condominium Rider	<input type="checkbox"/> Second Home Rider
<input type="checkbox"/> Balloon Rider	<input type="checkbox"/> Planned Unit Development Rider	<input checked="" type="checkbox"/> Other(s) [specify]
<input type="checkbox"/> 1-4 Family Rider	<input type="checkbox"/> Biweekly Payment Rider	INTEREST ONLY RIDER
<input type="checkbox"/> V A Rider		

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for (i) damage to, or destruction of, the Property, (ii) condemnation or other taking of all or any part of the Property, (iii) conveyance in lieu of condemnation, or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 2 WFF (010)DCSDEEDSCVL NV_MERS CVL

Loan No: 0000479436

Form 3029 1/01
(page 2 of 13 pages)

BRECK000032

AA03919

407150

05/23/2007
023 of 20

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY

of

LYON

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A."

which currently has the address of 70 RIVERSIDE DRIVE (Street),
DAYTON (City), Nevada 89403 (Zip Code) ("Property Address")

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash, (b) money order, (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity, or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is

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not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note, (b) principal due under the Note, (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property, (b) leasehold payments or ground rents on the Property, if any, (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

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The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement, (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded, or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either (a) a one-time charge for flood zone determination, certification and tracking services, or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time reapplings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts

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disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6 Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7 Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

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Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8 Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9 Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument, (b) appearing in court, and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay (Borrower) any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

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Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has, if any, with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11 Assignment of Miscellaneous Proceeds, Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

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If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12 Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13 Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer") (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument, (b) is not personally obligated to pay the sums secured by this Security Instrument, and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit, and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's

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acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge

15. **Notices** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender, (b) words in the singular shall mean and include the plural and vice versa, and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument, (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate, or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred, (b) cures any default of any other covenants or agreements, (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses

NEVADA - Single Family - Tammie Mae/Freddie Mae UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 10 WFF (0101DCSDBRDS(CVL)NV_MERS CVL)

Loan No: 0000479436

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(page 10 of 13 pages)

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20. Sale of Note, Change of Loan Servicer, Notice of Grievance The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

21. **Hazardous Substances.** As used in this Section 21, (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials, (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection, (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law, and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance of Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

Form 3029 1/01
(page 11 of 13 pages)

NEVADA-Single Family-Fannie Mae/Treddie Mae UNIFORM INSTRUMENT with MERS
DRAW MERS NV CVL DT 11 WFF (0101DOCSDEEDSACVLNV_MERS CVL)

AA03928

NON-UNIFORM COVENANTS Borrower and Lender further covenant and agree as follows

22 Acceleration; Remedies Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of this evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lenders' election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums required by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25 Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U S \$ MAXIMUM ALLOWED BY LAW.



407150

05/25/2007
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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it

Vicenta Lincicome (Seal)
VICENTA LINCICOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

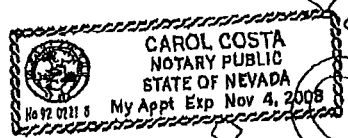
____ (Seal)
____ -Borrower

Loan No: 0000479436

STATE OF NEVADA, *Carroll City* County ss. *May 28 2007*, by

This instrument was acknowledged before me on
Vicenta Lincicome

Carol Costa
My Commission Expires *11-4-08*



NEVADA-Single Family-Fannie Mae Uniform Instrument with MERS
DRAW MERS NV CVL DT 13 WPR 010100SSUREDS/CV/LNV_MERS CVL

Form 3029 1/01
(page 13 of 13 pages)

WHEN RECORDED MAIL TO
MIP INSURING DEPARTMENT
SIERRA PACIFIC MORTGAGE COMPANY, INC.
50 IRON POINT CIRCLE, STE 200
FOLSOM, CA 95630
916-932-1700

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05/25/2007
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ADJUSTABLE RATE RIDER
(1 Year LIBOR Index - Rate Caps)
(Assumable after Initial Period)

THIS ADJUSTABLE RATE RIDER is made this 23rd day of MAY, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure the Borrower's Adjustable Rate Note (the "Note") to SIERRA PACIFIC MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION (the "Lender") of the same date and covering the property described in the Security Instrument and located at [REDACTED] DRIVE

70 RIVERSIDE DRIVE
DAYTON, NV 89403
(Property Address)

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT THE NOTE LIMITS THE AMOUNT BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

A. **INTEREST RATE AND MONTHLY PAYMENT CHANGES**
The Note provides for an initial interest rate of 6.875 % The Note provides for changes in the interest rate and the monthly payments, as follows

4 **INTEREST RATE AND MONTHLY PAYMENT CHANGES**

4 INTEREST RATE AND MONTHLY PAYMENT CHANGES
(A) Change Dates
The interest rate I will pay may change on the first day of JUNE 2017, and may change on that day every 12th month thereafter. Each date on which my interest rate could change is called a "Change Date".

(B) The Index
Beginning with the First Change Date, my interest rate will be based on an Index. The "Index" is the one-year London Interbank Offered Rate ("LIBOR") which is the average of interbank offered rates for one-year U S

Loan No: 0000479436

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER: 1 Year LIBOR Index (Assumable after 1P)-Single Family Freddie Mac Uniform Instrument

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(Page 1 of 1)

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dollar-denominated deposits in the London market, as published in *The Wall Street Journal*. The most recent index figure available as of the date 45 days before each Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new Index which is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding

TWO AND ONE QUARTER

percentage points (2.250 %)

to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 11.875 % or less than 2.250 %.

Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than TWO percentage points (2.000 %) from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 11.875 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

1 UNTIL BORROWER'S INITIAL INTEREST RATE CHANGES UNDER THE TERMS STATED IN SECTION A ABOVE, UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT SHALL BE IN EFFECT AS FOLLOWS.

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER-1 Year LIBOR Index (Assumable after IP)-Single Family Freddie Mac Uniform Instrument

DRAW 0304 MFCYL ARM RIDER 5131 2 WFF (P) OF \$SHARE(01)IDOC\$RIDERS/CVLMKTH5131 ARM)

Form 5131 3/04
(Page 2 of 4)

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If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

Transfer of the Property or a Beneficial Interest in Borrower As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing. If, at any time, the only way to require immediate payment in full, Lender shall give Borrower

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

MULTISTATE ADJUSTABLE RATE RIDER-1 Year LIBOR Index (Assumable after IP)-Single Family Freddie Mac Uniform Instrument

Form 5131 3/04
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DRAW 0304 MX CYL ARM RIDER 5151 3 WFF (P 10PSSHAREW101DOCSRIDERSICVLWKPFS131 ARM)

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05/25/2007
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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable
Rate Rider

Vicenta Lincicome (Seal)
VICENTA LINCICOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

[Sign Original Only]

Loan No: 0000479436

MULTISTATE ADJUSTABLE RATE RIDER, Year LIBOR Index (Assumable after 1P) Single Family Freddie Mac Uniform Instrument
DRAW 0304 MX CVL ARM RIDER 1131 WFE P 10P33HARR0101DOCSRIDERS(CVL)WKP46131 ARM)

Form 5131 9/04
(Page 4 of 4)

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INTEREST-ONLY ADDENDUM TO ADJUSTABLE RATE RIDER

Property Address 70 RIVERSIDE DRIVE
DAYTON, NV 89403

THIS ADDENDUM is made this 23rd day of MAY 2007
and is incorporated into and intended to form a part of the Adjustable Rate Rider (the "Rider") dated the same date
as this Addendum executed by the undersigned and payable to
SIERRA PACIFIC MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION (the "Lender")

THIS ADDENDUM supersedes Section 4(C) of the Rider. None of the other provisions of the Rider are changed
by this Addendum.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding
TWO AND ONE QUARTER percentage points (2.250 %) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

Loan No: 0000479436

INTEREST ONLY ADDENDUM TO ADJUSTABLE RATE RIDER 5/1 LIBOR ARM - MULTISTATE
DRAW MX CVA ARM TO ADDENDUM RIDER 1 WTF (0101DOCS\RIDERS\CVA\MXIO_ADN RID)

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(page 1 of 2 pages)

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05/25/2007
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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate
Rider

Vicenta Lincicome (Seal)
VICENTA LINCICOME -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

(Sign Original Only)

Loan No: 0000479436

INTEREST ONLY ADDENDUM TO ADJUSTABLE RATE RIDER 5/1 LIBOR ARM - MULTISTATE
DRAW MX CVL ARM TO ADNM RIDER 2 WPT (010106S/RIDERS/CVL/MXIO_ADN RID)

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(page 2 of 2 pages)

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05/28/2007
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EXHIBIT "A"
LEGAL DESCRIPTION

Order No: 06041897-JA

The land referred to herein is situated in the State of Nevada,
County of LYON, described as follows:

LOT 42 AS SHOWN ON THE OFFICIAL MAP OF GOLD CANYON ESTATES,
PHASE 2, FILE IN THE OFFICE OF THE LYON COUNTY, NEVADA RECORDER,
ON OCTOBER 20, 2005, AS DOCUMENT NO. 365687.

EXCEPTING THEREFROM ALL THAT PORTION THEREOF, LYING BELOW THE,
NATURAL ORDINARY HIGH WATER LINE OF THE CARSON RIVER.

ASSESSOR'S PARCEL NO. 029-401-17

Unofficial

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EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

APN: 029-401-17

WHEN RECORDED MAIL TO:

Sables, LLC

c/o Zieve Brodnax & Steele

3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169

DOC# 572258

11/03/2017

10:29AM

Official Record

Requested By
SERVICELINK TITLE AGENCY INC.

Lyon County - NV

Dawna L. Warr - Recorder

Page: 1 of 6

Fee: \$288.00

Recorded By BKC

RPTT: \$0.00



0572258

TS No.: 16-42397

NOTICE OF BREACH AND DEFAULT AND OF ELECTION TO SELL THE REAL PROPERTY UNDER DEED OF TRUST

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five (5) business day prior to the date set for the sale of your property pursuant to NRS 107.080. No sale date may be set until three months from the date this Notice of Default may be recorded (which date of recordation appears on this notice). This amount is \$265,672.38 as of 10/31/2017 and will increase until your account becomes current.

NOTICE IS HEREBY GIVEN THAT: SABLES, LLC, a Nevada limited liability company is either the original trustee, or the duly appointed substituted Trustee, or acting as agent for the Trustee or the Beneficiary under a under a Deed of Trust dated 5/20/2007, executed by VICENTA LINCICOME, A MARRIED WOMAN, as trustor to secure obligations in favor of Mortgage Electronic Registration Systems, Inc., as nominee for SIERRA PACIFIC MORTGAGE COMPANY, INC. its successors and assigns, as Beneficiary, recorded 6/25/2007, instrument no. 407150 The subject Deed of Trust was modified by Loan Modification Agreement recorded as instrument 475808 and recorded on 5/4/2011 of Official Records in the office of the County recorder of Lyon, County, Nevada securing, among other obligations including

One note(s) for the Original sum of \$381,150.00, that the beneficial interest under such Deed of Trust and the obligations secured hereby are presently held by Beneficiary; that a breach of and default in the obligations for which such Deed of Trust is security has occurred or that payment has not been made of;

The monthly installment which became due on 9/1/2008, along with late charges, and all subsequent monthly installments.

You are responsible to pay all payments and charges due under the terms and conditions of the loan documents which come due subsequent to the date of this notice, including, but not limited to; foreclosure trustee fees and costs, advances and late charges.

Furthermore, as a condition to bring your account in good standing, you must provide the undersigned with written proof that you are not in default on any senior encumbrance and provide proof of insurance.

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11/03/2017
2 of 6

T.S. No.: 16-42397

Nothing in this Notice of Default should be construed as a waiver of any fees owing to the beneficiary under the Deed of Trust, pursuant to the terms and provisions of the loan documents.

That by reason thereof the present Beneficiary under such deed of Trust has executed and delivered to said duly appointed Trustee a written Declaration of Default and Demand for Sale and has deposited with said duly appointed Trustee such Deed of Trust and all documents evidencing obligations secured thereby and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

NOTICE

You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the Payment of the amounts required by that statutory section without requiring payment of that portion of principal and interest which would not be due had no default occurred. As to owner-occupied property, where reinstatement is possible, the time to reinstate may be extended to 5 days prior to the date of sale pursuant to NRS 107.080. The Trustor may have the right to bring a court action to assert the nonexistence of a default or any other defense of Trustor to acceleration and Sale.

To determine if reinstatement is possible and the amount, if any, to cure the default, contact:

PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee
c/o Fay Servicing, LLC
c/o SABLES, LLC, a Nevada limited liability company
3753 Howard Hughes Parkway, Suite 200
Las Vegas, NV 89169
Beneficiary Phone: 800-495-7166
Trustee Phone: (702) 664-1774

To reach a person with authority to negotiate a loan modification on behalf of the lender:

Lauren Jowers
800-495-7166

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

If you have any questions, you should contact a lawyer or the governmental agency that may have insured your loan. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.
REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

Attached hereto and incorporated herein by reference is the Affidavit of Authority in Support of Notice of Default and Election to Sell pursuant to NRS 107.080.

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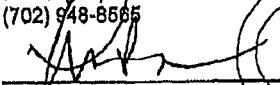
11/03/2017
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T.S. No.: 16-42397

You may wish to consult a credit counseling agency to assist you. The Department of Housing and Urban Development (HUD) can provide you with names and addresses of local HUD approved counseling agency by calling their approved Local Housing Counseling Agency toll free number: (800) 569-4287 or you can go to HUD's website: <http://portal.hud.gov>.

Dated: 11/1/2017

SABLES, LLC, a Nevada limited liability company, as Trustee
Sables, LLC
c/o Zieve Brodnax & Steele
3753 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89168
(702) 948-8565


Michael Busby, Trustee Sale Officer

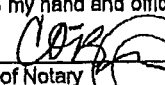
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of CALIFORNIA
County of ORANGE

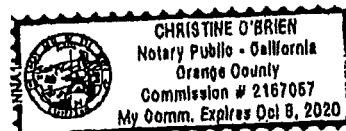
On 11/1/2017, before me, Christine O'Brien, personally appeared Michael Busby who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature of Notary



BRECK000082

AA03941



572258

11/03/2017
4 of 6**Affidavit of Authority**

(Nevada Revised Statute §107.080 as amended effective June 1, 2013)

Re: TS# 16-42397

Borrower Name: VICENTA LINCICOME

Property Address: 70 RIVERSIDE DRIVE

DAYTON, Nevada 89403

I, Veronica Talley, am the Foreclosure Specialist of Pay Servicing, LLC, the current servicer for the beneficiary of the deed of trust described in the notice of default and election to sell to which this affidavit is attached ("Deed of Trust"). The following facts are based upon my personal review of documents that are of public record in the State of Nevada and personal knowledge acquired by my personal review of the business records of the beneficiary, which are within my custody and control. The business records of the beneficiary contain entries made in the ordinary course of business at or about the time the events reflected therein occurred.

1(a). The full name and business address of the current trustee of record for the Deed of Trust is Sables LLC, a Nevada Limited Liability Company, 3753 Howard Hughes Parkway, Suite 200, Las Vegas, Nevada 89169

1(b). The full name and business address of the current holder of the Note secured by the Deed of Trust is PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee 60 Livingston Ave EP-MN-WS3D St. Paul MN 55107, Attn: Structured Finance Services - PROF.

1(c). The full name and business address of the current beneficiary for the obligation or debt secured by the Deed of Trust is PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee 60 Livingston Ave EP-MN-WS3D St. Paul MN 55107, Attn: Structured Finance Services - PROF

1(d). The full name and business address of the current servicer for the obligation secured by the Deed of Trust is Pay Servicing, LLC, 440 S. LaSalle St, Suite 2000, Chicago, IL 60605

2. From my review of the documents of public record and the business records of the current beneficiary and a title guaranty of title insurance issued by a title insurer or title agent authorized to do business in this State pursuant to Chapter 692A of the NRS, the name of each assignee and each recorded assignment of the Deed of Trust.

2(a). Assignee Name: PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee
Instrument and Recording Information: Assignment of Deed of Trust recorded on 11/25/2016 Instrument No. 544042

2(b). Assignee Name: Bank of America, N.A. Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP
Instrument and Recording Information: Corporation Assignment of Deed of Trust recorded on 08/15/2011 Instrument No. 480360

2(c). Assignee Name: Bank of America, N.A. Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP
Instrument and Recording Information: Assignment of Mortgage recorded on 11/10/2010 Instrument No 467719

3. The current beneficiary under the Deed of Trust, the successor in interest of the beneficiary or the trustee is in actual or constructive possession of the note secured by the Deed of Trust.

4. From my review of the documents of public record and the business records of the current beneficiary, the current trustee has authority to exercise the power of sale with respect to the property

Affidavit of Authority to Exercise the Power of Sale
Revised 6/1/2013

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11/03/2017
5 of 6

encumbered by the Deed of Trust, pursuant to instruction from the current beneficiary of record and current holder of the note secured by the Deed of Trust.

5. From my review of the documents of public record and the business records of the current beneficiary, the beneficiary, servicer of the obligation, or an attorney of the beneficiary or servicer has sent to VICENTA LINCICOME, a written statement of: (I) the amount of payment required to make good the deficiency in performance of payment, avoid the exercise of the power of sale and reinstate the terms and conditions of the underlying obligation or debt existing before the deficiency in performance or payment, as of the date of the statement; (II) the amount in default; (III) the principal amount of the obligation or debt secured by the deed of trust; (IV) the amount of accrued interest and late charges; (V) a good faith estimate of all fees imposed in connection with the power of sale; and (VI) contact information for obtaining the most current amounts due and the local or toll-free telephone number that VICENTA LINCICOME may call to receive the most current amounts due and a recitation of the information in this affidavit.

6. The borrower or obligor of the loan secured by the Deed of Trust may call Pay Servicing, LLC at 800-495-7166 to receive the most current amounts due and a recitation of the information contained in this Affidavit.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct and that this Affidavit was executed on October 5, 2016

By: Pay Servicing, LLC, its attorney in fact

Veronica Talley

(Print Name)

(Signature)

Foreclosure Specialist IV

(Title)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of Texas

County of Denton

On October 5, 2016 before me, Allison Ann Johnston, Notary Public, personally appeared, Veronica Talley, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) I have subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature





572258

11/03/2017
6 of 6

Declaration of Mortgage Servicer Pursuant to NR 107.510

T.S. Number: 16-42397
Borrower(s): VICENTA LINCICOME
Mortgage Servicer: Fay Servicing, LLC
Property Address: 70 RIVERSIDE DRIVE
DAYTON, Nevada 89403

The undersigned, as an authorized agent or employee of the mortgage servicer named below, declares that:

1. ☒ The mortgage servicer has contacted the borrower pursuant to NRS 107.510 (2), to assess the borrower's financial situation and to explore options for the borrower to avoid a foreclosure sale. Thirty (30) days, or more, have passed since the initial contact was made.
2. ☐ The mortgage servicer has exercised due diligence to contact the borrower pursuant to NRS 107.510 (5), to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure". Thirty (30) days, or more, have passed since these due diligence efforts were satisfied.
3. ☐ No contact was required by the mortgage servicer because the individual(s) did not meet the definition of "borrower" pursuant to NRS 107.410.
4. ☐ During the preceding annual reporting period, the Lender has foreclosed on 100 or fewer real properties located in this state and therefore, pursuant to NRS 107.460, the provisions of NRS 107.400 to 107.560, inclusive, do not apply.
5. ☐ The loan is not a "residential mortgage loan" as defined in NRS 107.450.

I certify that this declaration is accurate, complete and supported by competent and reliable evidence which the mortgage servicer has reviewed to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information.

Dated: 11-5-2016

By:

Page 1

BRECK000065

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EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Doc #: 587470

10/12/2018 02:27 PM Page: 1 of 2

OFFICIAL RECORD

Requested By: SERVICELINK TITLE AGENCY INC

Lyon County, NV

Dawna L. Warr, Recorder

Fee: \$38.00 RPTT: \$0.00

Recorded By: mkassebaum

APN No.: 029-401-17

[Recording requested by:]

[When recorded mail to:]

Sables LLC

c/o Zieve Brodnax & Steele

9435 West Russell Road, Suite 120

Las Vegas, Nevada 89148

T.S. No. 16-42397

NOTICE OF TRUSTEE'S SALE

YOU ARE IN DEFAULT UNDER A DEED OF TRUST DATED 5/23/2007. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

A public auction sale to the highest bidder for cash, cashier's check drawn on a state or national bank, check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, or savings association, or savings bank specified in Section 5402 of the Financial Code and authorized to do business in this state will be held by the duly appointed trustee as shown below, of all right, title, and interest conveyed to and now held by the trustee in the hereinafter described property under and pursuant to a Deed of Trust described below. The sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by the Deed of Trust, with interest and late charges thereon, as provided in the note(s), advances, under the terms of the Deed of Trust, interest thereon, fees, charges and expenses of the Trustee for the total amount (at the time of the initial publication of the Notice of Sale) reasonably estimated to be set forth below. The amount may be greater on the day of sale.

TRUSTOR: VICENTA LINCICOMI, A MARRIED WOMAN

Duly Appointed Trustee: Sables LLC, a Nevada Limited Liability Company

Recorded 5/25/2007, as Instrument No. 407150, The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011 Official Records in the office of the Recorder of Lyon County, Nevada, Described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:

Lot 42 as shown on the official map of GOLD CANYON ESTATES, PHASE 2, filed in the office of the Lyon County, Nevada Recorder, on October 20, 2005, as Document No. 365687.

EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Date of Sale: 11/9/2018 at 11:00 AM

BRECK000088

Place of Sale: 31 S. Main Street Yerington, Nevada 89447
Lyon County Courthouse

Estimated Sale Amount: \$666,632.22

Street Address or other common designation of real property: 70 RIVERSIDE DRIVE
DAYTON, Nevada 89403

A.P.N. No.: 029-401-17

The undersigned Trustee disclaims any liability for any incorrectness of the street address or other common designation, if any, shown above. If no street address or other common designation is shown, directions to the location of the property may be obtained by sending a written request to the beneficiary within 10 days of the date of first publication of this Notice of Sale.

Date: 10/11/2018

Sables LLC, a Nevada Limited Liability Company
c/o Zieve Brodnax & Steele
9435 West Russell Road, Suite 120
Las Vegas, NV 89148
Phone: (702) 948-8565
Sale Information: (714) 848-9272 www.elitepostandpub.com
For Non-Automated Sale Information, call: (702) 664-1774

Michael Busby, Trustee Sale Officer

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

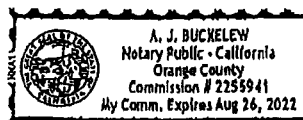
State of CALIFORNIA
County of ORANGE

On 10/11/2018, before me, A.J. Buckelew Notary Public, personally appeared Michael Busby who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

A.J. Buckelew
Signature of Notary



THIS FIRM IS ATTEMPTING TO COLLECT A DEBT AND
ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT PURPOSE.

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

1 John T. Steffen (4390)
2 Matthew K. Schriever (10745)
3 Alex R. Velto (14961)
4 HUTCHISON & STEFFEN, PLLC
5 10080 West Alta Drive, Suite 200
6 Las Vegas, NV 89145
7 Tel (702) 385-2500
8 Fax (702) 385-2086
9 mschriever@hutchlegal.com

10 Casey J. Nelson, Esq. (12259)
11 Wedgewood, LLC
12 Office of the General Counsel
13 2320 Potosi Street, Suite 130
14 Las Vegas, Nevada 89146
15 Tel (702) 305-9157
16 Fax (310) 730-5967
17 caseynelson@wedgewood-llc.com
18 Attorney for Defendant, Counterclaimant, and Cross-Plaintiff
19 Breckenridge Property Fund 2016, LLC

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

22 ALBERT ELLIS LINCICOME, JR., and
23 VICENTA LINCICOME,

24 Plaintiff,

25 v.

26 SABLES, LLC, a Nevada limited liability
27 company, as Trustee of the Deed of Trust given
28 by Vicenta Lincicome and dated 3/23/2007; 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 DOBS 1-50.,

Defendants.

AND RELATED MATTERS.

Case No.: 18-CV-01332
Dept No.: II

DECLARATION IN SUPPORT OF
BRECKENRIDGE PROPERTY FUND 2016
LLC'S MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFF

1 The undersigned, Jason Campbell declares under penalty of perjury that the following assertions
2 are true;

3 1. I am an authorized agent of Breckenridge Property Fund 2016, LLC ("Breckenridge").

4 2. I am competent to testify to the matters asserted herein, of which I have personal
5 knowledge, except as to those matters stated upon information and belief. As to those matters stated
6 upon information and belief, I believe them to be true. I make this declaration in support of
7 Breckenridge's motion for summary judgment against Plaintiffs.

8
9 3. On January 4, 2019, Breckenridge purchased real property located at 70 Riverside Drive,
10 Dayton, Nevada 89403 ("Subject Property") at a foreclosure sale conducted pursuant to NRS 107.
11 ("Foreclosure Sale").

12 4. Breckenridge was the highest bidder and paid \$294,000.01 to purchase the Subject
13 Property at the Foreclosure Sale.

14 5. Breckenridge relied on the fact that the noticed Foreclosure Sale was valid because
15 Plaintiffs failed to post the court-ordered bond.

16 6. Breckenridge had no role in this dispute prior to its purchase of the Subject Property at
17 the Foreclosure Sale.

18 7. Breckenridge is entitled to an order quieting title in its favor because there were no defects
19 in the Foreclosure Sale and any rights, title, or interest that Plaintiffs previously had in the Subject
20 Property has been terminated by way of the Foreclosure Sale.

21 8. I declare under penalty of perjury of the laws of the United States and the State of Nevada
22 that these facts are true to the best of my knowledge and belief.

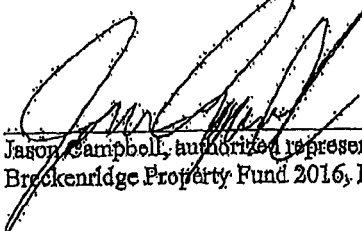
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Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding document filed in this court does not contain the social security number of any person.


Jason Campbell, authorized representative of
Breckenridge Property Fund 2016, LLC

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EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

70 RIVERSIDE DR

A.P.N.: 029-401-17

RECORDING REQUESTED BY:

AND WHEN RECORDED TO:
Breckenridge Property Fund, 2016, LLC
2320 Potosi St, Ste 130
Las Vegas, NV 89146

Recorded As An Accommodation
Only Without Liability

Forward Tax Statements to
the address given above

Doc #: 591393

01/25/2010 08:21 AM Page 1 of 2

OFFICIAL RECORD

Requested By: FIRST AMERICAN TITLE INSURANCE CO

Lyon County, NV
Margie Kassebaum, Recorder

Fee: \$38.00 RPTT: \$1,140.66
Recorded By: Inhumidat

SPACE ABOVE LINE FOR RECORDER'S USE

T.S. # 16-42397
Order #: 160069595-NV-V00

TRUSTEE'S DEED UPON SALE

Transfer Tax: \$ 1148.55
The Grantee Herein WAS NOT the Foreclosing Beneficiary.
The Amount of the Unpaid Debt was \$671,249.37
The Amount Paid by the Grantee was \$294,000.01
Said Property is in the City of DAYTON, County of Lyon

SABLES, LLC, a Nevada limited liability company, as Trustee, (whereas so designated in the Deed of Trust hereunder more particularly described or as duly appointed Trustee) does hereby GRANT and CONVEY to

Breckenridge Property Fund, 2016, LLC

(herein called Grantee) but without covenant or warranty, expressed or implied, all rights, title and interest conveyed to and now held by it as Trustee under the Deed of Trust in and to the property situated in the county of Lyon, State of Nevada, described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:
Lot 42 as shown on the official map of GOLD CANYON ESTATES, PHASE 2, filed in the office of the Lyon County, Nevada Recorder, on October 20, 2005, as Document No. 365687.

EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

This conveyance is made in compliance with the terms and provisions of the Deed of Trust executed by VICENTA LINCICOME, A MARRIED WOMAN as Trustor, dated 5/23/2007 of the Official Records in the office of the Recorder of Lyon, Nevada under the authority and powers vested in the Trustee designated in the Deed of Trust or as the duly appointed Trustee, default having occurred under the Deed of Trust pursuant to the Notice of Breach and Election to Sell under the Deed of Trust recorded on 5/25/2007, as Instrument No. 407150. The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011, of official records.

BRECK000026

A.P.N.: 029-401-17

RECORDING REQUESTED BY:

AND WHEN RECORDED TO:
Breckenridge Property Fund, 2016, LLC
2320 Potosi St. Ste 130
Las Vegas, NV 89146

Recorded As An Accommodation
Only Without Liability

Forward Tax Statements to
the address given above

SPACE ABOVE LINE FOR RECORDER'S USE

T.S. # 16-42397

Order #: 160069595-NV-VOO

TRUSTEE'S DEED UPON SALE

Transfer Tax: \$1148.55
The Grantee Herein WAS NOT the Foreclosing Beneficiary.
The Amount of the Unpaid Debt was \$671,249.37
The Amount Paid by the Grantee was \$294,000.01
Said Property is in the City of DAYTON, County of Lyon

SABLES, LLC, a Nevada limited liability company, as Trustee, (whereas so designated in the Deed of Trust hereunder more particularly described or as duly appointed Trustee) does hereby GRANT and CONVEY to

Breckenridge Property Fund, 2016, LLC

(herein called Grantee) but without covenant or warranty, expressed or implied, all rights, title and interest conveyed to and now held by it as Trustee under the Deed of Trust in and to the property situated in the county of Lyon, State of Nevada, described as follows:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LYON, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

All that certain real property situate in the County of Lyon, State of Nevada, described as follows:
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EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Carson River.

Property Address: 70 RIVERSIDE DRIVE, DAYTON, Nevada 89403

This conveyance is made in compliance with the terms and provisions of the Deed of Trust executed by VICENTA LINCICOME, A MARRIED WOMAN as Trustor, dated 5/23/2007 of the Official Records in the office of the Recorder of Lyon, Nevada under the authority and powers vested in the Trustee designated in the Deed of Trust or as the duly appointed Trustee, default having occurred under the Deed of Trust pursuant to the Notice of Breach and Election to Sell under the Deed of Trust recorded on 5/25/2007, as Instrument No. 407150, The subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011, of official records.

BRECK000026

TRUSTEE'S DEED UPON SALE

T.S. #: 16-42397

Order #: 160069595-NV-VOO

Trustee having complied with all applicable statutory requirements of the State of Nevada and performed all duties required by the Deed of Trust including sending a Notice of Breach and Election to Sell within ten days after its recording and a Notice of Sale at least twenty days prior to the Sale Date by certified return receipt mail, postage pre-paid to each person entitled to notice in compliance with Nevada Revised Statutes 107.080,

All requirements per Nevada Statutes regarding the mailing, personal delivery and publication of copies of Notice of Default and Election to Sell under Deed of Trust and Notice of Trustee's Sale, and the posting of copies of Notice of Trustee's Sale have been complied with. Trustee, in compliance with said Notice of Trustee's sale and in exercise of its powers under said Deed of Trust sold said real property at public auction on 1/4/2019. Grantee, being the highest bidder at said sale became the purchaser of said property for the amount bid, being \$ \$294,000.01, in lawful money of the United States, in pro per, receipt there of is hereby acknowledged in full/partial satisfaction of the debt secured by said Deed of Trust.

In witness thereof, SABLES, LLC, a Nevada limited liability company, as Trustee, has this day, caused its name to be hereunto affixed,

Date: 1/15/2019

SABLES, LLC, a Nevada limited liability company

Geoffrey Neal, Trustee Sale Officer

Geoffrey
Neal

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of CALIFORNIA
County of ORANGE

On 1/15/2019 before me, the undersigned, J. Develasco Notary Public, personally appeared Geoffrey Neal who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

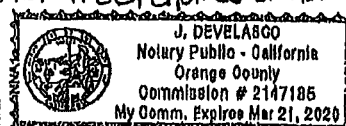
WITNESS my hand and official seal.

Signature

J. Develasco

(Seal)

J. Develasco



BRECK000027

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. Assessor Parcel Number(s)

a) 029-401-17
b) _____
c) _____
d) _____

2. Type of Property:

a) ☐ Vacant Land
b) ☒ Single Fam. Res.
c) ☐ Condo/Townhome
d) ☐ 2-4 Plex
e) ☐ Apt. Bldg
f) ☐ Comm'/Ind'l
g) ☐ Agricultural
h) ☐ Mobile Home
Other _____

FOR RECORDER'S OPTIONAL USE ONLY

Book: _____ Page: _____
Date of Recording: _____
Notes: _____

3. a. Total Value/Sales Price of Property
b. Deed in Lieu of Foreclosure Only (value of property)
c. Transfer Tax Value:
d. Real Property Transfer Tax Due

\$ 294,000.01

\$ 294,000.01
\$ 1148.56

4. If Exemption Claimed:

- a. Transfer Tax Exemption per NRS 375.090, Section _____
b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity AGENT

Signature _____ Capacity AGENT

SELLER (GRANTOR) INFORMATION
(REQUIRED)

Print Name: Sables, LLC, a Nevada
limited liability company
Address: 3753 Howard Hughes Parkway,
Suite 200, Las Vegas, NV 89169

BUYER (GRANTEE) INFORMATION
(REQUIRED)

Print Name: Breckenridge Property Fund,
2016, LLC
Address: 2320 Potosi St. Ste 130
Las Vegas, NV 89146

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Print Name: First American Escrow # 0000000000
Address: 10000 Wynn Avenue
City: Las Vegas State: NV Zip: 89135

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

BRECK000028

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

THREE-DAY NOTICE TO QUIT

TO: VICENTA LINCICOME
TENANT AND SUBTENANT AND ALL OCCUPANTS
70 RIVERSIDE DR.
DAYTON, NEVADA 89403

Or any occupants of the above-named property or any persons in possession of the above-mentioned property.

PLEASE TAKE NOTICE that the above-described real property has been sold at a foreclosure sale, pursuant to NRS 107 *et seq.*, and VICENTA LINCICOME is no longer the owner of the above-described real property. The new owner is BRECKENRIDGE PROPERTY FUND 2016, LLC.

YOU ARE HEREBY NOTIFIED AND DEMAND IS MADE that you surrender possession of the property to the undersigned at or before noon of the third (3) day after receipt of this Notice pursuant to Sections 40.255, 40.280, and 40.290 to 40.420 of the Nevada Revised Statutes.

YOU ARE HEREBY NOTIFIED that if you are a tenant of the prior owner of the Property, you are to refer to the Notice to Tenant which is attached as Exhibit A to this Three-Day Notice to Quit. If you need another copy of the Notice to Tenant, please contact the undersigned below.

UPON YOUR FAILURE TO VACATE OR SURRENDER THE PREMISES AS DEMANDED, the undersigned may apply to the Dayton Township Justice Court or other court of appropriate jurisdiction, for an order from the Court granting BRECKENRIDGE PROPERTY FUND 2016, LLC possession of the property. Upon the Court granting such an order the Court may direct the Sheriff or Constable of the County or City to remove the occupant within twenty-four (24) hours after the receipt of the aforesaid order.

DATED this 25th day of January, 2019.

WEDGEWOOD, LLC



CASEY J. NELSON, ESQ.

Nevada Bar # 12259

Office of the General Counsel

2320 Potosi Street, Suite 130

Las Vegas, Nevada 89146

Attorney for Plaintiff

Breckenridge Property Fund 2016, LLC

EXHIBIT A

EXHIBIT A

NOTICE TO TENANT

TO: VICENTA LINCICOME
TENANT AND SUBTENANT AND ALL OCCUPANTS
70 RIVERSIDE DR.
DAYTON, NEVADA 89403

PLEASE TAKE NOTICE that the above-described real property has been sold at a foreclosure sale, pursuant to NRS 107 *et seq.*, and VICENTA LINCICOME is no longer the owner of the above-described real property. The new owner is BRECKENRIDGE PROPERTY FUND 2016, LLC.

YOU ARE HEREBY NOTIFIED OF A CHANGE OF OWNERSHIP. The new owner of the property is BRECKENRIDGE PROPERTY FUND 2016, LLC, 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146.

YOU MUST CONTACT US AND ESTABLISH YOUR BONA FIDE TENANCY in the property within three (3) business days of receipt of this Notice.

IN ORDER TO ESTABLISH YOUR TENANCY, within three (3) business days of receipt of this Notice you must furnish a copy of your fully executed, current lease or rental agreement and proof of all past payments to Breckenridge Property Fund 2016, c/o the owner's attorney, Casey J. Nelson, Esq., at 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146. Failure to produce valid documentation clearly demonstrating a bona fide tenancy will result in eviction proceedings immediately being brought against all occupants.

A LEASE OR TENANCY shall be considered bona fide only if:

- 1) The mortgagor/prior owner or the child, spouse, or parent of the mortgagor/prior owner under the contract is not the tenant or occupant;
- 2) The lease or tenancy was the result of an arms-length transaction; and
- 3) The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy

The new owner reserves the right to challenge the authenticity and validity of any purported lease or tenancy based upon other terms, conditions, or factors which appear fraudulent or which are not otherwise standard terms within residential leases in the geographic area.

YOU ARE HEREBY NOTIFIED that if you are a bona fide tenant or subtenant in the property, you must still vacate the property within either 1) 90 days of this notice; or 2) upon the expiration of the remainder of the term of your bona fide lease, whichever date is later.


YOU ARE HEREBY NOTIFIED that you must continue to pay rent to the new owner throughout the remainder of your tenancy in order to avoid eviction proceedings being brought against you for non-payment of rent.

Rent shall be remitted to BRECKENRIDGE PROPERTY FUND 2016, LLC at 2320 Potosi St., Ste. 130, Las Vegas, Nevada 89146. Your failure to pay rent to the new owner throughout the notice period or comply with any other term of the agreement or applicable law shall constitute a breach of the lease or rental agreement and may result in eviction proceedings.

YOU ARE HEREBY NOTIFIED that upon your failure to timely establish your tenancy or upon your failure to fully vacate or surrender the premises as demanded, the undersigned may apply to the Dayton Township Justice Court or other court of appropriate jurisdiction, for an order from the Court granting BRECKENRIDGE PROPERTY FUND 2016, LLC possession of the property. Upon the Court granting such an order the Court may direct the Sheriff or Constable of the County or City to remove the occupant within twenty-four (24) hours after the receipt of the aforesaid order.

DATED this 25th day of January, 2019.

WEDGEWOOD, LLC


CASEY J. NELSON, ESQ.
Nevada Bar # 12259
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146

*Attorney for Plaintiff
Breckenridge Property Fund 2016, LLC*

Attorney or Party without Attorney: Wedgewood, LLC Casey J. Nelson, Esq. (SBN 12259) 2320 Potosi Street, Suite 130 Las Vegas, NV 89146 Telephone No: (702) 305-9157 Attorney For: Plaintiff				For Court Use Only	
Ref. No. or File No.: 70 RIVERSIDE DR.					
Insert name of Court, and Judicial District and Branch Court:					
Plaintiff: BRECKENRIDGE PROPERTY FUND 2016, LLC Defendant: VICENTA LINCICOME; TENANT AND SUBTENANT AND ALL OCCUPANTS					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Div:	Case Number:

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the Three-Day Notice to Quit, Notice to Tenant
3. a. Party served: Vicenta Lincicome; Tenant and Subtenant and All Occupants
 b. Person served: Posted
4. Address where the party was served: 70 Riverside Drive, Dayton, NV 89403
5. I served the party:
 - a. By Posting. On: Mon, Jan 28 2019 (2) at: 02:20 PM by posting a copy of the documents in a conspicuous place on the property.
 - b. By Mailing. On: Mon, Jan 28 2019 by mailing a copy of the documents, addressed as shown in Item 4, via Certified Mail Issued by United States Post Office from: Las Vegas, NV.
6. Person Who Served Papers:
 - a. Toni Ruckman (R-052005, Washoe)
 - b. FIRST LEGAL
 2920 N. Green Valley Parkway, Suite 514
 Henderson, NV 89014
 - c. (702) 671-4002
 - d. The Fee for Service was:

Pursuant to NRS 53.045

7. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

01/29/2019

(Date)

Toni L Ruckman

(Signature)



AFFIDAVIT OF
SERVICE

3012509
(55105770)

U.S. Postal ServiceTM
CERTIFIED MAIL[®] RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com.

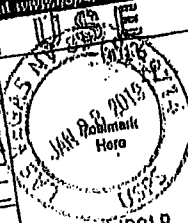
Certified Mail Fee \$2.50

Extra Services & Fees (check box, add fee to postage)
☐ Return Receipt (hardcopy) \$2.80
☐ Return Receipt (electronic) \$1.00
☐ Certified Mail Restricted Delivery \$0.00
☐ Adult Signature Required \$0.00
☐ Adult Signature Restricted Delivery \$0.00

Postage \$0.55

Total Postage and Fees \$6.85

Sent To: VICENTA LINCICOME
Address: TENANT/SUBTENANT/ALL OCCUPANTS
City/State: 70 RIVERSIDE DR.
Post Office: DAYTON, NV 89403-9055



1520 SOUT 2000 DEPT RT04

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EXHIBIT PAGE ONLY

EXHIBIT 7

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

FILED

2021 JUN 23 PM 4:07

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Tovar

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; MNM-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 **B. NRS 40.010**
26
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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 9. In April of 2010, the Plaintiffs filed for Chapter 13 bankruptcy and listed the debt for the
22 property at \$381,000. The Plaintiffs made no payments at the time of bankruptcy filing or
23 during the bankruptcy. The Plaintiffs did not challenge the underlying obligation.
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- 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
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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

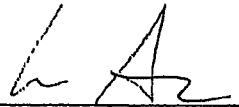
2 Breckenridge is entitled to a motion for summary judgment in its favor.

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
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28

Certificate of Mailing

I hereby certify that I, Guo Thau, 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.
Akerman LLP
1635 Village Center Cir. Ste. 200
Las Vegas, NV 89134

Matthew K. Schriever, Esq.
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

FILED

2021 OCT -4 AM 10:58

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Lindsey McCabe DEPUTY

Case No: 18-CV-01332

Dept.: II

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

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.

REQUEST FOR TRANSCRIPTS

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.

REQUEST FOR TRANSCRIPT

PAGE 1 OF 2

AA03974

1 COME NOW, Plaintiffs ELLIS LINCICOME and VICENTA LINCICOME by and through their
2 attorneys, Michael G. Millward, Esq., of Millward Law, Ltd., and Justin M. Clouser, Esq., of
3 Clouser Hempen Wasick Law Group, Ltd., and hereby request preparation of a transcript of the
4 proceedings before the District Court, specifically:

5 Judge hearing the proceeding: Hon. Leon Aberasturi

6 Dates of proceedings: November 20, 2018

7 April 15, 2019

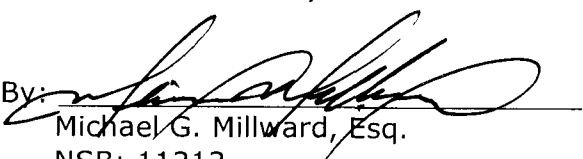
8 February 4, 2020

9 Portion of Transcripts: Entire Proceedings

10
11 This Notice requests a transcript of the above-proceedings. I recognize that I must serve
12 a copy of this form on the opposing parties and the court reporter in the above-referenced
13 mater, and that the court reporter shall have 30 days after the date that a request form is
14 served to (i) file the original transcript with the district court clerk; and (ii) deliver to the party
15 order the transcript 1 certified copy and an additional 1 certified copy for the appendix.

16 Respectfully submitted ^{30th} day of September, 2021

17 **MILLWARD LAW, LTD.**

18
19 By: 
20 Michael G. Millward, Esq.
21 NSB: 11212
22 Attorney for Petitioner
23 1591 Mono Ave.
24 Minden, NV 89423
25 (775) 600-2776
26
27
28

ORIGINAL

FILED

2021 OCT -6 AM 11:39

TANYA STEVENS
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Lindsey McElle

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,

Plaintiff,

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

Case No.: 18-CV-01332
Dept No.: II

**BRECKENRIDGE PROPERTY FUND
2016'S REPLY IN SUPPORT OF
MOTION FOR ENTRY OF ORDER
GRANTING PERMANENT WRIT OF
RESTITUTION AND PAYMENT OF
OVERDUE RENTS**

1 Breckenridge hereby incorporates its Opposition to Plaintiffs' Motion for Stay Pending
2 Appeal as its reply in support of its Motion for Entry of Order Granting Permanent Writ of
3 Restitution and Payment of Overdue Rents.

4 Dated this 5th day of October 2021.

5 HUTCHISON & STEFFEN, PLLC

6
7
8  John T. Steffen (4390)

9 Brenoch R. Wirthlin (10282)

Alex R. Velto (14961)

10 10080 West Alta Drive, Suite 200

11 Las Vegas, NV 89145

mschriever@hutchlegal.com

12 Wedgewood, LLC

13 Office of the General Counsel

Casey J. Nelson, Esq. (12259)

14 2320 Potosi Street, Suite 130

Las Vegas, Nevada 89146

15 E-mail: caseynelson@wedgewood-inc.com

16 *Attorneys for Defendant*

17 *Breckenridge Property Fund 2016 LLC*
18
19
20
21
22
23
24
25
26
27

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the date indicated below, I served a true and correct copy of the
3 **BRECKENRIDGE PROPERTY FUND 2016'S REPLY IN SUPPORT OF MOTION FOR**
4 **ENTRY OF ORDER GRANTING PERMANENT WRIT OF RESTITUTION AND**
5 **PAYMENT OF OVERDUE RENTS** via U.S. Mail to the parties designated below.

6 Michael G. Millward, Esq.
7 MILLWARD LAW, LTD.
8 1591 Mono Avenue
9 Minden, NV 89423
10 *Attorney for Plaintiffs*

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

11 Darren T. Brenner, Esq.
12 Ramir M. Hernandez, Esq.
13 WRIGHT FINLAY & ZAK, LLP
14 7785 W. Sahara Avenue, #200
15 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

16 Melanie Morgan, Esq.
17 Scott R. Lachman, Esq.
18 ACKERMAN, LLP
19 1635 Village Center Circle, #200
Las Vegas, NV 89134
Attorney for Bank of America

20 DATED this 5th day of October 2021.

21 
22 An Employee of HUTCHISON & STEFFEN
23
24
25
26
27

Do Not Copy

In The Matter Of:

*ALBERT ELLIS LINVICOME, JR. AND VICENTE LINCICOME vs
SABLES, LLC,*

November 18, 2020

*Capitol Reporters
628 E. John St # 3
Carson City, Nevada 89706
775 882-5322*

Original File 11-20-18lincicome.txt

Min-U-Script® with Word Index

1 Case No. 18-CV-01332

2 Department II

3

4

5

IN THE THIRD JUDICIAL DISTRICT COURT

6

IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

7

BEFORE THE HONORABLE LEON ABERASTURI

8

DISTRICT JUDGE, PRESIDING

9

10 LINCICOME,)

)

11 Plaintiff,)

)

12 vs.)

)

13 SABLES, LLC, et al.,)

)

14 Defendants.)

)

15 —)

16

JAVS-RECORDED TRANSCRIPT OF PROCEEDINGS

17

MOTIONS HEARING

18

TUESDAY, NOVEMBER 20, 2018

19

YERINGTON, NEVADA

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Transcribed by:

Shellie Loomis, RPR

CAPITOL REPORTERS (775) 882-5322

1 APPEARANCES:

2
3 For Lincicome: Millward Law, LTD.
4 Michael G. Millward, Esq.

5 For Fay Servicing, LLC: Ramir Hernandez, Esq.

6 For Bank of America: Akerman, LLP
7 Brent Lachman, Esq.

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1 YERINGTON, NEVADA, TUESDAY, NOVEMBER 20, 2018

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3
4 THE COURT: Okay. All right. So we're going to
5 go on the record on 18-CV-01332. We're here on the
6 restraining order, and could I have the parties state their
7 names for the record and counsel?

8 MR. MILLWARD: Your Honor, Michael Millward on
9 behalf of Alvarez, Lincicome and then (indiscernible)
10 Lincicome.

11 THE COURT: All right.

12 MR. HERNANDEZ: Ramir Hernandez, Bar Number
13 13146, on behalf of Fay Servicing and the U.S. Bank of Trust,
14 Your Honor.

15 THE COURT: Okay. All right. And have there
16 been any discussions and possible agreements or anything of
17 that nature before I start the hearing?

18 MR. HERNANDEZ: Your Honor, we briefly talked
19 about it before the hearing, but we have not come to any
20 resolution.

21 THE COURT: All right. Would it help if I gave
22 you more time? This is the only matter I have this afternoon,
23 so if you wanted to discuss for 15, 20 more minutes, I don't
24 have a problem.

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1 MR. HERNANDEZ: After the discussions,
2 Your Honor, I don't think there's agreements (indiscernible)
3 possible resolution.

4 THE COURT: Okay.

5 MR. HERNANDEZ: With opposing counsel, unless
6 opposing counsel disagrees. If he wants to talk 15 minutes,
7 I'm happy to do it.

8 THE COURT: Yeah, do you want more time?

9 MR. MILLWARD: Your Honor, we discussed authority
10 that he has to settle under certain terms.

11 THE COURT: Okay.

12 MR. MILLWARD: And he doesn't have such
13 authority.

14 THE COURT: Okay.

15 MR. HERNANDEZ: But I can get my client on the
16 phone if I need to, Your Honor, but I think we're so far apart
17 on anything realistic, but I think it (indiscernible).

18 THE COURT: Okay. All right. That's fine. I
19 just always ask. You know, it's always easier if we can come
20 up to some resolution and then depending how this goes, I can
21 always bring in a mediator if that helps.

22 All right. So as the moving party, Mr. Millward,
23 I'll have you go first and I did receive a copy of the
24 exhibits from the bank and I appreciated that. And are there
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1 any other exhibits or anything else?

2 MR. MILLWARD: Those are our exhibits, Your
3 Honor, that has been (indiscernible).

4 THE COURT: Oh, these are your exhibits?

5 MR. MILLWARD: That's right.

6 THE COURT: Okay.

7 MR. MILLWARD: Your Honor, with regards --

8 MR. HERNANDEZ: Are you sure, Your Honor? I know
9 I -- my office sent a binder up here.

10 THE COURT: Yeah, I have a binder, Mr. Millward.
11 It's -- the first filing I have is the response to
12 application.

13 MR. MILLWARD: Yeah, Your Honor, the binder I've
14 provided starts with a promissory dated May 23rd, 2007,
15 (indiscernible). So it might be the other binder to your
16 left.

17 THE COURT: Where is that? Oh, okay.

18 THE CLERK: (Indiscernible).

19 THE COURT: All right. All right. Is there
20 going to be any objection to the Court considering any of the
21 exhibits that have been previously presented?

22 MR. HERNANDEZ: Mr. Millward (indiscernible)
23 couple of documents. For the purposes of this hearing,
24 Your Honor, I'm not going to object to those documents.

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1 THE COURT: All right then. And how about you,
2 Mr. Millward?

3 MR. MILLWARD: Your Honor, I'm not sure what the
4 binder (indiscernible) that's been provided contains. If it
5 provides no other documents that I provided in the response,
6 then I have no objection.

7 THE COURT: All right. Yeah, no, these are the
8 documents that were attached to the response.

9 MR. HERNANDEZ: Okay.

10 THE COURT: All right.

11 MR. MILLWARD: All right. Your Honor, as to the
12 other defendants in this matter, I understand that there was a
13 request for them to attend by phone. I'm not sure if that --

14 THE COURT: All right. Is that the Ackerman law
15 firm?

16 MR. MILLWARD: I believe so.

17 THE COURT: Okay. Get them.

18 All right. Good afternoon. This is Judge
19 Aberasturi. Who do I have on the telephone?

20 MR. LACHMAN: Your Honor, this is Scott Lachman
21 from Ackerman on behalf of Bank of America.

22 THE COURT: All right. One more time. I'm
23 having difficulty hearing you.

24 MR. LACHMAN: I'm sorry, Your Honor. This is
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1 Scott Lachman.

2 THE COURT: Scott Lotson?

3 MR. LACHMAN: Lachman. That's L-A-C-H-M-A-N.

4 THE COURT: Okay. All right. And are you having
5 any difficulty hearing him or --

6 MR. LACHMAN: I'm hearing an echo.

7 THE COURT: Yeah, let me just try to adjust.

8 Does Judge Schlegelmilch have anything going on?

9 THE CLERK: No.

10 THE COURT: All right. Can you speak up again,
11 sir?

12 MR. LACHMAN: Yes, this is Scott Lachman from
13 Ackerman on behalf of Bank of America, Bar Number 12016.

14 THE COURT: All right. Okay. All right. Was
15 anyone else intending to participate today?

16 MR. MILLWARD: I'm not aware of any other person.
17 I know that there is another individual representing Sables,
18 LLC. I don't know if he had made any request.

19 THE COURT: All right. I don't believe that
20 there were any other requests in the --

21 What I'm going to do is I'm going to put you on
22 hold, sir. We're going to have to go to the other courtroom
23 and use the -- the other courtroom has a better sound system.
24 All right.

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1 So I'm going to put you on hold, sir, and we'll
2 probably pick up in about five minutes.

3 MR. LACHMAN: Okay. Great. Thank you, Your.
4 Honor.

5 (Recess.)

6 THE COURT: We're back on the record in
7 18-CV-01332. We've switched courtrooms due to the problems
8 with the telephone. Let's hope it works now.

9 All right. Good afternoon. This is
10 Judge Aberasturi again. Who do I have on the telephone?

11 MR. LACHMAN: Your Honor, this is Scott Lachman
12 from Ackerman on behalf of Bank of America.

13 THE COURT: All right.

14 MR. LACHMAN: Bar Number 12016.

15 THE COURT: All right. And I can hear you a lot
16 better, so thank you. All right. So we've just discussed
17 the -- previously that I have the two binders from the
18 different parties.

19 On behalf of your client, had you filed anything
20 or were there any documents that you wanted my to see on
21 behalf of Bank of America?

22 MR. LACHMAN: No, Your Honor. I was retained as
23 counsel yesterday, so I'm just getting up to speed. Based on
24 my review of the public record, it does not appear, at first
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1 glance, that Bank of America has an interest in the property
2 or the foreclosure.

3 THE COURT: Okay. All right. So did you wish to
4 remain in on the case or what are your druthers?

5 MR. LACHMAN: I intended to listen.

6 THE COURT: Okay.

7 MR. LACHMAN: And chime in if necessary.

8 THE COURT: Okay. All right. So how it goes,
9 Mr. Millward, it's your motion and then Mr. Hernandez next,
10 and then I'll do Bank of America and that's the routine we'll
11 follow. All right?

12 MR. MILLWARD: That sounds fine, Your Honor.

13 THE COURT: Okay.

14 MR. MILLWARD: And, Your Honor, if I may --

15 THE COURT: And let me just ask, though, if you
16 would pull the microphone as close as you can to yourselves
17 so --

18 MR. MILLWARD: Sure.

19 THE COURT: -- we don't have any issues. All
20 right. Go ahead.

21 MR. MILLWARD: Your Honor, if the Court will
22 allow, I would like to just make a brief opening.

23 THE COURT: All right. Go ahead.

24 MR. MILLWARD: And then present witness testimony
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1 as well as --

2 THE COURT: Go ahead.

3 MR. MILLWARD: (Indiscernible).

4 MR. HERNANDEZ: Your Honor, I am not prepared for
5 an evidentiary hearing today. This is a hearing on the motion
6 of the merits. If the Court wishes to (indiscernible)
7 evidentiary hearing, I believe it would be, I would need to
8 call my own witnesses as well, Your Honor.

9 THE COURT: Okay.

10 MR. HERNANDEZ: That's how -- I'm sorry, if
11 that's the way that things are done here. That's not
12 generally -- and this is my first time appearing before this
13 district court.

14 Generally, when I've appeared in Washoe or Clark
15 County, generally we have an evidentiary hearing and I get to
16 prepare for that evidentiary hearing and bring my own witness
17 (indiscernible) hearing on the motion and then if you decide
18 you need more evidence, you just kick it out. I'm just
19 here --

20 THE COURT: All right. What evidence were you
21 intending to --

22 MR. MILLWARD: Your Honor, the evidence I was
23 going to present would conform with the evidence presented in
24 the motion, primarily the affidavit and statements of my
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1 client.

2 I guess if opposing counsel would have the Court
3 consider those -- that affidavit as actual evidence and
4 testimony of my client in the proceeding, then I would be fine
5 without --

6 THE COURT: Putting on additional.

7 MR. MILLWARD: What's that?

8 THE COURT: Without having to put your clients on
9 for additional information. Okay. All right. Is there --

10 MR. HERNANDEZ: That's fine, Your Honor. If
11 Your Honor believes there's still issues of fact, you know, of
12 course, if the Court wishes to hold an evidentiary on the
13 preliminary injunction motion, I believe that we can prevail
14 on the legal merits without having to go based on the facts
15 that they presented.

16 But if the Court wants to do that, then that's at
17 the Court's discretion obviously.

18 THE COURT: All right. Well, I -- what the Court
19 intended to do was to look at the -- in terms of the facts
20 presented in the affidavit. The only thing I'm concerned in
21 terms of what you provided to the Court as well seems to --
22 you've added additional facts to their affidavit.

23 And so in terms of my review under the applicable
24 rules, I guess that's where I'd have a concern. But, again,
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1 if this is -- was set as a preliminary, I'm required to set it
2 within so many days and I've done that.

3 MR. HERNANDEZ: Well, Your Honor, I have included
4 declaration (indiscernible) documents.

5 THE COURT: Right.

6 MR. HERNANDEZ: So that's our position,
7 Your Honor, with our (indiscernible) that these documents were
8 documents that were -- we've readily produced here, so --

9 THE COURT: Okay. All right. So let's just go
10 ahead. I'm not hearing any objections to the facts as
11 contained in the affidavit or the need to clarify, so go ahead
12 with your argument.

13 MR. MILLWARD: All right, then, Your Honor. Then
14 what I'm going to do is make legal argument and point out a
15 few things from the documents provided to the court as
16 evidence and I guess extract information that I really want
17 the Court to pay close attention to.

18 The -- this matter, Your Honor, pertains to a
19 2009 loan modification agreement that was breached by Bank of
20 America. And when I say "breached," payments were refused
21 from my client.

22 My client worked for a year and a half trying to
23 make payments to Bank of America, calling regularly, trying to
24 find out why a loan modification that she entered into with
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1 Bank of America in 2009 was not accepted.

2 Thereafter, Bank of America signed the loan
3 modification agreement and recorded it, and there is no
4 dispute as to the parties that it was signed and recorded.
5 There's no dispute that it exists and that it's effective and,
6 in fact, Your Honor, the notice of default here refers to the
7 loan modification.

8 However, every statement provided to the Court
9 that is admitted now as evidence reflects terms from the
10 original 2007 agreement.

11 If, in fact, this loan modification was an
12 effective agreement and all of parties would agree that it is
13 effective, then the terms of the current statements that have
14 been sent by Bank of America and by Fay Servicing in this case
15 would reflect those terms, but, in fact, they do not. They
16 only reflect the terms of the 2007 agreement.

17 The loan modification agreement was not followed
18 and it continues not to be followed. It was breached in 2009
19 and the parties continue to be in breach by not adopting the
20 lower interest rate, by not adopting low -- the extended
21 length of the term.

22 And so as to that factual piece, I would like the
23 Court to be aware that there is no documents -- documentary
24 evidence showing that even though it was recorded, signed and
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1 agreed to, and that my client made a payment on it in
2 September 1st of 2009, there is no documentary evidence
3 showing that Bank of America or Fay Servicing has in any way
4 honored that agreement or accepted payments on it.

5 Next, as to the legal argument for the leading my
6 client's duty of performance on the agreement. Fay Servicing,
7 U.S. Bank would like to foreclose on this property because
8 payments haven't been made. Payments haven't been made
9 because my client couldn't make them because no bank would
10 accept them.

11 At no time has either Bank of America or
12 U.S. Bank and Fay Servicing gone back and said, oh, we
13 recognize that there's a problem here.

14 There's this agreement that you entered into in
15 2009 and apparently there was this mix-up and you weren't able
16 to make payments on that agreement. We're willing to fix this
17 and go back so that you can make your payments. That hasn't
18 happened.

19 The accrual of interest and non-payment shouldn't
20 be prejudiced to my client, should be -- my client shouldn't
21 be held accountable for it under general contract law
22 principles and a recent case that I just found in Nevada, Cane
23 versus Price, which is 134 Nevada Advanced Opinion 26.

24 THE COURT: What was the number?
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1 MR. MILLWARD: 134.

2 THE COURT: Yeah.

3 MR. MILLWARD: Advanced Opinion Nevada 26.

4 THE COURT: Okay.

5 MR. MILLWARD: And it's a 2018 case. And it
6 simply says, when parties exchange promises to perform, one
7 party's material breach under this promise discharges the
8 non-breaching party to the duty to perform.

9 So you -- the Court can't hold my client
10 accountable for missed payments when they weren't able to make
11 them in the first place under the loan modification agreement.

12 And under that rule of law, the Court should see
13 this case not as a foreclosure case, but as a case where we've
14 got a bank trying to enforce a loan modification agreement and
15 an original deed of trust when, in fact, that bank's
16 predecessor in interest breached the agreement, relieving the
17 Lincicomes of any duty to perform.

18 Now, the Lincicomes aren't asking for their house
19 for free. The Lincicomes are just asking for what they agreed
20 to, which is to be given the right to makes payments on this
21 loan modification agreement and to be relieved of all the
22 accruing penalties, interest and non-payments over the years.
23 They are relieved of that duty under the law, they should be
24 relieved of it now.

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1 As to the Homeowner's Bill of Rights. So
2 NRS 107.5001(b) requires that information be provided before a
3 notice of default is recorded and it requires the information
4 be provided 30-plus days prior to the recording of the notice
5 of default.

6 The information that's supposed to be provided
7 pertains to the interest rate, the principle balance, the term
8 of the loan, the accrued missed payments, the accrued
9 interest, all of the material terms so that the debtor, the
10 homeowner can make good on the mortgage payment and correct
11 and reinstate the loan essentially.

12 THE COURT: All right. And let me just ask in
13 terms of what they received, that's Exhibit 16?

14 MR. MILLWARD: And that's Exhibit 16 in the
15 Lincicomes' binder, Your Honor.

16 THE COURT: Yes.

17 MR. MILLWARD: That is the notice of breach and
18 default. That's the recorded default I do not have and
19 neither does my client have the actual notice. It would
20 appear that according to the terms of the notice of default
21 and the declaration or affidavit attached thereto, that that
22 document would have been provided in --

23 THE COURT: I guess what did they receive that
24 you're claiming doesn't meet 107.500?

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1 MR. MILLWARD: Well, that's the problem,
2 Your Honor. It hasn't been produced. We don't have it. But
3 there's no evidence to the -- no evidence whatsoever that
4 they, all of a sudden, would have adopted the loan
5 modification terms in that notice, even though every statement
6 made since then and every statement made before then included
7 incorrect information.

8 THE COURT: Okay. But what did they receive in
9 order -- they must have received something from the bank
10 saying we're ready to foreclose?

11 MR. MILLWARD: Right, right. The indication that
12 that happened is in the affidavit attached to the notice of
13 default. And so that's, what, two or three pages into the
14 notice of default.

15 THE COURT: All right. What document is the
16 notice of default?

17 MR. MILLWARD: I'm sorry, Your Honor.

18 THE COURT: I guess I need to understand, what
19 did they receive -- in order for me to make a finding as
20 you're requesting that 107.500 wasn't met, I would have to
21 look at what they did receive.

22 MR. MILLWARD: Right.

23 THE COURT: Compare it to what 107.500 requires.

24 MR. MILLWARD: That -- my client's affidavit --
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1 THE COURT: Right.

2 MR. MILLWARD: -- provides that they didn't
3 receive anything --

4 THE COURT: Okay.

5 MR. MILLWARD: -- that complies with 107.500.

6 THE COURT: So what was the first document that
7 they received that indicated the bank was foreclosing? Or has
8 the bank even started foreclosure at this point?

9 MR. MILLWARD: Yeah, the bank has. The bank
10 reported the notice of default.

11 THE COURT: Okay.

12 MR. MILLWARD: And the notice of default says
13 that -- and I'm just looking at -- the affidavit saying that
14 the NRS 107.500 statement was provided is dated October 5th of
15 2016.

16 So sometime prior to October 5th of 2016, some
17 kind of statement was sent and the person signing this
18 affidavit says that that affidavit -- or that statement was
19 sent.

20 THE COURT: Okay.

21 MR. MILLWARD: But my clients' testimony and
22 affidavit provides that nothing was received.

23 THE COURT: Okay.

24 MR. MILLWARD: At least nothing indicating the
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1 correct terms of the loan, the correct interest rate, the
2 correct term -- the correct principle balance.

3 All of the things that are required by NRS
4 107.5001(b) were not provided correctly and/or the document
5 wasn't provided.

6 THE COURT: Okay.

7 MR. MILLWARD: As to -- and maybe this is a point
8 that I needed to clarify. Not only are my clients seeking a
9 preliminary injunction under the Homeowner's Bill of Rights as
10 it provides for the -- by the Homeowner's Bill of Rights, but
11 they're also seeking an injunction because Fay Servicing and
12 U.S. Bank do not have a contract that's enforceable because of
13 the breach that occurred in 2009 and the successive breaches
14 in failing to recognize the loan modification agreement
15 thereafter.

16 THE COURT: All right. Explain that argument to
17 me.

18 MR. MILLWARD: Well, if you don't have an
19 effective deed of trust on property because you breached the
20 agreement to enforce -- breached the agreement allowing you to
21 enforce that deed of trust, then you can't seek to foreclose.

22 And one of the relief -- a part of the relief
23 sought in the complaint is declaratory relief as to the rights
24 and duties of the parties.

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1 And as to the Lincicomes, the duty to make
2 payment was relieved as to Bank of America, Fay Servicing and
3 U.S. Bank. The duty was to honor the agreement, and because
4 of their failure to do so, they are no longer able to enforce
5 that agreement and its terms because of a material breach of
6 the contract.

7 THE COURT: All right. But is the -- isn't the
8 agreement separate from the deed of trust?

9 MR. MILLWARD: Actually, here, it's a modified
10 deed of trust. So it's not a note.

11 THE COURT: Okay. Was --

12 MR. MILLWARD: It's a modified deed of trust and
13 so --

14 THE COURT: So the 2009 agreement, there was a
15 modified deed of trust and was that filed?

16 MR. MILLWARD: Yes.

17 THE COURT: Or recorded?

18 MR. MILLWARD: It was recorded. And it was
19 recorded in 2011.

20 THE COURT: So a modified deed of trust is filed
21 and -- all right. What document is that?

22 MR. MILLWARD: Yeah, that is going to be the loan
23 modification agreement Number 3.

24 THE COURT: Number 3. All right. It says loan
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1 modification title of document.

2 MR. MILLWARD: And you'll see that it states that
3 a man (sic.) supplements the mortgage deed of trust deed to
4 secure debt (indiscernible) dated May 23rd, 2007.

5 THE COURT: Okay.

6 MR. MILLWARD: And you'll also note in this
7 document that the principle balance is adjusted to
8 417,196.50 -- I believe that's 58. You'll also note that the
9 interest rate that is to be charged from 2009 to 2014 is
10 4.875 percent.

11 THE COURT: Okay.

12 MR. MILLWARD: On the next page is a step-up loan
13 modification addendum, which notes that the interest rate in
14 August of 2014 should step up to 5.375 percent.

15 THE COURT: Okay.

16 MR. MILLWARD: No statement provided in the
17 evidence, Your Honor, anywhere indicates the extension of the
18 term that the modification makes, the interest rate, or the
19 change in payment or the change in principle balance.

20 It provides on that first page of Exhibit 3 --
21 excuse me, second page of Exhibit 3, that the maturity date is
22 extended to 2049 rather than 2037. In essence, it created a
23 40-year fixed rate loan rather than a 30-year adjustable rate
24 loan.

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**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

ALBERT ELLIS LINCICOME, JR. and)	NEVADA SUPREME COURT
VICENTA LINCICOME,)	CASE NO.: 83261
)	
Appellants,)	
)	
v.)	THIRD JUDICIAL DISTRICT
)	COURT CASE NO.: 18-CV-01332
SABLES, LLC, A NEVADA LIMITED)	
LIABILITY COMPANY, AS TRUSTEE)	
OF THE DEED OF TRUST GIVEN BY)	
VICENTA LINCICOME AND DATED)	
5/23/2007; FAY SERVICING, LLC, A)	
DELAWARE LIMITED LIABILITY)	
COMPANY AND SUBSIDIARY OF)	
FAY FINANCIAL, LLC; PROF-2013-M4)	
LEGAL TITLE TRUST BY U.S. BANK,)	
N.A., AS LEGAL TITLE TRUSTEE;)	
BANK OF AMERICA, N.A.;)	
BRECKENRIDGE PROPERTY FUND)	
2016, A UTAH LIMITED LIABILITY)	
COMPANY; NEWREZ, LLC, D/B/A)	
SHELLPOINT MORTGAGE)	
SERVICING, LLC.; 1900 CAPITAL)	
TRUST II, BY U.S. BANK TRUST)	
NATIONAL ASSOCIATION; AND)	
MCM-2018-NPL2,)	
)	
Respondents.)	
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APPELLANTS' APPENDIX TO OPENING BRIEF

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1 THE COURT: Okay. And who was the servicer at
2 the time that this document was filed?

3 MR. MILLWARD: The servicer was Bank of America
4 or its predecessor, I believe it's Back Home Loan Servicing.

5 THE COURT: Okay. All right. And if I -- again,
6 I apologize. I don't have the opportunity to read all and
7 everything in seven days.

8 MR. MILLWARD: Sure.

9 THE COURT: But was the amended agreement
10 transferred?

11 MR. MILLWARD: Was it transferred to the new --

12 THE COURT: To the new bank and the new servicer?

13 MR. MILLWARD: Well, if the original deed of
14 trust was amended by the loan modification agreement and then
15 that -- excuse me, yeah, by the loan modification agreement
16 and then the deed of trust is assigned, I would -- I believe
17 that there's no reason to separate.

18 THE COURT: All right. And this loan
19 modification agreement, did it supplant or did it simply amend
20 the original?

21 MR. MILLWARD: It amends. According to its
22 terms, it amends.

23 THE COURT: Okay.

24 MR. MILLWARD: It says it does amend and
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1 supplement, but not supplant.

2 THE COURT: Supplant, okay.

3 MR. MILLWARD: So it's in addition to those
4 terms.

5 THE COURT: All right.

6 MR. MILLWARD: So I think, next, we have to go to
7 the statements to kind of understand -- well, let's move to
8 Exhibit 4, Your Honor, just real quick.

9 Exhibit 4, and I was mistaken earlier, I provided
10 this document to counsel, not believing it was in the binder,
11 but it made the binder anyway.

12 Exhibit 4 provides that these are the terms of
13 the loan modification agreement. This is the letter that was
14 provided to my client from Bank of America, saying, this is
15 how we're modifying your loan, this is when the payments are
16 going to be due, this is the interest rate.

17 THE COURT: Okay.

18 MR. MILLWARD: So this isn't the agreement, but
19 this is the information provided with the agreement before it
20 was signed. Then we have some statements.

21 So the first statement that fails to recognize
22 the loan modification agreement is under Number 5, and it is a
23 statement dated October 29th, 2009. It would appear from this
24 statement that they have not capitalized the loan or
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1 recapitalized the loan. But the principle balance is still
2 381,150 as the original loan agreement says.

3 It still says it's a 30-year conversion loan. It
4 still says that the interest rate is 6.875, rather than the
5 4.285, and it still shows a past due amount of \$42,000 at that
6 point in time, rather than zero, because of the loan being
7 capitalized -- recapitalized.

8 Under Exhibit 6, Your Honor, you'll see all the
9 evidence that my client was contacting Bank of America.
10 You'll see this first page, December 15, 2009, that they
11 recently received authorization requests from the law offices
12 of Charles K. Marshall to access their loan information. They
13 were looking for help at that time. They reached out to other
14 counsel.

15 You'll see that on March 12th, 2010, that there's
16 a response to request for information. You'll see on
17 October 19, 2011, a request for information and an explanation
18 that they'll receive a letter.

19 They didn't ever receive any document indicating
20 what happened to this loan modification, where it went, why it
21 is not being enforced, why its terms haven't been applied with
22 the loan. Nothing like that was provided.

23 And to that point, I think they have to go back
24 to the loan modification agreement itself to understand what
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1 may or may not have happened here. But if you look at the
2 date of recording, it's recorded on May 4th of 2011 and it's
3 signed by someone that looks like -- I think it says James
4 Smith on March 22nd, 2011.

5 So it would be speculation for me to say what
6 happened here. But we have an agreement that's effective
7 September 1st -- or, excuse me, effective July 31st of 2009
8 that's been agreed to and signed, before a notary even, and
9 recorded and yet its terms have never, ever been applied to
10 this loan and the bank has -- U.S. Bank continually rejected
11 payments according to the modification agreement and no
12 statement from Fay Servicing has ever incorporated the terms
13 of the loan modification agreement.

14 And that's evidenced by the list of statements
15 here by (indiscernible) Exhibit -- yeah, Exhibit 13.

16 So under Exhibit 13, which is a large stack of
17 exhibits, you'll see that this is now from Fay Servicing. The
18 outstanding principle balance isn't 417 like the loan
19 modification would say there would be.

20 It's still incorrectly 381,150 as of
21 September 1st of 2015. The interest rate 6.875, instead of
22 the 4.825. And, in fact, as of September of 2015, it would
23 have already bumped up to the five point -- 5.375.

24 The unpaid balance is assumed to be wrong because
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1 we would assume that they would include the 42,000 that Bank
2 of America was still saying was owed in October of 2009.
3 Being as -- being as Bank of America never recognized the
4 terms of this loan in any of the statements, it has to be
5 assumed that because of all the terms continuing to be
6 incorrect, that these balances are also still incorrect.

7 We don't have a spreadsheet or any type of
8 evidence showing the history of the loan to go off of. We
9 can't state one way or the other that they incorrectly applied
10 the interest rate. However, if we go off this statement, then
11 they would have.

12 The statements provided in Exhibit 13,
13 Your Honor, go through October 10th of 2018. It's the last
14 two pages of the Exhibit 13. And what's interesting about the
15 last few statements is the interest rate fluctuates all over
16 the place for no known reason.

17 It doesn't -- it doesn't relate to the original
18 agreement in 2007. It also doesn't relate to the loan
19 modification agreement. It's just wrong as to both
20 agreements.

21 The interest rate on, for example, the
22 November 1st, 2018, statement -- or excuse me, the -- yeah,
23 the October 10th, 2018, statement is 5 percent. You go back
24 to several pages and look at the July 10th, 2017, statement,
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1 it's at 4 percent.

2 This loan should have never been below 4.285 and
3 we're not complaining that they were charging the wrong rate,
4 but I think it proves something, that they're not following
5 the terms of either agreement.

6 It looks like the last time that they used the
7 six point -- 6.875 rate is the 5/10/17 statement. So
8 May 10th, 2017, was the last time that they used the 6.875
9 rate. All rates thereafter are all over the place and I don't
10 know of any rhyme or reason why they're going from 4 to
11 5 percent and that doesn't make sense. But it's certainly not
12 a recognition of the loan modification agreement because the
13 rates don't equal what they would be under the loan mod.

14 With regards to modifications attempted by my
15 client, they attempted a half modification according to
16 their -- the affidavit of -- and verifications of both my
17 clients, they attempted a modification with Fay Servicing.

18 They attempted a modification with Bank of
19 America and then ultimately the failure to modify, I think,
20 does nothing but show an attempt by my client to correct this
21 error that occurred in 2009 when Bank of America chose not to,
22 for whatever reason, adopt the terms of this loan and accept
23 payments.

24 THE COURT: All right. Now, you say they
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1 attempted to modify. Didn't they, in fact, modify?

2 MR. MILLWARD: They have not modified. There's
3 no modification agreement other than the 2009 modification
4 agreement. So when I talk about the loan modification
5 agreement, it's a signed agreement that's now part of the deed
6 of trust. That's essentially the binding contract that the
7 parties are operating under. That's the -- that's stated
8 within the notice of default and admitted to by the parties or
9 at least by Fay Servicing and U.S. Bank.

10 As to other modifications, in 2015, my clients
11 attempted to modify with Bank of America. They made two
12 payments. In fact, they -- the interest rate was a great
13 rate. The terms were great for them. They were excited to
14 modify to those terms.

15 They made two payments. And then on August 1st
16 of 2015, when they went to make a third payment, Bank of
17 America said, I'm sorry, we have transferred your loan.
18 You'll have to make your loan with Fay Servicing.

19 And so it's the testimony of my client that Fay
20 Servicing told my client on the phone that we will not accept
21 payments under a modification from Bank of America.

22 So my client ran to Bank of America, hopped in
23 the car, drove to Bank of America, the local branch, to make a
24 payment and Bank of America refused that payment. And I know
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1 that that piece of evidence was provided in the -- in the
2 motion, I'm just looking for it here, see if I can find it.
3 Yeah, that's Number 12, Your Honor.

4 THE COURT: All right. But I guess I'm having
5 trouble following you, because if there was no modification,
6 then why do I even look at whether or not they made payments
7 or Bank of America?

8 MR. MILLWARD: I completely -- I get that point
9 and I'm with you on it. You're right. My clients wanted,
10 however, not to deal with this issue like we are today. My
11 clients didn't want --

12 THE COURT: But as a matter of law, they either
13 amended or they didn't. It's not a, we felt like it, we
14 tried.

15 MR. MILLWARD: I get it. I get it. The point of
16 me making the representations, the point of me discussing the
17 evidence is not for the Court to consider that they didn't
18 believe that their modification was invalid. It's because
19 they wanted to save their home and they were willing to look
20 past it if a bank would work with them to do so.

21 They knew that Bank of America, for example, was
22 continuing to send them statements, saying that you haven't
23 paid your mortgage. They knew that threats of foreclosure
24 were just down the road.

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1 THE COURT: All right. Well, let's stop there.
2 So you -- first I'm hearing it was amended in 2009.

3 MR. MILLWARD: Yeah.

4 THE COURT: Now I'm hearing that there was action
5 taken in 2015.

6 MR. MILLWARD: Statements were given in '15, a
7 motion for relief of stay from their bankruptcy, and I kind of
8 skipped over that. We can just discuss that.

9 THE COURT: Well, the bankruptcy, like I say, I'm
10 not concerned about the bankruptcy because all the bankruptcy
11 did was say we're not going to take it under our pages.

12 MR. MILLWARD: Well, kind of, it actually proved
13 something. Bank of America did file a claim in the
14 bankruptcy. They didn't have to. I mean, a creditor doesn't
15 have to file a claim.

16 But the whole point of their bankruptcy was so
17 that Bank of America would file a claim so that they could
18 adjudicate the loan modification and force Bank of America to
19 honor it. Well, Bank of America didn't even appear. They
20 didn't even ask to be paid.

21 THE COURT: Yeah, but that doesn't resolve the
22 issues as to what the underlying deed of trust is, and so --

23 MR. MILLWARD: Well, you're right, Your Honor,
24 but I don't think that's at issue. Everybody admits it.

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1 THE COURT: Well, no, I -- what I -- we have an
2 issue. I'm hearing that there was an amended in 2009, it
3 wasn't filed until later. Then I'm hearing that there was a
4 HAMP program.

5 MR. MILLWARD: Sure, but --

6 THE COURT: You're listing 2015.

7 MR. MILLWARD: But none of those modifications
8 actually occurred, happened. So the 2015 attempt by my
9 client --

10 THE COURT: So there was -- there was no
11 documents executed by both parties saying --

12 MR. MILLWARD: That's correct.

13 THE COURT: -- this is changing what's been
14 previously --

15 MR. MILLWARD: That's correct.

16 THE COURT: Okay. All right. So then after
17 2015, what's the next attempt?

18 MR. MILLWARD: Right. So then Fay Servicing has
19 their loan. They attempt to do a modification with HAMP, so
20 they apply. Fay Servicing says, sorry, you don't qualify, we
21 can't do it.

22 They then applied under a program that I'm not
23 familiar with called HAMP unemployed or underemployed,
24 unemployed, something like that, where somebody is unemployed,
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1 and therefore, the program is designed for people that don't
2 have current income so that they can save their homes.

3 THE COURT: All right. When was that?

4 MR. MILLWARD: That was in, I believe, 2016.
5 Yeah, 2016.

6 THE COURT: 2016. Okay. And again, you're
7 stating that there's no written documents, nobody signed
8 anything.

9 MR. MILLWARD: That's correct.

10 THE COURT: We just tried to do it and --

11 MR. MILLWARD: Right. They wanted to save their
12 home, Your Honor, and they believed that all these threats
13 that they were receiving from Fay at the point, that they were
14 receiving from Bank of America were going to lead to where we
15 are today.

16 THE COURT: Okay.

17 MR. MILLWARD: And they didn't want to be here.

18 THE COURT: All right. What was the next action
19 taken?

20 MR. MILLWARD: The next action after that, they
21 started working with Senator Reed's office. And after working
22 with Senator Reed's office, they were offered modification by
23 Fay.

24 They made the three payments on the trial
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1 modification, then the terms were provided and they realized
2 that they would be making a payment of \$2800 a month, which
3 they couldn't afford.

4 THE COURT: Okay. But, again, you're telling --
5 you're representing to the Court no documents were signed, no
6 agreements were entered into.

7 MR. MILLWARD: That's correct.

8 THE COURT: That could have possibly affected the
9 amended deed in 2009.

10 MR. MILLWARD: That's correct.

11 THE COURT: Okay.

12 MR. MILLWARD: Otherwise, I think the statements
13 would reflect something other than the original agreement from
14 2007, which they don't.

15 THE COURT: Okay.

16 MR. MILLWARD: I mean, it's -- all the statements
17 are complied with.

18 THE COURT: All right. So when was the Senator
19 Reed's -- he recommended Fay, what year was that?

20 MR. MILLWARD: That was 2016, Your Honor.

21 THE COURT: 2016. Okay. Then what happened?

22 MR. MILLWARD: After that modification
23 (indiscernible) Fay began this process.

24 THE COURT: What is this process?
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1 MR. MILLWARD: The foreclosure process.

2 THE COURT: Okay. And how did they begin this
3 foreclosure process.

4 MR. MILLWARD: Well, according to the affidavit
5 attached to the notice of default, they submitted documents in
6 2016 to the Lincicomes, saying that this is the current
7 balance you owe. This is the current interest rate, what not,
8 you need to make a payment or we'll foreclose.

9 Then after the modification fell through, they
10 filed a notice of default. It's the 27 NOD that is referred
11 to in the exhibit and that would be 16.

12 THE COURT: 16.

13 MR. MILLWARD: And you'll see that in the notice
14 of default, it talks about the original agreement, the
15 original instrument executed -- or recorded, excuse me, on
16 5/25/2007. It talks about the principle balance being
17 381,150. It talks about monthly installments being due on
18 September 1, 2008. Yeah, it references the loan modification
19 agreement that was recorded on 5/4/2011.

20 THE COURT: Right.

21 MR. MILLWARD: And so that's the document.

22 THE COURT: Now, in terms of the amended, which
23 is what, Exhibit 3?

24 MR. MILLWARD: I believe so, yeah.
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1 THE COURT: Did they substitute a note?

2 MR. MILLWARD: Did they substitute a note?

3 THE COURT: Right.

4 MR. MILLWARD: They didn't at the time, but I
5 believe the note becomes -- as to the discharge entered by the
6 bankruptcy court, I believe the note essentially goes away and
7 the deed of trust being secured by the real property is the
8 only document effective as to being enforced by the creditor.

9 THE COURT: Okay. All right. So then what
10 happened after the notice of breach and default?

11 MR. MILLWARD: So then my clients began the
12 mediation program. So they started mediation, applied for
13 mediation, and they had a mediation that occurred in the fall
14 of 2017. The mediator was unsatisfied with the documents
15 provided, and therefore, declined to give a certificate.

16 THE COURT: To foreclose. Then what happened?

17 MR. MILLWARD: Right. Then the mediation was
18 continued to -- I believe it was April 2018. And I heard,
19 again, at this point in time, I guess appropriate documents
20 were provided. I don't know what the mediator hasn't looked
21 at.

22 But the mediator encouraged the parties to
23 resolve the case, to dissolve the matter, the mediation, and
24 the parties agreed to resolve it with a deed in lieu.

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1 And so as to the Lincicomes, they agreed that the
2 mediation would be over, that no longer would the mediator
3 have jurisdiction over -- to prevent the foreclosure of the
4 case and that the mediation would cease essentially upon an
5 agreement that they do a deed in lieu.

6 THE COURT: Okay.

7 MR. MILLWARD: I've looked for the terms of --
8 that applied to that agreement. There's no doubt that my
9 clients signed off and that the mediator checked the box deed
10 in lieu, but there are no other terms to that agreement that I
11 see effective.

12 I certainly don't see anything that would show
13 that my clients waived their rights to making any of the
14 claims that they're making now, that they agreed that there
15 was an enforceable, you know, deed of trust, that they agreed
16 to waive any breach by either Fay Servicing or Bank of America
17 of the Homeowner's Bill of Rights. None of those things were
18 stated in the document provided by the mediator.

19 THE COURT: And why would they have to be stated
20 in the document if they're agreeing to do a deed in lieu?

21 MR. MILLWARD: Why would they have to?

22 THE COURT: Right.

23 MR. MILLWARD: Because what my clients believed
24 that they were agreeing to is simply what's there, that the
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1 mediation will end and that they will do a deed in lieu.

2 And so as to a breach of that agreement by my
3 clients, right, what would the other side be entitled to, the
4 foreclosure to enforce their rights if they --

5 THE COURT: Yeah, they'd also be entitled to
6 specific performance, which would be that your clients turn
7 over the deed.

8 MR. MILLWARD: Yeah.

9 THE COURT: In lieu of foreclosure.

10 MR. MILLWARD: I agree, but only if they have
11 those rights in the first place.

12 THE COURT: No, if they enter into an agreement
13 that states we're willing to walk away from this house, we
14 will give the deed in lieu.

15 MR. MILLWARD: Okay.

16 THE COURT: Then everybody signs that document,
17 the bank could come to court and say, we want specific
18 performance, force them to do the deed in lieu transaction
19 that they promised to do in a mediation, which everybody
20 agreed that they'd be bound by.

21 MR. MILLWARD: Right. I understand the Court's
22 point. In fact, from the testimony and discussions with my
23 client, I'm now making representations because this isn't part
24 of the --

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1 THE COURT: All right.

2 MR. MILLWARD: -- motion. And if the Court wants
3 to hear testimony, I would be happy to put my client on.

4 But as to my clients's understanding, they were
5 given three options: A modification, a short sale, or a deed
6 in lieu. They --

7 THE COURT: Okay. They had counsel at this, did
8 they not?

9 MR. MILLWARD: They did. They did. It wasn't
10 explained to them. They didn't understand.

11 THE COURT: All right. So --

12 MR. MILLWARD: That there was no -- well -- but
13 even back to my point, if I'm sitting as counsel in a
14 mediation and I look at the agreement that my clients are
15 being set with, I'm looking at they're not waiving their
16 rights to make a claim that the lender actually has rights to
17 foreclose. I mean, that's not the statement that's being
18 agreed to.

19 THE COURT: Why not?

20 MR. MILLWARD: Because --

21 THE COURT: Because if you're counsel for them
22 and they're not waiving rights, you sure as hell want to have
23 on the agreement that my clients are not waiving anything.

24 MR. MILLWARD: I did that. But, in fact, there
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1 is no agreement. There is no statement as to what it means or
2 what has been complied with, or what my clients rights were
3 that they were giving up or what they were agreeing to.

4 THE COURT: But do you understand the
5 implications of what you're asking me to do? You're basically
6 saying, we throw the mediation program out and that parties go
7 to mediation, they can agree to whatever they want to do, and
8 then just throw it out the window because we're not going to
9 follow anymore.

10 MR. MILLWARD: Well, yeah, but that seems a lot
11 worse than giving somebody something that they weren't
12 entitled to for nine years.

13 THE COURT: It also means in terms of good faith,
14 when people participate in a modification process and they go
15 to a mediation --

16 MR. MILLWARD: Right.

17 THE COURT: -- and they state to the mediator,
18 we're willing to settle this by doing this, and then they sign
19 off on it after they're represented by counsel, for them to
20 come back afterwards and say, well, we're not bound by what
21 the mediator says.

22 MR. MILLWARD: Right. I understand that point.
23 And, in fact, the law that's cited by opposing counsel as to
24 what the report is referring to, as to what the effect of a
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1 mediation agreement is right.

2 THE COURT: Okay.

3 MR. MILLWARD: That lawfully comes from Jones v.
4 Suntrust Mortgage Inc., which is cited by counsel in their
5 response. It's interesting because the arguments made in that
6 case relate to not whether or not a -- the agreement
7 satisfies -- it is an agreement of waiver of rights, an
8 agreement as to anything other than as to the code that
9 surrounds mediation; right?

10 One of the arguments made, for example, in that
11 case is that the lender had failed to offer them alternatives
12 in the past. And so they were citing the code in the
13 mediation -- or after the mediation, right, so they failed to
14 follow the terms of the mediation and failed to modify like
15 stated; right? And so they then assert these --

16 THE COURT: Well, let me just ask, though. On
17 the basis of the mediator's decision, did the lawsuit go
18 forward?

19 MR. MILLWARD: Did the lawsuit go forward?

20 THE COURT: Or did the foreclosure go forward?

21 MR. MILLWARD: In that case?

22 THE COURT: No, in this case. Everybody stopped
23 what they were doing because they believed that they had an
24 agreement to the case and therefore --

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1 MR. MILLWARD: Well, actually it's kind of
2 interesting. The mediation certificate --

3 THE COURT: Right.

4 MR. MILLWARD: -- didn't come out until October
5 of 2018, October 4th. So my clients reacted as quickly as
6 they could.

7 THE COURT: Okay.

8 MR. MILLWARD: They found counsel immediately
9 once the certificate was issued. And, in fact, based on my
10 client's testimony, they didn't know that they had agreed to
11 anything at mediation.

12 THE COURT: Even though they were represented by
13 counsel?

14 MR. MILLWARD: Even though they were represented
15 by counsel.

16 THE COURT: And so --

17 MR. MILLWARD: They believed that they were given
18 three options and that those three options were it, and there
19 was no option for no agreement. Nobody explained that to
20 them. The mediator didn't explain that to them.

21 THE COURT: All right. Counsel, I'm just having
22 a real hard time with this.

23 MR. MILLWARD: I guess it.

24 THE COURT: You're asking -- the whole idea of
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1 the foreclosure mediation is the parties get together, they
2 have a mediator. And in terms of your clients, they're
3 represented by counsel and the whole idea is, we work this
4 out, the mediation goes through and then the parties are done.

5 MR. MILLWARD: Okay. I get that point,
6 Your Honor. But let's just assume that we follow your line of
7 reasoning and we say you're right. They should be allowed to
8 foreclose because of what happened in mediation, right. Okay.
9 So what balance --

10 THE COURT: No, and it's not in terms of
11 foreclosure. What they agreed to was your clients would do a
12 deed in lieu of foreclosure.

13 MR. MILLWARD: Right. Right.

14 THE COURT: And I don't understand your argument
15 as to why they can't expect that your clients are going agree
16 to what they signed off on.

17 MR. MILLWARD: The reason is because of the way
18 it happened and I would prefer to put my client on the stand
19 so I can address my client's testimony as to that, what my
20 client believed she was agreeing to.

21 THE COURT: No, I think that's for a later date.
22 That doesn't have to do with the foreclosure as to whether or
23 not they can prevail on their claim.

24 MR. MILLWARD: Give me a second, Your Honor.
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1 THE COURT: Yeah, that's fine. Take your time.

2 MR. MILLWARD: Okay. Your Honor, I have a piece

3 of evidence. I don't believe that it's provided in the

4 (indiscernible).

5 MR. HERNANDEZ: Your Honor, I would object to any

6 evidence being presented.

7 THE COURT: Well, no, I'm just -- in terms of the

8 argument, where I guess I'm hung up when I read through all

9 this is I -- you have a fine argument until we get to the --

10 MR. MILLWARD: Well, this --

11 THE COURT: The last mediation.

12 MR. MILLWARD: Well, this, in fact, I think,

13 resolves the Court's issue.

14 THE COURT: All right.

15 MR. MILLWARD: I don't see that I've got this

16 document, though, provided anywhere.

17 THE COURT: Well, I think with the loan -- the

18 mediator.

19 MR. HERNANDEZ: (Indiscernible) 2018 letter?

20 MR. MILLWARD: No.

21 MR. HERNANDEZ: May 2000 (indiscernible).

22 MR. MILLWARD: This is June 20th.

23 THE COURT: Yeah, I think that one is in the

24 document, what the parties signed off on.

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1 MR. HERNANDEZ: Your Honor, this is the response
2 to the (indiscernible) claims.

3 MR. MILLWARD: Yeah, that's what I thought, yeah.

4 MR. HERNANDEZ: But I disclosed that.

5 THE COURT: All right.

6 MR. MILLWARD: Do you know where it might be?

7 MR. HERNANDEZ: Yeah, I can tell you the
8 specifics. It's Exhibit U, Your Honor.

9 THE COURT: U. Okay.

10 MR. MILLWARD: And do you have it? I don't have
11 it in the May 16th, 2018, letter.

12 MR. HERNANDEZ: The revised May 16th, 2018,
13 letter.

14 MR. MILLWARD: Yeah, the (indiscernible) program
15 letter. So, Your Honor, the number -- I guess U.

16 THE COURT: Right.

17 MR. MILLWARD: June 20, 2018; is that right?

18 THE COURT: Um-hum.

19 MR. MILLWARD: So my client has informed me that
20 they believed that the deed in lieu option for them was closed
21 off because of the statement made at the bottom of -- the
22 bottom paragraph there in April of 2017.

23 If you read the last sentence of that paragraph
24 as to that page, the first page, the enclosed deed in lieu
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1 program closing document was mailed to you May 16th, 2018, to
2 notify you that your ineligibility to participate in the deed
3 in lieu program has been terminated.

4 THE COURT: Okay. When was the deed in lieu
5 agreement made?

6 MR. MILLWARD: So the mediation occurred in
7 April. And so by May 16th, according to this statement, their
8 opportunity to participate was closed. And at least as to my
9 client's understanding from what they has informed me, she
10 understood that no deed in lieu was an option after May 16th.

11 THE COURT: Okay. All right. Go on with your
12 argument.

13 MR. MILLWARD: Your Honor, with -- you don't need
14 testimony as to that fact?

15 THE COURT: No. No, I have the documents that
16 were admitted.

17 MR. MILLWARD: Okay. So I think we have to
18 then -- I think the Court maybe is satisfied with the history
19 that we've covered.

20 THE COURT: Right.

21 MR. MILLWARD: Do we need to go beyond October of
22 2018? There was a notice of sale recorded, the notice of sale
23 is what it is.

24 THE COURT: Well, what was the last notice that
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1 was filed in terms of them starting the foreclosure process?

2 MR. MILLWARD: The notice of sale was recorded
3 October 11th, 2018. It's the only notice of sale recorded
4 since the notice of default.

5 THE COURT: Okay.

6 MR. MILLWARD: There is a nine-month requirement
7 for someone to file a notice of sale and within nine months of
8 the notice of default, that requirement is stayed when someone
9 enters the mediation program. And so there's no problem for
10 timing for the notice of sale. That's not an argument that my
11 client's making.

12 THE COURT: Okay.

13 MR. MILLWARD: But as to the enforceability of
14 this loan, because of the breach that occurred in 2009, and
15 essentially the successive breach with every month that had
16 gone by that every institution involved had not applied the
17 terms of the modification and allowed the client to make
18 payments -- allowed my client to make payments according to
19 those terms, I think, is serious, Your Honor.

20 I think that the ultimate resolution of this
21 matter for my clients would be seeking to return back in 2009,
22 so that they then get what they wanted to get back then, which
23 was to make payments according to that modification that was
24 agreed, signed and recorded, and that's been acknowledged by
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1 all parties.

2 To say that my client had a duty to pay any
3 amount of money from that time forward, that my client had a
4 duty to -- I mean, we've been going into mediation. Mediation
5 is a response to the notice of default. Mediation's in
6 response to a failure to provide my client with terms that
7 were the loan modification agreement.

8 I mean, everything that occurs from there on out
9 results from the failure and breaches of Bank of America and
10 Fay Servicing to honor their agreement.

11 THE COURT: All right. Anything else?

12 MR. MILLWARD: Let me just make sure I've covered
13 everything.

14 THE COURT: All right.

15 MR. MILLWARD: And just briefly, Your Honor, it's
16 difficult to establish irreparable harm when I can't have my
17 client on the stand.

18 MR. HERNANDEZ: I concede irreparable harm.

19 MR. MILLWARD: You can.

20 MR. HERNANDEZ: Yes, I concede the irreparable
21 harm one.

22 MR. MILLWARD: Fantastic.

23 MR. HERNANDEZ: (Indiscernible) it's always
24 (indiscernible) same thing in our HOA case, Your Honor, so I
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1 can't come back and say we're not irreparable harm.

2 THE COURT: Well, let's just say you shouldn't.

3 MR. MILLWARD: With regards to likelihood of
4 proceeding, Your Honor, most of the evidence that proves that
5 this (indiscernible) was breached is in front of the Court on
6 documentary evidence provided by the defendants in this
7 matter, either directly to my client or provided in response.

8 I mean, every statement shows that the terms were
9 not acknowledged. Every statement shows that the balance, the
10 principle balance is wrong. Every statement shows that the
11 interest rate was wrong.

12 My client's affidavit establishes that my client
13 couldn't make payments and made attempts. She has dates and
14 names of individuals she spoke with or met with to discuss
15 these issues to find out why this modification isn't being
16 honored or accepted or why what -- why she's receiving
17 statements saying she owes 40, 50, \$60,000 and not being able
18 to move forward under the agreement that they agreed to.

19 I think that there should be no question as to
20 what's happened here and that's simply that there was an
21 agreement made that I agree it's been recognized by all
22 parties, though it wasn't honored, and failure to accept
23 (indiscernible) from the very beginning is a material breach
24 of the agreement.

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1 And it has to -- as a matter of equity, fairness
2 as a matter of law, it has to estop, the servicer here and its
3 predecessors in interest from seeking to enforce the documents
4 for which (indiscernible) breached.

5 THE COURT: Okay.

6 MR. MILLWARD: As to the Homeowners Bill of
7 Rights, Your Honor, it's -- the Homeowners Bill of Rights has
8 been violated simply because the terms stated within their
9 notices can't be accurate and aren't accurate.

10 It's argued by opposing counsel that in
11 California, if you misstate the terms, that's not a material
12 violation. What would be the point of NRS 107.5001(b) if
13 everybody can just make up numbers and make up interest rates
14 and make up the corrected payoff balance?

15 It has to mean something and to say that
16 providing it absolutely 100 percent incorrect reflection of
17 what is owed on the mortgage in this case, it has to be a
18 material violation. Otherwise, the statute is meaningless.

19 I mean, the only thing -- I guess if you provide
20 100 percent incorrect document and comply with the statute,
21 well, that can't be right. Otherwise, it sends somebody a
22 foreclosure notice and have the wrong names and the wrong
23 address and misstate everything. Why would it matter?

24 THE COURT: Why would you be entitled to some
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1 type of relief in terms of a -- if the Court just ordered,
2 okay, fine, you can't foreclose on this notice, go back and do
3 it right?

4 MR. MILLWARD: Right. Well, I think that --
5 because they can't. It's two stabs. The first argument is
6 they can't foreclose because we've got a breach.

7 THE COURT: Okay. That, I understand. But under
8 the --

9 MR. MILLWARD: And then on top --

10 THE COURT: But you're asking for an injunction
11 to keep them from --

12 MR. MILLWARD: All right. And then on top of
13 that, the Homeowners Bill of Rights says that when do you this
14 wrong, you're entitled to an injunction. When it's a material
15 violation of the statute, you're entitled to an injunction.

16 And so your statement is, what kind of relief
17 does that give my clients? Well --

18 THE COURT: What are you saying, though, that
19 you're entitled to an injunction from them ever again trying
20 to foreclose on the property?

21 MR. MILLWARD: I -- if we went back and adopted
22 2009 terms and moved forward under what had happened and --

23 THE COURT: Right.

24 MR. MILLWARD: -- recognized the breach, well,
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1 then I wouldn't say that. I mean, what -- because they would
2 then, in their future notice of default, say that the loan
3 modification principle, balance and interest rate and how many
4 payments have been missed and whatnot, but it would require
5 them to accept those terms. It would require them to up --

6 THE COURT: Right. But what I'm just saying, if
7 I go that route and I say, okay, fine, take it back to 2009,
8 recalculate it, but --

9 MR. MILLWARD: But I don't think that solves the
10 problem because my client's never been able to make payments
11 on that.

12 THE COURT: Well, but it would solve the problem
13 as to the notice issue.

14 MR. MILLWARD: I don't think so, because the
15 difference is this: If you have a duty to pay, then the
16 balance accrues from 2009 forward. If the breaching party by
17 failing to recognize the terms and not accepting payments
18 under those terms --

19 THE COURT: All right.

20 MR. MILLWARD: -- (indiscernible) breaching, then
21 my client --

22 THE COURT: All right. I accept that argument.
23 But if I don't rule in favor of your client as to the breach
24 and the material, but I find that there was a different and
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1 your client's not willing to do and I don't order a deed in
2 lieu, but I find that there was no material breach and that
3 they did fail to abide under the 2009 agreement, then
4 certainly they could go back, readjust the note. You can't
5 get an injunction on that.

6 MR. MILLWARD: I don't think so.

7 THE COURT: Okay.

8 MR. MILLWARD: And if they corrected everything,
9 then I couldn't see the future injunction.

10 THE COURT: Right.

11 MR. MILLWARD: Right. As to the Homeowners Bill
12 of Rights, as to my clients claiming that they still have --
13 the servicer and U.S. Bank have no rights to pursue a
14 foreclosure, which is the first argument I started with, then
15 yeah, they would be entitled to an injunction there, but not
16 under the Homeowners Bill of Rights.

17 THE COURT: Okay. All right. Anything else?

18 MR. MILLWARD: I don't think so. Thank you.

19 THE COURT: All right. Mr. Hernandez.

20 MR. HERNANDEZ: Your Honor, I apologize.

21 THE COURT: You want to take a five-minute break?

22 MR. HERNANDEZ: Let's take a five-minute break.

23 THE COURT: All right. Let's go ahead and take a
24 five-minute break. The only thing is I have to get this done
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1 by 5:00 or I get in trouble with overtime.

2 MR. HERNANDEZ: If I go longer than 30 minutes,
3 Your Honor --

4 THE COURT: Okay.

5 MR. HERNANDEZ: -- you can throw something at me.

6 THE COURT: All right. So, sir, on the
7 telephone, I'm going to put you on hold -- or actually I'll
8 just leave the phone open. Okay? We'll be back in about five
9 minutes. Court's in recess.

10 (Recess.)

11 THE COURT: All right. So let's go back on the
12 record in 18-CV-03112. Go ahead, Mr. Hernandez.

13 MR. HERNANDEZ: Thank you, Your Honor.

14 Your Honor, I think you're beating
15 (indiscernible) over the head (indiscernible). The Jones
16 versus Suntrust Mortgage case, which is a binding Nevada
17 (indiscernible) published opinion that says that a mediation
18 contract is a -- a mediation agreement is a binding contract
19 that is enforceable by the parties.

20 In this instance, on April 3rd, 2018, the parties
21 entered into a mediation agreement. We included that
22 mediation agreement as Exhibit Q in our book.

23 In the mediation agreement, it specifically
24 states that the party -- that the Plaintiff -- I'm sorry, that
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1 the borrower (indiscernible) and, Your Honor, I want to be
2 clear that even though both (indiscernible) is the only one
3 named on the loan documents as being in the contract -- the
4 trustor or the person who (indiscernible) anything
5 (indiscernible) and I just want to be clear on that.

6 It states on the agreement that the parties would
7 agree that the (indiscernible) foreclosure pursuant to the
8 terms of March 6th letter, which we included as Exhibit P in
9 exchange -- the consideration is this, is there can be no
10 contract without a consideration. The consideration was that
11 they could delay the foreclosure (indiscernible) July 15,
12 2010.

13 Mr. Millward has attempted to come up here and
14 try and make an argument that somehow there was a mistake at
15 the mediation or that she wasn't fully informed.

16 Your Honor pointed out very well that the -- that
17 they were represented by counsel. And it's funny, you heard
18 from Mr. Giles. I -- Mr. Giles (indiscernible) have had a lot
19 of other cases because we're frequently both opposing counsel,
20 and out here, I guess, defending Mr. Giles (indiscernible).

21 And if they had a problem with Mr. Giles's work,
22 then they should talk to Mr. Giles about that or they should
23 come back to the court or seek some other form of relief.

24 They didn't. They agreed to this modification and they've not
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1 gone back to court in the mediation case, they're trying to
2 change the terms of that agreement.

3 I want to talk about one of the elephants in the
4 room here and it's that May 16th letter. Your Honor, I really
5 can see here and I didn't include it as an exhibit, but I can
6 produce it later as a supplement if you want. There was a
7 May 16th letter that stated that Ms. Senta no longer qualified
8 for a loan modification.

9 I want to be clear. The terms of that letter
10 were that she had not submitted all the necessary paperwork to
11 do a deed in lieu. However, Your Honor, I want to point out
12 that on June -- July 12th, 2018, Fay sent Ms. Senta a letter
13 indicating her eligibility for (indiscernible) and this is
14 Exhibit W.

15 THE COURT: Okay.

16 MR. HERNANDEZ: And then there's another one,
17 Your Honor, and it's Exhibit Y, an October 7th letter, stating
18 that, again, that they would accept a deed of foreclosure.
19 And that was five days prior to the recording of the notice of
20 default.

21 Your Honor, as you're well aware, under
22 (indiscernible) or anything, if there was -- obviously there
23 was some error on the part of -- if -- let's assume the worst
24 case scenario, if there was some error on the part of Fay in
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1 terms of the deed in lieu, it was subsequently corrected by
2 those two letters.

3 And I would argue here, Your Honor, that if you
4 wanted -- if she wanted -- if we wanted to come back and give
5 her another chance to sign the deed in lieu, we would not
6 object to that at this point, okay, because that's the terms
7 of the agreement.

8 However, Ms. Senta never presented any documents
9 or a deed in lieu. Instead, what she did on May 21st, 2018,
10 was send a letter to Fay, this is Exhibit S, where she backed
11 out of the deed in lieu and agreed -- and demanded that Fay
12 renegotiate her loan with her. Okay?

13 So again, Your Honor, there was an agreement
14 between the parties, an enforceable agreement. They -- she
15 agreed to relinquish the property. In fact, if you look at
16 the complaint, the complaint specifically alleges that we have
17 to take the alleged allegations of the complaint as true.

18 On paragraph 65, he alleges certificate of
19 mediation provides that the Lincicomes will voluntarily
20 relinquish the property. Okay. I think Your Honor is crystal
21 clear, they have agreed to a relinquishment of the property.
22 They have a signed agreement.

23 Now, opposing counsel is trying to come up here
24 and say a signed agreement is not anything what it is and,
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1 Your Honor, I think the signed agreement is very clear. He
2 wants to try to bring up his clients to come argue it. Your
3 Honor, this is an agreement relating to real property. As we
4 know, real property is subject to the statute of frauds. It
5 doesn't allow for any type of paroled evidence. Okay?

6 So we have a binding agreement for relinquishment
7 of the property here, okay? That's been provided in this
8 case. All right. That's why she would never be able to
9 succeed on the merits of any type of foreclosure because
10 you're entitled to foreclosure. She's agreed that we can
11 foreclose on the property.

12 All right. And also, Your Honor, I cited this in
13 my case. I think we also applied the theory of equitable
14 estoppel here and I think I cited it In Re: Harrison living
15 trust case. Your Honor, when a party relies on promises to do
16 something and then the other party doesn't go through with it
17 and then they're estopped from arguing that they can't do it.
18 She has not provided any documentation, any attempt to do a
19 deed of foreclosure.

20 It would be different if she (indiscernible) here
21 that, yes, here is my deed of lieu -- here's my documents
22 (indiscernible) foreclosure and you're refusing to record
23 them. Yes, then I would argue that there's a case of estoppel
24 of foreclosure of that case.

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1 That's not what's pleaded hereto, Your Honor.
2 The law -- the mediation agreement is a brand new agreement
3 that changed the relationship between the parties. Everything
4 else that happened before that doesn't exist anymore.

5 When we sent that May 16th letter, we may have
6 technically violated that -- the terms, but that didn't stop
7 the agreement from being the new agreement that was in effect.
8 And our argument is that we corrected it after the fact
9 anyway. So at that point, we were still going on with it.

10 There's no evidence, no legal argument that says
11 that that deed modification agreement is a void contract.
12 They have provided no defenses. They've provided nothing that
13 says it was done under the pretences of fraud. They've
14 provided nothing that says that she was incapacitated when she
15 did it.

16 As far as we're -- as far as (indiscernible)
17 nothing happened. That agreement is binding on the parties.
18 Okay. So I guess that's my own (indiscernible) on that issue.
19 Do you have any questions about that issue?

20 THE COURT: No.

21 MR. HERNANDEZ: Okay. I want to talk about next
22 the 2009 loan modification agreement, Your Honor. I want to
23 bring your attention to the complaint. The complaint has two
24 causes of action.

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1 One is for a protective cause of action, is for
2 breach of contract. That's on page 12 of the complaint.
3 Okay? It is (indiscernible) in the complaint that on
4 July 31st -- this is Paragraph 82 -- 2009, all received the
5 offer. Plaintiff, Senta Lincicomes, accepted and executed the
6 (indiscernible) provided by Bank of America. Okay.

7 Following Ms. Senta Lincicome's execution of the
8 (indiscernible), she immediately sent the agreement via
9 Federal Express in the envelope that I provided with Bank of
10 America. (Indiscernible) relief, Bank of America failed to
11 process (indiscernible).

12 Okay. Now, third cause of action, there's a very
13 similar paragraph on the third cause of action. I believe on
14 Paragraph 90 -- yeah, 97, where they fail to accept payments
15 from October 1st, 2009. Then, Your Honor, the fourth cause of
16 action. All right. The declaratory relief.

17 Now, I think the reason that opposing counsel is
18 pushing declaratory relief a lot here is because he thinks
19 that's the way to get around the six-year statute of
20 limitation requirement.

21 As we know, Your Honor, NRS 11.1901(b) places a
22 six-year statute of limitation for the enforcement of any
23 written agreement. That's the maximum statute of limitation
24 that's (indiscernible).

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1 The cause of action accrues, Your Honor, when a
2 party discovered or should have discovered the facts that gave
3 rise to the cause of action. And that's a case I'm sure
4 you're very familiar with, Your Honor.

5 THE COURT: Um-hum.

6 MR. HERNANDEZ: It's the case that everybody
7 cites to, which is the Lemus case. Okay? Your Honor, the
8 allegation presented in the complaint is that Bank of America
9 failed to process the loan modification and that was in 2009.

10 Let's just say we would be going to 2011, which
11 was actually recorded, and still we're beyond the six-year
12 statute of limitation there.

13 The point I'm making is, Your Honor, is that
14 there's no cause of action for two or three because they knew
15 about Bank of America's violation all the way back in 2009 and
16 they did nothing, Your Honor. They sat on it. Okay? And
17 this statute, that means the contract is no longer
18 enforceable. They can't come here and say, oh, this is now a
19 valid contract (indiscernible).

20 Now, the reason I bring this is up is because in
21 the fourth cause of action, Paragraph 101, because the
22 Defendants (indiscernible) material breach in July 11, 2011,
23 (indiscernible) trust and promissory note was modified and
24 excused.

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1 Your Honor, there was no excuse. They never
2 brought any cause of action to prevent the (indiscernible) of
3 it. Okay? And that's important here. They have no -- they
4 have no standing here because they should have brought that by
5 2015.

6 They have (indiscernible) -- now, here's the
7 interesting thing, Your Honor. In 2011, or I forget what year
8 it was, they filed for bankruptcy. They claimed -- he just
9 came up here and argued that Bank of America did nothing
10 during the bankruptcy.

11 But, Your Honor, he alleges in his complaint on
12 Paragraph 37 -- I'm sorry, Paragraph 36, on November 26, 2014,
13 Bank of America appeared in the (indiscernible) case and filed
14 a motion for a relief of stay (indiscernible) appellate U.S.
15 362.

16 Okay. Now, he claims that in that motion, Bank
17 of America did not inform -- this is Paragraph 37, did not
18 inform the bankruptcy court 2008 (indiscernible) 2011. Okay.
19 Now, I don't (indiscernible) bankruptcy, Your Honor, and I
20 don't know if you're familiar with bankruptcy court.

21 But the way it works in bankruptcy is if you file
22 a motion for relief of automatic stay, the other party gets to
23 file their objection.

24 At that point, they could have filed an
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1 objection, saying, hey, you're not (indiscernible) because
2 there was no violation because there's no -- we didn't default
3 on the loan because you didn't honor the 2009 loan
4 modification agreement. Okay? I don't know what happened,
5 Your Honor, because that's not part of the record.

6 However, on Paragraph 39, it says, prior to
7 discharge, but after the (indiscernible) granting -- I'm
8 sorry. I apologize, Your Honor.

9 Yes, there's no -- the dates aren't clear. But
10 it says, prior to discharge, but after the Court had entered
11 an order (indiscernible) Bank of America motion for relief of
12 stay, the Lincicomes again applied for a loan modification.

13 Okay. So at that point, Your Honor, they had a
14 chance to object to all of this, and whatever happened -- I
15 don't have the full record, Your Honor, I can supplement if
16 you want, the bankruptcy court felt that it was sufficient
17 (indiscernible) to provide that the lien provided without
18 the -- that the loan provided without -- that the loan
19 provided without (indiscernible) 2009 loan (indiscernible)
20 agreement was sufficient to proceed with the relief from the
21 (indiscernible).

22 So what does that mean? That means at that
23 point, they could have had a right to raise an objection and
24 they didn't. So at this point, they're waiving. They're
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1 estopped from arguing in 2014 when the motion from
2 (indiscernible) was filed, they're estopped from arguing that
3 the 2009 agreement is in effect. Okay. So that's the first
4 time they're estopped from it.

5 But I would argue there's a second time they're
6 estopped from it. Your Honor, in 2015, they entered into a
7 trial loan modification.

8 Now, the way the loan modification works, Your
9 Honor, is you get a loan modification and you recapitalize.
10 Unless there's principle forgiveness, the entire debt back in.
11 She signed and agreed to a temporary loan modification.

12 When they did that in 2015, Your Honor, she was
13 agreeing at that point that the terms of the new balance of
14 the loan, the way it was recapitalized was correct.

15 THE COURT: All right. But do I have that
16 document before me today?

17 MR. HERNANDEZ: I think it's Exhibit 9 to the
18 complaint.

19 THE COURT: Exhibit 9. I have Bank of America
20 statements.

21 MR. HERNANDEZ: I wasn't necessarily saying it
22 was Exhibit 9 (indiscernible).

23 MR. MILLWARD: Exhibit 9 does refer to a loan
24 mod; right?

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1 MR. HERNANDEZ: Right. Exhibit 9 refers to a
2 loan modification.

3 MR. MILLWARD: Yeah, it's not a signed document,
4 it's a --

5 MR. HERNANDEZ: Well, okay, I understand his
6 point that it's not a signed document, Your Honor, but the
7 minute that she started making payments and she agrees in the
8 complaint that she started making two payments, she was
9 ratifying at that point that that was a valid -- that the
10 numbers were valid loan numbers at that point. Okay.

11 And she's estopped now from arguing those aren't
12 valid loan numbers based on that. And if we need to
13 supplement the record, I'll supplement the record with
14 official documents.

15 THE COURT: All right. I'm having trouble
16 finding Exhibit 9.

17 MR. HERNANDEZ: The complaint?

18 THE COURT: Yeah. There's Exhibit 4. Okay.
19 Here's Exhibit 9. So Exhibit 9 is the letter to -- sent to
20 Lincicomes, proposed modification terms. If we do not receive
21 acceptance to this by one or more options, we can only accept
22 the first trial payment and certified.

23 Okay. So it appears to be an offer rather
24 than --

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1 MR. HERNANDEZ: That's true, Your Honor. But the
2 minute -- why would she make payments on an offer if she
3 thought that the --

4 THE COURT: All right. So --

5 MR. HERNANDEZ: The terms -- the original terms
6 from 2009 were the ones in effect?

7 THE COURT: All right. So --

8 MR. HERNANDEZ: When that loan modification was
9 based on the original deed of trust.

10 THE COURT: All right. But in terms of accept
11 your offer, make your first trial payment, you're stating that
12 the -- by their own allegations, they made the first trial
13 payment.

14 MR. HERNANDEZ: They made the first two trial
15 payments, Your Honor.

16 THE COURT: Okay.

17 MR. HERNANDEZ: Then there was another one in
18 2000 (indiscernible) well, that one failed (indiscernible)
19 and, Your Honor, they argue that we refused -- that they
20 refused to accept their payment.

21 Our position is if you look at the COPD response
22 letter and the Nevada (indiscernible) division letters, our
23 position is that we never -- that either Fay or Bank of
24 America were offered the third payment.

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1 THE COURT: Okay.

2 MR. HERNANDEZ: And opposing -- the Plaintiff's
3 have not produced any proof that a third payment was presented
4 in any of the documents.

5 THE COURT: Okay. But for purposes of today's
6 hearing, I'm not -- they could very well have --

7 MR. HERNANDEZ: I understand, Your Honor.

8 THE COURT: (Indiscernible) the allegation at
9 face value.

10 MR. HERNANDEZ: All right. And then, Your Honor,
11 again, when they did the 2016 loan modification, the one where
12 they made three payments, but didn't make the final payment,
13 again, Your Honor, that was based on the original terms of the
14 deed of trust, not the modified deed of trust. So again --

15 THE COURT: Okay. But have you provided me any
16 documents with the 2016 --

17 MR. HERNANDEZ: No, Your Honor. It's allegations
18 that he's made separate from the complaint.

19 THE COURT: Okay. All right.

20 MR. HERNANDEZ: If we need to supplement the
21 record after we finish, we can supplement the record.

22 THE COURT: Okay.

23 MR. HERNANDEZ: Okay. All right. So our
24 argument, Your Honor, is that the -- that there's this issue
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1 about whether or not the 2011 -- the 2009 loan modification is
2 in effect.

3 My two arguments is: Number one, statute of
4 limitation has run, and number two, by entering into these
5 (indiscernible) temporary loan modification agreements and
6 ultimately, Your Honor, the deed in lieu at the end, those
7 were three examples of instances where she (indiscernible) the
8 original debt. Okay.

9 And I would argue that she was estopped at this
10 point even if there was no statute of limitations from arguing
11 enforcement of the 2009 agreement. That's the point I'm
12 trying to make.

13 THE COURT: Okay.

14 MR. HERNANDEZ: Okay. The last point I want to
15 make, Your Honor, is material violations of (indiscernible).

16 NRS 107 -- and I think this is what we agreed to
17 earlier. I think opposing counsel concedes this point. In
18 NRS 105.563 allows for mitigation violations of
19 (indiscernible) after the fact.

20 And, Your Honor, our argument is that material
21 violation of the statute that -- I'm sorry, Your Honor, NRS
22 107.561 -- one more time, NRS 107.5601 states there must be a
23 material violation of NRS 107.400 through 560 in order for
24 this Court to grant injunctive relief.

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1 And we cited California cases, the material
2 violation is a violation where you change the course of the
3 foreclosure. There's no Nevada law, Your Honor, of what the
4 material violation law is.

5 THE COURT: Right.

6 MR. HERNANDEZ: The good news about California's
7 Hobar statute is we basically cut and pasted it when we
8 created our Nevada statute. I think that's very persuasive
9 authority here.

10 I think it's the burden here for the opposing
11 side to come up and say, hey, how would this (indiscernible)
12 the course of the foreclosure had we been provided the
13 information that we got requested. Okay. I'm going to get to
14 my (indiscernible) in a second.

15 So what happened was -- and this is where I'm a
16 little confused, Your Honor, he claimed -- he claims that his
17 client didn't get any preforeclosure, 30-day preforeclosure
18 notice letter as required under NRS 107.5001. Okay.

19 However, he elected -- his client elected into
20 mediation in 2016, and this is where I'm a little bit
21 confused, because usually you don't elect into mediation
22 unless there was a notice of a default recorded first. So
23 this was under the old program.

24 THE COURT: Right.
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1 MR. HERNANDEZ: I could not find, for the life of
2 me, a recorded in 2016. However, what we did produce in this
3 litigation is the letter dated -- I want to draw the attention
4 to this exhibit, Your Honor, December 15th, 2015, and this is
5 the Exhibit I, is the notice of default and intent
6 (indiscernible).

7 This is, Your Honor, I present to you the
8 NRS 107.5001 letter because it includes all the information,
9 including the indebtedness, foreclosure mediations, options,
10 everything that needed to be done. The notice of default in
11 this case, Your Honor, was recorded in 2017. The statute of
12 limits says 30 days prior to the notice of default being
13 recorded.

14 Now, I can see where somebody says, well, two
15 years seems to be a very long time. Well, let me -- let --
16 there's a reason why the notice of default wasn't recorded
17 here, Your Honor, and I think we can infer why it took two
18 years to record it.

19 Because if you look at the allegations set forth
20 in the complaint and the statement of facts that I presented
21 here, from 2000 -- December of 2015 up until recording the
22 notice of default in November of 2017, the Lincicomes went
23 through a series of loan modification proposals, temporary
24 loan modifications.

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1 They even allegedly went through a foreclosure
2 mediation, and I couldn't find any record of that foreclosure
3 mediation, Your Honor, (indiscernible) didn't seem to have it.

4 And so through that entire time, they kind of
5 dragged that whole process out, because as you know,
6 Your Honor, if you're going through that process, you can't --
7 because of the dual tracking laws, you can't record a notice
8 of default.

9 So what happened was for those two years, they
10 exhausted all their remedies and that's when there was a
11 default recorded.

12 My position here, Your Honor, is that the
13 December 15th letter, that we provided to you is the
14 NRS 107.5001 letter and it shows compliance. Okay.

15 Now, they claim that that's in error and I've
16 argue here, Your Honor, by legally -- the date they're
17 estopped from arguing that the papers (indiscernible) were in
18 error.

19 Now, even if those figures were in error, Your
20 Honor, it's not like we didn't provide them with a ton of
21 (indiscernible) two mediations and a ton of loan modifications
22 and also short sale options and a deed in lieu option. Okay.

23 And during that time, Your Honor, they could have
24 come up and tried to stop the foreclosure or, Your Honor, they
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1 could have even sent a RESPA letter, a real estate settlement
2 procedures act letter to the bank and the bank would enforce
3 respond to a qualified written request that says, oh, my God,
4 this error, fix it, and that would have been an actual claim
5 in Federal Court.

6 They did nothing of the sort, Your Honor. They
7 just went through the modification process. They went through
8 the mediation process. They did nothing up until the very
9 last minute when they had their last resort here to do,
10 Your Honor, the last resort that they tried, Your Honor, was
11 on the 11th hour right before the foreclosure was before the
12 Court, that's when they tried to settle it.

13 NRS -- that's not fair to my client. My client
14 has presented them with a whole bunch of different options
15 under Hobar and they've refused to take any of them until she
16 agreed to take the deed in lieu. And then at that point,
17 she's now backing out of that deal.

18 The reason this is important, Your Honor, is
19 because 107.560 only allows for injunctive relief for the
20 violations of 400 through 560. However, he's claiming as an
21 independent reason to stop the foreclosure, the notice of
22 deficiencies in the NOD notice that was (indiscernible), he
23 says there's wrong numbers in there.

24 Your Honor, the notice, the NOD notice is covered
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1 under NRS 107.085. The reason that's important is because
2 it's not under 400 through 560. There is no mechanism under
3 the Hobar statute for this court to grant an injunction based
4 on a defective notice of default. And I've cited a California
5 case, which also stands for that same proposition in my
6 briefing. Okay. So -- and that's Travis versus Nation,
7 sorry.

8 Your Honor, I would argue that at this point --
9 I'm almost done, at this point, there was no violation of the
10 Hobar because they got the mediation. They went through
11 apparently mediation twice.

12 They were offered multiple options. They did
13 not -- they actually elected to one of those options, which
14 was the deed in lieu, and now they're backing out of it.
15 Okay.

16 A Hobar violation occurs when, hey, we're
17 foreclosing on you and the bank's not cooperating with you.
18 That's the purpose of the Homeowners Bill of Rights is to give
19 homeowners alternatives prior to the foreclosure occurring.
20 That's what (indiscernible) those alternatives, I'm positive,
21 were presented here in this case.

22 THE COURT: Okay.

23 MR. HERNANDEZ: So unless you have any questions,
24 Your Honor, that's all I have to have (indiscernible)
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1 pleadings.

2 THE COURT: Let me just say in terms of the
3 letter after the mediation, is there an anticipatory breach or
4 a --

5 MR. HERNANDEZ: If there was an anticipatory
6 breach, Your Honor, and her -- and if you could -- I could
7 cite -- if there was an anticipatory breach, Your Honor, then
8 she could come back and sue us and force us to enforce the
9 agreement.

10 THE COURT: Right.

11 MR. HERNANDEZ: Your Honor, the fact of the
12 matter is that even under Hobar and mixing the legal standards
13 here --

14 THE COURT: Right.

15 MR. HERNANDEZ: -- we fixed that later. We
16 offered a deed in lieu twice.

17 THE COURT: All right.

18 MR. HERNANDEZ: I suspect what happened --

19 THE COURT: All right. But are they entitled,
20 the breach themselves, even if they went with that?

21 MR. HERNANDEZ: Well, Your Honor, I would argue
22 that we -- that these are (indiscernible) that they sent her
23 that letter and I don't have that letter and I can produce it
24 for you.

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1 THE COURT: All right.

2 MR. HERNANDEZ: Is the reason they sent that
3 letter is because they waited for a month for her to produce
4 the documents. They requested documents and she never
5 produced it.

6 THE COURT: Okay.

7 MR. HERNANDEZ: And I think what ended up
8 happening was they figured out, oh, we have an agreement, we
9 have to send her these letters and they did offer her that
10 opportunity to it.

11 THE COURT: Okay.

12 MR. HERNANDEZ: I understand that, you know,
13 Your Honor, that doesn't look great for us, but that's an
14 immaterial fact because we did fix it and the fact of the
15 matter is she (indiscernible) just sent the letter saying she
16 didn't want (indiscernible) either.

17 But, Your Honor, just because the parties don't
18 mean it, doesn't mean you don't have and forcible agreement
19 here. And I argue that we do have an enforceable agreement
20 here to proceed with the (indiscernible) -- and, again, if she
21 wants time to do the deed in lieu, I think that's something we
22 could do.

23 You know, she (indiscernible) on her record, but
24 right now, these -- this is just a last-minute attempt to stop
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1 what's inevitable. And I want to make another point,
2 Your Honor: In Nevada law, it's just common knowledge that if
3 you're in default, you're -- you can't contest the
4 foreclosure. There's no question here that she's in default.

5 THE COURT: All right.

6 MR. HERNANDEZ: Now, let's say we're going to go
7 back to the 2009 (indiscernible), and I don't mean to be mean
8 to the Lincicomes, but have they saved up all the money to
9 make all the back payments from 2009 to get the loan current,
10 you know, because, you know, that would be the requirement
11 here to fix it.

12 I had issues like that, Your Honor, where we had
13 loan modification agreements with my other clients where they
14 weren't properly stated and the way to fix that is, okay, the
15 borrower pays what they owe back and then we continue on
16 forward.

17 THE COURT: Right.

18 MR. HERNANDEZ: I have seen no evidence, nothing
19 here from the Lincicomes that they -- that they would be
20 willing to reinstate the loan. I don't know how we can go
21 back in time at this point, Your Honor. They had a right
22 after 2009 to go to the court and enforce it and they sat on
23 their rights.

24 So if they can't provide -- Your Honor, I would
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1 argue that if you are going to grant any type of injunction or
2 any type of relief, then they have to post the bond and the
3 payments that they believe are true, right, because and at
4 the end -- and they can post that bond at the end, but they
5 can't post those -- the payments amounts, then this is all an
6 academic exercise because then they're in default no matter
7 what.

8 THE COURT: Right.

9 MR. HERNANDEZ: It's just a question of how much
10 their indebtedness is.

11 THE COURT: Okay. All right.

12 MR. HERNANDEZ: Anything else, Your Honor?

13 THE COURT: No, I think you've answered. All
14 right. On the telephone, any argument?

15 MR. LACHMAN: Your Honor, again, this is Scott
16 Lachman on behalf of Bank of America. I've listened for the
17 past two hours and I'm aware of all the arguments from both
18 parties.

19 Like I said (indiscernible) this hearing, based
20 on the -- based on my review of the public record, it doesn't
21 appear that Bank of America has any property right, any
22 interest in the foreclosure.

23 That being said, I agree with the statements from
24 counsel for U.S. Bank regarding statute of limitations and the
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1 claims against Bank of America.

2 Looking at the complaint, it looks like there's
3 two causes of action against Bank of America, breach of duty
4 to act (indiscernible) fair dealing and breach of contract.

5 And based on the complaint and what Plaintiff's
6 counsel -- also states that Plaintiff counsel's mentioned
7 during his argument this afternoon, the only dates regarding
8 Bank of America are 2009 and 2011. I have no idea why Bank of
9 America was even named in this complaint.

10 THE COURT: Okay. Anything else?

11 MR. LACHMAN: That's it, Your Honor. Thank you.

12 THE COURT: All right. Mr. Millward.

13 MR. MILLWARD: Thank you, Your Honor. I've tried
14 to keep up.

15 THE COURT: Okay.

16 MR. MILLWARD: The statute of frauds argument is
17 an interesting argument as to mediation and the agreement.

18 First of all, parole evidence isn't allowed, and
19 so we have to look directly at the agreement, what the
20 agreement provides. And all that I have seen, and counsel can
21 correct me if I'm wrong or the Court if I'm wrong, all I have
22 seen is to an agreement is a checked box saying deed in lieu.

23 The statute of frauds requires that agreements
24 in -- affecting property rights be notarized. There's no
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1 notary on anything, so that doesn't really work.

2 Furthermore, the specific terms of what my
3 clients were agreeing to is not provided. I couldn't tell my
4 clients, would you agree to a deed in lieu without fully
5 explaining what that means other than a check box and state
6 what those rights that they would be giving up are or are not.

7 THE COURT: Did you --

8 MR. MILLWARD: And the law doesn't afford
9 (indiscernible) --

10 THE COURT: Well, let me ask: Did your clients
11 try to appeal or have they done anything to argue that the
12 deed in lieu?

13 MR. MILLWARD: My clients have learned about the
14 deed in lieu check box after they came to meet with me
15 because --

16 THE COURT: Well, but that's -- see, that's
17 not -- and I'm not going to allow you to go there. They're
18 two adults, they're with an attorney. I have the signatures
19 on the document.

20 So this idea -- you know, I guess you could argue
21 at trial they're incompetent and so forth, but the problem I'm
22 having with is I -- again, Lyon County is one of the most
23 heavy hit, I've seen plenty of these and what you're arguing
24 is you basically want to undo the last ten years of mediation.

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1 And again, this is a typical -- what I've seen in
2 terms of the agreements, this is a typical order that we get
3 back from the mediators.

4 Patty Shipman is a top notch mediator. I've had
5 other cases involving her and so forth, and so the idea that
6 your clients left that mediation not knowing, I -- again, I'll
7 hear the evidence, I'm not here today to make that decision,
8 but for me to find that you're going to prevail on that point
9 is kind of difficult.

10 MR. MILLWARD: Well, I think, though, that the
11 Court like is 4 or 5 steps ahead of that. For us to be here
12 on a foreclosure matter, they should have the right to
13 foreclose; right?

14 And mediation and everything else that derives
15 from that, derives from that right. All of the steps that are
16 required under the law to essentially give them the right to
17 foreclose here are dependent on the facts and agreements that
18 they've admitted are accurate and are --

19 THE COURT: Right. But even --

20 MR. MILLWARD: (Indiscernible).

21 THE COURT: But even by your own allegations and
22 so forth, I have allegations that we all went to mediation, we
23 all agreed to deed in lieu.

24 MR. MILLWARD: Right.
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1 THE COURT: Your allegations are that they didn't
2 agree to the deed in lieu and so, therefore, they can't
3 foreclose.

4 MR. MILLWARD: Right. But it's not --

5 THE COURT: So if you can't prevail, then they
6 have a right to foreclose --

7 MR. MILLWARD: Well --

8 THE COURT: -- because you didn't follow through
9 on the mediation.

10 MR. MILLWARD: But, Your Honor, what would they
11 foreclose on?

12 THE COURT: That's a separate issue.

13 MR. MILLWARD: Well, I get that it is. But let's
14 say that we go there.

15 THE COURT: Okay.

16 MR. MILLWARD: And then we go to say, okay, they
17 can foreclose because no payments have been made as of
18 October 1st of 2009.

19 THE COURT: Right.

20 MR. MILLWARD: Because their predecessor rejected
21 payments.

22 THE COURT: Right. But, again, they're pointing
23 to the mediation where nobody seemed to care what the balance
24 was, what the interest rates were and so forth.

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1 The mediation statement appears to bring in the
2 March 6th letter, which sets forth the terms as to what
3 payments they were going to make and so forth in terms of the
4 deed in lieu.

5 And so, again, you have a hard estoppel issue.
6 How are you going to get over the estoppel when they went
7 through three different modification --

8 MR. MILLWARD: Attempts.

9 THE COURT: -- attempts?

10 MR. MILLWARD: I don't think that any of those
11 modifications change the terms of the agreements because there
12 was no signature. The statute of frauds isn't changed.

13 THE COURT: Okay. But what about the --

14 MR. MILLWARD: And then all of those --
15 Your Honor, I'm sorry, I don't mean to move by it.

16 THE COURT: Yeah.

17 MR. MILLWARD: All of those are attempts by my
18 client to solve this problem. I mean --

19 THE COURT: Yeah, but it's an attempt, but at the
20 same time, they get a letter saying, here's our offer, go
21 ahead and make a payment to accept it and they send in a
22 payment.

23 MR. MILLWARD: Right.

24 THE COURT: So now we're going to throw out offer
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1 and acceptance and we're going to go to a whole new contract
2 theory in Nevada?

3 MR. MILLWARD: I would love, and so would my
4 clients, to go back to 2015 and say we'll accept that 2015
5 modification.

6 THE COURT: And she did, she sent in a payment.
7 It's in your own terms.

8 MR. MILLWARD: Sent in two and the third was
9 rejected.

10 THE COURT: Okay. And then what about the other
11 one?

12 MR. MILLWARD: But even beyond that, they --
13 those temporary agreements can't be enforced by a homeowner.
14 I've been in multiple cases where judges have said, no, we
15 can't accept the trial -- the trial payments as a modification
16 of the agreement. I dealt with one just recently.

17 Without a signature on the document, there's no
18 modification. The statute of frauds hasn't been followed
19 through with. So it can't be used both ways by the banks,
20 Your Honor.

21 THE COURT: Okay.

22 MR. MILLWARD: I get it, but my clients --

23 THE COURT: All right. Let's jump to the gorilla
24 in the room. Your clients have the ability to put up a bond,
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1 several hundred thousand?

2 MR. MILLWARD: Well, no, because one isn't owed.
3 Under the law, this is a material breach as of 2009.

4 THE COURT: Yeah, but they would still have to
5 show that they have the ability. So you're saying this
6 basically wipes out all the terms and then I'm reconstructing.

7 MR. MILLWARD: Well, that's what the law says,
8 Your Honor. That's what --

9 THE COURT: No, the law doesn't say that in
10 terms of mortgage law.

11 MR. MILLWARD: It does.

12 THE COURT: It does not state that you get to --
13 that the Court gets to re-construe the whole mortgage.

14 MR. MILLWARD: No, it -- the law says,
15 Your Honor --

16 MR. HERNANDEZ: I got it.

17 MR. MILLWARD: Oh, there it is. The law says,
18 when the parties exchange promises to perform one parties
19 material breach of the promises discharged in the
20 non-breaching party's duty to perform; right?

21 THE COURT: So you're saying they get something
22 for free.

23 MR. MILLWARD: Not at all.

24 THE COURT: Okay.
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1 MR. MILLWARD: No, I'm saying --

2 THE COURT: So if they're not getting something
3 for free, they must have been saving up all that money for all
4 these years and they're able to put up a bond.

5 MR. MILLWARD: No, in fact, what I'm saying --

6 THE COURT: Okay.

7 MR. MILLWARD: -- Your Honor, is that they aren't
8 seeking their house for free.

9 THE COURT: Okay.

10 MR. MILLWARD: They're not trying to nullify
11 anything at this juncture. They are trying to say that they
12 don't have the right to foreclose because of this material
13 problem with this 2009 agreement.

14 This breach by them damaged the document to such
15 a degree that they can't enforce it and enforcement means
16 anything beyond 2009. My client hasn't been afforded the
17 opportunity to act under the agreement. How do you --

18 THE COURT: But that's incorrect, though. Your
19 client made payments and so forth over the years.

20 MR. MILLWARD: Only one payment, Your Honor.

21 THE COURT: And I can't read -- I can't redraft
22 the agreement. So I can't give them additional times on the
23 end. I can't -- so if I agree with your theory that we go
24 back to 2009 --

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1 MR. MILLWARD: Right.

2 THE COURT: -- then they're going to have to make

3 the payments to catch up.

4 MR. MILLWARD: I don't -- I don't think so.

5 THE COURT: They have to.

6 MR. MILLWARD: Well, if you have no duty to

7 perform, then how do you -- how do you perform?

8 THE COURT: Okay. So under your theory, I just

9 say, okay, start the 2009 agreement nine years later.

10 MR. MILLWARD: Right.

11 THE COURT: Okay. Now, the 2009 agreement was a

12 40-year mortgage.

13 MR. MILLWARD: Right.

14 THE COURT: Right? So how are they going to make

15 all the payments that they were supposed to make under the

16 40-year agreement within the next 31 years?

17 MR. MILLWARD: No, I'm saying that we go back and

18 enforce the agreement as it was written starting today, give

19 my clients the opportunity --

20 THE COURT: And we put both parties in the

21 position that they would have been had the agreement been in

22 place.

23 MR. MILLWARD: Right. And putting it -- starting

24 today, I'm not saying starting back --

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1 THE COURT: Well, how do I put both parties in
2 the position that they would have been had the agreement been
3 followed if your clients don't come up with the payments --

4 MR. MILLWARD: Right.

5 THE COURT: -- to get current?

6 MR. MILLWARD: There's a really good argument as
7 to why they can't be forced to do that and that goes to the
8 bankruptcy. When they filed the bankruptcy, it was to catch
9 up. It was to force Bank of America to (indiscernible) and
10 Bank of America didn't show up. They didn't file a claim
11 during the claims period.

12 They didn't show up until six months before the
13 bankruptcy was over, they filed a motion for relief of stay
14 six months before. And so my clients, instead of paying maybe
15 30 percent to creditors and making up the necessary --

16 THE COURT: Wait, wait, wait. But your clients
17 didn't have a right to have the bankruptcy court decide on
18 that. Bankruptcy courts all the time, they're a secured
19 lender. They had a right to go in and ask for relief, which
20 was granted. Am I wrong? Am I misunderstanding the facts?

21 MR. MILLWARD: I think you're misunderstanding
22 the way Chapter 13 banks works. In a Chapter 13 --

23 THE COURT: Wait. No, no, no. I'm asking you,
24 counsel, did the bankruptcy court issue a relief?

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1 MR. MILLWARD: No.

2 THE COURT: Or did they not?

3 MR. MILLWARD: They issued relief as to discharge
4 (indiscernible). But I think you're misunderstanding the
5 mechanics of Chapter 13. Once you enter into a Chapter 13,
6 you know, and you propose a payment plan and you propose these
7 things, you still have claims that have to be made.

8 And if a claim is not made by a creditor, then
9 the creditor doesn't receive payment; right? And so my
10 clients were seeking to make payment of the mortgage through
11 the Chapter 13 bankruptcy process. No claim was filed, so --

12 THE COURT: All right.

13 MR. MILLWARD: -- according to the five-year
14 plan, they didn't have --

15 THE COURT: No, I -- again, I'm not going there.

16 MR. MILLWARD: Well -- and, Your Honor, it's all
17 about the means testing (indiscernible). I do bankruptcy, so
18 I know how this works.

19 THE COURT: I -- and like I said, I've dealt with
20 the bankruptcy courts, too. Counsel, again, Lyon County was
21 one of the top counties, I've been through these foreclosure
22 things for the last 11 years I've been on the bench.

23 MR. MILLWARD: Again, I understand that, but I
24 think the Court's missing what I'm saying. When the
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1 bankruptcy court looks at what you have to pay your creditors
2 right, they look at their claims right.

3 THE COURT: Right.

4 MR. MILLWARD: They do what your claims are and
5 when the claim relates to your house right, to approve that
6 claim by the trustee means that they're going to afford
7 essentially a portion of your payment to that necessity of
8 life, right.

9 And so when there is no claim there, the rest of
10 the creditors eat up the balance. And so the, the, the left
11 over amount of their income wasn't necessary for their
12 survival of life went to other creditors, went to pay other
13 people at a hundred percent.

14 THE COURT: Okay. Like I say, so, why didn't
15 they go back to the bankruptcy court and seek relief?

16 MR. MILLWARD: What relief do you seek in
17 bankruptcy court.

18 THE COURT: Well you're saying, you're saying
19 they were deprived of some right under the bankruptcy action
20 and now you're coming to a state court asking a state court
21 Judge to make up for something that happened in the
22 bankruptcy.

23 MR. MILLWARD: I'm actually just trying to
24 correct the argument, Your Honor. The argument is that my
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1 clients should be forced to repay nine years of arrearages.

2 Well I've got five years where Bank of America,
3 right, five of those years didn't seek any relief on their
4 own. When they're in front of a court, a bankruptcy court,
5 they provide the relief that my clients were willing to give
6 them.

7 And so then why did my clients go forward and not
8 object to the motion from relief of state because their
9 counsel said hey, yes the officer was going to object or do
10 what I think they want to do and that's seek modification and
11 fix this whole loan thing for you and get you outside of the
12 problem and that's exactly what happened.

13 A loan mod was sought they tried to make payments
14 and Fay Servicing rejected according to my client's affidavit,
15 Fay Servicing rejected her payment. I've shown you evidence
16 that they ran to Bank of America right as soon as they found
17 out there was a rejection and tried to make a payment Bank of
18 America refused. The check is provided.

19 It's not like my clients have been dallying this
20 whole time trying to defraud somebody. We're not taking
21 advantage of a bank. My clients have just been trying to get
22 what they agreed to from the beginning. And when that wasn't
23 working, they tried to modify the loans over and over and over
24 again.

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1 THE COURT: Right.

2 MR. MILLWARD: And it didn't work.

3 THE COURT: And, see, that's the problem I'm
4 having here with how you can succeed when your clients tried
5 to take advantage, and I'm not saying advantage in a bad way
6 or a pejorative way, the law set forth for all these different
7 programs and so forth --

8 MR. MILLWARD: Right.

9 THE COURT: -- that homeowners in debt could try
10 to take advantage of to try to keep the home.

11 MR. MILLWARD: Right.

12 THE COURT: Now, they went through it several
13 times and then we finally get to a mediation where everybody
14 signs off, including their lawyer, saying this is how it's
15 going to be done, and yet the third time wasn't the charm and
16 we're back to Step 1.

17 And I'm having difficulty understanding how we
18 don't have estoppel, we don't have changes and how I can go
19 back to the 2009.

20 Then the other issue I'm having, if I go back to
21 the 2009, all right, I can't rewrite contract law and say,
22 well, fine, we're going to go back to 2009 because one of the
23 theories of contract law is put the parties in the position
24 that they agreed to.

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1 MR. MILLWARD: Right.

2 THE COURT: Right?

3 MR. MILLWARD: And sue for specific performance.

4 THE COURT: And so your clients agreed to make
5 payments over the years under this agreement. They agreed to
6 accept them and I can't redraft the agreement. If I go back
7 to the 2009, I then can't go and redraft it. Courts can't do
8 that.

9 MR. MILLWARD: And I think the Court might also
10 misunderstand, then, what we're asking for; right? I'm not
11 saying we filed a complaint and cause of action for specific
12 performance. That's not what we've been asking for.

13 We're not -- we're not -- that's not where we're
14 going. I'm saying that might be a solution for us to restate
15 the terms now, starting now and moving forward.

16 THE COURT: And that would give your clients an
17 additional nine years on -- and so we're now up to what would
18 now be a 59 or 49 or 50-year mortgage.

19 They got the benefit of living in a house free,
20 because they didn't pay. Whether or not they had to or not,
21 they had that benefit; right?

22 MR. MILLWARD: Well, I get the point.

23 THE COURT: And this is all equitable; right?

24 This is what you're telling the Court, this is equitable?

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1 MR. MILLWARD: Well, it's not -- it's equitable.
2 I'm not asking the Court to say that they had a duty not to
3 pay any equity. I'm saying it as a matter of law.

4 And so the -- I'm asking the Court to go, okay,
5 if somebody rejects their payment on a mortgage so that they
6 can later foreclose, if somebody does that, is that a breach
7 on that party and is it material.

8 THE COURT: Right. And in theory they're
9 supposed to put the payment in the bank and then when it comes
10 to court, they have the ability to though show that they had
11 the ability to perform and they had -- all right.

12 MR. MILLWARD: But the material breach doesn't
13 require performance.

14 THE COURT: All right.

15 MR. MILLWARD: And that's the -- that's what
16 they -- the case that I cited.

17 THE COURT: Right. But in order for them to come
18 forward and ask for the Court to grant the requested relief,
19 they're going to have to show at that point in time, they can
20 perform, because you're basically asking me to enforce the
21 agreement in 2009.

22 MR. MILLWARD: I'm providing that as a possible
23 remedy. I'm asking the Court to hold that the agreement in
24 2009 was an effective enforceable agreement, that it was
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1 breached by their side, by the Bank of America and its
2 successors, and that because of those breaches, there is no
3 right to foreclose.

4 THE COURT: Right.

5 MR. MILLWARD: That's it.

6 THE COURT: And we're not -- we're just spinning
7 wheels. All right. Do you have any additional evidence?

8 MR. MILLWARD: I do. I just have some responses,
9 Your Honor, just real quick.

10 With regards to the idea that the mediation
11 resulted in a modification in the loan, I think that's absurd
12 primarily because it doesn't fulfill the requirements of the
13 modification to an interest in property, so nor do I believe
14 there's sufficient statements of material terms at all.

15 THE COURT: What about sufficient terms for
16 novation or satisfaction and accord?

17 MR. MILLWARD: I don't think so either.

18 THE COURT: Why not?

19 MR. MILLWARD: Because satisfaction and accord
20 means waiver of rights and there's nothing stated in a -- as
21 to a waiver of rights.

22 THE COURT: Sure, there is. In the agreement, it
23 says we'll take -- we'll give you the deed, you won't come
24 after us. It sounds like a satisfaction and accord.

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1 MR. MILLWARD: What agreement are you looking at?
2 Because I might not understand what the Court's reading.

3 THE COURT: Well, I'm saying, if you look at the
4 mediators agreement, everybody left that mediation saying this
5 is how it's going to go down.

6 MR. MILLWARD: Well, and the reason I prefaced
7 when I started, I don't know if this agreement as to anything
8 more than a check box saying deed in lieu was the resolution.

9 THE COURT: Okay. Now, I understand you want to
10 go to statutes of fraud because you're thinking you want to
11 argue against the modification. All right.

12 And you're saying in order to modify -- all
13 right. But in terms of parties coming together at a mediation
14 and agreeing, this is how we're going to resolve all of our
15 differences, all right, that sounds like a satisfaction and
16 accord.

17 Everybody agreed, I'll drop this, you drop that.
18 I would agree with you, it's not a modification of the
19 underlying deed. I would agree with you there.

20 MR. MILLWARD: Okay. And to that point, if it's
21 not, then it's a separate issue and it doesn't change --

22 THE COURT: Well, it does. It gets into the
23 estoppel arguments that they're making as to how are you going
24 to overcome the -- your clients being estopped.

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1 MR. MILLWARD: Well, so if they are allowed to
2 move forward with this foreclosure; right, we would have to
3 determine the balance owed under the 2009 agreement. We'd
4 have to determine the interest and the late fees under that
5 agreement. Everything would have to be --

6 THE COURT: I agree with you.

7 MR. MILLWARD: What's that?

8 THE COURT: I agree with you on the point.

9 MR. MILLWARD: Right. And none of that's been
10 done. So my point is they can't foreclose regardless of the
11 mediation, because the underlying documents are defective.

12 THE COURT: Okay.

13 MR. MILLWARD: The argument that my client -- or
14 that my client is complaining about NRS 107.080 or 085, we're
15 complaining about NRS 107.500 -- or excuse me, 107 -- yeah,
16 107.500.

17 MR. HERNANDEZ: (Indiscernible).

18 MR. MILLWARD: About the Exhibit I. If you look
19 at Exhibit I, it still has all the wrong terms. Every term in
20 Exhibit I is still wrong. If Exhibit I is materially
21 defective, it would serve no purpose if you could send
22 somebody a notice that has everything wrong on it.

23 THE COURT: Okay.

24 MR. MILLWARD: But as to the idea that -- this is
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1 last minute. My clients have done everything without being
2 lawyers and without having bundles of money. They've done
3 everything they can to fix this over the years.

4 The reason that they've made modification
5 payments is not because they wanted to be estopped from
6 enforcing their original terms. It was because they wanted to
7 make it go away so that they pay on their loan. I mean, you
8 can't claim that's estoppel if you're agreeing to something
9 because you think that you're going to be foreclosed upon out
10 of fear.

11 THE COURT: Well, but they're not here today
12 asking the Court to enforce the mediation agreement.

13 MR. MILLWARD: You're right. We're here to stop
14 the foreclosure.

15 THE COURT: Right.

16 MR. MILLWARD: And before that, we would probably
17 be asking the Court for -- to enforce the modification and all
18 those other things that we could be asking the Court for, but
19 right now, we've got this attempted foreclosure based on
20 absolutely incorrect information, incorrect balances,
21 everything is incorrect.

22 THE COURT: Okay.

23 MR. MILLWARD: And a breach of that agreement.

24 THE COURT: All right. Let me ask Mr. Hernandez
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1 some questions. All right. If the mediation agreement does
2 not modify the underlying and it's merely an accord and
3 satisfaction, and the Court finds that they are under the
4 2009, then isn't the information in the notices that you sent
5 in, if that's incorrect, I can't allow the foreclosure to go
6 forward.

7 MR. HERNANDEZ: Well, I would argue, Your Honor,
8 I --

9 THE COURT: Do you understand what I'm --

10 MR. HERNANDEZ: I understand your point and it's
11 been troubling to me, too. Okay. So I would argue,
12 Your Honor, that they can't -- that the order for that
13 agreement, they don't have the right to enforce the terms of
14 that agreement, Your Honor, and that they've attempted to
15 modify those terms.

16 They have -- I would argue there's an accord of
17 satisfaction that that debt is valid, because if that debt was
18 not valid, they would have never agreed to the 2015
19 modification. They wouldn't have agreed to the 2016
20 modification. They wouldn't have agreed to the deed in lieu.
21 They would argue that the debt was invalid in each of those
22 instances.

23 The minute you say that, yes, you're doing this
24 or they would have challenged the standing of the bank to
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1 proceed with the foreclosure at the mediation because that's
2 what you're supposed to do with the mediation is say, hey, you
3 don't have a standing because you didn't produce the proper
4 documentation here. There's no evidence here.

5 Wherever -- they erased that issue at the
6 mediation, that, hey, you can't foreclose upon us because you
7 didn't breach this loan modification agreement and we both
8 know, Your Honor --

9 THE COURT: Well, but, see, the thing is would
10 have, could have, should have and I can't get involved in
11 that. All I can deal with is what I have in terms of the deed
12 in lieu and so forth.

13 And let's just say I -- at the end of the day, I
14 agree with you it's valid and enforceable to Mr. Millward's
15 point, okay, fine, they breached the -- they're in breach of
16 the mediators agreement and now your client is seeking to go
17 forward, I would still have to have something saying --

18 MR. HERNANDEZ: I understand your point now,
19 Your Honor (indiscernible) waived that right at the mediation
20 (indiscernible) that, Your Honor. That's my point is they
21 waived all their other rights, all their -- any other claim
22 they could make when they agreed.

23 THE COURT: Right. But I can't allow the
24 foreclosure to go forward until I have a determination or an
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1 order saying that because --

2 MR. HERNANDEZ: Could you do -- do you want us to
3 go to the -- I'm sorry, were you the mediation judge for this
4 matter or is it the other department?

5 THE COURT: It would be the other department.

6 MR. HERNANDEZ: Okay. Do you want us to go to
7 the other department and seek enforcement of the mediation
8 certificate first? Is that what --

9 THE COURT: Well, that's what I'm thinking
10 might -- what might need to happen, because I -- you're using
11 a nonjudicial process.

12 MR. HERNANDEZ: Correct, Your Honor.

13 THE COURT: All right. And if I agree with
14 Mr. Millward in terms of the mediation doesn't affect it, the
15 HAMP, the HARP doesn't affect the underlying, and we're under
16 the 2009 filed in 2011.

17 And I agree with them that they might have a
18 victory, but at the end of the day, you can come in and, you
19 know -- but in terms of his argument that, fine, even if
20 you're correct in trying to foreclose, you still have to use
21 the right numbers.

22 MR. HERNANDEZ: That's true. Okay. And let's
23 take this (indiscernible) logical conclusion, Your Honor. If
24 the standard is reasonable by (indiscernible) success of the
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1 merits.

2 THE COURT: Right.

3 MR. HERNANDEZ: (Indiscernible) stop the
4 foreclosure from (indiscernible) violation. If I go back to
5 court, I think you have to ask yourself: What's the
6 reasonable likelihood that I'm going to succeed over here,
7 because if I do succeed over there, this all becomes moot.

8 THE COURT: Right.

9 MR. HERNANDEZ: Right? So --

10 THE COURT: Right.

11 MR. HERNANDEZ: And at this point, Your Honor, I
12 mean, in equity, we've given her multiple opportunities.

13 THE COURT: I hear you.

14 MR. HERNANDEZ: (Indiscernible) deed in lieu, so
15 I guess that's my analysis right now.

16 THE COURT: Okay.

17 MR. HERNANDEZ: If I wanted you to pull the
18 trigger right now on that argument, my point would be that,
19 Your Honor, they have no chance of winning over there.

20 THE COURT: Right.

21 MR. HERNANDEZ: And if they have no chance of
22 winning over there, they have no chance of winning over here
23 either. That's -- that would be my point.

24 THE COURT: All right.

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1 MR. HERNANDEZ: Your Honor, I have one missed
2 housekeeping matter --

3 THE COURT: Right.

4 MR. HERNANDEZ: -- real quick. The -- and I
5 discussed this with opposing counsel beforehand. The
6 injunction order says that the notice of sale is -- it says
7 that the Court can cancel the notice of sale and I thought
8 that to mean that it cancelled the sale date, but it didn't
9 cancel the entire (indiscernible). That would actually be a
10 rescission of the notice.

11 THE COURT: Okay.

12 MR. HERNANDEZ: If you can clarify what that
13 means, I would appreciate that. I mean, (indiscernible) if
14 you granted -- rule in our favor, do we have to record a new
15 notice of sale or -- because what we did in this instance, we
16 just postponed the sale pending an order to the court. As far
17 as (indiscernible) if you want us to (indiscernible) sale, I'm
18 fine with that.

19 THE COURT: All right. I -- like I said, I'd be
20 afraid to give you what you ask for because then I get another
21 saying that you violated.

22 MR. HERNANDEZ: Right. That's why I want --
23 that's why I want clarification on what you meant by that
24 order, Your Honor.

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1 THE COURT: All right. Mr. Millward.

2 MR. MILLWARD: Yes, I've talked about this with
3 other counsel actually.

4 THE COURT: Right.

5 MR. MILLWARD: And that's where I got the idea.
6 I had it happen where the stay is lifted and nobody knows the
7 sale date because nobody knew when it was continued to, and so
8 I would much rather have the Court cancel the notice of sales
9 and the new notices recorded if the Court determines that an
10 injunction is improper. I just think that that's appropriate.

11 MR. HERNANDEZ: And the order -- then the order
12 should say rescission of notice of sale, Your Honor.

13 THE COURT: Right. I agree with you on that,
14 but --

15 MR. HERNANDEZ: Then -- so I would ask that if
16 they order -- if you order -- if the Court ordered on
17 (indiscernible) just to be clear (indiscernible) that is we
18 have it scheduled in.

19 We did an order (indiscernible) which would allow
20 (indiscernible) under the statute until November 30th. But,
21 of course, if this Court doesn't rule today (indiscernible)
22 we're not going to do anything.

23 THE COURT: Okay.

24 MR. HERNANDEZ: But if the Court wants to --
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1 THE COURT: All right. Let me just ask you one
2 other question, though. In terms of the bond, what are you
3 requesting for a bond?

4 MR. HERNANDEZ: Your Honor, I would say the
5 entire amount.

6 THE COURT: Which is?

7 MR. HERNANDEZ: The 2000 -- every payment made
8 since 2009.

9 THE COURT: Okay.

10 MR. HERNANDEZ: Minus the five payments that they
11 made, we can apply those.

12 THE COURT: Do you know what was paid?

13 MR. HERNANDEZ: Yeah, there were two payments
14 made in the 2015 -- there are allegations of two payments that
15 were made in 2015 and there was three payments that were made
16 in 2016. Okay?

17 THE COURT: So that's it in terms of -- is that
18 all --

19 MR. HERNANDEZ: That's all I'm aware of. There's
20 only been five payments made since 2000 -- if there was more,
21 I am unaware.

22 THE COURT: All right. What do you believe was
23 paid?

24 MR. MILLWARD: Your Honor, there was also the
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1 first payment made in the year.

2 MR. HERNANDEZ: Okay. Six payments.

3 MR. MILLWARD: September.

4 MR. HERNANDEZ: Six payments, Your Honor.

5 THE COURT: So six -- so they paid six payments
6 in nine years?

7 MR. MILLWARD: Well --

8 MR. HERNANDEZ: There's slightly -- and there --
9 I think there are more. We can get the exact numbers.

10 THE COURT: Okay.

11 MR. MILLWARD: But those five payments were made
12 on modifications.

13 THE COURT: Okay. But were there payments made
14 on -- before the modifications?

15 MR. MILLWARD: Yeah, there was the first payment
16 and then all payments after that were rejected under the loan
17 modification.

18 THE COURT: Okay. When was the original loan
19 entered?

20 MR. HERNANDEZ: 2007, Your Honor.

21 MR. MILLWARD: 2007.

22 THE COURT: 2007. And they made payments 2007 to
23 2009.

24 MR. MILLWARD: They made payments 2007 to 2008
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1 where they fell into hardship.

2 THE COURT: Okay.

3 MR. MILLWARD: Which has caused the modification.

4 THE COURT: All right. And then there were six
5 payments made after 2008.

6 MR. MILLWARD: Yeah, September of 2009, two in
7 2015 and then the three in 2016.

8 THE COURT: Okay. And what is the payment under
9 the 2009?

10 MR. MILLWARD: At the time as the payment went
11 from (indiscernible) to 14, when the interest rate changed, I
12 believe that is under Exhibit, Your Honor --

13 MR. HERNANDEZ: It was 197729 from September 1st,
14 2009. In September through August 31st, 2014, and then from
15 September 1st onwards \$2,105.10.

16 THE COURT: 2,100.

17 MR. HERNANDEZ: \$5.10.

18 THE COURT: Okay.

19 MR. HERNANDEZ: Plus, Your Honor, there's escrow.
20 The escrow is variant, but here, this document produced shows
21 an escrow of 295.33, so we -- if Your Honor -- I'm fine with
22 even just using that as an escrow figure, 295 (indiscernible).
23 So it would be those two numbers I gave you, plus the 295.33
24 as escrow.

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1 THE COURT: Okay. All right.

2 MR. MILLWARD: I believe that's what comports
3 with the (indiscernible) Your Honor.

4 THE COURT: Okay. All right. So what I'm going
5 to do -- all right. I'm going to rule in favor of the
6 Plaintiffs' to extend it, the reason being that I -- there is
7 a likelihood of success proving that the 2009 agreement
8 modified the 2007 and that those are the terms.

9 And I find that I agree with the bank, I think
10 they're likely to prevail in terms of the estoppel. They're
11 likely to in terms of the estoppel that they went through, two
12 modifications and the Supreme Court mediation.

13 However, the remedy for the estoppel and the --
14 on the modifications and the mediation would be I could grant
15 them specific performance if they ask, but technically the
16 Plaintiff's are correct that if they wish to use a nonjudicial
17 foreclosure, then it has to be based upon the numbers of the
18 2007, 2009.

19 THE COURT: All right. And then I'm going to
20 require a bond in the amount, see it was filed in 2011. I'll
21 require an amount of the payments due times 12, times seven.

22 So it's 84 payments. And then I'll require the
23 parties to file each month the payment due. Okay, what is the
24 rule require? When does the bond have to be posted? Is it
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1 30 days or --

2 MR. HERNANEZ: I'm fine with 30 days, Your Honor.

3 THE COURT: 30 days. And we'll start the payment
4 each month December, what's today the 20th, December 20th, by
5 the 20th of each month.

6 Okay. Now, let me ask if terms of mediation, do
7 you want me to set up a mediator or would you prefer someone
8 private or --

9 MR. HERNANEZ: Your Honor, just to clarify, I can
10 go back to the other department, I'm not sure.

11 THE COURT: I don't even if you need -- if you
12 want to file -- well, well, there's two departments so I'm not
13 going to tell you -- again, I'm not going to tell you I'm not
14 going to get involved in possible litigation that the bank's
15 going to file. But there's two departments.

16 Judge Schlegelmilch is the other Judge. And
17 normally what we do is we mediate each others, but if there is
18 going to be additional filing, what I would suggest is I can
19 get a senior Judge.

20 And if there's a senior Judge, the two of you are
21 familiar with that you think would help out, I'll gladly do
22 that, or if there's not a senior Judge or if there's a Judge
23 in another district, we all help each other out.

24 MR. MILLWARD: Judge Gamble, Judge Russell, Judge
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1 Young, any of those three would work.

2 THE COURT: Right.

3 MR. HERNANEZ: I guess there's no judges in
4 (indiscernible) Clark County.

5 THE COURT: Yes.

6 MR. HERNANEZ: Your Honor, how about this. If
7 can we be assigned in Reno? I would --

8 THE COURT: A Judge in what.

9 MR. HERNANEZ: In Washoe.

10 THE COURT: No, I don't have a problem with that,
11 that's why I'm asking.

12 MR. HERNANEZ: The reason is because that kind of
13 splits the baby.

14 THE COURT: For travel wise.

15 MR. HERNANEZ: For travel wise.

16 THE COURT: You're out of Reno too?

17 MR. HERNANEZ: -- (indiscernible) Washoe Judge --

18 MR. MILLWARD: What's that?

19 THE COURT: You're out of Reno too?

20 MR. MILLWARD: No, I'm in Minden (indiscernible).

21 THE COURT: You are in Minden, okay. No, I don't
22 have a problem -- is there a Judge in Washoe that I can ask?

23 MR. MILLWARD: The chief, there is Judge --

24 MR. HERNANEZ: Stiglich?
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1 THE COURT: Hardy.

2 MR. MILLWARD: Yeah.

3 THE COURT: All right. I know Judge Hardy real
4 well, I'm sure he would be willing to do it.

5 MR. HERNANEZ: I'll take your word for it. I'll
6 just --

7 THE COURT: Yeah, like I say, I know Judge Hardy.
8 Let me see, I'll contact Judge Hardy and see if he would be
9 willing to do it. And I'm guessing with the holidays, we
10 probably would be looking at January.

11 MR. HERNANEZ: That's fine, Your Honor.

12 THE COURT: All right.

13 MR. MILLWARD: Your Honor, as to the order, are
14 you going to find --

15 THE COURT: I'll find that the parties' agreement
16 that there's irreparable injury. What's the rule?

17 MR. HERNANEZ: I have it here, 65.

18 THE COURT: In your brief?

19 MR. HERNANEZ: It's in my brief, Your Honor.

20 THE COURT: All right. What --

21 MR. HERNANEZ: It's on page, page 7, Your Honor.

22 THE COURT: Page 7. All right. So a likelihood
23 of success on the merits that the 2009 applies, and again, I
24 don't have a counterclaim or answer, so I can't, I mean, an
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1 answer and counterclaim alleging the Defense -- well, I just
2 say in terms of the remedy, even if I go with the estoppel or
3 I can't find today that the modifications or the Supreme Court
4 mediation would have modified the 2011.

5 Now, maybe if you supplement the record, there's
6 additional documents out there, that could change my mind. I
7 don't have anything that I saw today that looked like it
8 satisfied the statute of frauds to modify a deed of trust and
9 note.

10 MR. HERNANEZ: Again, there's nothing that stops
11 me from going.

12 THE COURT: Like I'm saying, that's up --

13 MR. HERNANEZ: Yeah.

14 THE COURT: -- to you.

15 MR. HERNANEZ: Okay.

16 THE COURT: I'm just saying with what I have
17 filed before me today, I don't have any evidence that the 2009
18 filed in 2011 was modified by a document that would satisfy
19 the statute of frauds.

20 Then in terms of the arguments as to the estoppel
21 and the mediation, possible accord and satisfaction, I'm
22 agreeing with Mr. Millward, I agree with his argument that
23 even if the bank prevails on that, if they seek to use a
24 judicial, non-judicial foreclosure, it would have to be based

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1 off of the 2009, 2011 file document.

2 Because I, again, maybe I changed my mind at
3 trial and so forth, but for today's hearing as to your statute
4 of frauds arguments, that they had the burden to enforce the
5 2011, I don't see that as of today.

6 Perhaps you know if it's fully briefed in a
7 motion for summary judgment, but as of today, I'm not seeing
8 that.

9 So, how I see this going, I think Mr. Millward's
10 correct, if they want to use a non-judicial, I can't estop
11 them at this point in time.

12 MR. HERNANEZ: Your Honor, then --

13 THE COURT: All right. Is that enough? You're
14 going to be drafting the order.

15 MR. HERNANEZ: Your Honor, if he doesn't --

16 THE COURT: Right.

17 MR. HERNANEZ: -- let's say they don't post the
18 bond, the 84 months.

19 THE COURT: Right.

20 MR. HERNANEZ: Then could we have (indiscernible)
21 renotice of sale or just --

22 THE COURT: Okay. So, when did you renotice the
23 sale that's.

24 MR. HERNANEZ: We did an oral postponement, Your
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1 Honor.

2 THE COURT: An oral postponement. So then let's
3 clarify, you'll do the order clarifying that I didn't --

4 MR. HERNANEZ: They can put it in that order.

5 THE COURT: Okay.

6 MR. HERNANEZ: That's fine.

7 THE COURT: All right. That the Court did not
8 intend to rescind.

9 MR. HERNANEZ: Okay. Okay. Do you need any
10 specific findings, Mr. Millward, or --

11 MR. MILLWARD: Yeah, one more thing, Your Honor.

12 THE COURT: Go ahead.

13 MR. MILLWARD: What about the owner
14 (indiscernible) rights? Does the Court find that it's been
15 violated?

16 THE COURT: No. As to the homeowner Bill of
17 Rights, well, I think I would have to go there too.

18 So based upon the finding that it would have to,
19 I believe that the homeowner Bill of Rights would have to
20 reflect the -- the 2009, '11, and I don't have anything in the
21 record before me today that the numbers reflected in the
22 notices were based upon the 2009, '11 and we'll go back up.
23 Okay.

24 So I think that there is a likelihood of success
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1 on the homeowners' Bill of Rights.

2 All right. Any other clarification, Mr.
3 Millward?

4 MR. MILLWARD: I believe that's all.

5 THE COURT: Okay.

6 MR. MILLWARD: Thank you, Your Honor.

7 THE COURT: All right. So this is how I
8 typically work it. Send Mr. Hernandez a copy, the other
9 attorney a copy. If the two of you can't agree on it, if one
10 or two emails doesn't work it out, simply submit your own and
11 then, otherwise, do a request for submit to Judge to sign the
12 order.

13 And once I get that request for submit, I'm
14 assuming everybody's agreed. But like I'm saying, if we can't
15 handle it in one or two emails, I don't want to get dragged
16 into a dispute. Simply file your own order and I'll cut and
17 paste.

18 MR. MILLWARD: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. MILLWARD: Do you have a deadline?

21 THE COURT: I'd like to get it done in about --
22 well, I'm ordering payments by the 20th, so could you get me
23 something by the tenth?

24 MR. MILLWARD: Of December?
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THE COURT: December.

MR. HERNANEZ: Thank you (indiscernible), Your Honor.

THE COURT: Okay. Any questions, counsel, on the telephone?

MR. LACHMAN: No, Your Honor, I appreciate your time. I'll likely be filing a motion to submit.

THE COURT: All right. I'm terrible with names, that's why I'm calling you counsel on the telephone.

MR. LACHMAN: Yeah, not a problem.

THE COURT: I apologize. All right, thank you, very much. I'm hanging up the telephone. You have a good day. All right.

Have a good day, gentlemen.

MR. MILLWARD: Thank you, Your Honor.

(Proceedings concluded.)

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1 STATE OF NEVADA,)
2) ss.
3 CARSON CITY.)

4 I, Shellie Loomis, a certified transcriber for the
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9 That the foregoing transcript, consisting of pages
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11 said hearing.

12
13 Dated at Carson City, Nevada, this 12th day of
14 October, 2021.

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17 SHELLIE LOOMIS, RPR
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Do Not Copy

In The Matter Of:

*ALBERT ELLIS LINCICOME, JR. AND VICENTE LINCICOME vs
SABLES LL,*

April 15, 2019

*Capitol Reporters
628 E. John St # 3
Carson City, Nevada 89706
775 882-5322*

Original File 4-15-19lincicomehrg.txt

Min-U-Script® with Word Index

1 Case No. 18-CV-01332

2 Department II

3
4 IN THE THIRD JUDICIAL DISTRICT COURT

5 IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

6 BEFORE THE HONORABLE LEON ABERASTURI

7 DISTRICT JUDGE, PRESIDING

8 ALBERT ELLIS LINCICOME,
9 JR.; AND VICENTA LINCICOME,
Petitioners,

vs.

10 THE THIRD JUDICIAL DISTRICT
11 COURT OF THE STATE OF
12 NEVADA, IN AND FOR THE
13 COUNTY OF LYON; AND THE
HONORABLE LEON ABERASTURI,
DISTRICT JUDGE,

Respondents,

and

14 SABLES, LLC, A NEVADA
15 LIMITED LIABILITY COMPANY;
16 FAY SERVICING, LLC, A
17 DELAWARE LIMITED LIABILITY
18 COMPANY AND SUBSIDIARY OF
19 FAY FINANCIAL, LLC;
PROF-2013-M4 LEGAL TITLE
TRUST BY U.S. BANK, N.A.,
AS LEGAL TITLE TRUSTEE; AND
BAND OF AMERICA, N.A.,
Real Parties in Interest

20 —
ELECTRONIC-RECORDED TRANSCRIPT OF PROCEEDINGS

21 MONDAY, APRIL 15, 2019

22 YERINGTON, NEVADA

23
24 Transcribed by: Shellie Loomis, RPR

CAPITOL REPORTERS (775) 882-5322

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2
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7 -Telephonically-

8 For Bank of America: Ackerman Law Firm
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Las Vegas, NV
10 -Telephonically-

11 For U.S. Trust & Fay: Ramir Hernandez, Esq.

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1 YERINGTON, NEVADA, MONDAY, APRIL 15, 2019, P.M. SESSION

2 -oOo-

3

4 THE COURT: All right. Good afternoon. This is
5 Judge Aberasturi, who do I have on the telephone?

6 MR. BRENNER: Hi, this is --

7 THE COURT: Who?

8 MR. BRENNER: Sorry. Darren Brenner with the
9 Ackerman Law Firm for Bank of America.

10 THE COURT: All right. Hold on one second. I'm
11 going to try to conference in one more party.

12 All right. This is Judge Aberasturi, do I have
13 both parties on the line?

14 MR. BRENNER: You still have Darren Brenner here
15 from Bank of America.

16 THE COURT: And do I have someone from the Zieve
17 Law Firm?

18 MR. WADE: Shadd Wade on behalf of Sables, LLC.

19 THE COURT: Okay. I need you to speak up, sir.
20 Say your name again.

21 MR. WADE: Yes, Your Honor, Shadd Wade is here on
22 behalf of Sables, LLC.

23 THE COURT: Okay. All right. And in the
24 courtroom I have Mr. Millward?

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1 MR. MILLWARD: Yeah, Michael Millward on behalf
2 of Lincicomes.

3 MR. HERNANDEZ: Ramir Hernandez, Your Honor, on
4 behalf of the U.S. Bank Trust and Fay.

5 THE COURT: Okay. Today was set for a motion
6 hearing. Now, on the phone, are you hearing me all right?

7 MR. BRENNER: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. WADE: Yes, Your Honor.

10 THE COURT: I have I believe five matters to hear
11 today. I have the declaration of nonmonetary status. I have
12 a motion to dismiss filed by Bank of America. I have a motion
13 for Rule 11 sanctions. I have a motion for leave to file
14 amended complaint. And then I have a motion to set aside the
15 default.

16 Let's start with the motion to set aside the
17 default first.

18 MR. MILLWARD: Your Honor, I believe there was
19 also an application for the default judgment.

20 THE COURT: Okay.

21 MR. MILLWARD: That pertains to the other
22 motions.

23 THE COURT: Okay.

24 MR. MILLWARD: So we probably might want to hear
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1 all three of those at the same time.

2 THE COURT: All right. And the application, when
3 was that filed?

4 MR. MILLWARD: That's a good question. The
5 application was filed --

6 MR. HERNANDEZ: I have it, Your Honor, it was
7 filed on December 19th was the application for entry of
8 default and December 18th -- January 18th this was the filing
9 application for entry of default judgment.

10 MR. MILLWARD: Yeah, it should be, the file
11 stamped copy reflects (indiscernible) court January 22nd.

12 THE COURT: January 20th -- all right. I don't
13 have anything January -- okay, you're right. I have it.

14 Do you -- I have it down as January 21st
15 application for entry of default against Bank of America
16 application for entry of default versus Sables.

17 MR. MILLWARD: You must mean December.

18 THE COURT: December.

19 MR. MILLWARD: So on December 21st the clerk --
20 the court clerk took a default of Sables and Bank of America
21 upon application. Then we have an application for default
22 judgment filed a month later on January 22nd.

23 THE COURT: January 22nd. Okay. Wasn't there a
24 stipulation to set aside?

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1 MR. MILLWARD: So there's a stipulation to set
2 aside the default taken against Bank of America. There was
3 not a stipulation as to Sables, LLC.

4 THE COURT: Okay. All right. So let's hear from
5 Sables first, why should I set aside the default?

6 MR. WADE: Yes, Your Honor, as set forth in the
7 moving papers and the declaration to the court,
8 (indiscernible) office, three-day notice of intent to take
9 default.

10 We reached out to Plaintiffs' counsel on
11 December 18th and we spoke with the paralegal in his office
12 and we also emailed her and we indicated we would be filing a
13 response. That we were just waiting on a check from our
14 corporate office so that we could send it in with the response
15 to the court due to the lack of electronic filing service.

16 Despite that indication on December 18th,
17 Plaintiffs' counsel proceeded to move forward and enter a
18 default against Sables.

19 We believe that is a violation of RPC3.5A because
20 she knew that represented Sables and that we intended to
21 appear in the case, but he proceeded to --

22 (Telephonic feedback.)

23 MR. WADE: -- filing and proceeded to enter a
24 default against Sables essentially just taking advantage of
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1 the (indiscernible).

2 So, for that purpose as well as the arguments and
3 the reasoning in the motion, we think that the default should
4 be set aside. There's no prejudice alleged. There's no
5 prejudice on the record and we have filed a responsive
6 pleading and we filed it as quickly as we could once we
7 received the three-day notice.

8 So we'd ask for the default to be set aside and
9 for the declaration of nonmonetary status to be considered by
10 the court.

11 THE COURT: Okay. All right. Your argument,
12 Mr. Millward?

13 MR. HERNANDEZ: Your Honor, I did file a joinder
14 I believe to that motion (indiscernible) arguments.

15 THE COURT: Well, I thought there was a
16 stipulation to let your client off?

17 MR. HERNANDEZ: I represent (indiscernible).

18 THE COURT: U.S. Bank.

19 MR. HERNANDEZ: Trust, Your Honor.

20 THE COURT: All right. Go ahead.

21 MR. HERNANDEZ: What I'd like to put on the
22 record, the Fay listing, and correct me if I'm wrong, Shadd,
23 but I believe I did file a joinder to this motion to set aside
24 the default judgment. And I'm not going to repeat the
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1 arguments that Mr. Wade made, but I do want to point out, Your
2 Honor, that -- and I can wait until I file for my motion
3 against -- my motion for sanction when that's heard, that when
4 that 50 -- the mis -- there's been a lot of miscommunication
5 here going on between the parties, not between the Defendants,
6 but with the Plaintiffs' side in particular regarding the
7 filing of notices.

8 And I'm only making one point, Your Honor,
9 whenever one of our sides file something, we send a courtesy
10 copy emailed to everybody the day we're going to file
11 something, but Mr. Millward has not been doing that and he's
12 been using the filing process by surprise. And I just want to
13 point out here I think that something happened here with the
14 entry of default of judgment.

15 THE COURT: Okay. All right. Anything else?
16 All right. Your opposition, Mr. Millward?

17 MR. MILLWARD: Yes, Your Honor. So, on -- on I
18 believe December 14th of 2018, I provided Sables, LLC and Bank
19 of America notice of intention to take default. RBC3.5
20 requires that if I know of an attorney representing a party in
21 a matter, that I should give them adequate notice and time
22 before taking default.

23 Even though Sables at that point in time had not
24 made any entry into the case nor had I spoken with Mr. Wade, I
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1 still gave notice of default which is not required by the
2 NRCP, I think it's NRCP 60 or 55, I think it's 55 now that I
3 think about it.

4 But regardless, I gave adequate notice. I
5 understand from my paralegal that on the 18th she received a
6 phone call requesting that Sables be given through the 21st to
7 file a responsive pleading.

8 I told my paralegal okay, well, we will submit
9 our filing for application for default on the 20th. And so on
10 the 20th, it was mailed out and it was received by the clerk
11 on the 21st. And she took default on the 21st.

12 I had no understanding that Sables wouldn't have
13 had their adequate time and opportunity to file something by
14 then. They knew that they were going to seek their default.
15 We filed a notice of intention to seek their default. I
16 wasn't violating any rule in seeking their default as to
17 whether or not the default should be set aside.

18 So the rules require that set aside of a default
19 occur upon good cause where if there was neglect, that it be
20 excusable. On that point, Mr. Wade's argument is that they
21 communicated with me, asked for an extension and then I took
22 default.

23 Those facts don't establish in any which way why
24 they hadn't responded within the 20-day time frame, which was
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1 by December 9th. They had until December 9th to file a
2 pleading. I gave them notice of intent to take -- to apply
3 for default, to have the clerk take their default with plenty
4 of time. They didn't get a filing made in time. Their
5 default was taken by the clerk. The default shouldn't be set
6 aside.

7 THE COURT: Can you cite to me any case in Nevada
8 where the Supreme Court would uphold a judge for not setting
9 aside a default?

10 MR. MILLWARD: Well --

11 THE COURT: In this type of situation?

12 MR. MILLWARD: In fact, it's a discretionary
13 decision of the court. And so the court wouldn't be
14 overturned on appeal because the court has discretion, but the
15 cases cited in the -- my filing opposing are all cases in
16 which the State Supreme Court has upheld a District Court
17 finding that a default shouldn't be set aside.

18 THE COURT: Where the attorneys were
19 communicating before and --

20 MR. MILLWARD: The attorneys weren't
21 communicating before, but the rule requires that where a party
22 has made an appearance that you have to give notice of intent
23 to take default. And that's what I did, even though they
24 hadn't made an appearance at that point in time. So I've
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1 satisfied that part of the rule.

2 THE COURT: All right. Anything additional from
3 Sables?

4 MR. WADE: Yes, Your Honor, there's ample Supreme
5 Court case law to support the policy, the good public policy
6 tradition that a case be adjudicated on their merits.

7 Given that policy and the fact that we notified
8 counsel prior to his seeking entry of default against Sables
9 that we were appearing and that we did appear within the time
10 frame, we said we did, but he proceeded to obtain a default
11 against Sables anyway and then his conduct following entry of
12 that default in seeking to obtain a default judgment nunc pro
13 tunc for an injunction.

14 This had already been litigated with other party,
15 it demonstrated to Plaintiffs that hey, a proceeding to
16 default Sables for an improper purpose, given the decorations
17 that I have in the file and the case law cited I will submit
18 to the court on the motion to set aside default.

19 MR. HERNANDEZ: If I may add one more thing, Your
20 Honor?

21 THE COURT: Go ahead.

22 MR. HERNANDEZ: All cases that he cites to about
23 setting aside a default, setting aside a default judgment.

24 THE COURT: Right.
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1 MR. HERNANDEZ: Not the default.

2 THE COURT: Right.

3 MR. HERNANDEZ: And the standard for defense of
4 default judgment is different than (indiscernible) default.
5 So there is -- I've looked, Your Honor. I don't know any
6 Nevada case where the judge has overturned (indiscernible) a
7 default and I just want to make that clear.

8 MR. MILLWARD: Your Honor, actually I believe the
9 standards are the exact same standard. If you look at NRCP60,
10 that's where the standard for default judgment and default are
11 discussed. I know of no other standard but the standard for
12 default judgment that also applies to a default.

13 THE COURT: Okay. All right. I'm going to grant
14 the motion to set aside the default. Nevada case law is quite
15 clear that the court is supposed to hear matters on the
16 motion.

17 We're talking about days, not weeks, months,
18 years. I'll find that there was communication, that the
19 Defendant Sables had attempted to work out a reasonable time
20 period. Okay. And that from public policy favors decisions
21 on the merits. Okay.

22 All right. Then as to the motion for Rule 11
23 sanctions, let's go to that one next.

24 MR. HERNANDEZ: Your Honor, this case I think has
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1 had a tortured history more than it really should have at this
2 point. We -- what began was what began as a TRO to stop a
3 foreclosure has blown up to try to be something else.

4 And I think, Your Honor, that what's happened
5 here is that opposing counsel is trying to manip -- has been
6 trying to manipulate the system to retroactively annul an
7 order that this court entered.

8 And, Your Honor, I'll be honest with you, this is
9 the first time in my five years of practice that I have filed
10 a Rule 11 motion against an opposing counsel.

11 And I think that in this case, it rises to a
12 level of egregiousness where I think this motion of sanctions
13 should be awarded simply to deter future behavior from this
14 counsel, especially in this case, because opposing counsel is
15 not being reasonable with anything in regarding the filings
16 with the deadlines and he is trying to -- to play got you
17 (indiscernible) and trying to get retroactive relief where
18 there's other avenues for him to get the relief.

19 If I go back to November, Your Honor, when we met
20 here I think we had to go to the next courtroom because I
21 think the telephone was broken that day.

22 THE COURT: Yes.

23 MR. HERNANDEZ: You granted their motion for
24 preliminary injunction. It was conditioned on them posting
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1 the bond within 30 days of 84 monthly payments. They failed
2 to post that bond.

3 Now, opposing counsel argues that the order that
4 was submitted -- I want to give you -- by the way, before we
5 talk about the order, Your Honor, I want to tell you what
6 happened with the order. Opposing counsel submitted an order
7 to me and told me by email I'm filing this.

8 And I put the brakes on, I said wait a minute,
9 give me a chance to actually review what this order says. And
10 I made several substantial changes, for example, opposing
11 counsel tried to put in the original draft of this order that
12 he was trying to seek a permanent injunction.

13 And then ultimately we ended up changing that to
14 preliminary injunction. And that's just part and parcel of
15 the story I'm trying to tell, Your Honor, with what's
16 developed so far.

17 Then, open opposing counsel puts language in the
18 order on paragraph 1 that says Sables is hereby enjoined from
19 selling the public auction, the real property located at
20 70 Riverside Drive, Dayton, Lyon County, Nevada.

21 And I identified the notice of trustee sale
22 recorded with the office of the Lyon County recorder as
23 document number 587470 until further order of the court.

24 But if you jump to two paragraphs later it says
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1 that the injunction shall be effective against Defendants so
2 long as bond is posted and Plaintiffs post additional security
3 in the sum of \$2,105.10 on January 20th, 2019, and on the 20th
4 day of each month thereafter with the Third Judicial District
5 Court clerk's office.

6 Then go down to paragraph 5. That failure of
7 Plaintiff to timely post a bond and provide notice of bond by
8 December 20th, 2018 shall relieve Defendants of their duty to
9 comply with this injunction in joining the sale of
10 70 Riverside Drive, Dayton, Lyon County, Nevada until finally
11 a notice of bond -- notice of compliance of Plaintiffs'
12 satisfaction of requirement to post additional security with
13 the Third Judicial District Court in this matter are therefore
14 served upon Defendants.

15 And, Your Honor, the reason I put that all
16 together is because opposing counsel says -- has basically two
17 arguments.

18 The first argument is that he's entitled to a
19 nunc pro tunc default judgment back to December 20th because
20 that was the first day that he could seek a default judgment.

21 However, Your Honor, number one, there's no
22 mechanism for a nunc pro tunc de -- retroactive default
23 judgment in this -- in that matter. There's nothing.

24 In fact, the case law is specific, it
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1 specifically says that a nunc pro tunc -- a nunc pro tunc
2 order in Findley versus Findley is a case from 1948 and all
3 the cases I cite are well-established laws in Nevada that have
4 been around for decades that a (indiscernible) order cannot be
5 modified -- sorry, that the object -- I'm sorry, I was quoting
6 the wrong case, I was (indiscernible) in 1917. The object of
7 the nunc pro tunc is to make records speak true to an act
8 already done.

9 And I also want to cite, and the reason I cite
10 that case, Your Honor, is because I want to make a point very
11 clear that the purpose of a nunc pro tunc order is okay, there
12 was an error made in the drafting of the order and we're here
13 to fix that drafting of the order.

14 The nunc pro tunc has never ever been used in a
15 method that opposing counsel has supplied. In fact, it would
16 be contrary to everything that Nevada law says.

17 So there is no mechanism, nothing that would
18 allow him to do that.

19 Now, if he wanted to get a default judgment
20 against Sables for monetary damages, I wouldn't be here
21 talking to you today. In fact, I wouldn't have pulled up here
22 today. I have no stake in this game.

23 But the fact that he came here and is trying to
24 seek a nunc pro tunc judgment in a manner which is
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1 substantially going to affect the rights of my clients, the
2 beneficiary and the loan servicer is why I'm arguing here
3 today that the motion for entry of default judgment no pro
4 tunc was done for improper purpose. Because, Your Honor, the
5 foreclosure sale, this is undisputed, took place on January 4,
6 2019.

7 It took place on that date because the injunction
8 had dissolved. Now, opposing counsel files a default judgment
9 and then tries an entry -- files an entry of default judgment
10 to enjoin Sables all the way back to December 21st from
11 participating and going forward with the foreclosure sale,
12 which means retroactively it would have made our January 4th
13 foreclosure sale invalid. Okay.

14 This court has already stated that the
15 foreclosure sale could take place if the bond was not posted.

16 Opposing counsel's interpretation of the order is
17 just nonsensical. There's nothing in the order. We were all
18 here, Your Honor, we knew what their intent was.

19 Your intent that day if they did not post the
20 84 months of bonds, 84 monthly payments as bond within 30 days
21 that you were going to allow the foreclosure sale to take
22 place.

23 There is a third party called Breckenridge that
24 came to the foreclosure sale based on all this and in good
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1 faith as a bona fide purchaser purchased the property.

2 Now, I called opposing counsel in January and I
3 said look, if you want to seek a monetary default against
4 Sables that's your prerogative. But don't seek a default
5 against Sables that's going to affect the record, my party,
6 the party that has appeared and participated in this case.

7 And I'm sorry if I'm being indignant, Your Honor,
8 but this is part and parcel of what's been going on with this
9 case with opposing counsel. As I alluded to earlier, opposing
10 counsel has frequently made filings as frequently -- has
11 frequently made filings in other actions in this case without
12 informing all parties together.

13 Our side, the defense side has always sent emails
14 out saying this has been filed. Instead of respecting what's
15 been going on, opposing counsel has been taking advantage of
16 the fact that this district does not have electronic filing.

17 And so he's using -- and by the way, Your Honor,
18 all the other counsel are in Las Vegas, so we have to mail
19 everything up here, get it filed, your clerk staff is great,
20 things are filed very quickly, they get up here. But that's
21 just not fair to us that opposing counsel is able to take
22 advantage of this non-filing system to play the gotcha here.
23 Okay.

24 And I'm afraid that if we continue through this
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1 litigation we're just going to have more of this. Especially
2 now that he's probably -- he's going -- he's going to make a
3 complaint that's going to be filed.

4 THE COURT: Stay away from that. We'll
5 address --

6 MR. HERNANDEZ: But that's the point, I know
7 you're trying to stay away from that, Your Honor, but the
8 point I'm making is that, you know, at some point he needs --
9 he needs to be sanctioned by the court for this type of
10 behavior.

11 I'm not asking -- you know, I'm not asking for a
12 million dollar sanction, Your Honor. At the very least I have
13 to file here -- I had to file an opposition to his application
14 for default judgment and I had to file my -- my -- my Rule 11
15 motion. And I gave him the safe harbor, I tried to talk him
16 out of it, I did everything I could and he just kept insisting
17 on going forward.

18 And what's even egregious to me, Your Honor, is
19 he's willing to set aside the default of Bank of America
20 because that gave him notice of damage, but he wasn't going to
21 set aside the default of Sables and I know (indiscernible) a
22 lot because if he set aside the default of Sables, he would
23 have no mechanism to do this nunc pro tunc nonsense that he's
24 trying to do.

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1 Your Honor, if he didn't like your injunction
2 order he had an opportunity to file a writ with the Supreme
3 Court of the Court of Appeals, it would have gone to the
4 Supreme Court, it probably would have been shuttled down. He
5 had an opportunity to file a writ with the Supreme Court to
6 stop the foreclosure sale.

7 He didn't do that. Okay. He allowed the
8 foreclosure sale to happen and then after the foreclosure sale
9 happened then he filed his application for default judgment,
10 and that's when he tried to do it nunc pro tunc.

11 You know, I -- I'll be honest with you, Your
12 Honor, I've never seen anybody in my years of litigation, I've
13 never seen opposing counsel try to do this with a preliminary
14 injunction before.

15 So I know that Rule 11 sanctions are harsh, I
16 know they can be punitive, but I think this is an opportunity
17 here, Your Honor, to -- to really get this case off the rails
18 and back on track. And unless you have any questions, I think
19 everything else is in my pleadings.

20 THE COURT: No. Mr. Millward?

21 MR. MILLWARD: Thank you, Your Honor. This order
22 for sanctions against me personally and against my client is
23 about three words, nunc pro tunc. The Defendants U.S. Bank
24 believe that -- that the request for entry of judgment nunc
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1 pro tunc is a sanctionable offense.

2 I have seen attorneys ask for nunc pro tunc
3 relief and had it granted and had it denied for various
4 reasons.

5 The reason it was sought in this matter, Your
6 Honor, was because Sables at the point, at the point that the
7 default has been taken had not appeared in this matter, had
8 not shown up at the last hearing that this court had, had not
9 been involved otherwise and had defaulted. And the clerk had
10 taken their default.

11 It was my argument that because they hadn't shown
12 up, they didn't care about the injunction. They didn't care
13 to follow the court's order. The court on December 31st
14 entered its order and its order said that until further order
15 of the court Sables should not foreclose. Shall not
16 foreclose.

17 When I sought nunc pro tunc application of a
18 judgment, it was --

19 THE COURT: You submitted that order?

20 MR. MILLWARD: I did.

21 THE COURT: Right.

22 MR. MILLWARD: And counsel signed off on it.

23 THE COURT: And counsel signed off on it.

24 MR. MILLWARD: They agreed to it.
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1 THE COURT: And so in that order I had specific
2 language and at the last hearing I gave specific language that
3 if your client didn't post the bond and start making payments
4 the sale could go through.

5 MR. MILLWARD: That's exactly right. And the
6 reason I wrote the order the way I did, Your Honor, was so
7 that they did not need to seek another hearing or any other
8 type of relief to get that order entered by the court.

9 I thought it made sense that we not be wishy
10 washy about when they could and when they couldn't move
11 forward. Because when the order was submitted the preliminary
12 injunction still was in place. So we had to have some order
13 of the court turning it off, shutting it down.

14 THE COURT: All right. But your nunc pro tunc
15 request is to grant the requested relief injunctive relief.

16 MR. MILLWARD: The nunc pro tunc.

17 THE COURT: Wait. If I sign that and I enter a
18 default judgment against Sables saying they're enjoined then
19 what does that do?

20 MR. MILLWARD: Well, all that it would do is that
21 Sables would probably not be the trustee any longer, that they
22 would probably seek to have another trustee appointed and move
23 forward.

24 But regardless, it would require the case be
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1 heard on the merits rather than running as quickly as we can
2 to a foreclosure settlement in this matter. I mean, the court
3 already found in this case that my client's likely to prevail
4 on the merits.

5 THE COURT: No. I found it likely to prevail on
6 the merits that there was an issue with how the deficiency
7 judgment was calculated and on that basis they would be able
8 to stop the sale if they posted the bond, because your
9 client's going to pay something at the end of the day.

10 MR. MILLWARD: Your Honor --

11 THE COURT: Do you understand that?

12 MR. MILLWARD: I'm not saying that my client's
13 not going to. I'm saying that my client's entitled to her day
14 in court.

15 THE COURT: And she had her day in court as to
16 the preliminary injunction.

17 MR. MILLWARD: Right.

18 THE COURT: And I gave her the opportunity to put
19 up the bond.

20 MR. MILLWARD: Right.

21 THE COURT: And then you filed this and you are
22 clearly seeking to undo what I did.

23 MR. MILLWARD: Your Honor, I promise when I filed
24 this nunc pro tunc, I thought not only have they violated the
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1 court's order, the current order that this court signed, but
2 the order that counsel had already approved, but they failed
3 to otherwise plead in this case.

4 I sought to make the judgment effective as of the
5 date that I first could have applied to it because I could
6 have applied for it on that day.

7 Had I filed an application for judgment as of
8 that date to make the injunction permanent, there would be no
9 argument or dispute here and my understanding at the time of
10 getting a default then entitled the party to the relief sought
11 to the court's order.

12 THE COURT: This is how it appears to the court.
13 If there was a duty of candor to the court when you filed the
14 preliminary injunction you would have filed for the default at
15 that point in time.

16 I could have done everything at the same time. I
17 could have heard arguments from opposing counsel as to look,
18 you can't issue an injunction against one party when you have
19 a default that's already established the injunction against
20 the other party.

21 MR. MILLWARD: I'm on the date of the last
22 hearing, nobody was in default, Your Honor. So, the default
23 occurred about a month after the last hearing. So, the
24 default was taken on December 21st. Our hearing was
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1 November 20th. And so I wouldn't be arguing for default or
2 default judgment at the last hearing.

3 The last hearing was whether or not a preliminary
4 injunction should enter. And so on the 18th of December, I
5 submitted the order to the court. The court signed it on the
6 31st. Opposing counsel signed off on it. Opposing counsel's
7 rendition of how things went isn't exactly accurate.

8 I submitted to them the order that I planned to
9 present. He submitted his response back. I looked at it and
10 I said wow, wow, wow, this is way off base, this is not what
11 the judge said. I disagree. I'm going to submit my order
12 just like the judge had ordered because if you look at the
13 clerk's minutes --

14 THE COURT: Let me ask, did you discuss whether
15 or not it should just be for the monetary or did you discuss
16 whether or not the inclusion of the injunctive relief would
17 cause problems not only for the party that appeared and got a
18 ruling, but for a potential third-party purchaser?

19 MR. MILLWARD: Well, as to the default judgment
20 and default, none of that had occurred yet. We were just
21 submitting the order on December 18th. The default by Sables
22 hadn't occurred yet because I didn't know whether or not they
23 were going to be filing an answer timely or not. I didn't
24 know.

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1 And so when we were discussing it we weren't
2 talking about any of those issues, because they weren't --
3 they weren't in front of us.

4 But as to the rendition, I didn't just force him
5 to sign anything. He said no, no, no, no, wait, I don't want
6 the judge to have to make a decision between competing orders.
7 Send me what you've got.

8 THE COURT: Right. And that's typically how it
9 works.

10 MR. MILLWARD: Right. I know it is. And I
11 thought that's how it worked because, Your Honor --

12 THE COURT: And that's my problem, in the order
13 you submitted it is clear that if your client didn't make the
14 payment and didn't bother to make the payments thereafter the
15 sale could go through.

16 MR. MILLWARD: And it was also about notice;
17 right? About filing notice with the clerk; right? That's
18 what entitled the sale to go through.

19 And so I wrote it in such a way that if no notice
20 had been filed an ex parte order could easily be issued so
21 that the sale can go through. It wasn't --

22 THE COURT: But why do they now have to ask for
23 an order to go through when my previous order said it goes
24 through if they don't put up the bond?

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1 MR. MILLWARD: Because somehow you have to -- you
2 have to say that the preliminary injunction is no longer in
3 force. There has to be some finding at least.

4 THE COURT: So now you're challenging the order
5 that you submitted and --

6 MR. MILLWARD: Absolutely not, no. In fact, I
7 wrote the order specifically so that it would follow that
8 purpose. I mean, that might have been a disagreement of
9 counsel, but it wasn't resolved in his signing off and the
10 court signed it. The court looked at the order obviously and
11 signed off saying that Sables had to file essentially another
12 order in order to foreclose.

13 THE COURT: No, the order states that your client
14 had to issue and file everything -- do we need to go word by
15 word?

16 MR. MILLWARD: I'm fine if we do that, Your
17 Honor. I thought that the first sentence of that order made
18 it absolutely clear what had to happen. They're entitled to
19 disregard the preliminary injunction but not until they've got
20 another order of the court.

21 THE COURT: Look at paragraph 5. The failure of
22 the Plaintiffs to timely post a bond to provide notice of
23 bond, that's Plaintiffs providing notice by December 20th,
24 shall relieve Defendants of their duty to comply with the
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1 injunction.

2 So the condition precedent for the injunction to
3 continue was that the Plaintiffs were to file and post a bond
4 and provide notice.

5 MR. MILLWARD: Right. And I'm not --

6 THE COURT: Okay. Until a filing of notice of
7 bond and notice of compliance of Plaintiffs' satisfaction
8 they're required to post additional security.

9 MR. MILLWARD: Because there was an ongoing
10 requirement for essentially bond or payment to be made to the
11 clerk in this matter. I thought it made sense that we have
12 one order whenever they're going to move forward with the
13 foreclosure, have one order specifically say yes, they can
14 foreclose.

15 THE COURT: Okay.

16 MR. MILLWARD: The clerk does not have a notice
17 from the Plaintiff showing that they posted a bond.

18 THE COURT: All right. So explain to me other
19 than trying to mess up the foreclosure sale, what benefit did
20 your client get from a nunc pro tunc application?

21 MR. MILLWARD: None.

22 THE COURT: Then why did you request it?

23 MR. MILLWARD: Because they had already violated
24 the order. They had already acted in violation of the order
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1 and they were presently in default.

2 THE COURT: So, again, I'm going to ask you one
3 more time. What benefit other than trying to mess up the
4 foreclosure sale does your client get by having a nunc pro
5 tunc default judgment --

6 MR. MILLWARD: None.

7 THE COURT: -- ordered against Sables?

8 MR. MILLWARD: None, but I didn't believe at the
9 time that the request was inappropriate. It's not a frivolous
10 lawsuit. It's not a claim that is frivolous. It is a remedy
11 that I've never seen anyone in the history of my practice
12 sanctioned for.

13 THE COURT: When was the last time you personally
14 requested as an attorney a nunc pro tunc default judgment?

15 MR. MILLWARD: I don't think I've ever done it
16 exactly like that, but I have sought nunc pro tunc relief
17 before.

18 THE COURT: Okay. 12 years on the bench I've
19 never seen a request for a nunc pro tunc default judgment.

20 MR. MILLWARD: Well, I asked -- I asked other
21 counsel around me if it was improper relief to be sought. And
22 the advice I was given by the other attorneys is no, you're
23 entitled to the relief as of the date of the default.

24 THE COURT: Okay.

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1 MR. MILLWARD: If the court finds that the
2 default is valid and not to be set aside.

3 THE COURT: All right. Mr. Millward --

4 MR. MILLWARD: Then obviously --

5 THE COURT: -- you need to stop digging, you're
6 basically now telling the court this did absolutely nothing
7 for my client, but I wanted it anyway.

8 MR. MILLWARD: Your Honor --

9 THE COURT: How am I supposed to -- how am I
10 supposed to understand that?

11 MR. MILLWARD: No, the reason I included it
12 because as of the date you're entitled to that relief.

13 THE COURT: The injunctive relief. So you were
14 seeking to try to reinstate the injunction relief?

15 MR. MILLWARD: No. The injunctive relief existed
16 according to the court's order as of the date of the
17 foreclosure already.

18 THE COURT: No. Because your client hadn't filed
19 by -- did your client file the bond by what was it,
20 December 20th?

21 MR. MILLWARD: No, Your Honor.

22 THE COURT: And had your client made payments as
23 your client was supposed to pursuant to my order?

24 MR. MILLWARD: Well, January 20th was after the
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1 foreclosure, I wouldn't have my client be making payments when
2 the foreclosure --

3 THE COURT: Okay. Because they hadn't put up the
4 bond, it would make no sense.

5 MR. MILLWARD: They couldn't file, first of all,
6 they couldn't file by December 20th because they didn't know
7 what the court order would state, other than the one I was
8 submitting. The court would taken issue with the way I wrote
9 the order.

10 So filing it by December 20th when the order was
11 ordered December 21st isn't really fair to my client. But --

12 THE COURT: So now we're challenging again the
13 order?

14 MR. MILLWARD: I haven't been, no, Your Honor,
15 I'm just saying that my client can't follow the terms of a
16 written order at -- before the order's been entered by the
17 court.

18 I mean, Your Honor, you signed the order
19 December 31st.

20 THE COURT: What was the date of the hearing in
21 which I announced what I wanted in the order?

22 MR. MILLWARD: November 20th, Your Honor.

23 THE COURT: Okay.

24 MR. MILLWARD: And so I wrote the order,
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1 counsel -- counsel signed off on it.

2 THE COURT: Right.

3 MR. MILLWARD: They saw it, they reviewed it,
4 they decided to sign off on it. They knew another order was
5 required from the court to foreclose.

6 Ex parte, no hearing needed, all that the court
7 would have to do is verify that notice of bond had been filed.

8 THE COURT: All right. Anything else?

9 MR. MILLWARD: Not on that motion, Your Honor.

10 THE COURT: Okay. Did you want to add anything?

11 MR. HERNANDEZ: I don't want to add anything,
12 Your Honor.

13 THE COURT: All right. I'm going to grant the
14 Rule 11 sanctions. Award the costs of bringing the motion.
15 I'm not going to award travel time since we have the other
16 motions.

17 So file a statement of your fees. And just in
18 terms of the -- again, I -- I think you got a little too cute,
19 Mr. Millward, you tried to undo the court's order. Your
20 client was given a fair opportunity to come, she was given an
21 opportunity and in terms of what went down, counsel tried to
22 talk you out of it and you were trying to get an unfair
23 advantage.

24 MR. HERNANDEZ: Your Honor, I'm sorry --
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1 THE COURT: And you violated --
2 MR. HERNANDEZ: -- (indiscernible) you want
3 application pursuant to what's that case again? The fees
4 case?
5 THE COURT: Brunzell.
6 MR. HERNANDEZ: Brunzell.
7 THE COURT: Yeah.
8 MR. HERNANDEZ: You want a Brunzell application?
9 THE COURT: Yeah.
10 MR. HERNANDEZ: Thank you, Your Honor.
11 THE COURT: And again, if your client was unhappy
12 with the written order, you had an opportunity to file a
13 motion for clarification. You had an opportunity to appeal it
14 to the Supreme Court, but again, a nunc pro tunc application
15 for default judgment to get around a court's ruling on a
16 temporary restraining order, it's improper.
17 MR. HERNANDEZ: One more housekeeping, Your
18 Honor, ten days to respond to the Brunzell?
19 THE COURT: Yes, ten days.
20 MR. HERNANDEZ: And can I file a reply afterward?
21 THE COURT: Yes. Ten days to file the reply.
22 MR. HERNANDEZ: And submit an order in blank,
23 Your Honor?
24 THE COURT: Yes.
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1 MR. HERNANDEZ: Thank you.

2 THE COURT: All right. Now, let's go into the
3 motion to dismiss.

4 MR. BRENNER: Very good, Your Honor, this is
5 Darren Brenner for Bank of America, I'm ready to present brief
6 argument when the court is ready.

7 THE COURT: Go ahead.

8 MR. BRENNER: Your Honor, it's essentially in the
9 pleadings it will give a brief Reader's Digest summary --
10 (Telephonic interference.)

11 THE COURT: One second. All right. Go ahead.

12 MR. BRENNER: Thank you, Your Honor. We moved on
13 two grounds, I don't have really anything additional to add,
14 it's in the brief so I'm going to summarize. We've moved on
15 the statute of limitations.

16 The complaint alleges essentially there are two
17 loan modification agreements. All of the allegations against
18 my client Bank of America relate to a 2009 loan modification
19 agreement of course what we don't necessarily ultimately agree
20 with the merits, we're accepting these allegations as true for
21 the purpose of this motion.

22 There was a loan modification in 2009. According
23 to the complaint, a Bank of America teller at a local branch
24 accepted the first payment and then after that, Bank of
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1 America would accept no further payments. And again,
2 according to the complaint in 2011, the Plaintiffs gave up
3 trying to make payments based on that loan modification.

4 Then there's other allegations in the complaint
5 about what happened next, a bankruptcy and then subsequently a
6 second loan modification.

7 There are two causes of action in the complaint
8 relating to this loan modification and largely they're the
9 same, at least for the purpose of this motion.

10 Breach of contract and breach of the covenant of
11 good faith and fair dealing. Both have an outermost limit of
12 six years for statute of limitation. The briefs of this loan
13 modification allegedly occurred back in 2009 when Bank of
14 America allegedly refused to stop making payment.

15 So, Your Honor, based on the express allegations
16 of the complaint six years would have been 2015. Even if we
17 give Plaintiffs two more years because they allege that they
18 kept trying to make payments until 2011, that was the statute
19 of limitation at 2017.

20 Although there's allegation of equitable
21 totalling and delayed discovery, which I will address in
22 reply, what I will point is, Your Honor, is that clearly based
23 on Plaintiffs' own allegations, they knew Bank of America was
24 not accepting payments. You know, again, going back 2009.

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1 So, on that basis, we think that the express
2 allegations of complaint if accepted as true for what they
3 knew and when they knew precludes recovery against my client
4 based on the statute of limitation.

5 The second ground we moved on is declaratory
6 relief. Again, simply stated, Your Honor, as pled in
7 Plaintiffs' complaint, Bank of America no longer has any role
8 in this loan. It is routine for these loans to change hands.

9 The court doesn't have to take my word for it,
10 the deed of trust which is attached to the complaint includes
11 paragraph 20, which is the standard language that every deed
12 of trust I've seen contained, which says that these loans can
13 be sold at any time and the servicer can change.

14 Plaintiff acknowledges that happened back in
15 2015. And to sum it up, Your Honor, given that my client Bank
16 of America no longer has a role with the loan, it has no role
17 with foreclosure or anything related to the foreclosure.

18 So there's no right controversy on declaratory
19 relief against my client. And I'll submit it on that, Your
20 Honor.

21 THE COURT: Okay. Mr. Millward?

22 MR. MILLWARD: Thank you, Your Honor. The
23 primary argument that my client makes in regard to the motion
24 to dismiss filed by Bank of America pertains to primarily
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1 first discovery.

2 So Bank of America had informed my client after
3 they submitted the 2009 modification agreement that they
4 didn't know where it was. That they couldn't find it. That
5 it wasn't in their system.

6 At the time that my client was attempting to make
7 payment, Bank of America was acting as if it didn't exist. My
8 client is now being asked to do something unreasonable at the
9 time, which would have been to file a lawsuit to serve her
10 rights and make a claim for breach of contract on a contract
11 that she believes was never released at the time, relief was
12 never received.

13 The Lincicomes had no idea that the modification
14 had been signed or it had been recorded in 2011 when it was
15 later maybe found, or I don't know, processed.

16 But there's no notification from 2009 until 2017
17 to my client, that that modification had ever been found, that
18 had it had ever been received that my clients had a viable
19 claim for breach of contract.

20 They at no time during the course of the loan
21 over the last nine years, they had at no time known that the
22 modification had been received and accepted by Bank of America
23 until 2017. So, the statute of limitations should start
24 running once my client discovered the existence of her claim.

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1 As to the statute of limitations, if -- if my
2 client is deemed to have received notice because it was
3 recorded in (indiscernible), NRS 11190 says that if the party
4 claiming the statute of limitations has run receives a payment
5 on a claim, that the statute tolls (indiscernible).

6 Well, in 2015, my client was again trying to make
7 a modification. She'd entered into a temporary modification
8 agreement to change the terms of the loan and unfortunately by
9 the time that the last payment was to be made she was informed
10 that the loan had been --

11 MS. LINCICOME: (Indiscernible).

12 MR. MILLWARD: -- changed to Fay Servicing and
13 Bank of America wouldn't receive her payment.

14 So the prior two payments made by Bank of America
15 were applied to the loan, applied to the deed of trust that
16 was modified and signed in 2011 and recorded in 2011 by Bank
17 of America unbeknownst to my client.

18 So I see a couple ways in which the statute of
19 limitations is tolled. Il, the first one is discovery, it
20 couldn't have been discovered until my client was actually
21 informed.

22 My client was first informed in 2017 when the
23 notice of default said that the modification had been
24 reported. That was the first time my client knew that. And
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1 if you look at the public record, that's really the first
2 recording that is sent to my client, notifying my client that
3 modified deed of trust or that the deed of trust was modified
4 by the 2009 loan modification agreement.

5 THE COURT: When was that filed with the county?

6 MR. MILLWARD: The modification?

7 THE COURT: Yeah.

8 MR. MILLWARD: That was recorded in 2011, I
9 believe it was April or March. I can tell you real quick. I
10 thought I had it written down in my notes.

11 MR. BRENNER: If you're looking for the record,
12 if you're looking for the recording date according to the
13 complaint it is May 4th, 2011.

14 THE COURT: May 4, 2011.

15 MR. BRENNER: Section 3 of the complaint.

16 THE COURT: And we're all talking about the same
17 document that says that the modification was accepted; is that
18 correct, Mr. Millward?

19 MR. MILLWARD: That's right.

20 THE COURT: Okay.

21 MR. MILLWARD: So that's when the public
22 recording of it occurred.

23 The recording was not given to my client. My
24 client wasn't given notice of it. And, in fact, in the 20 --
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1 I believe it's in 2015.

2 MS. LINCICOME: '15.

3 MR. MILLWARD: The bankruptcy filing by Bank of
4 America on their motion to stay included all of the recordings
5 as exhibits to the motion for relief from stay except for the
6 modification. They didn't inform my client then that the
7 modification (indiscernible) was made nor did they notify the
8 bankruptcy court that modification had been accepted.

9 And so it appears that Bank of America was trying
10 to kind of sweep it under the rug and not letting my client
11 know about it.

12 Their outward acts of informing my client that it
13 hadn't been received (indiscernible) accept payment that we
14 don't know where it's at, led my client to believe it was
15 never received timely. I mean, my client had no idea of
16 knowing to file a lawsuit against Bank of America for breach
17 of contract.

18 Bank of America was saying --

19 THE COURT: What about their argument though if
20 they're in breach for something, that's when she should have
21 filed and then she can't just wait until 2017?

22 MR. MILLWARD: I agree, but usually, you know,
23 you've got a contract before you've -- you hold that over a
24 party.

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1 THE COURT: So your client thought she was in the
2 house without a contract?

3 MR. MILLWARD: No, no. The deed of trust in 2007
4 was modified in 2009. So my client believed that the 2009
5 modification wasn't effective because either it wasn't timely
6 received or it had been destroyed by FedEx. For whatever
7 reason, Bank of America didn't have it.

8 She did not know that they had signed it. They
9 never sent her a signed copy. They never told her it was
10 accepted. They never updated the terms of the agreement.

11 THE COURT: Okay.

12 MR. MILLWARD: There is nothing in the record
13 that would have tipped my client off until the notice of
14 default that she received.

15 THE COURT: And so how has she been damaged --
16 what cause of action does this fall under?

17 MR. MILLWARD: Well, if she had been given the
18 right to enforce the agreement by having discovered it earlier
19 right between 2009 and 2015 or 2011 and 2017, right, she could
20 have sought to enforce that agreement retroactively taking
21 everything back to Bank of America's breach. I mean, in
22 retrospect, it would have made sense for when Bank of America
23 would have found --

24 THE COURT: But again, your client wasn't paying
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1 during that time, so what would the damage have been?

2 MR. MILLWARD: Well, so they would still -- they
3 wouldn't be in default. They wouldn't be subject to this
4 monstrous --

5 THE COURT: So she would be subject to a
6 different deficiency judgment, not the deficiency judgment
7 that was claimed?

8 MR. MILLWARD: There is no deficiency judgment
9 sought at this point, Your Honor. She would be -- she would
10 be entitled to if --

11 THE COURT: She would have been entitled under
12 the bill of rights to a correct amount of the deficiency that
13 they were seeking.

14 MR. MILLWARD: Right.

15 THE COURT: What other damage -- what else would
16 she have been able to --

17 MR. MILLWARD: But the breach -- the breach under
18 contract law stopped the clerk as to her ability to pay.

19 I mean, how do you -- if your mortgage -- if your
20 mortgage company told you sorry, we're not going to accept
21 payments and I know your contract says that you would
22 (indiscernible); right? You'd throw a fit and you would
23 probably file a lawsuit; right? She didn't get that
24 opportunity.

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1 They told her not what I'm telling you that your
2 mortgage company is refusing your loan payment
3 (indiscernible), they told her that the agreement wasn't
4 there, that she couldn't make payments.

5 THE COURT: So isn't that when they breached it?

6 MR. MILLWARD: That's --

7 THE COURT: When they told her the agreement
8 wasn't there?

9 MR. MILLWARD: That's when the breach occurred,
10 but the tolling statute --

11 THE COURT: Right.

12 MR. MILLWARD: -- the discovery rule said she
13 shouldn't be held liable or responsible for having to file a
14 claim within a period of time where she doesn't even know she
15 has a cause of action.

16 And the manipulation or fraud of a party tolls
17 that time frame.

18 So I'm not suggesting that Bank of America
19 committed a fraud here. I'm suggesting that probably it was
20 lost, processed, not updated.

21 THE COURT: All right. What about as to the
22 argument that they're not subject to the injunctive relief?
23 That they no longer own the contract, it's been assigned, that
24 they're no longer participating in the sale of the property?

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1 MR. MILLWARD: So I think -- I think that relates
2 more to the argument that they're a necessary party.

3 So Bank of America is a necessary party because
4 depending on the briefing that occurs in this case and the way
5 in which the State case is resolved, this contract may have
6 been assignable or may not have been assignable from either
7 Bank of America to its successors in interest or not.

8 And if it wasn't, then Bank of America's liable
9 not only to my client for breach of contract but to the other
10 parties in this matter.

11 THE COURT: And what about the intervening
12 modifications, how does that address?

13 MR. MILLWARD: Those intervening modifications
14 were never finalized, my client wanted modifications attempted
15 to modify, was acting in good faith they keep her loan, you
16 know, to originate her loan and to get a modification that
17 would work.

18 The modifications that have occurred, there's
19 really only two since or at least two attempted modifications
20 that occurred.

21 The first was in 2015 with Bank of America where
22 the third payment was rejected by the servicer.

23 The next was with the new servicer, Fay
24 Servicing, where they went all the way through the process,
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1 was presented with the final terms of the modification and
2 declined to accept it because it was so far out of what they
3 could afford that it was impossible for them to modify under
4 those terms. They were hoping for better terms. It would not
5 have made sense financially to sign something that they
6 couldn't have followed through with.

7 THE COURT: Okay.

8 MR. MILLWARD: So I don't see that those -- those
9 attempted -- those attempts to modify the deed of trust has
10 anything to do with the actual modified deed of trust where
11 Bank of America accepted and failed to notify my client with
12 any reasonable time frame that she had the right to enforce
13 the terms of the agreement.

14 THE COURT: All right. Anything else?

15 MR. MILLWARD: That's it. Thank you.

16 THE COURT: Reply?

17 MR. BRENNER: Thank you, Your Honor. Looking
18 directly at the allegations of the complaint. If we look at
19 paragraph 22, there's an allegation that they attempted to
20 make the loan modification payment back in September 1st of
21 2009 and it wasn't accepted.

22 Allegation 23, attempt to make it October 1 of
23 2009 and was it accepted. Same thing with October 29th, 2009
24 in paragraph --

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1 (Telephonic feedback.)

2 THE COURT: Hold on, feedback or not.

3 MR. BRENNER: -- (indiscernible) Bank of America
4 to continue until 2011 when they tried.

5 The argument which I am respectfully going to
6 present to the court I believe is circular, but the argument
7 from Plaintiffs' counsel is well, nobody would have known that
8 there was an issue with Bank of America and the loan
9 modification until 2017.

10 Well, respectfully, Your Honor, when they plead
11 that they believe there was a loan modification and they plead
12 that there's two years of Bank of America (indiscernible)
13 anything to effectuate the loan modification, that hidden
14 notice of an issue. Directly they should have known and it's
15 what they did commencing after September of 2009.

16 The payment that counsel is talking about were
17 related to completely different loan modification in 2015.
18 And we heard two separate arguments from Plaintiff which were
19 contradictory on the one hand, the argument is well, you
20 (indiscernible) because payments were accepted under this 2015
21 trilevel modification program.

22 And then on the other hand, you heard Plaintiffs'
23 counsel towards the end saying --

24 (Telephonic feedback.)
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1 THE COURT: Hold on, sir, I'm getting too much
2 feedback.

3 MR. BRENNER: Okay.

4 THE COURT: All right. Go ahead and repeat the
5 last argument.

6 MR. BRENNER: I think I was saying, Your Honor,
7 that counsel is arguing the 2015 modification is a red
8 herring, but at the same time counsel in the briefing
9 (indiscernible) payments in 2015 that (indiscernible)
10 supposedly tolled the breach of contract -- discovery of the
11 breach of contract allegations.

12 And again, Plaintiffs especially plead when they
13 knew Bank of America wouldn't accept payments on the loan
14 modification. And that was back on September 1st.

15 THE COURT: All right. Can you step back and
16 point to the paragraphs in the complaint that you're
17 discussing that you believe are contradictory?

18 MR. BRENNER: Sure. I think it really starts
19 at -- if you look at 21 through 25.

20 THE COURT: Okay.

21 MR. BRENNER: 26 maybe.

22 THE COURT: All right. Page 4 of 19?

23 MR. BRENNER: Yes, that's where it begins, Your
24 Honor.

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1 THE COURT: Okay.

2 MR. BRENNER: And I'll pause until you tell me
3 that you're ready.

4 THE COURT: Yeah, go ahead. All right.

5 MR. BRENNER: Okay.

6 THE COURT: In that paragraph it states that the
7 Lincicomes traveled to the Bank of America branch to make the
8 first payment under the LMA.

9 MR. BRENNER: Correct. And it guess on to
10 explain how the teller didn't know about the loan modification
11 agreement, but it kept it as a payment.

12 But after that, starting on paragraph 22 and
13 going forward, the Plaintiffs explain how Bank of America --
14 (Telephonic feedback.)

15 MR. BRENNER: -- payment under the alleged loan
16 modification agreement.

17 THE COURT: Okay.

18 MR. BRENNER: And it's our position that that is
19 when -- certainly during that year period, that is when it
20 would have triggered discovery that there was an issue with
21 the loan modification agreement. And that's when it would
22 have started the clock rolling on a statute of limitations for
23 breach of contract.

24 Now, obviously somebody can sue or they can
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1 decide not to sue, but let's assume that there was a valid
2 loan modification agreement, certainly when a party remediates
3 that, as Bank of America is alleged to do, that is going to be
4 noted that that is an issue and that notice starts in 2009.
5 Based on the allegations of the complaint, the Plaintiffs
6 should have then pursued that, they pursued other avenues,
7 they declared bankruptcy, they attempted a second loan
8 modification into '15. Those are the remedies they elected,
9 not a breach of contract.

10 And then the one other thing, Your Honor, that I
11 want to point out to you, this allegation that we didn't
12 discover Bank of America had recorded an intended honor of the
13 loan modification agreement in 20 (indiscernible) is a
14 complete red herring.

15 The allegations of the complaint are not Bank of
16 America accepted a loan modification because of course that
17 would not give rise to a breach of contract claim. People
18 don't sue for honoring the terms of a contract.

19 The allegations of the complaint, the express
20 allegations of the complaint, and we can look at those
21 paragraphs too, are Bank of America refused to honor the 2009
22 loan modification agreement. They aren't about any type of
23 subsequent conduct.

24 And unless Your Honor has any questions, I think
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1 everything else has been addressed in the briefs.

2 THE COURT: Okay. Your response, Mr. Millward?

3 MR. MILLWARD: Yeah, Your Honor, I did my best to
4 hear everything he said.

5 THE COURT: Yeah, sure.

6 MR. MILLWARD: In trying to understand
7 everything. But with regard to this 2015 statement as to the
8 modification in 2015, first of all, the law, 11190 says we can
9 make a payment on the contract that the statute of limitations
10 is (indiscernible). Well, this deed of trust is what the
11 payment was applied to, the deed of trust that was modified in
12 2011 by signed agreement by Bank of America.

13 So for Bank of America to say that the 2015
14 payment applies to a modification, that's something else,
15 well, sure I get that it was a modification that my client was
16 trying to make.

17 But the law just says that it's tolled until the
18 last payment. And the last payment that was applied to this
19 loan was in 2015.

20 THE COURT: Okay.

21 MR. MILLWARD: So under their -- you know, under
22 the law and under the facts that have been set forth in the
23 documents that have been submitted to the court, 2015's the
24 date that we would be looking at according to 11190.

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1 There is no argument against that, other than
2 your argument well, that -- that applied to an attempted
3 modification and wasn't a legitimate payment.

4 With regards to the idea that the -- that the
5 complaint says things that do not comport with the idea that
6 my client didn't know or didn't discover, well, the
7 allegations are quite simple. I mean, you look at 21,
8 paragraph 21 on page 4 that you're citing.

9 It says after searching -- on the third sentence
10 in paragraph 21st, after searching for information concerning
11 Lincicomes' loan, Crystal could not find any record of the
12 (indiscernible) in their system.

13 Crystal accepted payment under the understanding
14 that it would -- that if -- that it was to be credited against
15 Lincicomes' home as modified by the LMA once the LMA had been
16 entered into their system.

17 So, my client at that time or at the very
18 beginning in making that first payment are told we don't have
19 it, but we'll process this payment.

20 And then the following month in October, they're
21 told again their payment -- they were refused payment or the
22 payment was refused and the person taking money indicated to
23 them that there was no record of the existence of an LMA in
24 the Bank of America's peer systems.

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1 My client would be willing to testify today, Your
2 Honor, as to what she believed.

3 THE COURT: Well, I'm not going to go there.

4 MR. MILLWARD: I know.

5 THE COURT: I'm just --

6 MR. MILLWARD: I'm just saying --

7 THE COURT: -- but what about their argument
8 though once she goes for the second she gave up any -- she
9 waived in terms of the 2009 agreement, if she didn't know it
10 was out there and then she went to get a second one.

11 MR. MILLWARD: A second modification.

12 THE COURT: A second modification, then doesn't
13 that trigger something?

14 MR. MILLWARD: Well, by the time the second one
15 is discussed, we're talking about I think 2016 or 2017. And
16 so if the statute was tolled until then, then there is no
17 statute of limitations issued.

18 THE COURT: Okay. Let me ask Bank of America, as
19 to the payments received, how can the court discern at this
20 point with no discovery as to whether or not those payments
21 were put towards the first agreement or the second or the -- I
22 guess it would be the first or the second?

23 MR. BRENNER: I think we just have to look at the
24 allegations of the complaint. The allegations of the
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1 complaint were expressed that those payments were made as part
2 of a second trial loan modification.

3 So there was a completely separate negotiation
4 for a completely separate contract with completely separate
5 consideration. And Plaintiffs, I can find the exact
6 allegations if you need it, when Plaintiffs allege that in
7 their complaint it looks like it starts around paragraph 40.

8 Your Honor is correct, I'm reading it now, it --
9 the complaint answers your question. Bank of America -- on or
10 about April 24th, 2015, Bank of America accepted the loan
11 modification application and required the Lincicomes, and I
12 apologize if I'm misstating their names, to complete the trial
13 modification payments or they could move forward with
14 modifying their mortgage loan, and then it goes on to talk
15 about the payment.

16 Paragraph 42 says it made their, quote, first
17 trial payment of \$2,013.78.

18 Your Honor, I hate to suggest that there should
19 be a different complaint or the Plaintiffs should be given
20 leave to plead what's been argued is not what is alleged --

21 THE COURT: Right.

22 MR. BRENNER: -- in the complaint. Because if we
23 again go directly to the breach of contract allegations --

24 THE COURT: All right.

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1 MR. BRENNER: -- as directly related to the 2009
2 loan modification.

3 THE COURT: All right. So hold on one second.
4 So, Mr. Millward, pull up paragraph 40.

5 MR. MILLWARD: If you give me just a second.

6 THE COURT: Yeah.

7 MR. MILLWARD: Is it on or about April 12th?

8 THE COURT: Yeah, accepted the loan modification
9 having required. So, why are we still arguing about what
10 happened prior to April 24, 2015?

11 MR. MILLWARD: No, they accepted the application.
12 That doesn't mean there's an actual modification. So, when
13 any party wants to modify their loan they submit an
14 application saying hey, would you give me this relief?

15 And so Bank of America accepted that application
16 for the opportunity to extend my client relief. And then my
17 client began to perform under the terms of that application
18 that didn't result in an actual modification.

19 THE COURT: Is that an accord and satisfaction?

20 MR. MILLWARD: No, it's an accord and
21 satisfaction as to let's attempt to resolve these issues
22 concerning missed payment or payment history. But they don't
23 resolve them because the contract isn't complete and it
24 doesn't modify the deed of trust.

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1 So had it, we wouldn't be here, Your Honor, I
2 completely agree.

3 THE COURT: Is there anything in the loan
4 modification as to what was owed and wasn't that part of the
5 application? We owe this amount of money, we promise to pay
6 it off at this rate and --

7 MR. MILLWARD: In the modification that they
8 signed and they accepted in 2009, the modification
9 agreement --

10 THE COURT: Well, I'm talking about the one in
11 2015? Because you allege that they accepted a loan
12 modification, so your client applied, they accepted, that
13 sounds like an agreement.

14 MR. MILLWARD: But it's not an agreement to
15 modify the loan. It's an agreement to work towards working
16 out a modification.

17 So right now there is no modification in 2015
18 that affects the deed of trust that's being -- that -- that is
19 the subject matter of this case. It's just a history of
20 something that --

21 THE COURT: All right.

22 MR. MILLWARD: -- may have -- may have affected.

23 THE COURT: Let me ask Bank of America in terms
24 of the 2015 loan modification application and acceptance,
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1 would that have listed what was owed?

2 MR. BRENNER: I don't want to speak out of turn,
3 Your Honor.

4 THE COURT: All right.

5 MR. BRENNER: I'm almost positive it would, I
6 don't want to speak out of turn on that without directly
7 knowing.

8 THE COURT: Okay.

9 MR. BRENNER: If I do make one different point,
10 Your Honor.

11 THE COURT: Yeah.

12 MR. BRENNER: It would be this, that it really
13 shouldn't ultimately matter where the payments were applied to
14 because it goes back to the point that I was trying to make at
15 the end of my opening statement, that if Plaintiff is arguing
16 that the payments were applied to the 2011 loan -- or the 2009
17 loan modification, then where is the breach? But really my
18 point is this, I guess, we have two options.

19 Either Bank of America honor the loan
20 modification and recorded it and applied payments to it, in
21 which case there can be no breach because we effectuated the
22 terms of the agreement or Bank of America breached it.

23 If Bank of America breached it, discovery of the
24 breach as they put in the complaint is 2009, it's the latter
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1 point that's pled in the complaint. I submit that trying to
2 plead the former would be futile, but it's not what's alleged
3 in the complaint.

4 THE COURT: Okay. All right. Now, the problem
5 I'm having though with where we're at is originally the
6 complaint and how the court was construing the complaint was
7 based upon the inability to figure out which loan application
8 was in place led to an issue when foreclosure was filed as to
9 how much of a deficiency judgment would be owed by the
10 Plaintiffs.

11 That if you went by the 2009, then that would
12 accrue at one rate. If you went by the 2015, that would
13 accrue as a different rate and that would affect the
14 requirements in the -- the bill of rights that you inform the
15 property owner as to what is needed in order to pay off the
16 mortgage and what they'll owe if the sale goes through.

17 So, that's the issue I'm having. If -- so I
18 think what I'm going to do is I'm going to deny the motion to
19 dismiss at that point in time.

20 Now, Mr. Millward, I think you're heading down a
21 rabbit hole.

22 MR. MILLWARD: Well, Your Honor.

23 THE COURT: I really do.

24 MR. MILLWARD: I understand the court's opinion
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1 there. I'm not trying to undo what's been done. I'm trying
2 to get relief for my client that -- that pertains to what's
3 happened in the past.

4 THE COURT: I appreciate that, but you're seeking
5 monetary damages.

6 MR. MILLWARD: Right.

7 THE COURT: All right. From someone who wasn't
8 paying on the mortgage.

9 MR. MILLWARD: But because they couldn't.

10 THE COURT: No.

11 MR. MILLWARD: There was -- there was no -- there
12 was no ability -- all that they could pay in 2011, in 2009, in
13 2010 was the complete amount owed. The Bank of America had
14 accelerated -- had accelerated --

15 THE COURT: And they entered into three loan
16 modifications, two and plus with the last one --

17 MR. MILLWARD: Right.

18 THE COURT: -- last year in which they agreed to
19 do a deed in lieu of foreclosure; isn't that correct?

20 MR. MILLWARD: No, Your Honor. So -- so that's
21 different. That was something else. So let's just back up,
22 because I think I want you (indiscernible).

23 THE COURT: I'm just saying, Mr. Millward, all
24 right --

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1 MR. MILLWARD: I understand where the court's
2 confused. So there is no deficiency judgment at issue here.

3 THE COURT: No, because they haven't sought it
4 yet.

5 MR. MILLWARD: Right. So I'm not talking about
6 one -- and they haven't talked about one yet, they might talk
7 about one down the road, and that's okay.

8 THE COURT: Right.

9 MR. MILLWARD: We can deal with that. But as to
10 what my client is seeking, my client is seeking relief for
11 breach of contract, my client is seeking relief for a wrongful
12 foreclosure for quite a few things.

13 It all pertains to the documents that are in
14 play, that everybody admits are in play, which is the 2007
15 deed of trust and the 2009 modification of that deed of trust.

16 THE COURT: And the 2015 loan modification.

17 MR. MILLWARD: That, Your Honor, was nothing
18 different than an opportunity to modify. My -- see, between
19 2009 and 2015 --

20 THE COURT: Mr. Millward, I've -- you -- I've
21 heard -- if I'm just warning you you're heading down a rabbit
22 hole on this. And again, I would strongly suggest -- now, I'm
23 going to give the opportunity, are you going to stop filing
24 things long enough to -- where the court can have one more
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1 chance at settling this?

2 MR. MILLWARD: I would have loved to have gone to
3 settlement.

4 THE COURT: Because Judge McGee was not happy
5 that I set up a thing, I had him there and everything and then
6 he finds out no, we're still litigating this.

7 MR. MILLWARD: Right.

8 THE COURT: We're still going to be filing
9 things, the parties aren't really interested in settling this.

10 MR. MILLWARD: Your Honor, my client absolutely
11 was. And I was excited to go. We were excited, I was working
12 on the application and then we found out that the foreclosure
13 already happened.

14 THE COURT: Okay.

15 MR. HERNANDEZ: I want to --

16 MR. MILLWARD: Thank you.

17 MR. HERNANDEZ: For the record, I was more than
18 ready to go to settlement conference.

19 THE COURT: Right.

20 MR. HERNANDEZ: It was not on our part
21 (indiscernible).

22 THE COURT: Like I say, I appreciate --

23 MR. MILLWARD: Your Honor, we looked at it and we
24 said okay, now we've got whether or not this is a wrongful
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1 foreclosure, whether or not there's a bona fide buyer here,
2 I've got all these parties I've got to bring in plus prior to
3 the sale on the foreclosure, the loan changed hands twice. So
4 I don't even know that we have the right parties involved
5 anymore to settle the matter.

6 So I'm looking at all that, there's no way we can
7 have a settlement when all of these things changed between the
8 hearing and the settlement. The house was foreclosed upon,
9 the loan was sold twice.

10 THE COURT: All right. Like I say, I'm not going
11 to grant the motion to dismiss. I'm going to give you a
12 little opportunity for discovery.

13 MR. MILLWARD: Okay.

14 THE COURT: But like I say, as to the motion for
15 leave, I haven't had an opposition filed on that yet.

16 MR. MILLWARD: That's right.

17 THE COURT: So, how much time do we need to
18 oppose the motion for leave?

19 MR. HERNANDEZ: I'm not opposing the motion for
20 leave, Your Honor.

21 THE COURT: All right. How about Sable -- I
22 mean, the Bank of America? You still there?

23 MR. BRENNER: (Indiscernible) I'm still here.
24 I'm sorry, Your Honor, if you asked a question I missed it.

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1 THE COURT: Are you going to oppose the motion to
2 amend?

3 MR. BRENNER: Your Honor, I honestly haven't
4 looked at it and I don't even know if it changes things for my
5 client. If my time has run, then I will officially say no,
6 we're not opposing it. If my time hasn't off run, then --
7 then I need an opportunity to look at it.

8 THE COURT: For purposes of the motion to
9 dismiss, I'm just going to deny it to the argument of
10 payments. If Bank of America accepted payments as of 2015
11 that would extend the -- the statute.

12 So go ahead and submit an order on that,
13 Mr. Millward. All right?

14 Then what I'll do is --

15 MR. BRENNER: And then, Your Honor, may I ask you
16 a question, and do I understand for the purposes of proceeding
17 forward your specific concern is the -- for the purposes of
18 calculating the deficiency, if any?

19 THE COURT: Well, like I say, I haven't seen that
20 from either Sable or Bank of America. And then the other
21 issue we have hanging out there is the effect of the last
22 settlement conference. There appears to be another accord and
23 satisfaction there and I haven't seen that.

24 So, like I'm saying here, I have a party that
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1 hasn't paid on a -- on a mortgage for over ten years seeking
2 damages. It's another case where the banks couldn't get their
3 paperwork together for the last ten years. And again, I'm
4 just curious as to the end of the day what the damage theories
5 are and so forth.

6 But if this is another case where a homeowner is
7 going to think that the court's going to grant free house
8 because the bank screwed up a little paperwork in 2011, like I
9 say, I haven't seen that case yet from the Supreme Court.

10 And so, again, I'm just having real issues, you
11 know, as to where we're going on this. I've yet to see a case
12 from the Nevada Supreme Court where paperwork leads to
13 homeowners coming out with 6, \$700,000, whatever the
14 property's worth.

15 MR. BRENNER: And, Your Honor, I don't want to
16 (indiscernible) to beat a dead horse, the question I'm going
17 to ask you just for direction going forward, the allegations
18 of the complaint are for breach of contract --

19 THE COURT: All right.

20 MR. BRENNER: -- and --

21 THE COURT: I understand, let me -- I understand
22 where you're going. So I'm going to grant the motion as to
23 the injunctive relief because they're no longer -- they've
24 transferred everything and they're not involved in any sort of
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1 foreclosure. They weren't involved in the foreclosure when it
2 occurred.

3 MR. MILLWARD: I don't believe that the complaint
4 seeks to enjoin them specifically, but it might say Defendants
5 generally, so that's fine.

6 THE COURT: All right. So I'm going to grant
7 injunctive relief. That's out. I'll dismiss the injunctive
8 relief against Bank of America.

9 And then as to the monetary damages, again, I --
10 it's written broadly enough to allege that your client had
11 somehow damaged them with the recordkeeping and then -- and so
12 forth, I'll -- we'll deal with that theory I guess in -- when
13 we get the motions for summary judgment.

14 But at this point in time, on the -- on the 12B5,
15 I think they survive a 12B5 on the request for monetary, not
16 the --

17 MR. BRENNER: Not declaratory relief?

18 THE COURT: What's that?

19 MR. BRENNER: You said you would grant on
20 injunctive relief, does Your Honor mean you would grant on
21 declaratory relief count?

22 THE COURT: Yeah, I'll grant on the injunctive
23 relief that, you know, you're not longer involved, I think
24 that's a legitimate argument. And then just as to the
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1 monetary claim against the Defendants, again, I'll deny it on
2 the basis of a 12B5 on the pleadings, but certainly, you know,
3 will entertain a motion for summary judgment.

4 MR. BRENNER: Very good, Your Honor. Thank you.

5 THE COURT: All right. Any other clarifications
6 you need?

7 MR. BRENNER: No, Your Honor. Thank you.

8 THE COURT: All right. Any clarification?

9 MR. HERNANDEZ: So, Your Honor, just out of
10 clarity, are you granting the motion for relief then because
11 you haven't asked Sables, you haven't --

12 THE COURT: Yeah, let's talk about the motion for
13 leave. All right. Again, what are you trying to accomplish
14 with the motion for leave, Mr. Millward?

15 MR. MILLWARD: Your Honor, it's in essence to
16 bring all the parties that have now come into play to the
17 table so we can look at having an accurate settlement
18 conference.

19 THE COURT: Well, who do we need to add at this
20 point?

21 MR. MILLWARD: Well, we now have a buyer of the
22 property that bought out the foreclosure that's involved. And
23 we also have -- and I'm not positive which one owns the loan
24 or at least owned the loan prior to foreclosure.

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1 We have two -- my client received two notices
2 that the loan had been transferred after the last hearing. In
3 fact, it was --

4 THE COURT: Okay. Can I ask you what is your
5 claim going to be against the buyer?

6 MR. MILLWARD: Against the buyer?

7 THE COURT: Yeah.

8 MR. MILLWARD: It's just going to be essentially
9 declaratory relief that -- that they (indiscernible) subject
10 to, for example, if the deed of trust is not enforceable
11 because of Bank of America's breach and that's really an issue
12 of law that we have -- we'll have to resolve, then -- then you
13 can't accept title to the property when the foreclosure on
14 that property was thus nil.

15 THE COURT: So if it was sold at a valid sale
16 that the court said could go through we're going to bring the
17 third party in?

18 MR. MILLWARD: Right. Because they brought --
19 they came in knowing that there was, for example, lis pendens
20 on the property. I have spoke with the attorney for the owner
21 and he said oh, yeah, we do this all the time.

22 THE COURT: Okay.

23 MR. MILLWARD: We know that it's subject to being
24 brought in the case.

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1 THE COURT: Okay.

2 MR. MILLWARD: We might just want out, but yeah,
3 they've indicated to me --

4 THE COURT: Okay.

5 MR. MILLWARD: -- that they knew what they were
6 getting into.

7 THE COURT: All right. And then you're saying
8 there was two prior loan servicers?

9 MR. MILLWARD: I don't know that they're loan
10 servicers, I believe they're actual owners, holders of the
11 deed of trust.

12 So at the time of foreclosure sale it may not
13 have been U.S. Bank that owned the loan that was subject to
14 the deed of trust. I don't know that. I have to explore
15 that.

16 But in the motion I designate who those two
17 owners are and request that they be added as parties. If
18 they're not necessary parties --

19 THE COURT: Well, I guess I'm having difficulty,
20 why is the buyer a necessary party?

21 MR. MILLWARD: Because we are contesting the
22 validity of the sale.

23 THE COURT: Okay. And then as to the owners of
24 the deed, when did they own it you believe?

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1 MR. MILLWARD: I believe that they owned it right
2 prior to the sale within two weeks. In fact --

3 THE COURT: Okay.

4 MR. MILLWARD: -- my client was receiving notices
5 for hey, we want to help you get -- correct this and not be
6 foreclosed upon.

7 THE COURT: Okay.

8 MR. MILLWARD: The statements --

9 THE COURT: Okay.

10 MR. MILLWARD: -- from three servicers.

11 THE COURT: So the cause of action gets the
12 buyers to undo the sale?

13 MR. MILLWARD: It's to determine the rights of
14 the parties, yes, under the declaratory relief.

15 THE COURT: Okay. And then -- all right. As to
16 the deed that's clear. All right. Anything else as to who
17 else you want to add?

18 MR. MILLWARD: I believe those are the only
19 parties I'm adding, yes.

20 THE COURT: Okay. All right. Did you want to go
21 first since you're in the courtroom or?

22 MR. HERNANDEZ: Your Honor, I didn't file an
23 opposition.

24 THE COURT: Okay.
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1 MR. HERNANDEZ: I heard Mr. Brenner I think in
2 (indiscernible) Sables, I don't know what their position is
3 on --

4 THE COURT: All right. What's Sables' position?

5 MR. WADE: With respect to what exactly, Your
6 Honor?

7 THE COURT: I'm asking do you have a position on
8 the motion for leave to file the amended complaint to
9 substitute parties?

10 MR. WADE: I -- I have no problem with him
11 substituting parties. I do believe we still have our
12 declaration of nonmonetary status.

13 THE COURT: All right. I'll do that motion next.
14 So what I'm hearing the current parties, I'm not hearing
15 anyone's going to oppose the motion for leave to substitute
16 parties.

17 Now, is there anything in the complaint though
18 where there -- you're amending theories?

19 MR. MILLWARD: Yes. Let me go over the causes of
20 action. Just a second, Your Honor. I'm trying to get to the
21 attached complaint, unfortunately it's 84 pages and it's
22 taking me a while. I'm sorry. I -- let me see if I can pull
23 it up faster in paper form. Okay. So there's a claim for
24 wrongful foreclosure.

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1 THE COURT: Okay.

2 MR. MILLWARD: That remains a declaratory relief
3 claim, an injunctive relief claim.

4 THE COURT: Okay. So we have wrongful
5 foreclosure, then what?

6 MR. MILLWARD: Injunctive relief, declaratory
7 relief.

8 THE COURT: And what would the injunctive relief
9 be?

10 MR. MILLWARD: Well, at the time I did not know
11 the validity of the foreclosure occurring January 4th. So it
12 would be continuing to enjoin the foreclosure sale of the
13 property.

14 THE COURT: Okay. But the property's been sold,
15 so do we need the injunctive relief at this point in time?

16 MR. MILLWARD: Yeah, this is what I'm saying. At
17 the time of writing this --

18 THE COURT: Okay.

19 MR. MILLWARD: -- I didn't know that.

20 THE COURT: All right. What's the third one?

21 MR. MILLWARD: So the next one, breach of
22 contract, Bank of America. And then breach of duty to act in
23 good faith (indiscernible) Bank of America.

24 THE COURT: Okay.
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1 MR. MILLWARD: Breach of contract, U.S. Bank.
2 Breach of duty to act in good faith with U.S. Bank.
3 THE COURT: All right.
4 MR. MILLWARD: Slander of title. Special damages
5 for attorney's fees.
6 THE COURT: Okay. Who's the slander of title
7 against?
8 MR. MILLWARD: The slander of title is going to
9 be -- it looks like it's Sables, U.S. Bank, Fay Servicing.
10 THE COURT: Okay.
11 MR. MILLWARD: Yeah, that is all.
12 THE COURT: Okay. Any comments on the new
13 theories?
14 MR. HERNANDEZ: No, Your Honor.
15 THE COURT: On the telephone?
16 MR. BRENNER: Well, Your Honor, I -- you still
17 have our ending declaration of nonmonetary status.
18 THE COURT: Okay. No, I appreciate, I'm just
19 trying to get through motion by motion.
20 MR. BRENNER: I understand that, but what I'm
21 saying is depending on how (indiscernible).
22 THE COURT: Okay. Now you're correct. All
23 right. So let's hear the -- before I rule on the complaint as
24 to Sables, I understand their request. How is Sables -- I'm
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1 going to ask Mr. Millward the nonmonetary?

2 MR. MILLWARD: Yes. So, in fact, the statute in
3 NRS, I believe it's 107020 -- it's 023 or 028, I don't have it
4 memorized per se.

5 It says that when a trustee is given notice of
6 incorrect terms, incorrect amounts owed, incorrect -- anything
7 in the notice of default, notice of sale, that they have a
8 duty to correct within 20 days.

9 So, their liability actually extends from the
10 filing of this lawsuit being given actual notice of
11 incorrection and then failing to correct those notice of
12 default, notice of sale within the 20-day time frame as
13 required by NRS 107.

14 In fact, it says something to the effect that a
15 trustee shall not be held liable for any incorrections made or
16 -- yeah, made in reliance of the beneficiary statements. So
17 long as the corrections are made within 20 days.

18 THE COURT: Okay. All right. What is Sables'
19 argument to that?

20 MR. WADE: I'm sorry, Your Honor, which document
21 is he referring to there? I don't see that argument in any of
22 the briefing.

23 THE COURT: You got a specific statute you want
24 to point to, Mr. Millward?

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1 MR. MILLWARD: Yeah, I'll find it. I --

2 MR. HERNANDEZ: I believe, Your Honor, it's NRS
3 107.209.

4 THE COURT: 029?

5 MR. HERNANDEZ: Yes, sir.

6 THE COURT: Okay. Let me see if I can pull that
7 up. All right. And what section are you referring to,
8 Mr. Millward?

9 MR. MILLWARD: I found it, it's 107.0286.

10 THE COURT: 0286?

11 MR. MILLWARD: Yes. And it says that the -- in
12 the selection, the trustee incurs no liability for any good
13 faith error resulting from reliance on information provided by
14 the beneficiary of the nature and amount of the default.
15 Under the obligations secured by the deed of trust. If the
16 trustee corrects the good faith error not later than 20 days
17 after discovering the error.

18 THE COURT: Okay.

19 MR. WADE: Your Honor --

20 THE COURT: What's Sables' argument on that?

21 MR. WADE: Our argument would be that
22 (indiscernible) statute, just further our argument under NRS
23 107.029 that the trustee is not liable for its dispute between
24 the beneficiary and the borrowers just by virtue of performing
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1 the duties it's supposed to be.

2 (Telephonic feedback.)

3 THE COURT: All right. So --

4 MR. WADE: (Indiscernible).

5 THE COURT: 107.029 what?

6 MR. WADE: The entire statute of 029.

7 THE COURT: One more time, 0291?

8 MR. WADE: 1, yes, it says if the trustee is

9 named in an action in which the deed of trust is the subject,

10 I believe we've met that.

11 THE COURT: All right.

12 MR. WADE: Has a reasonable belief, he or she has

13 been named in the action solely in his or her capacity as

14 trustee and not as a result of a wrongful act or omission made

15 in the performance of his or her duties as trustee. The

16 trustee may at any time file a declaration of nonmonetary

17 status.

18 THE COURT: Okay.

19 MR. WADE: In this case we don't have a single

20 cause of action pled against Sables. We have attorney's fees

21 based on the fact that Sables recorded the notice of default.

22 The statutory scheme requires the trustee to record the notice

23 of default, it's an express duty of the trustee.

24 (Telephonic feedback.)

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1 So the argument in this case is the trustee has
2 done nothing but performance duties as required by statute.
3 There is nothing alleged that the trustee has committed any
4 wrongful act or any omission which it's responsible for.

5 That section pointed out by counsel in 107.0286
6 actually provided further support for my argument that the
7 trustee doesn't have (indiscernible) obligation even liable
8 for.

9 (Telephonic feedback.)

10 THE COURT: Hold on. All right. So you're
11 referring to 0286?

12 MR. WADE: Right. (Indiscernible) trustee incurs
13 no liability for any good faith error resulting from the
14 (indiscernible) on the information provided by the
15 beneficiary.

16 Regarding the nature and the amount of the
17 default, that's exactly what we're talking about here, the
18 beneficiary provided information, it's the beneficiary's own
19 record, the trustee does nothing.

20 But the administerial duties of recording these
21 documents on behalf of the trustee in furtherance of a
22 foreclosure. Plaintiff has pointed to nothing that Sables has
23 done that exposes it to liability outside of the duty of the
24 trustee.

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1 With that, I'll submit, Your Honor.

2 THE COURT: All right. Your response,
3 Mr. Millward?

4 MR. MILLWARD: Yeah, Your Honor, I mean, the
5 point of NRS 107.0286 would be meaningless if Sables is
6 allowed to essentially not correct the documents, not follow
7 the law to correctly state the balance of the correct interest
8 rate.

9 I mean, Sables knew of the loan modification.
10 They cited it in the notice of default, and yet they don't
11 incorporate any of its terms.

12 They state that it's a valid modification. They
13 say that the loan was modified by it.

14 THE COURT: But do you have any evidence that
15 they weren't relying on the information provided from --

16 MR. MILLWARD: Right. And there's no doubt that
17 they were. The real issue now as to liability arrives, I
18 mean, the -- the allegations made against Sables primarily was
19 for the purpose of preliminary injunction because they
20 violated the homeowner's bill of rights.

21 But now they've incurred liability under 028
22 including slander of title by misstating the balance owed. In
23 our opinion no balance is owed because we have a breach of
24 contract that occurred in 2009 that needs to be rectified by
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1 the parties.

2 I understand that. And when I say that, Your
3 Honor, I feel (indiscernible) court (indiscernible) position,
4 I want the court to understand that we don't hold the position
5 that we're entitled to a house. We hold the position that the
6 law says a breaching party breaches, we've got to resolve that
7 breach for the parties coming forward.

8 THE COURT: I appreciate that. I'm going to
9 grant the nonmonetary status under 107.029. And then
10 therefore, as to the additional theories in the motion for
11 leave to file, I'm going to require you to submit another
12 motion for leave to file that's in accordance with the
13 nonmonetary status of Sables. And then also with my previous
14 rulings on the injunctive relief.

15 All right. So Sables, you'll provide the court
16 an order for the granting of the nonmonetary status.

17 MR. WADE: Yes, Your Honor, I will do that.
18 Thank you.

19 THE COURT: Okay. All right. Is there any other
20 motions or anything else we need to address?

21 MR. HERNANDEZ: Just for the record, the
22 obligation to enter default judgment (indiscernible).

23 THE COURT: Right. So you'll go ahead and like I
24 say, supply --

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1 MR. HERNANDEZ: (Indiscernible).
2 THE COURT: So you're out of it.
3 MR. HERNANDEZ: I'm not out of it, Your Honor.
4 THE COURT: Well --
5 MR. HERNANDEZ: I'm still in this case.
6 THE COURT: No, U.S. -- but there was a
7 stipulation.
8 MR. HERNANDEZ: That's the Bank of America.
9 THE COURT: For Bank of America. Okay. All
10 right. So go ahead as to the default judgment, I'm not
11 granting that.
12 So you'll supply me an order.
13 MR. HERNANDEZ: Well, do you want one order or do
14 you want separate orders on everything? I'm happy to produce
15 a super order to share with everybody, if everybody --
16 whatever you want, Your Honor, I'm happy to do.
17 THE COURT: All right. If you're willing to do
18 it. Okay.
19 MR. HERNANDEZ: Okay.
20 THE COURT: All right.
21 MR. MILLWARD: Your Honor, I won't submit an
22 order on the motion for leave to file the amended complaint.
23 I will just submit another motion.
24 THE COURT: All right.
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1 MR. MILLWARD: If that's fine.

2 THE COURT: Can you just note in your orders that
3 he'll submit a second motion with the amended complaint that
4 he's proposing?

5 MR. HERNANDEZ: So is it denied or is it a
6 (indiscernible)?

7 THE COURT: Well, what I'll do, I guess the
8 court's withdrawing it for him.

9 MR. HERNANDEZ: Okay.

10 THE COURT: So, I'll order -- well, no, I got in
11 trouble the last time, so I'm going to grant leave to file an
12 amended motion to amend.

13 MR. HERNANDEZ: Okay.

14 THE COURT: All right. Okay. How much time do
15 you need to file the motion to amend?

16 MR. MILLWARD: I don't think it will take me more
17 than a couple days to put it together, so a week.

18 THE COURT: So if I give you 20 days.

19 MR. MILLWARD: Oh, that's perfect.

20 THE COURT: So 20 days. And if there's any
21 comments you have the normal filing time to respond to the
22 renewed motion?

23 MR. MILLWARD: Your Honor, with the renewed
24 motion, all I'm going to do is remove Sables (indiscernible)
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1 essentially a named liable party under the slander of title --

2 THE COURT: Okay.

3 MR. MILLWARD: -- claim. With that being said,
4 can I file just a complaint that comports with that --

5 THE COURT: No.

6 MR. MILLWARD: -- statement?

7 THE COURT: No, I want to see what you're going
8 to file and then give everybody an opportunity to respond to
9 it.

10 MR. MILLWARD: Because I don't see it materially
11 change otherwise.

12 THE COURT: Counsel, I'm just afraid I tell you
13 you're okay to file and then I'm going to see something else.

14 MR. MILLWARD: I understand.

15 THE COURT: So -- all right?

16 MR. MILLWARD: Okay. Okay.

17 MR. HERNANDEZ: I hate to bring up the sore
18 subject.

19 THE COURT: All right.

20 MR. HERNANDEZ: (Indiscernible) I'm happy
21 (indiscernible) settlement conference I have upon this, I'm --
22 I don't see why we can't be (indiscernible) to the settlement
23 conference and the parties if they want to end, it's not
24 mandatory (indiscernible) mandatory voluntary.

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1 THE COURT: I appreciate that, but the problem I
2 have is Judge McGee, and when the parties are still filing
3 flurries of motions and so forth it's a waste of his time.

4 MR. HERNANDEZ: Okay.

5 THE COURT: Okay. So what I'll do -- all right.
6 Now, I guess the other thing we need to do is get a scheduling
7 order, but we really can't do that until the new parties are
8 involved. So -- and again, I'm not familiar with the new 161.

9 So what's going to happen, what happens with the
10 new 161 when the additional parties, you have to do a new case
11 management or --

12 MR. MILLWARD: Well, we haven't done a case
13 management yet because of the motions --

14 THE COURT: Motions.

15 MR. MILLWARD: -- to dismiss and motions in this
16 matter.

17 As soon as I have everyone served --

18 THE COURT: Okay.

19 MR. MILLWARD: -- I'll schedule the case
20 management conference. And I don't anticipate or see any
21 future motions other than motions for summary judgment coming
22 down the pike.

23 THE COURT: Okay.

24 MR. MILLWARD: In the relatively short order. So
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1 I will work towards --

2 THE COURT: All right. Let's go just go ahead
3 when we have the case management discussed and I'll try to get
4 a senior judge, Judge Hardy no longer does outside -- we had
5 tried to get Judge Hardy, he doesn't do outside settlement
6 conferences anymore.

7 So I'll try to get a senior judge. And again,
8 I'll try for the benefit of the attorneys, I'll try to have it
9 set up in Reno Behavioral or Carson.

10 MR. MILLWARD: Okay. And with that being said, I
11 clerked for Judge Gamble.

12 THE COURT: Yeah.

13 MR. MILLWARD: Don't --

14 THE COURT: Don't bother calling Judge Gamble.

15 MR. MILLWARD: -- bother him, yes.

16 MR. HERNANDEZ: I'm happy with the bankruptcy
17 judges, I don't know if they would do it.

18 MR. MILLWARD: Yeah, if they're willing to.

19 MR. HERNANDEZ: If they're willing to do it, I
20 think that would be --

21 MR. MILLWARD: Judge Beasley would be fine.

22 MR. HERNANDEZ: They don't usually assign whoever
23 you want, Your Honor.

24 THE COURT: Now, again, if there's a judge you
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1 all agree upon I have no problem with that.

2 MR. MILLWARD: Judge McGee was fine as well.

3 MR. HERNANDEZ: Judge McGee is fine, Your Honor.

4 THE COURT: All right. All right. Any other
5 questions before we go into recess? No?

6 All right. So Counsel on the telephone, thank
7 you very much, I'm going to hang up the telephone. You have a
8 good day.

9 MR. BRENNER: Thank you, Your Honor.

10 MR. WADE: Thank you, Your Honor.

11 THE COURT: Court's in recess.

12 (Proceedings ended at 3:12 p.m.)
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1 STATE OF NEVADA)
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I, Shellie Loomis, a transcriber for the Third
Judicial District Court of the State of Nevada, in and for
Lyon County, do hereby certify:

That I received an audio recording of the
above-entitled court proceedings and transcribed the
proceedings herein into typewriting as herein appears to the
best of my ability;

That the foregoing transcript is a full, true and
correct transcription of said proceedings.

DATED: At Carson City, Nevada, this 11th day of
March, 2019.

//SHELLIE LOOMIS//
Shellie Loomis, RPR

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	20	11:8,11;13:10;15:1;	America (63)	12:12;50:14
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Do Not Copy

In The Matter Of:

*ALBERT ELLIS LINCICOME, JR. AND VICENTE LINCICOME vs
SABLES LLC,*

February 4, 2020

*Capitol Reporters
628 E. John St # 3
Carson City, Nevada 89706
775 882-5322*

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1 Case No. 18-CV-01332

2 Department II

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IN THE THIRD JUDICIAL DISTRICT COURT

6

IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

7

BEFORE THE HONORABLE LEON ABERASTURI

8

DISTRICT JUDGE, PRESIDING

9

10 LINCICOME,)

)

11 Plaintiff,)

)

12 vs.)

)

13 SABLES, LLC, et al.,)

)

14 Defendants.)

)

15

16

JAVS-RECORDED TRANSCRIPT OF PROCEEDINGS

17

MOTIONS HEARING

18

TUESDAY, FEBRUARY 4, 2020

19

YERINGTON, NEVADA

20

21

22

23

24 Transcribed by:

Shellie Loomis, RPR

CAPITOL REPORTERS (775) 882-5322

1 APPEARANCES:

2
3 For Lincicome: Millward Law, LTD.
4 Michael G. Millward, Esq.
5 -and-
6 Justin M. Clouser, Esq.

7 For Fay Servicing, LLC: Ramir Hernandez, Esq.

8 For Breckenridge Property
9 Fund 2016, LLC: Matthew K. Schriever, Esq.

10 For Defendant Sables, LLC: Shadd A. Wade, Esq.

11 For Bank of America: Akerman, LLP
12 Darren T. Brenner, Esq.

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1 YERINGTON, NEVADA, TUESDAY, FEBRUARY 4, 2020, A.M. SESSION

2 -oOo-

3

4 THE COURT: Good morning. Who do I have on the
5 telephone? This is Judge Aberasturi.

6 MR. HERNANDEZ: Hi, Judge, this is Ramir
7 Hernandez representing Fay.

8 (Indiscernible audio via the
9 telephone.)

10 MR. SCHRIEVER: Matt Schriever, representing
11 Breckenridge Property Fund.

12 THE COURT: All right. Did you get all those?
13 All right.

14 THE CLERK: (Indiscernible).

15 THE COURT: Which two did you get?

16 THE CLERK: (Indiscernible).

17 THE COURT: All right. We got Mr. Hernandez and
18 Mr. Schriever. Who else do we have on the line?

19 MR. WADE: Good morning, Your Honor, Shadd Wade
20 on behalf of Sables, LLC.

21 THE COURT: Okay. All right. Anyone else? All
22 right.

23 MR. HERNANDEZ: I think we're going to be waiting
24 for Akerman, Your Honor.

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1 THE COURT: Oh, we're still waiting for Akerman.
2 Are they appearing up here or are they going to appear by
3 telephone?

4 I just had Mr. Millward --

5 MR. HERNANDEZ: It was my understanding they were
6 going to appear by telephone.

7 THE COURT: And Mr. Millward just entered. All
8 right. Mr. Clouser's here. All right. And then I heard a
9 ring in the background?

10 Was that Akerman?

11 MR. BRENNER: Yes, it is. This is Darren Brenner
12 with Akerman for Bank of America.

13 THE COURT: Okay. All right. Did you get that?
14 Okay, the clerk's telling me she has everybody.

15 All right. So we'll start the hearing.

16 18-CV-01332 --

17 (The JAVS recording glitches out
18 of the program for about 30
seconds to minute...)

19 (The recording continues to play
20 for the rest of the hearing with
no issues.)

21 MR. MILLWARD: -- using the new provisions of the
22 Nevada Rules of Civil Procedure that were revised earlier last
23 year. I have not had the response from the two substituted
24 parties as of yet.

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1 I had the clerk issue new summonses that reflect
2 the updated rules and so those new summonses have been issued
3 and I'm going to be doing personal service here shortly.

4 I was going to give it about 20 days from the
5 waivers of service to be contacted to see if I could get
6 waivers accepted so that we can just move forward and get
7 answers on file. 20 days would be roughly, two, three days
8 from now.

9 THE COURT: Okay. All right. Are there going
10 let me ask the attorneys on the other end. Are there going to
11 be issues as to personal service or are the attorneys going to
12 accept service?

13 MR. HERNANDEZ: Your Honor, this is Ramir
14 Hernandez. We have filed an answer to the -- Fay has filed an
15 answer to the complaint.

16 THE COURT: Okay. Anyone else?

17 MR. SCHRIEVER: This is Matt Schriever.
18 Breckenridge has also filed an answer.

19 MR. BRENNER: This is Darren Brenner for Bank of
20 America, so there's no issue.

21 MR. MILLWARD: Yeah, so there's no issue as to
22 the parties that were not substituted. There's only an issue
23 as to the substituted parties that haven't been involved.

24 THE COURT: Okay. And who are those parties?
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1 MR. MILLWARD: Yeah, so let me give you the names
2 here. Okay. It appears that they would be 1900 Capital Trust
3 Number 2 by U.S. Bank Trust National Association, as well as
4 Shellpoint Mortgage Servicing, LLC.

5 THE COURT: Okay. All right. And then you're
6 hoping those will all be served within the next 20 days.

7 MR. MILLWARD: Well, I'm hoping that they waive,
8 but if I don't receive something in the next week or so, I'm
9 going to be working on personal service on both of them.

10 THE COURT: Okay. All right. And these are all
11 in Nevada? We don't have any issues with out of state?

12 MR. MILLWARD: I believe both are out of state.

13 THE COURT: Okay. All right. And then is there
14 an issue with setting a 16.1?

15 MR. MILLWARD: There's not. I was actually
16 drafting one up. I'm hoping to have one maybe in the middle
17 of March.

18 THE COURT: Okay.

19 MR. MILLWARD: That way I can give time for
20 20 days for a response on personal service. So I was looking
21 at my calendar, March 16th would be good.

22 THE COURT: Okay.

23 MR. MILLWARD: I was thinking something like that
24 too.

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1 THE COURT: All right. Is there an issue as to
2 location?

3 MR. MILLWARD: I would imagine the parties would
4 want just stay by phone. I don't know that.

5 THE COURT: All right. Is there an issue
6 participating by telephone, any of the attorneys on the line?

7 MR. BRENNER: This is Darren Brenner for Bank of
8 America, that would be preferred to do it by phone.

9 THE COURT: Okay.

10 MR. HERNANDEZ: This is Ramir Hernandez for Fay.
11 I agree, Your Honor.

12 THE COURT: Okay. And how about Mr. Schriever?

13 MR. SCHRIEVER: We would agree with telephonic,
14 Your Honor.

15 THE COURT: Okay.

16 MR. WADE: Your Honor, this is Shadd Wade for
17 Defendant Sables, LLC. I just want to confirm that our
18 declaration of non-monetary status that is filed is still
19 standing.

20 I understand the petition to the Supreme Court
21 was denied, and I just want to confirm that pursuant to the
22 statute, we're not obligated to put (indiscernible) discovery
23 other than responding to the request concerning the deed of
24 trust.

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1 THE COURT: All right. That's my understanding
2 as well. I think last week, I don't know if the Supreme Court
3 sent anything to our clerk yet, but --

4 MR. MILLWARD: I don't know that anything's been
5 sent to your clerk. I was working on a petition for review by
6 the Supreme Court. So, I anticipate that will be filed.

7 THE COURT: Okay. All right. Well, but my
8 viewpoint on that until the appellate court overturns me, I
9 think you're correct in what you're stating in terms of 16.
10 So, any -- do we need a ruling or an order or
11 what's your thought process on that?

12 MR. CLOUSER: Your Honor, if I might, I think
13 getting an initial 16.1 in the books is imperative.

14 THE COURT: Okay.

15 MR. CLOUSER: And if there's any delay with the
16 two additional parties that --

17 MR. WADE: This is Shadd Wade.

18 THE COURT: Wait, wait.

19 MR. WADE: I don't have any objection to the 16.1
20 conference proceeding.

21 THE COURT: Okay.

22 MR. WADE: I'm just -- I just want to confirm on
23 the record that Sables, LLC is not obligated to participate.
24 I have no objection to the other parties proceeding.

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1 THE COURT: So, is there going to be any
2 objection if they comply with 16 as if they hadn't the limited
3 obligations based upon my previous ruling.

4 MR. MILLWARD: Yeah. As long as under the
5 statute, they comply with the discovery request, I would have
6 no objection to that.

7 MR. CLOUSER: And we can have a supplemental 16.1
8 after the other, the new parties are brought in. But I think
9 it's important to go ahead and move forward and get 16.1 in
10 place so we've got that aspect covered by the Court.

11 THE COURT: All right. Is there any objection to
12 that?

13 MR. HERNANDEZ: Your Honor, can that be repeated
14 because it didn't come through on my end. I didn't hear --

15 THE COURT: Go ahead and pull that closer. Is
16 the blue light on?

17 MR. CLOUSER: Yes, it is.

18 THE COURT: Okay. Thank you.

19 MR. CLOUSER: This is Justin Clouser with Michael
20 Millward. My comment was that at this point in the case, it's
21 imperative that we go ahead and schedule the 16.1. And if we
22 can get the substitute, the parties that are coming that are
23 out for service, that's great.

24 But if not, we should move forward with the
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1 parties that are already in the matter, so we at least have a
2 16.1 on file with the Court and we can always do a
3 supplemental 16 point, supplemental JCCR after those other
4 parties are brought in. But at least we're moving in the
5 right direction at that point.

6 THE COURT: All right. Any objection?

7 MR. HERNANDEZ: As long as we schedule it by no
8 later than March 16th, Your Honor, this is Ramir Hernandez. I
9 think I can say that we don't want any, and I'm speaking for
10 myself, I'm sure the other Defendants will agree, that we
11 really want to get this case moving forward.

12 So I really, really would want no later than
13 March 16th for the 16.1.

14 THE COURT: All right. And I think Mr. Millward
15 has thrown out that date as well. Can we all agree on
16 March 16th?

17 Is there anyone that can't do that? Okay. All
18 right. So then --

19 MR. BRENNER: Your Honor, this is Darren Brenner.
20 I don't know, but as long as it's okay with everyone if I find
21 a substitute if that date doesn't work for me, then absolutely
22 we'll make it work with Bank of America.

23 THE COURT: I don't think anyone is going to have
24 an issue with a substitute. All right. So, any issue if I
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1 just order that it will occur on or before March 16.

2 MR. MILLWARD: That sounds fine, Your Honor. Why
3 don't we just work on a time then --

4 THE COURT: Okay.

5 MR. MILLWARD: -- that way I don't even have to
6 send a notice out.

7 THE COURT: All right. Is there a time on the
8 16th, that's a Monday.

9 MR. MILLWARD: I'm available the whole day. At
10 9:30 would be great.

11 THE COURT: All right. How about you, Mr.
12 Clouser?

13 MR. CLOUSER: We'll make that work.

14 THE COURT: How about 9:30 on the 16th?

15 MR. HERNANDEZ: Your Honor, this is Ramir
16 Hernandez. I actually have a mediation in Reno at 9:00 a.m.
17 on March the 16th.

18 If we could do -- if we could push it back
19 probably to 11 o'clock or noon, probably better by noon, I
20 think I can get it in at that time.

21 THE COURT: All right. Any issue with noon?

22 MR. CLOUSER: That's fine.

23 MR. MILLWARD: Noon is fine.

24 THE COURT: I'm hearing from both attorneys in
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1 the courtroom noon is fine? How about the attorneys --

2 MR. SCHRIEVER: Matt Schriever for Breckenridge,
3 noon is fine for me, Your Honor.

4 THE COURT: Okay.

5 MR. BRENNER: Same for Bank of America.

6 THE COURT: All right. So what I'll do is order
7 today March 16th, noon. All right. And then who's going to
8 set up the conference call.

9 MR. CLOUSER: We'll set up the conference call.

10 THE COURT: All right.

11 MR. CLOUSER: The Plaintiffs will set up the
12 conference call.

13 THE COURT: THE Plaintiffs will set up the
14 conference. Okay. And then, okay, anything else regarding
15 the 16.1?

16 MR. CLOUSER: Just if we could request that all
17 the parties provide us with the best call-in number so we can
18 notify, so we can make sure that everyone is notified
19 properly.

20 THE COURT: Okay. Which office do you want them
21 to call?

22 MR. CLOUSER: Mr. Millward's office, please.

23 THE COURT: So if everyone else on the telephone
24 contact Mr. Millward's office, let him know what the telephone
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1 numbers are and then they'll contact. All right.

2 MR. HERNANDEZ: This is Ramir Hernandez, we'll do
3 that, Your Honor.

4 THE COURT: All right. Anything else regarding
5 the 16?

6 MR. CLOUSER: I don't believe so from Plaintiffs,
7 Your Honor.

8 THE COURT: All right. Now, as to the remaining,
9 there were some motions, did we want to deal with those today
10 or do we want to wait and see what happens after the 16.1?

11 MR. SCHRIEVER: Your Honor, this is Matt
12 Schriever for Breckenridge. We have a request for --

13 THE COURT: Restitution.

14 MR. SCHRIEVER: -- restitution. I would like to
15 argue that today.

16 THE COURT: Okay. All right. And then I believe
17 there was one other motion for reconsideration on the
18 declaratory judgment; is that correct?

19 MR. MILLWARD: Yes, Your Honor.

20 THE COURT: All right. Let me start off before
21 we discuss that one. I think in terms of reading the
22 pleadings, the issue that I saw in the pleadings is not
23 necessarily the cause of action, but what declaratory -- what
24 are you seeking to declare?

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1 Is there an issue if Mr. Millward sets forth
2 exactly what he's seeking to have the Court declare, is there
3 still going to be an issue as to the cause of action? Let me
4 ask the attorneys on the phone?

5 Did any of you have a point of view on that?

6 Are we still there?

7 MR. SCHRIEVER: This is Matt Schriever for
8 Breckenridge. Your Honor, I didn't file any sort of
9 opposition and I don't believe, I don't recall to the motion
10 for reconsideration.

11 I'm not sure that I understand the necessary
12 point of the motion at this point, but maybe I did not file an
13 opposition to it.

14 THE COURT: All right. Either of the other two
15 attorneys on the phone?

16 MR. HERNANDEZ: Your Honor, this is Ramir
17 Hernandez. We also did not file a motion for reconsideration,
18 or an opposition for a motion for reconsideration.

19 THE COURT: All right.

20 MR. BRENNER: Your Honor, Darren Brenner for Bank
21 of America. We don't have a position on this issue.

22 THE COURT: Okay.

23 MR. MILLWARD: And, Your Honor, just to maybe
24 clarify some things. So it was argued by Breckenridge that
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1 the, that a single claim for declaratory relief was improper
2 in Nevada, that you couldn't file a suit against one party for
3 declaratory relief by itself.

4 MR. SCHRIEVER: This is Matt Schriever for
5 Breckenridge. I think we cut out again. I couldn't hear the
6 rest of Mr. Millward.

7 THE COURT: Pull the microphone closer.

8 MR. MILLWARD: Let me say that again. I said
9 that it was argued by Breckenridge, and I'm trying to remember
10 the motion. I believe it was the motion pertaining to the lis
11 pendens.

12 But anyway, it was argued that you could not
13 bring an action for a single relief against a party for
14 declaratory relief. And Breckenridge cited to Federal
15 District Court cases and Federal case law to substantiate that
16 position, granted they were Nevada Federal District Court
17 cases.

18 NRS 30 in Nevada makes it clear that you can.
19 And so the Court entered an order establishing that in this
20 case that the actions for declaratory relief where it stood as
21 the sole action against a party were improper.

22 And so thereafter, I filed a motion to amend and
23 I included additional causes of action against parties that
24 the Court allowed for me to file.

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1 THE COURT: Right.

2 MR. MILLWARD: Gave me leave to file. And so I

3 think that in some respects the motion is moot.

4 THE COURT: Okay.

5 MR. MILLWARD: And if everybody would agree to

6 that, then I would agree to withdraw the motion.

7 THE COURT: All right. Is there any objection to

8 having the Plaintiffs withdraw the motion if everyone agrees

9 that it's moot at this point in time?

10 MR. HERNANDEZ: Ramir Hernandez --

11 MR. SCHRIEVER: -- Matt Schriever --

12 MR. HERNANDEZ: Go ahead, Matt.

13 MR. SCHRIEVER: Matt Schriever has no objection

14 to that.

15 MR. HERNANDEZ: This is Ramir Hernandez. I have

16 no objection to that, Your Honor.

17 THE COURT: Okay. All right.

18 MR. BRENNER: Darren Brenner, I have no

19 objection. I just don't think it involves my client at all.

20 THE COURT: Okay. So we'll go ahead and withdraw

21 that. And so are there any other motions before we get to

22 the writ of restitution that I need to address today?

23 MR. CLOUSER: Not that I'm aware, Your Honor.

24 THE COURT: All right. So as to the writ of
CAPITOL REPORTERS (775) 882-5322

1 restitution, let me hear argument and then I'll hear from the
2 Plaintiff.

3 MR. SCHRIEVER: All right. Your Honor, again
4 this is Matt Schriever. Your Honor, as the Court is well
5 aware, Your Honor entered an order on December 31st, 2018,
6 enjoining the foreclosure sale if the Plaintiff filed a bond
7 of \$172,000, and then thereafter posted approximately \$2,100 a
8 month thereafter.

9 No bond was posted, and so on January 4th, 2019,
10 the foreclosure sale was held and my client purchased the
11 property for \$294,000.

12 On January 28th, 2019, we filed -- or served the
13 three-day notice and the Plaintiffs are remaining in the
14 property. They're squatting on the property and my client's
15 the title owner the property as it is right now and we are
16 entitled to possession of the property.

17 It's currently costing my client approximately
18 \$75 a day just to carry this property that the Plaintiffs are
19 living in rent free, mortgage free, and my client is holding a
20 loan and carrying the property. And so we're asking for
21 possession of the property.

22 If the Court is not inclined possession of the
23 property during the pendency of this action, then we request
24 that the Plaintiffs be required to post a bond and I -- if --
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1 I calculate that to be about a \$30,000 bond. That's based on
2 the \$75.65 per month times, it's been approximately 400 days
3 since the foreclosure sale. That came out to \$30,260.

4 So we would ask if the Court is not inclined to
5 grant possession or grant a writ of restitution, it is
6 required the Plaintiffs to post a bond of \$30,000 and then
7 plus the \$2,105 amount that the Court previously ordered in
8 December per month.

9 That's just to protect my client in the event
10 that the Court ultimately finds that the foreclosure sale was
11 valid and those would be rents that would be payable to my
12 client for this possession period where the Plaintiff is
13 renamed in the property without paying rent.

14 And then if the Court determines that the sale is
15 void, then that amount would -- would be determined later on
16 where that amount should go.

17 THE COURT: Okay. Mr. Millward.

18 MR. SCHRIEVER: And with that, Your Honor, I have
19 nothing else unless the Court has questions.

20 THE COURT: All right. Mr. Millward, are you
21 going to argue?

22 MR. MILLWARD: Yeah. I'll sit.

23 THE COURT: Yeah, have a seat.

24 MR. MILLWARD: Otherwise they won't be able to
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1 hear me. So, Your Honor, so my client's position is that the
2 foreclosure sale should never have happened.

3 My client's position has been, throughout this
4 matter that they've never been in breach of contract. That
5 there was no default. That the trustee under NRS 107.080(1)
6 and (2) do not permit a sale by foreclosure unless at first a
7 default is had by the homeowner.

8 In this instance, the default was caused by Bank
9 of America. The Court's preliminary findings in the
10 December 31st order establish, at least as a preliminary
11 determination, that my clients are likely to prevail on those
12 -- on proof of those facts. That the evidence before the
13 Court are primarily public documents and recorded documents.

14 Other than my clients's testimony that was
15 admitted before the Court in their affidavit at the hearing in
16 November of 2018, most of the facts, almost all the facts here
17 are undisputed.

18 There was a loan modification in July of 2009.
19 It was signed and recorded by Bank of America in May of 2011.
20 My clients attempted make payment as their affidavits that
21 have been admitted into evidence before this court
22 established, that they were -- those payments were refused as
23 of October of 2018.

24 That all this information was available to the
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1 trustee and available to the parties prior to and they were
2 made aware of the information prior to the foreclosure sale on
3 January 4th.

4 There was a lis pendens recorded. The purchaser
5 purchased subject to knowledge of this suit, purchased subject
6 to the allegations that, that there was no authority to
7 foreclose in this matter, because there was no default, as
8 well as knowledge of documents, including inaccurate interest
9 rates, inaccurate balances, inaccurate dates.

10 In this case, Your Honor, this is almost an issue
11 of summary judgment. It's undisputed that my clients have
12 never been permitted under the loan modification agreement to
13 make a payment.

14 THE COURT: Okay. But which loan modification
15 agreement are you talking about, because there was --

16 MR. MILLWARD: There's only one. And that's the
17 2009 loan modification agreement that was ever agreed to by
18 the parties and recorded.

19 THE COURT: Right. But then there was a
20 settlement through the foreclosure process.

21 MR. MILLWARD: Yeah, Your Honor, and we have
22 talked about that. And it was -- the settlement was simply
23 mediation would end if my clients did a deed in lieu, but
24 nobody's held the position that my clients entered into an
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1 intervening agreement that eliminated their rights or changed
2 the rights under the original loan, under the loan
3 modification agreement. Nobody's held that position.
4 Nobody's taken that position.

5 THE COURT: Right. At this time.

6 MR. MILLWARD: Right.

7 THE COURT: Okay.

8 MR. MILLWARD: Right. And I've reviewed those
9 documents and I don't see that they create an intervening
10 contract. I would imagine this case would be over if they
11 did. That would be a simple resolution to the case if that
12 were the matter.

13 Your Honor, but what the point of this is, is
14 that we've got a purchaser here that knew what they were
15 purchasing. That knew that they were buying a property that
16 was going to be subject to a claim that the foreclosure sale
17 was void.

18 When you look at the statutes that are applicable
19 to this matter, when you look at NRS 107.080(5), right. It
20 states: That when the trustee or other person authorized to
21 make sale does not substantially comply with the provisions of
22 this section, right, that the Court must determine, must
23 declare that the sale is void.

24 It says, "must". And the very first obligation
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1 that the trustee had to do is to make sure that the
2 homeowners' in default.

3 So, so based on the argument that there was a
4 mediation agreement, right, that supersedes the loan
5 modification agreement, the trustee sale would have to be in
6 violation for violation of that agreement which it was not.

7 THE COURT: Okay.

8 MR. MILLWARD: The notice of sale, the notice of
9 default, all the documents reported that are required by NRS
10 107.080 establish that there was a loan modification,
11 acknowledge that there was a loan modification, and yet none
12 of the terms repeated in those documents reflect the modified
13 loan.

14 THE COURT: Okay.

15 MR. MILLWARD: My clients's position has always
16 been in this matter that they've never been permitted to make
17 payment according to that agreement.

18 THE COURT: All right. Now, if is only issue is
19 the deficiency, if the Court doesn't see that, because your
20 clients still had a duty to make the payments.

21 I understand your argument you want to argue that
22 they tried to make payments at some point eight, nine years
23 ago, so now they're excused from making payments forever.

24 But if the Court doesn't accept that agreement,
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1 is the fact that there is an issue with the deficiency enough
2 under Chapter 107 to undo the sale?

3 MR. MILLWARD: I don't think so, Your Honor,
4 because at no point has anybody, any party in this matter,
5 offered my client the opportunity to make payments under the
6 terms of the loan modification.

7 THE COURT: Well, you had that there were offers
8 in terms of the foreclosure and mediation, and if I'm
9 recalling everything correctly, I know it's been a year, but
10 there were attempts to rework it. There was at least two or
11 three.

12 MR. MILLWARD: By my client.

13 THE COURT: Right.

14 MR. MILLWARD: Absolutely. My clients tried to
15 preserve their home and preserve the mortgage, and
16 unfortunately, they were never able to enter into a
17 superseding agreement that would resolve the whole case.

18 THE COURT: All right.

19 MR. MILLWARD: They were real close, but then
20 when the offer came through from the bank, they realized that
21 the terms were absolutely unaffordable to them, they couldn't
22 -- they would have been back in the same place that they had
23 been. So they had to reject those terms leaving the loan
24 modification agreement from 2009 in place.

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1 THE COURT: Right.

2 MR. MILLWARD: And so the point though, is Your
3 Honor, we have Bank of America refusing those payments.
4 There's no evidence showing that, that they didn't refuse the
5 payment in October. There is evidence that they accepted my
6 clients's first payment in September, right.

7 THE COURT: Right. But it gets back to my
8 question, though, if at the end of the day the only issue is
9 what is the deficiency --

10 MR. MILLWARD: Right.

11 THE COURT: -- is that sufficient under 107 to --

12 MR. MILLWARD: My argument, Your Honor, is that
13 107 requires a breach and default. And you can't hold my
14 clients liable for a breach and default when they've never
15 been given the opportunity from July of 2094 (sic.) to make
16 payment on the agreed upon terms.

17 THE COURT: All right. Let me rephrase it a
18 different way.

19 If the only breach the Court at the end of the
20 day finds the only breach is they didn't notify your clients
21 as to what the correct deficiency judgment was or what the
22 correct deficiency, would that be enough under 107 to undo the
23 sale?

24 MR. MILLWARD: I think, Your Honor, for a
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1 deficiency to exist, right, would have to have my clients
2 obligated to make a payment, right.

3 THE COURT: Which they were under the agreement.

4 MR. MILLWARD: Right, and they did. They made a
5 payment in September and were refused a payment in October.

6 THE COURT: Right.

7 MR. MILLWARD: So that the deficiency is, if any
8 deficiency, is one payment in October that was refused.

9 THE COURT: All right. But they still have to,
10 all right, I'm not going to -- all right.

11 So, are you going to answer my question as to
12 whether or not if at the end of the day, the only violation of
13 107 was the bank didn't notify them of what they owed.

14 MR. MILLWARD: I don't see how we can get to that
15 point, Your Honor. Like I understand where the Court's going
16 and I appreciate the Court's statements, but what I'm saying
17 is I don't get how you -- how you get to notifying someone
18 that they owe something when they wanted to and haven't been
19 able to make payment the entire time.

20 I mean, if at any time any of the banks involved
21 said, oh, we discovered erred this loan modification. It's
22 never been -- we've never accepted a payment from you and
23 we're willing to start accepting payments, then my clients
24 would have started making payments.

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1 THE COURT: Well, that's not true, because they
2 didn't.

3 MR. MILLWARD: It's never happened, Your Honor.
4 There is no evidence whatsoever in this case.

5 THE COURT: They were asked -- all right. All
6 right. I'm not -- all right, any other arguments?

7 MR. MILLWARD: Your Honor, it's quite simple.
8 The right to restitution relies upon the validity of the
9 foreclosure sale, right.

10 THE COURT: Okay.

11 MR. MILLWARD: As a matter of law in this state,
12 when a party breaches an agreement, right, the other party is
13 let off the hook.

14 THE COURT: That's not true.

15 MR. MILLWARD: It is true.

16 THE COURT: That is absolutely not true.

17 MR. MILLWARD: I can give you citations and case
18 law, Your Honor.

19 THE COURT: All right. So you're saying if the
20 bank didn't accept two or three payments nine years ago, your
21 clients get a free house.

22 MR. MILLWARD: That's not at all what I'm saying,
23 Your Honor. My argument is simply that my clients can't be
24 held liable for missed payments that they couldn't make.

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1 THE COURT: All right. Okay. Anything else?

2 MR. MILLWARD: Do you have any argument?

3 THE COURT: All right. Response?

4 MR. SCHRIEVER: Your Honor, this Matt Schriever
5 with Breckenridge. Your Honor, my client wasn't involved in
6 this property until they purchased it on January 4th of 2019.
7 I'm not concerned with all these payments that they tried to
8 make in 2009 to 2019.

9 I'm concerned with what have they done since
10 foreclosure occurred on January 4th, 2019, to try to make some
11 sort of payment make some payments. They knew that it was
12 coming.

13 We've been asking since May, we filed our motion
14 to intervene May 23rd, asking that the Court set some sort of
15 bond for the Plaintiffs to post a monthly amount as a rent to
16 some sort, something, some sort of security to -- for this
17 property and they haven't -- they haven't done it.

18 And like, I mean, that's where what we're asking
19 for is a monthly security amount to protect the parties'
20 interests during the resolution of everything.

21 I would like possession of the property, that's
22 my primary -- that's my primary request. But if the Court's
23 not willing to, then we're asking for a bond that acts as a
24 security until the final resolution of this and the proper

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1 amount of that would be 30,000, plus what the Court previously
2 ordered in December of 2018, \$2,100 per month and then that
3 acts as that security, because to make payment status quo
4 until the case is resolved.

5 And I think it's -- I think it's bad faith and
6 they come with unclean hands if they say, oh, well, we're not
7 entitled, or we're not need to make any payments at all and we
8 can stay in this house for the next three years as we slowly
9 drag this litigation on. That's not how, that's not how
10 litigation works. There needs to be some sort of
11 responsibility to hold their feet to the fire and to let there
12 be security in this case.

13 THE COURT: All right. But do you want to
14 address --

15 MR. SCHRIEVER: As far as --

16 THE COURT: Can you address, though, the issue if
17 at the end of the day, because I think at the end of the day
18 like I held previously are likely to prevail that the bank did
19 not give them the proper information as to what the interest
20 rate was and what their deficiency would be which is required
21 under 107. Would that be enough to undo the sale?

22 MR. SCHRIEVER: Your Honor, I think that's a --
23 that's a discovery issue that we need to look at the facts a
24 little more into.

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1 I mean, if the Court in the end of the day undoes
2 the sale, declares the sale void, then these -- these rental
3 payments that they're holding in, as a security that they're
4 posting with the Court, if the sale is ultimately void, then
5 they would probably be entitled to have those returned back to
6 them or else they get applied to the mortgage. But, I'm just
7 asking for there to be some sort of security posted in the
8 mean time.

9 THE COURT: Okay, but --

10 MR. SCHRIEVER: To protect everybody's interests
11 and to make sure that the property is being protected, that my
12 client is protected in the long run if the sale is declared
13 valid.

14 THE COURT: Well, that seqways into my next issue
15 though, this isn't a joint motion between your client and the
16 bank and I'm not being asked to protect the bank any more.
17 It's just an issue from your client. And my concern is if I
18 do over turn the sale, and at this point in time I don't know,
19 I haven't heard the arguments.

20 You raised the issue of discovery, you know,
21 that's my concern. But, if it is enough to over turn the
22 sale, then they've been required to do something that they
23 shouldn't have been required to do.

24 MR. SCHRIEVER: Well --
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1 MR. HERNANDEZ: Your Honor, I shouldn't -- Your
2 Honor, I didn't file, but I do have a point of law, this is
3 Ramir Hernandez. I have a point of law regarding your
4 question that may address it, but I don't know if I'm allowed
5 to speak to --

6 THE COURT: Well, no I --

7 MR. HERNANDEZ: -- I don't have a dog in this
8 show.

9 THE COURT: Like I'm saying, I appreciate,
10 Mr. Hernandez, you're not on the motion, so, all right. All
11 right, is there any --

12 MR. HERNANDEZ: No, I was just trying to be
13 helpful, I'm sorry.

14 THE COURT: I appreciate that.

15 Anything else?

16 MR. SCHRIEVER: Your Honor, if they post a bond
17 and any party or they or my client, since it's our motion and
18 we're asking for the bond, if they're ultimately successful
19 they can ask for a motion to release the bond back to them in
20 the long run if this were declared that the sale was void.

21 But, if the Court declares that the sale was
22 valid, then we would request that the bond be released back to
23 us. And I think that's an issue that we deal with once we get
24 there, but there needs to be security posted, a bond posted in
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1 place to make payments status quo until that time comes.

2 THE COURT: All right. Anything else?

3 MR. SCHRIEVER: No, Your Honor.

4 MR. WADE: Your Honor, this is Shadd Wade,
5 President of Sables, LLC, and I would request permission to
6 put my input in based on the fact that Plaintiffs, essentially
7 Plaintiffs' opposition implicated the trustee's conduct with
8 respect to the recorded documents and proceeding for sale.

9 THE COURT: All right. At this point, I'm not
10 going to allow to you get into -- we're dealing with the writ
11 of restitution. All right. Yes, go ahead.

12 MR. WADE: It's not related to the writ of
13 restitution, it's more related to the fact that the Court
14 allowed the foreclosure to proceed.

15 You ordered an injunction, but required a bond
16 because the Plaintiffs' request for the injunction presupposes
17 the idea that they were able and ready to pay.

18 So the bond amount was essentially saying, okay,
19 you haven't been able to pay for ten years, pay the bond
20 amount and stop the sale. They weren't willing or able to do
21 that. So that essentially establishes that they were unable
22 to perform under the contract any way.

23 So what when counsel says there was no default,
24 that's inaccurate. There was a default. There was a failure
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1 to pay. And then when the Court provided them an opportunity
2 to cure that default through a bond to obtain an injunction to
3 stop the sale, they failed to make that payment which is just
4 furthering their pattern and practice of conduct in failing to
5 pay.

6 So, I just wanted to point that out that there
7 was, in fact, a default, that that issue is not in dispute.
8 That there was a failure to pay on behalf of the Plaintiffs.
9 That (indiscernible).

10 THE COURT: All right. Did you want to respond
11 to that, Mr. Millward?

12 MR. MILLWARD: Yeah, Your Honor.

13 THE COURT: Let me, just before you do that, then
14 the other issue is what is the status quo.

15 MR. MILLWARD: Yeah. Thank you, Your Honor.

16 THE COURT: Go ahead.

17 MR. MILLWARD: Just as to the bond, as a matter
18 of practicality, my clients would have to post cash for
19 \$30,000. And I don't -- while I -- if the Court were inclined
20 to follow the argument that some security is necessary to
21 protect the buyer's interest, if the Court's going to go that
22 way, then I certainly could understand that the Court would
23 require some kind of payment or something.

24 But requiring a \$30,000 in cash security up front
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1 that my clients I know would not be able to post in cash would
2 essentially by force, and my clients's ability to proceed here
3 and protect their interest.

4 And I don't think that would be equitable in
5 light of the fact that this buyer knew what they were buying.
6 The buyer was aware of the action and was aware of all the
7 allegations.

8 And had they pulled the Court file before they
9 purchased the property, they would have seen in the Court's
10 order that -- that it said, until further order of the Court,
11 there should be no foreclosure and there was no further order
12 of the Court.

13 So, they should have known at least, at least as
14 to the Court's order that purchase of the property was going
15 to be subject to litigation and that they were the one risking
16 moving forward in purchasing the property.

17 They can't now ask for security, or shouldn't be
18 permitted to ask for security when they were jumping into this
19 case by buying the property, and doing it knowingly.

20 THE COURT: Okay. All right. What I'm going to
21 do, I'm going to deny the motion without prejudice. I'll hear
22 it again after discovery.

23 MR. MILLWARD: Your Honor --

24 MR. CLOUSER: Thank you.

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1 MR. MILLWARD: Thank you.

2 THE COURT: Hold on. Let me just keep my
3 notes -- all right. And like I say, because if there's some
4 legal issues here and again, as to the breach and the lack of
5 payments, I'll certainly see the legal arguments and so forth
6 once we're done with discovery, and -- but at the same time,
7 I, like saying, the bank, again, I'm -- you can change my mind
8 after we've seen some discovery and so forth, but the initial
9 documents and so forth indicated that this was a typical case
10 where the bank, the modification was attempted.

11 I don't know which mortgage I'm dealing with. I
12 don't know what the deficiency was. I don't have an
13 accounting before me and I think at the end of the day, it's
14 going to be clear that the bank didn't satisfy the provisions
15 in 107 in terms of notifying the homeowners what the
16 deficiency would be.

17 So, again, I'll allow you to make arguments,
18 Mr. Millward, that there was a breach and that there was no
19 breach on their part, no breach, I'll listen to all that, but
20 the problem I'm having from the banks and the third party now
21 argument, we know that there was a deficiency.

22 And then again, the other big problem I'm having
23 with the Plaintiffs' argument is regarding the foreclosure
24 mediation process and what that did to it.

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1 But even with the foreclosure mediation process,
2 I don't believe that anyone in this room today can, with any
3 sort of certainty, tell the Court what would be the end
4 deficiency.

5 So, I'll deny it without prejudice. We can bring
6 it up later after discovery, and then if the bank and the
7 trustee want to get in on the restitution and the preserving
8 the asset, I'll certainly allow to you do that at that point
9 in time.

10 But the only motion before me today is regarding
11 the third pretty purchaser who --

12 MR. SCHRIEVER: Your Honor --

13 THE COURT: Yeah.

14 MR. SCHRIEVER: -- this is Matt Schriever for
15 Breckenridge. For clarification, you're denying the request
16 for writ of restitution.

17 Are you also denying the request that the bond be
18 posted?

19 THE COURT: Yes.

20 MR. SCHRIEVER: And that -- the -- are -- can we
21 get a bond posted going forward every month?

22 THE COURT: Well, again, the issue I'm having
23 with ordering the bond at this point in time is I see separate
24 issues in terms of who I'm protecting and what I'm protecting.

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1 And then I still the issue hanging out there as to it is
2 possible at the end of the day, I undo the sale.

3 MR. SCHRIEVER: Correct. And that's why I'm
4 asking for the bond just going forward at this point, just
5 between Plaintiff and Breckenridge, if the sale is unwound,
6 they would simply be able to give that money back. If it's
7 not unwound, then it would come to us for the security going
8 forward.

9 THE COURT: Right. But, again, the status quo,
10 when you're client purchased the property, they knew that they
11 were getting into litigation.

12 And at this point in time too, I don't have any
13 information regarding their ability to pay and so forth, and
14 so I'll allow you to re-raise the motion after discovery and
15 then the one thing I'll put everyone on notice is this isn't
16 going to be another four or five years.

17 MR. SCHRIEVER: I'm sorry, it's not going to be
18 another what?

19 THE COURT: We're not going to let this case go
20 on for four or five years or even three. You know, we will
21 resolve this quickly.

22 I think once the discovery is done in this case,
23 there should be some summary judgment motions. The record is
24 what the record is, and at that point in time, I don't see a
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1 lot of material issues of fact coming at me.

2 So, we'll know what the record is and then we
3 should be able to resolve this on summary judgment motions.

4 MR. SCHRIEVER: Your Honor, if I could just --
5 one last plea here.

6 THE COURT: Okay.

7 MR. SCHRIEVER: Ordering -- ordering on-going
8 monthly payments would be consistent with your order from
9 December 31st, 2018, when in an attempt to stop the sale, you
10 ordered that they pay me \$2,100 per month going forward.

11 I'm simply asking for consistency here. That's
12 what I would ask for at this point. They pay \$2,100 going
13 forward to stop the eviction, to stop the restitution of the
14 property.

15 THE COURT: All right.

16 MR. SCHRIEVER: I mean, that's consistent with
17 what you ordered a year ago.

18 THE COURT: Well, but again, it's -- it's
19 different in that I ordered it a year ago to protect the bank
20 and the mortgage and they had paperwork showing that there was
21 a mortgage plan, an agreement to pay X, Y and Z each month.

22 And now I'm in a situation with what is the
23 rental value of the property and so forth. So, I don't see it
24 exactly as apples to apples.

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1 All right, did you want to put something on the
2 record, Mr. Clouser?

3 MR. CLOUSER: Yes, if I may. I find it
4 interesting that they are ignoring the part of your order that
5 precluded them from a foreclosure sale going forward, they're
6 ignoring that part, and they're just trying to hang their hat
7 on the order requiring \$2,100 a month. They can't argue both
8 sides of that, Your Honor.

9 THE COURT: Well, I think that's an interesting
10 reading of my order, but your clients were ordered to put up
11 the bond or the house would be sold.

12 So, all right, anything else?

13 MR. SCHRIEVER: Your Honor, as far as rental
14 value, I mean, we can look -- we know the property was sold
15 for \$294,000. If you simply take that at seven percent
16 interest --

17 THE COURT: Okay, but see this is what I'm not
18 ready to do, and I'll give you an opportunity. Like I'm
19 saying, I'm denying this without prejudice.

20 If you want to bring something else in, I'll
21 gladly consider it, but, you know, in terms of covering the
22 costs and so forth, I don't see that's relative.

23 MR. SCHRIEVER: Okay.

24 THE COURT: So, if you want to file another
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1 motion, I'll gladly hear it again and so forth, but I can't
2 just force them to put up a bond to cover your clients'
3 investment costs. I'm not going to head there.

4 MR. SCHRIEVER: All right. I appreciate your
5 time in hearing my arguments, Your Honor.

6 THE COURT: All right, thank you. Is there
7 anything else we need to discuss today?

8 MR. CLOUSER: Nothing from us, Your Honor.

9 THE COURT: All right. So I'll do the order on
10 the denying the writ and then do we need an order on the 16.1
11 info, or do --

12 MR. MILLWARD: Your Honor, I can prepare that, or
13 I can just do a notice of 16.1 case conference according to
14 what the Court wants.

15 THE COURT: All right. Is there any issue if Mr.
16 Millward just issues a notice of 16.1?

17 MR. HERNANDEZ: This is Ramir Hernandez, I have
18 no problem with that.

19 THE COURT: Okay.

20 MR. SCHRIEVER: This is Matt Schriever, I have no
21 issue, Your Honor.

22 MR. BRENNER: Your Honor, Darren Brenner, no
23 issue.

24 THE COURT: Okay. All right. So anything else
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1 we need to discuss?

2 MR. CLOUSER: Nothing, Your Honor.

3 THE COURT: All right. So thank you, very much.
4 You all have a good day. I'm going to hang up the telephone.

5 MR. HERNANDEZ: Thank you, Your Honor.

6 MR. SCHRIEVER: Thank you.

7 THE COURT: And thank you for setting up the
8 conference call. I appreciate that.

9 MR. HERNANDEZ; of course, Your Honor.

10 (Proceedings ended at 10:10 a.m..)

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1 STATE OF NEVADA,)
2) ss.
3 CARSON CITY.)

4 I, Shellie Loomis, a certified transcriber for the
5 Third Judicial District Court, do hereby certify:

6 That I received a CD-ROM containing the
7 above-entitled hearing and transcribed said hearing to the
8 best of my ability.

9 That the foregoing transcript, consisting of pages
10 1 through 40, is a full, true and correct transcript of
11 said hearing.

12
13 Dated at Carson City, Nevada, this 5th day of
14 August, 2021.

15
16 //Shellie Loomis//
17 SHELLIE LOOMIS, RPR
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	19:15	appreciate (5)	9:3;18:1;22:3;31:6	20;38:14;39:12,13
\$	affidavits (1)	25:16;30:9,14;	behalf (2)	Capital (1)
	19:20	39:4;40:8	3:20;32:8	6:2
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**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

ALBERT ELLIS LINCICOME, JR. and)	NEVADA SUPREME COURT
VICENTA LINCICOME,)	CASE NO.: 83261
)	
Appellants,)	
)	
v.)	THIRD JUDICIAL DISTRICT
)	COURT CASE NO.: 18-CV-01332
SABLES, LLC, A NEVADA LIMITED)	
LIABILITY COMPANY, AS TRUSTEE)	
OF THE DEED OF TRUST GIVEN BY)	
VICENTA LINCICOME AND DATED)	
5/23/2007; FAY SERVICING, LLC, A)	
DELAWARE LIMITED LIABILITY)	
COMPANY AND SUBSIDIARY OF)	
FAY FINANCIAL, LLC; PROF-2013-M4)	
LEGAL TITLE TRUST BY U.S. BANK,)	
N.A., AS LEGAL TITLE TRUSTEE;)	
BANK OF AMERICA, N.A.;)	
BRECKENRIDGE PROPERTY FUND)	
2016, A UTAH LIMITED LIABILITY)	
COMPANY; NEWREZ, LLC, D/B/A)	
SHELLPOINT MORTGAGE)	
SERVICING, LLC.; 1900 CAPITAL)	
TRUST II, BY U.S. BANK TRUST)	
NATIONAL ASSOCIATION; AND)	
MCM-2018-NPL2,)	
)	
Respondents.)	
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19 *Attorneys for Intervenor*

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

22 ALBERT ELLIS LINCICOME, JR., and
23 VICENTA LINCICOME,

24 Plaintiff,

25 v.

26 SABLES, LLC, a Nevada limited liability
27 company, as Trustee of the Deed of Trust given
28 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.; and DOES 1-50.,

Defendants.

BRECKENRIDGE PROPERTY FUND 2016,
LLC,

Defendant in Intervention.

FILED

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TANYA SUE BONE
COURT ADMINISTRATOR
Bayley Baptist
CLERK OF DISTRICT COURT

Case No.: 18-CV-01332
Dept No.: II

ORDER CONCERNING:

**BRECKENRIDGE PROPERTY FUND 2016,
LLC'S MOTION FOR ENTRY OF ORDER
GRANTING PERMANENT WRIT OF
RESTITUTION AND PAYMENT OF
OVERDUE RENTS**

AND

**PLAINTIFFS' MOTION FOR STAY
PENDING APPEAL**

1 On October 12, 2021, at 1:30 p.m., the Court held a hearing in the above-captioned matter to
2 consider Defendant in Intervention Breckenridge Property Fund 2016, LLC's Motion for Entry of Order
3 Granting Writ of Permanent Restitution and Payment of Overdue Rents and on Plaintiffs' Motion for
4 Stay Pending Appeal. Todd W. Prall and Casey J. Nelson appeared on behalf of Defendant in
5 Intervention Breckenridge Property Fund 2016, LLC. Michael G. Millward appeared on behalf of the
6 Plaintiffs. Ramir M. Hernandez appeared on behalf of Fay Servicing, LLC and US Bank Prof-2013-M4
7 Legal Title Trust. Paige L. Magaster appeared on behalf of Bank of America, N.A.

9 The Court, after hearing arguments of counsel and sworn testimony from Plaintiffs Albert Ellis
10 Lincicome, Jr., and Vincenta Lincicome, and for good cause, enters the following Findings of Fact,
11 Conclusions of Law, and Order.

12
13 **A. Findings of Fact.**

14 1. On June 23, 2021, the Court entered an order denying Plaintiffs' motion for partial
15 summary judgment and granting summary judgment in favor of Defendants Bank of American, N.A.,
16 Shellpoint Mortgage Servicing, Prof-2013 M4 Legal Trust, U.S. Bank, N.A. as Legal Trustee (the and
17 Fay Servicing, LLC (hereinafter the "Banks MSJ Order") and certified the judgment as final under NRC
18 54(b).

20 2. On June 23, 2021, the Court entered a separate order granting summary judgment in favor
21 of Breckenridge Property Fund 2016, LLC ("Breckenridge") on its First and Third Claims for Relief for
22 Quiet Title and Writ of Possession (hereinafter, the "Breckenridge MSJ Order").

23 3. The Breckenridge MSJ Order and the Banks MSJ Order are collectively the MSJ Orders.

24 4. In the MSJ Orders, the Court made numerous findings of fact and conclusions of law
25 which are adopted herein by reference.
26
27
28

1 5. In granting summary judgment in favor of Breckenridge, the Court found that
2 Breckenridge purchased the Property at a properly noticed foreclosure sale and is therefore entitled to
3 both title to and possession of the real property at issue in this case, which is located at 70 Riverside
4 Drive, Dayton, Nevada 89403 (the "Property").

5 6. On July 23, 2021, Plaintiffs filed a Notice of Appeal, which sought review of both the
6 MSJ Orders, among other things.

7 7. On September 9, 2021, Breckenridge filed a Motion for Entry of Order Granting
8 Permanent Writ of Restitution and Payment of Overdue Rents (the "Motion for Permanent Writ of
9 Restitution")
10

11 8. On or about September 14, 2021, Plaintiffs served their Motion for Stay Pending Appeal
12 (the "Motion for Stay").
13

14 9. On or about September 22, 2021, Plaintiffs served an opposition to the Motion for Writ
15 of Permanent Restitution in which Plaintiffs simply incorporated the Motion for Stay as their opposition.

16 10. On October 1, 2021, Breckenridge filed an opposition to the Motion for Stay.

17 11. On October 6, 2021, Breckenridge filed a Reply in Support of the Motion for Permanent
18 Writ of Restitution.
19

20 12. On September 28, 2021, the Court entered an Order Granting Ex Parte Application for
21 Order shortening Time for Hearing on Breckenridge's Motion for Permanent Writ of Restitution, which
22 set a hearing on Breckenridge's motion for October 13, 2021 at 1:30 p.m.

23 13. Breckenridge purchased the Property at a properly noticed foreclosure sale on January 4,
24 2019 for \$294,000.00. A Three-Day Notice to vacate the Property was served on the Plaintiffs on January
25 28, 2019.
26
27
28

1 14. Plaintiffs have continued to live in the Property from February 1, 2021 to the present,
2 which is a total of 32 months through the end of September 2021.

3 15. Based on the current rental market and the evidence provided by Breckenridge, the Court
4 finds that a fair market rental value for the Property is \$2,500 per month.

5 16. Plaintiffs testified concerning their assets at the hearing on October 13, 2021. Plaintiffs
6 testified that they have a rental property that is secured by a trust deed located Carson City, Nevada. The
7 debt secured by the deed of trust is somewhere between \$225,000 and \$250,000, with a potential market
8 value of around \$325,000. The rental income they receive from the property is only a few hundred dollars
9 more than the mortgage payment each month.
10

11 17. Plaintiffs testified that they have a retirement account with approximately \$125,000.00
12 and that they live on approximately \$3,000.00 per month in social security income.
13

14 18. Plaintiffs testified that they have a significant amount of medical bills.

15 19. Plaintiffs testified that they did not believe they could make a monthly rental payment for
16 the Property in the amount of \$2,500.
17

18 **B. Conclusions of Law.**

19 20. NRS § 40.255(1)(c) provides for removal of a person who holds over and continues in
20 possession of real property after a 3-day written notice to surrender has been served upon the person
21 “where the property . . . has been sold under a power of sale granted by NRS 107.080 to the trustee of a
22 deed of trust executed by the person . . . , and the title under such sale has been perfected” Nev.
23 Rev. Stat. Ann. § 40.255 (West).
24

25 21. Plaintiffs’ continued occupation of the Property was and is in clear violation of NRS §
26 40.255 and Breckenridge is entitled to permanent possession of the Property as prescribed in NRS §§
27 40.290 to 40.420. Therefore, Breckenridge is entitled to a permanent writ of restitution for the Property.
28

1 22. Plaintiffs have requested a stay of the proceedings in this Court to enforce the MSJ Orders,
2 including Breckenridge's request for a permanent writ of restitution.

3 23. The Nevada Supreme Court has noted that "generally, in determining whether to issue a
4 stay pending disposition of an appeal, [a court] considers the following factors:

- 5 (1) whether the object of the appeal will be defeated if the stay is denied,
6 (2) whether appellant will suffer irreparable or serious injury if the stay is denied,
7 (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and
8 (4) whether appellant is likely to prevail on the merits in the appeal.

9
10 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

11 24. The Nevada Supreme Court has "not indicated that any one factor carries more weight
12 than the others" although some courts have recognized "that if one or two factors are especially strong,
13 they may counterbalance other weak factors." *Id.*

14
15 25. Here, rather than focusing on these factors, the Court believes a stay is warranted under
16 NRCP 62(d) so long as Plaintiffs meet the requirements of securing Breckenridge's interests.

17 26. NRCP 62(d) provides:

18 Stay Pending an Appeal.

19
20 (1) *By Supersedeas Bond.* If an appeal is taken, the appellant may obtain a stay by
21 supersedeas bond, except in an action described in Rule 62(a)(2). The bond may be
22 given upon or after filing the notice of appeal or after obtaining the order allowing
the appeal. The stay is effective when the supersedeas bond is filed.

23 (2) *By Other Bond or Security.* If an appeal is taken, a party is entitled to a stay by
24 providing a bond or other security. Unless the court orders otherwise, the stay takes
25 effect when the court approves the bond or other security and remains in effect for
the time specified in the bond or other security.

26 27. The amended rule, which appears to have added subsection (2) essentially adopts the case
27 law from Nevada and the federal courts that had recognized that the rule "allows an appellant to obtain a
28

1 stay pending appeal as of right upon the posting of a supersedeas bond for the full judgment amount, but
2 that courts retain the inherent power to grant a stay in the absence of a full bond.” *Nelson v. Heer*, 121
3 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), as modified (Jan. 25, 2006) (citations omitted).

4 28. Here, the appeal was taken upon a certification of a final judgment pursuant to NRCP
5 54(b) prior to Breckenridge obtaining a final judgment. However, Breckenridge has demonstrated that
6 it will be entitled to damages against Plaintiffs based on the fair market monthly rental value of the
7 Property multiplied by the number of months in the Property.
8

9 29. Based on the facts presented, the Court finds that the approximately fair market monthly
10 rental value for the Property is \$2,500.00. The Court further finds that an adequate supersedeas bond in
11 this case would be the amount of a judgment were it to be entered today plus another 24 months of rental
12 payments. This amount is \$80,000.00 (32 months * \$2,500.00) plus \$60,000.00 (24 months * \$2,500),
13 which equals \$140,000.00.
14

15 30. Plaintiffs, however, request that the Court consider allowing Plaintiffs to provide other
16 types of security in place of a “full judgment” bond. Specifically, Plaintiffs ask for the Court to approve
17 the other real property owned by Plaintiffs, or the real property Plaintiffs own in Carson City that they
18 rent out (the “Carson City Property”).
19

20 31. “The purpose of security for a stay pending appeal is to protect the judgment creditor's
21 ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to
22 the creditor arising from the stay.” *Id.* at 835, 122 P.3d at 1254. “[T]he focus is properly on what security
23 will maintain the status quo and protect the judgment creditor pending an appeal.” *Id.* at 835-36, 122
24 P.3d at 1254.
25

26 32. The Nevada Supreme Court has recognized five factors to consider in determining
27 whether other alternative security for less than a full supersedeas bond:
28

- (1) the complexity of the collection process;
- (2) the amount of time required to obtain a judgment after it is affirmed on appeal;
- (3) the degree of confidence that the district court has in the availability of funds to pay the judgment;
- (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and
- (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. at 836, 122 P.3d at 1254.

33. The Court finds that the facts and circumstances of this case do not warrant allowing an alternative security other than a supersedeas bond.

34. Because Plaintiffs only asset being submitted as alternative to a bond is the Carson City Property, which has a mortgage on it, and a retirement account, the complexity of collecting on the proposed collateral is very high.

35. Because the current appeal is based on a Rule 54(b) certification, there will be a significant amount of time between an appeal and when Breckenridge can obtain a judgment in this case. Breckenridge will be required to complete the process of obtaining a judgment.

36. The Court is not confident that there will be funds available to pay Breckenridge for any judgment. Plaintiffs testimony demonstrates that their income is such that they would not be able to pay such a judgment.

37. Finally, although Plaintiffs do not appear to be in a strong financial situation, there is no evidence indicating that requirement a full supersedeas bond would place any other creditor in an unsecure position.

1
2 38. As noted above the Court finds that that a reasonable fair market monthly rental rate for
3 the Property is \$2,500. The Court further finds that a reasonably expected judgment against Plaintiffs
4 would be the amount of rent due from February 1, 2019 to the culmination of the appeal, which is
5 anticipated to be an approximate 56 months and which would equal \$140,000.00
6

7 39. Based on this findings and conclusions, the Court finds that Breckenridge is entitled to a
8 permanent writ of restitution.

9 40. The Court further finds, however, that Plaintiffs should be granted a stay pending appeal
10 which would become effective upon the posting of a \$140,000.00 supersedeas bond from which
11 Breckenridge may recover its damages should it prevail on appeal. Plaintiffs shall have until November
12 12, 2021 to post the supersedeas bond.
13

14 41. The Court authorizes the issuance of a permanent writ of restitution effective November
15 15, 2021 allowing Breckenridge to remove the Plaintiffs and their belongings from the Property. Should
16 Plaintiffs post the \$140,000.00 supersedeas bond with the Court by 5:00 p.m. on November 12, 2021, the
17 permanent writ of restitution shall issue, but will be stayed pending the appeal.
18

19 **C. Order**

20 IT IS SO ORDERED.

21 IT IS FURTHER ORDERED that Breckenridge's Motion for Entry of Order Granting Permanent
22 Writ of Restitution and Payment of Overdue Rents is GRANTED IN PART and DENIED IN PART.
23

24 IT IS FURTHER ORDERED that the Permanent Writ of Restitution shall issue effective
25 immediately on November 15, 2021.

26 IT IS FURTHER ORDERED that all other relief sought in Breckenridge's Motion for Entry of
27 Order Granting Permanent Writ of Restitution and Payment of Overdue is DENIED.
28

1 IT IS FURTHER ORDERED that Plaintiffs' Motion for Stay Pending Appeal is GRANTED IN
2 PART and DENIED IN PART.

3 IT IS FURTHER ORDERED that Plaintiffs' shall be granted a stay pending appeal upon the
4 posting of a \$140,000.00 supersedeas bond.

5 /././

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1 IT IS FURTHER ORDERED that Plaintiffs' shall have until November 12, 2021 to post the
2 \$140,000.00 supersedeas bond, otherwise no stay pending appeal shall be granted and Breckenridge may
3 proceed with execution upon the writ of restitution.

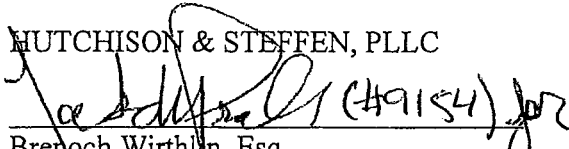
4 DATED this 3rd day of November 2021.

5
6 
7
8 DISTRICT COURT JUDGE

9 Respectfully submitted by:

10 Dated this 28th day of October, 2021

11 HUTCHISON & STEFFEN, PLLC

12 
13 Brenoch Wirthlin, Esq.
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15 10080 W. Alta Dr., Suite 200
16 Las Vegas, NV 89145
Attorneys for Defendant, Breckenridge
Property Fund 2016, LLC

Approved as to form and content by:

Dated this _____ day of _____, 2021

MILLWARD LAW, LTD.

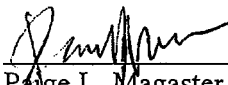
17 Refused to sign

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18 Approved as to form and content by:

19 Dated this 28 day of October, 2021

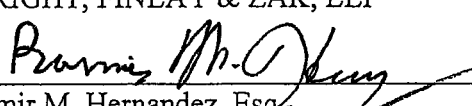
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Approved as to form and content by:

27 Dated this 22nd day of October, 2021

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Legal Title Trust, by U.S. Bank, National
Association, as Legal Title Trustee, Fay
Servicing LLC, and Shellpoint Mortgage
Servicing, LLC

FILED

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TANYA E. LANE
CLERK, JUDICIAL DISTRICT COURT
THIRD JUDICIAL DISTRICT

Case No: 18-CV-01332

Dept.: II

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

KATHY THOMAS

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.)

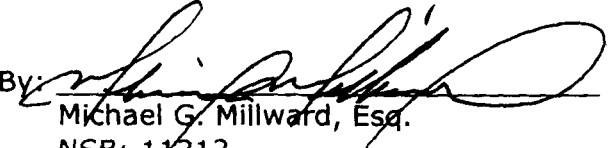
**EX PARTE MOTION FOR
ADDITIONAL TIME
TO OBTAIN SUPERSEDEAS BOND**

1 COME NOW, Plaintiffs ELLIS LINCICOME and VICENTA LINCICOME by and through their
2 attorney, Michael G. Millward, Esq., of Millward Law, Ltd., and Justin M. Clouser, Esq., of Clouser
3 Hempen Wasick Law Group, Ltd., and hereby move this Court for an ex parte order extending
4 the time for Plaintiffs to obtain a supersedeas bond.

5 This motion is supported by the Memorandum of Points and Authorities attached hereto,
6 the documents previously admitted as evidence in this Court, and the Declaration of Michael G.
7 Millward, Esq., provided herewith.

8 Respectfully submitted 12th day of November, 2021

9 **MILLWARD LAW, LTD.**

10
11 By: 
12 Michael G. Millward, Esq.
13 NSB: 11212
14 Attorney for Plaintiffs
15 1591 Mono Ave.
16 Minden, NV 89423
17 (775) 600-2776
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1 Courts order resulting from the October 13, 2021 hearing is served upon Plaintiffs' counsel so
2 that Plaintiffs may have an opportunity to obtain a bond before the Writ of Restitution to be
3 issued becomes effective.

4 Without an order of additional time, the timeframe given by the Court at the October 13,
5 2021 hearing will have not served the intended purpose of providing the Lincicomes' with
6 sufficient opportunity to obtain a supersedeas bond before a Writ of Restitution becomes
7 effective. Accordingly, the Lincicomes respectfully request the Court provide the requested
8 additional time.

9 Dated this 12th day of November, 2021.

10 **MILLWARD LAW, LTD.**

11
12
13 By: 

14 Michael G. Millward, Esq.

15 NSB: 11212

16 Attorney for Plaintiffs

17 1591 Mono Ave.

18 Minden, NV 89423

19 (775) 600-2776
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21
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1 On the 12th day of November, 2021, pursuant NRCP 5(b) I, Ashely Voss, an employee of
2 Millward Law, Ltd., caused to be deposited for delivery Plaintiffs' *Ex Parte Motion for Additional*
3 *Time to Obtain Supersedeas Bond* and the proposed Order upon Plaintiffs' *Ex Parte Motion for*
4 *Additional Time to Obtain Supersedeas Bond*, by placing a true copy thereof in a sealed envelope
5 for collection and mailing by first class mail, postage prepaid, in Minden, Nevada, on said date,
6 following ordinary business practices to:

7 Shadd A. Wade, Esq.
8 ZIEVE, BRODNAX & STEEL
9 9435 W. Russel Rd., Suite 120
10 Las Vegas, NV 89148
11 *Attorney for Sables, LLC*

12 Scott R. Lachman, Esq.
13 Darren T. Brenner, Esq.
14 ACKERMAN, LLP
15 1635 Village Center Circle, Suite 200
16 Las Vegas, NV 89134
17 *Attorney for Bank of America*

18 Matthew K. Schriever, Esq.
19 HUTCHINSON & STEFFEN, PLLC
20 Peccole Professional Park
21 10080 West Alta Drive, Suite 200
22 Las Vegas, NV 89145
23 *Attorney for Breckenridge Property Fund*
24 *2016, LLC*

25 Casey J. Nelson, Esq.
26 WEDGEWOOD, LLC
27 Office of the General Counsel
28 2320 Potosi Street, Suite 130
Las Vegas, NV 89146
Attorney for Breckenridge Property Fund
2016, LLC

Christopher A. J. Swift, Esq.
Ramir M. Hernandez, Esq.
WRIGHT FINLAY & ZAK, LLP
7785 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
Attorney for Fay Servicing, LLC and US
Bank Prof-2013-M4 Legal Title Trust.

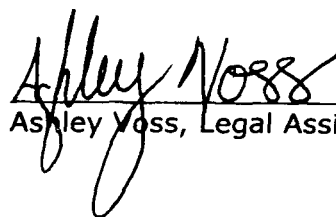

Ashley Voss, Legal Assistant

Exhibit 1

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1. That I am an attorney practicing law with the firm Millward Law, Ltd.;

2. That I represent Plaintiffs Ellis and Vicenta Lincicome concerning Third Judicial District Case No. 18-CV-01332;

4. That on October 26, 2021, I was able to review the proposed order provided by Todd W. Prall on behalf of Breckenridge Property Fund 2016, LLC, and no objection to the same was made on behalf of the Lincicomes;

6. That based upon consideration of prior applications by providers, 21 additional days will provide the Lincicomes with sufficient time to submit their respective applications with the Court's order for issuance of a supersedeas bond.

DATED this 11th day of November, 2021.


Michael G. Millward, Esq.

FILED

2021 NOV 16 PM 2:40

TANYA SCHEFF
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Lindsey Mable

1 John T. Steffen, Esq. (4390)
2 Brenoch R. Wirthlin, Esq. (10282)
3 Alex R. Velto, Esq. (14961)
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14 caseynelson@wedgewood-inc.com
15 *Attorney for Defendant, Breckenridge, and Cross-Plaintiff*
16 *Breckenridge Property Fund 2016, LLC*

THIRD JUDICIAL DISTRICT COURT
LYON COUNTY, NEVADA

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

16 Plaintiff,

17 v.

18 SABLES, LLC, a Nevada limited liability company, as
19 Trustee of the Deed of Trust given by Vicenta Lincicome
20 and dated 5/23/2007; FAY SERVICING, LLC, a Delaware
21 limited liability company and subsidiary of Fay Financial,
22 LLC; PROF-2013-MF LEGAL TITLE TRUST by U.S.
23 BANK, N.A., as Legal Title Trustee; for BANK OF
24 AMERICA, N.A.; BRECKENRIDGE PROPERTY FUND
25 2016; NEWREZ LLC dba SHELLPOINT MORTGAGE
26 SERVICING, LLC; 1900 CAPITAL TRUST II, BY U.S.
27 BANK TRUST NATIONAL ASSOCIATION; MCM-
28 2018-NPL2 and DOES 1-50.,

Defendants.

AND RELATED MATTERS.

Case No.: 18-CV-01332
Dept No.: II

**BRECKENRIDGE PROPERTY
FUND 2016'S OPPOSITION TO
PLAINTIFFS' IMPROPER EX
PARTE MOTION FOR
ADDITIONAL TIME TO OBTAIN
SUPERSEDEAS BOND
-AND-
REQUEST FOR SANCTIONS**

Defendant in Intervention/Counterclaimant Breckenridge Property Fund 2016, LLC
("Breckenridge" or "Breckenridge"), by and through its attorneys of record, Hutchison & Steffen,

1 submits this Opposition to Plaintiffs' Albert Ellis Lincicome, Jr. and Vicenta Lincicome ("Plaintiffs")
2 Improper Ex Parte Motion for Additional Time to Obtain Supersedeas Bond ("Motion") and Request for
3 Sanctions. This Opposition is based on the following memorandum of points and authorities and all
4 exhibits attached thereto, including the declaration of Todd W. Prall, Esq. ("Prall Declaration"), any oral
5 argument the Court may entertain at a hearing on this matter, and all papers and pleadings on file herein.
6

7 DATED this 16th day of November, 2021.

8 HUTCHISON & STEFFEN, PLLC

9 
10 John T. Steffen (4390)
11 Brenoch R. Wirthlin (10282)
12 Alex R. Velto (14961)
13 HUTCHISON & STEFFEN, PLLC
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15 10080 West Alta Drive, Suite 200
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18 Casey J. Nelson, Esq. (12259)
19 Wedgewood, LLC
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22 Las Vegas, Nevada 89146
23 caseynelson@wedgewood-inc.com
24 *Attorney for Breckenridge Property Fund 2016,*
25 *LLC*
26
27
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

1. On October 3, 2019, Breckenridge filed its Intervenor's Counterclaim ("Counterclaim") pursuant to which Breckenridge asserted, among other things, claims for quiet title and writ of restitution regarding that certain real property at issue located at 70 Riverside Drive, Dayton, Nevada 89403 ("Property").

2. On December 31, 2018, the Court entered an order enjoining the foreclosure on the Property if the Plaintiffs timely posted of a bond in the amount of \$172,610.67 and additional security in the amount of \$2,105.10 per month thereafter.

3. Plaintiffs failed to post the bond and the Property went to foreclosure sale on or about January 4, 2019, at which time Breckenridge purchased the Property at the NRS 107 foreclosure sale.

4. On March 18, 2021, Breckenridge filed its Motion for Summary Judgment ("Breckenridge's MSJ") seeking judgment on all counterclaims.

5. On June 23, 2021, this Court entered its Order on Breckenridge's Motion for Summary Judgment ("Order") pursuant to which it granted the Breckenridge's MSJ in its entirety.

6. In the Order this Court made numerous findings of fact and conclusions of law, adopted herein by reference, including but not limited to the findings that Breckenridge purchased the Property at a proper foreclosure sale and is therefore entitled to summary judgment regarding its claims to title of the Property as against Plaintiffs.

7. On September 9, 2021, Breckenridge filed a Motion for Entry of Order Granting Permanent Restitution and Payment of Overdue Rents.

8. On September 14, 2021, Plaintiffs filed and served their Motion for Stay Pending Appeal.

9. On October 12, 2021, at 1:30 p.m., after further briefing had been filed on the motions filed on October 9, 2021 and September 14, 2021, the Court held a hearing on the two motions ("Hearing").

1 10. Based on the evidence presented at the Hearing, the Court granted Plaintiffs' Motion for
2 Stay Pending Appeal, but required Plaintiffs to post a supersedeas bond of \$140,000.00 to be paid by
3 November 12, 2021, at 5:00 p.m. for the stay to be entered.

4 11. The Court also granted Breckenridge's request for a permanent writ of restitution and
5 ordered that a permanent writ of restitution should be issued that states it is effective as of November 15,
6 2021 if no supersedeas bond was posted by November 12, 2021.

7 12. Plaintiffs posted no supersedeas bond on November 12, 2021.

8 13. Instead, in an underhanded and attempt to further delay and deny Breckenridge its rights,
9 on November 12, 2021, Plaintiffs filed their Motion seeking additional time in which to post a
10 supersedeas bond.

11 14. Neither Plaintiffs nor their counsel advised Breckenridge of this Motion.

12 15. Further evidencing Plaintiffs' bad faith, they filed the Motion on an improper *ex parte*
13 basis, and did not even bother to email Breckenridge's counsel a copy.

14 16. Rather, as Plaintiffs had intended, Breckenridge did not even receive the Motion until late
15 in the day on Monday, November 15.

16 17. Breckenridge's counsel immediately prepared this Opposition.

17 18. Further, Plaintiffs falsely attempt to excuse their failure to obtain a bond in the time
18 provided by the Court by claiming that Plaintiffs had not been provided with a "notice of entry of a copy
19 of any order that has been entered" and thereby claiming that the "Plaintiffs have not had the ability to
20 proceed to obtain a bond without a cop (*sic*) of an entered order being provided with sufficient time to
21 make application and have the application considered." *See* Motion at p. 3.

22 19. Plaintiffs' statements are false and misleading for at least three (3) reasons. First, in
23 addition to the dubious nature of Plaintiffs' claim to be unable to obtain a bond without a notice of entry
24 of order, Plaintiffs' counsel caused the delay at issue by failing to even respond to the proposed order
25 provided by Breckenridge's counsel, despite numerous calls and emails. Second, neither Plaintiffs nor
26 their counsel ever once stated to Breckenridge that any order was needed to obtain a supersedeas bond.
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1 And third, this is yet another attempt to further delay these proceedings in what has become Plaintiffs'
2 bad faith pattern throughout this litigation.

3 20. Regarding Plaintiffs' own delay of entry of what they claim is the necessary "notice of
4 entry," Plaintiffs' delay is evidenced by the fact that on October 22, 2021, pursuant to the Court's oral
5 ruling and direction from the Hearing held on October 13, 2021, counsel for Breckenridge Todd Prall,
6 Esq., sent an email to all counsel in the Action attaching a proposed Order Concerning: Breckenridge
7 Property Fund 2016, LLC's Motion for Entry of Order Granting Permanent Writ of Restitution and
8 Payment of Overdue Rents and Plaintiffs' Motion for Stay Pending Appeal ("Proposed Order") for
9 review and approval. *See* Declaration of Todd Prall ("Prall Declaration"), attached as **Exhibit A**, at ¶ 3.

10 21. The email that Mr. Prall used for Plaintiffs' counsel, Michael Millward, was
11 michael@millwardlaw.com. *Id.* at ¶ 3; *see* October 22, 2021 email, attached as **Exhibit B**.

12 22. Mr. Prall received responses approving the Proposed Order from all counsel **except for**
13 **Mr. Millward** on that same day, October 22, 2021. *See* Prall Declaration, **Exhibit A**, at ¶ 4.

14 23. In fact, even in the Motion, Mr. Millward states that he did not even review the Proposed
15 Order until October 26, 2021. *See* Motion at p. 3, lines 16-19.

16 24. Even then, Plaintiffs' counsel admits that "[n]o objection (*sic*) to the [Proposed] Order
17 was was (*sic*) provided to counsel for Breckenridge at the time." *Id.*

18 25. Yet, despite Plaintiffs' conveniently – and only currently – claimed need for a notice of
19 entry of order to obtain a bond, **at no time did Mr. Millward reach out to Breckenridge's counsel to**
20 **express this purported need**. *See* Prall Decl., at ¶ 9.

21 26. Not only did Mr. Millward not provide any objection to Breckenridge's counsel on
22 October 26, he conveniently leaves out the fact that he did not even respond to Breckenridge's counsel
23 at that time. **In fact, Mr. Millward never responded to the Proposed Order**. *Id.* at ¶ 8.

24 27. Thus, on October 27, 2021, as Mr. Prall still had not heard anything from Mr. Millward
25 regarding the Proposed Order, he sent two additional emails to Mr. Millward informing him that he (Mr.
26 Prall) had not yet received **any response** from Mr. Millward regarding the Proposed Order, and requested
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1 that Mr. Millward provide a response to the Proposed Order as soon as possible. *See* Prall Declaration,
2 **Exhibit A**, at ¶ 5.

3 28. Initially, Mr. Prall gave Mr. Millward until the end of the business day on October 28,
4 2021, to provide a response regarding the Proposed Order. However, because the following day, Friday,
5 October 29, 2021, was Nevada Day, Mr. Prall sent Mr. Millward a later email informing him that Mr.
6 Prall needed to hear from him by noon on October 28, 2021, or Mr. Prall would submit the Proposed
7 Order. *Id.*; *see* Emails to Mr. Millward dated October 27, 2021, attached as **Exhibit C**.

8 29. Moreover, in an attempt to move the process along more quickly, and due to Mr.
9 Millward's unresponsiveness, after sending these emails, Mr. Prall also called Mr. Millward's office and
10 spoke to Becky, who is Mr. Millward's paralegal. She requested that Mr. Prall send the proposed order
11 to her email address at becky@milwardlaw.com. *See* Prall Declaration, **Exhibit A**, at ¶ 6. Mr. Prall then
12 forwarded the Proposed Order to Becky's email address, and also forwarded the emails that he had sent
13 to Mr. Millward earlier that day. *Id.* at ¶ 7; *see* Emails sent to Becky, dated October 27, 2021, attached
14 as **Exhibit D**.

15 30. Despite Mr. Prall's numerous emails and call to Mr. Millward regarding the Proposed
16 Order, Mr. Prall never received a phone call, email or any other correspondence whatsoever from Mr.
17 Millward regarding the Proposed Order. *See* Prall Declaration, **Exhibit A**, at ¶ 8.

18 31. Accordingly, the Proposed Order was submitted to the Court without Mr. Millward's
19 signature on the afternoon of October 28, 2021. *Id.* at ¶ 8.

20 32. Mr. Prall's office received the file-stamped order back from the Court on November 9,
21 2021. The notice of entry was submitted November 15, 2021. *Id.* at ¶ 10.

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1 II. ARGUMENT

2 A. Plaintiffs should not be permitted to benefit from their own wrong, including their
3 deliberate delay of entry of the Proposed Order and meritless claim that they did not
4 have time to obtain the required bond.

5 It is axiomatic under Nevada law that “one may not profit through his own wrong.” *See Choate*
6 *v. Ransom*, 74 Nev. 100, 103, 323 P.2d 700, 702 (1958) (“The reason, and the only reason, for this rule
7 is that to permit a recovery in which the negligent spouse would have a community interest would violate
8 the rule that one may not profit through his own wrong.”); *Steen v. Gass*, 85 Nev. 249, 253, 454 P.2d 94,
9 96 (1969) (“a principle that one may profit by his own wrong—a theory obnoxious to both law and
10 equity.”). Here the Plaintiffs’ bad faith and clear delay is obvious. Plaintiffs claim they did not have
11 time to obtain a supersedeas bond, yet Plaintiffs’ counsel fails to mention that he deliberately failed to
12 respond to numerous attempts to obtain his comments and approval for the submission of the Proposed
13 Order, which Plaintiffs themselves claim they needed to obtain the required bond. Plaintiffs cannot
14 deliberately delay the entry of the order they claim they need, then complain that the order was not entered
15 in time. This is simply a pattern of delay by Plaintiffs as evidenced by the fact that the Court previously
16 entered an order enjoining foreclosure if the required bond was posted; Plaintiffs never filed the required
17 bond in that instance either.

18 Further, aside from a request for an order shortening time, *ex parte* motions are generally
19 disfavored, as the District of Nevada has clearly recognized:

20 Courts do not deviate from the adversarial system without very good reason for
21 doing so. Ex parte requests for relief are disfavored. *See, e.g., United States v.*
22 *Thompson*, 827 F.2d 1254, 1257 (9th Cir.1987). “Given the value our system places on
23 the adversarial process, it is not surprising that the opportunities for legitimate ex parte
24 applications are extremely limited.” *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193
25 (C.D.Cal.1989). The Local Rules for this District make clear that ex parte motions are
26 only permitted when the movant establishes “compelling reasons” for not providing notice
27 to the opposing party. See Local Rule 7–5(c). This “compelling reasons” standard is a
28 stringent one that is not easily met. Generally speaking, meeting the “compelling reasons”
standard requires a showing that either (1) providing notice to the opposing party would
enable it to frustrate the movant’s ability to obtain relief or (2) the temporal urgency of the
matter is such that immediate and irreparable harm would occur if there is any delay in
obtaining relief. *See, e.g., Mission Power Eng’g Co. v. Continental Cas. Co.*, 883 F.Supp.

1 488, 490 (C.D.Cal.1995). Such circumstances must be shown with particularized
2 detail concurrently with the filing of the ex parte request, and a certification should
3 generally be made through a declaration specifying the reasons why notice to the
4 opposing party is not possible.

5 *Maxson v. Mosaic Sales Sols. U.S. Operating Co., LLC*, No. 2:14-CV-02116-APG, 2015 WL 4661981,
6 at *1 (D. Nev. July 29, 2015) (emphasis added). In this case, the Motion provides no reason that proper
7 notice and communication could not have been provided to the other parties to the case, including
8 Breckenridge. Further, the Motion provides no specific evidence that indicates the signed final order was
9 required for Plaintiffs to submit applications for supersedeas bond. Indeed, knowing that time it takes to
10 get an order entered where counsel for all the parties have offices in different parts of Nevada, Plaintiffs
11 did not mention this issue at the hearing when the Court stated that the supersedeas bond needed to be
12 submitted within 30 days. The reason is evident: the Plaintiffs' Motion is an unfortunate, and improper,
13 attempt to deliberately and continuously delay and deny Breckenridge its rights. This inappropriate
14 gamesmanship by Plaintiffs should not be permitted. Accordingly, the Motion should be denied.

15 III. COUNTER-MOTION FOR SANCTIONS

16 In this instance, sanctions against Plaintiffs are warranted. The Motion is brought in bad faith
17 with no reasonable basis and without citation to a single case or statute supporting the relief warranted.
18 Worse yet, the Motion is an obvious attempt to further Plaintiffs' unlawful pattern of delay and
19 deprivation of Breckenridge's rights as ordered by this Court. Accordingly, Breckenridge requests
20 sanctions in the amount of \$1,617.50. against Plaintiffs as attorney fees for needing to respond to the
21 instant frivolous and bad faith Motion.¹

22 ///

23
24 ¹ Regarding the requested sanction, in *Brunzell* the Court determined that factors considered in awarding attorney fees at the
25 conclusion of a matter – as was the case in *Brunzell* – include “(1) the qualities of the advocate: his ability, his training,
26 education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
27 importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they
28 affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the
29 work; (4) the result: whether the attorney was successful and what benefits were derived.” *Brunzell v. Golden Gate Nat. Bank*,
30 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Here the factors are met as the attorneys of Hutchison & Steffen are highly rated
31 and experienced attorneys, the result at issue is the order granting the writ of restitution, the work performed by the lawyers
32 at issue involved a necessary response to Plaintiffs' improper Motion including 2.9 hours at Brenoch Wirthlin's hourly rate
33 of \$395/hour, and 2.1 hours at Todd Prall's hourly rate of \$225/hour. Breckenridge anticipates a favorable result.


1 **IV. CONCLUSION**

2 For all these reasons, Breckenridge respectfully requests that this Court deny Plaintiffs' Motion
3 in its entirety, issue the writ of permanent restitution which Breckenridge has requested – and to which
4 it is now entitled due to lack of posting of the required bond – and grant such and further relief as the
5 Court deems appropriate.

6 Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding
7 document filed in this court does not contain the social security number of any person

8 DATED this 16th day of November, 2021.

9 HUTCHISON & STEFFEN, PLLC

10
11 
12 _____
13 John T. Steffen (4390)
14 Brenoch R. Wirthlin (10282)
15 Alex R. Velto, Esq. (14961)
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17 Las Vegas, NV 89145
18 bwirthlin@hutchlegal.com

17 Wedgewood, LLC
18 Office of the General Counsel
19 Casey J. Nelson, Esq. (12259)
20 2320 Potosi Street, Suite 130
21 Las Vegas, Nevada 89146
22 E-mail: caseynelson@wedgewood-inc.com

23 *Attorneys for Breckenridge Property Fund 2016, LLC*
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a true and correct copy of the
**BRECKENRIDGE PROPERTY FUND 2016'S OPPOSITION TO PLAINTIFFS' IMPROPER
EX PARTE MOTION FOR ADDITIONAL TIME TO OBTAIN SUPERSEDEAS BOND AND
COUNTERMOTION FOR SANCTIONS** 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

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

Darren T. Brenner, Esq.
Ramir M. Hernandez, Esq.
WRIGHT FINLAY & ZAK, LLP
7785 W. Sahara Avenue, #200
Las Vegas, NV 89117
*Attorney for Fay Servicing, LLC and
US Bank Prof-2013-M4 Legal Title Trust*

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

DATED this 16th day of November, 2021.


An Employee of HUTCHISON & STEFFEN

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EXHIBIT PAGE ONLY

EXHIBIT A

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

1 John T. Steffen (4390)
2 Brenoch R. Wirthlin (10292)
3 Alex R. Velto (14961)
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11 Casey J. Nelson, Esq. (12259)
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17 Fax: (310) 730-5967
18 caseynelson@wedgewood-inc.com

19 *Attorneys for Intervenor*

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

22 ALBERT ELLIS LINCICOME, JR., and
23 VICENTA LINCICOME,

24 Plaintiff,

25 v.

26 SABLES, LLC, a Nevada limited liability
27 company, as Trustee of the Deed of Trust given
28 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.; and DOES 1-50.,

Defendants.

BRECKENRIDGE PROPERTY FUND 2016,
LLC,

Defendant in Intervention.

Case No.: 18-CV-01332
Dept No.: II

**DECLARATION OF TODD W. PRALL IN
SUPPORT OF OPPOSITION TO EX PARTE
MOTION FOR ADDITIONAL TIME TO
OBTAIN SUPERSEDEAS BOND**

1 1. I am an attorney for Defendant and Counter-claimant Breckenridge Property Fund 2016,
2 LLC ("Breckenridge") in the case entitled *Lincicome v. Sables, LLC et al.*, Case No. 18-CV-01332,
3 currently pending in the Third Judicial District Court of the State of Nevada (the "Action"), and I have
4 personal knowledge of the facts set forth herein.

5 2. I make this declaration in support of Breckenridge's Opposition to the Ex Parte Motion
6 for Additional Time to Obtain Supersedeas Bond (the "Opposition").

7 3. October 22, 2021, pursuant to the Court's oral ruling and direction from the hearing held
8 on October 13, 2021, I sent an email to all counsel in the Action attaching a proposed Order
9 Concerning: Breckenridge Property Fund 2016, LLC's Motion for Entry of Order Granting Permanent
10 Writ of Restitution and Payment of Overdue Rents and Plaintiffs' Motion for Stay Pending Appeal for
11 review and approval. The email I used for Mr. Millward was michael@millwardlaw.com. A true and
12 correct copy of the October 22, 2021 email is attached to the Opposition as Exhibit B.

13 4. I received responses approving the proposed order from all counsel except for Mr.
14 Millward on that same day, October 22, 2021.

15 5. On October 27, 2021, I still had not heard anything from Mr. Millward. I sent two
16 emails to Mr. Millward informing him that I have yet received any response from him concerning the
17 proposed order and requested that he provide a response to me as soon as possible. Initially, I gave him
18 until end of business day on the following day, October 28, 2021, to provide me with a response.
19 However, because the following day, Friday, October 29, 2021, was Nevada Day, an observed state
20 holiday, I sent him a later email informing him that I needed to hear from him by noon on October 28,
21 2021, or I would submit the proposed order. A true and correct copy of the emails sent on October 27,
22 2021 to Mr. Millward are attached to the Opposition as Exhibit C.

23 6. After sending these emails, I also called Mr. Millward's office. I spoke to Becky, who is
24 Mr. Millward's paralegal. She requested that I send the proposed order to her email address at
25 becky@milwardlaw.com.

26 7. I forwarded the proposed order I had previously sent to Mr. Millward to Becky's email
27 address. I also forwarded the emails I had sent to Mr. Millward earlier that day to Becky's email
28

1 address. True, and correct copies of the emails I sent to Becky are attached to the Opposition as Exhibit
2 D.

3 8. I never received a phone call, email or any other correspondence from Mr. Millward.
4 Therefore, the proposed order was submitted to the Court without his signature on the afternoon of
5 October 28, 2021.

6 9. Neither I nor anyone at my office received any correspondence or communications
7 from Mr. Millward at all since the hearing on October 13, 2021 through the time we received the
8 improper ex parte Motion.

9 10. This office did not receive the filed-stamped order back from the Court until November
10 9, 2021. The Notice of Entry of the proposed order was submitted to the Court on November 15, 2021.

11 11. I declare the forgoing under the penalty of perjury for the laws of the State of Nevada.

12
13 Dated: 16 Nov 2021

14 
Todd W. Prall

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT B

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Danielle Kelley

From: Todd W. Prall
Sent: Friday, October 22, 2021 9:34 AM
To: paige.magaster@akerman.com; michael@millwardlaw.com;
rhernandez@wrightlegal.net; scott.lachman@akerman.com;
melanie.morgan@akerman.com; jclouser@clouserlaw.com; dbrenner@wrightlegal.net;
swade@zbslaw.com
Cc: Danielle Kelley; Brenoch R. Wirthlin
Subject: Lincecome v. Bank of America et al. - Proposed Order
Attachments: Order re Motion for permanent writ of possession and order on motion for stay FINAL.docx

Counsel,

Please find attached a proposed order on the hearing last week for your review. Please let me know if you approve. Also, I have not yet put on signature blocks for all of the other parties. I am not sure if the court requires it or not. If you can affirm what the practice has been in this case and confirm who represents which parties so we can insert that information in as necessary.

Thank you.

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EXHIBIT PAGE ONLY

EXHIBIT C

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Danielle Kelley

From: Todd W. Prall
Sent: Wednesday, October 27, 2021 1:53 PM
To: Ramir M. Hernandez; paige.magaster@akerman.com; michael@millwardlaw.com; scott.lachman@akerman.com; melanie.morgan@akerman.com; jclouser@clouserlaw.com; Darren T. Brenner; swade@zbslaw.com
Cc: Danielle Kelley; Brenoch R. Wirthlin; Lisa Cox
Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

Michael,

Because of how long we have waited, I need a response by noon tomorrow. I expect to submit everything to the Court if I do not hear from you by noon.

Thank you.

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Cc: Danielle Kelley <dkelley@hutchlegal.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Lisa Cox <lcox@wrightlegal.net>
Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

Michael,

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Thank you for your immediate attention to this matter.

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Cc: Danielle Kelley <dkelley@hutchlegal.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Lisa Cox <lcox@wrightlegal.net>
Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

Hi Todd,

We approve. I've revised with the appropriate signature block for all parties. I believe we still need wet ink signatures in the third judicial district, so I will print the order and mail it to you today with our signature.

Thanks,
Rami

Ramir M. Hernandez, Esq.

Attorney



WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

7785 W. Sahara Ave., Suite 200
Las Vegas, NV, 89117
(702) 983-5142 Direct
(818) 606-6791 Cell
(702) 946-1345 Fax
(702) 475-7964 Main Ext. 7008
rhernandez@wrightlegal.net

**Wright, Finlay & Zak: Your Counsel for
California, Nevada, Arizona, Washington,
Oregon, Utah, Idaho, Wyoming, Hawaii, South
Dakota, and Texas**



NAMWOLF
LAW FIRM MEMBER

For escalated communications on matters, please contact
the associate's supervising attorney, Darren T. Brenner
dbrenner@wrightlegal.net and (702) 608-1871.

PLEASE BE ADVISED THAT THIS FIRM IS A DEBT
COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY
INFORMATION OBTAINED WILL BE USED FOR THAT
PURPOSE.

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recipient, you are hereby notified that any distribution or copy of this
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7964 and arrangements will be made for the return of this material.
Thank You.

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Cc: Danielle Kelley <dkelley@hutchlegal.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>

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Thank you.

Todd W. Prall
Senior Counsel



HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

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EXHIBIT PAGE ONLY

EXHIBIT D

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Danielle Kelley

From: Todd W. Prall
Sent: Wednesday, October 27, 2021 2:03 PM
To: becky@millwardlaw.com
Subject: FW: Lincecome v. Bank of America et al. - Proposed Order

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Cc: Danielle Kelley <dkelley@hutchlegal.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Lisa Cox <lcx@wrightlegal.net>
Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

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Cc: Danielle Kelley <dkelley@hutchlegal.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Lisa Cox <lcx@wrightlegal.net>
Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

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<lcox@wrightlegal.net>

Subject: RE: Lincecome v. Bank of America et al. - Proposed Order

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Ramir M. Hernandez, Esq.

Attorney



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NAMWOLF
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Todd W. Prall
Senior Counsel



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Cc: michael@millwardlaw.com
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Attachments: Order re Motion for permanent writ of possession and order on motion for stay
FINAL_rmh revisions.docx

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Attorney



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Senior Counsel



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[EXTERNAL This email originated outside the network. Please use caution when opening any attachments or responding to it.]

FILED

2021 NOV 17 AM 9:14

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

KATHY THOMAS
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.

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; 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 EX
PARTE MOTION**

On November 15, 2021, the Plaintiffs filed an Ex Parte Motion for Additional Time. The
Court has reviewed the Motion and finds no support for the relief requested.

///

1 Therefore, good cause appearing, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.
2

3 DATED: This 17th day of November, 2021.
4

5 
6

7 HON. LEON ABERASTURI
8 DISTRICT JUDGE
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28

Certificate of Mailing

I hereby certify that I, Hiedi Andersen, 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

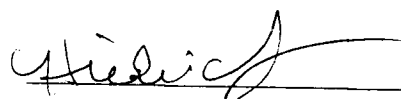
Scott R. Lachman, Esq.
Akerman LLP
1635 Village Center Cir. Ste. 200
Las Vegas, NV 89134

Matthew K. Schriever, Esq.
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 17th day of November, 2021.



Employee of Hon. Leon Aberasturi

FILED

2021 NOV 22 AM 9:52

JANVA S. LINDSEY
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Bayley Baptist

John T. Steffen, Esq. (4390)
Brenoch R. Wirthlin, Esq. (10282)
Alex R. Velto, Esq. (14961)
HUTCHISON & STEFFEN, PLLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel (702) 385-2500
Fax (702) 385-2086
bwirthlin@hutchlegal.com

Casey J. Nelson, Esq. (12259)
Wedgewood, LLC
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, Nevada 89146
Tel (702) 305-9157
Fax (310) 730-5967
caseynelson@wedgewood-inc.com
Attorney for Defendant, Counterclaimant, and Cross-Plaintiff
Breckenridge Property Fund 2016, LLC

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

ALBERT ELLIS LINCICOME, JR., and
VICENTA LINCICOME,

Plaintiff,

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 MATTERS.

Case No.: 18-CV-01332
Dept No.: II

PERMANENT WRIT OF RESTITUTION

1 THE STATE OF NEVADA TO THE SHERIFF OR CONSTABLE OF LYON COUNT, GREETING.

2 WHEREAS on October 3, 2019, Defendant in Intervention/Counterclaimant Breckenridge
3 Property Fund 2016, LLC ("Counterclaimant") filed its Intervenor's Counterclaim ("Counterclaim")
4 pursuant to which Counterclaimant asserted, among other things, claims for quiet title and writ of
5 restitution regarding that certain real property at issue located at 70 Riverside Drive, Dayton, Nevada
6 89403 ("Property");
7

8 WHEREAS on March 18, 2021, Counterclaimant filed its Motion for Summary Judgment
9 ("Counterclaimant's MSJ") seeking judgment on all counterclaims;

10 WHEREAS on June 23, 2021, this Court entered its Order on Breckenridge Motion for Summary
11 Judgment ("Order") pursuant to which it granted the Counterclaimant's MSJ in its entirety;
12

13 WHEREAS in the Order this Court made numerous findings of fact and conclusions of law,
14 adopted herein by reference, including but not limited to the findings that Counterclaimant purchased the
15 Property at a proper foreclosure sale and is therefore entitled to summary judgment regarding its claims
16 to title of the Property as against plaintiffs Albert Ellis Lincicome, Jr. and Vicenta Lincicome;
17

18 WHEREAS on September 9, 2021, Counterclaimant filed a Motion for Entry of Order Granting
19 Permanent Restitution and Payment of Overdue Rents.

20 WHEREAS on September 14, 2021, Plaintiffs filed and served their Motion for Stay Pending
21 Appeal.

22 WHEREAS on October 12, 2021, at 1:30 p.m., after further briefing had been filed on the motions
23 filed on October 9, 2021 and September 14, 2021, the Court held a hearing on the two motions.
24

25 WHEREAS based on the evidence presented, the Court granted Plaintiff's Motion for Stay
26 Pending Appeal, but required Plaintiffs to post a supersedeas bond of \$140,000.00 to be paid by
27 November 12, 2021, at 5:00 p.m. in order for the stay to be entered.
28

1 WHEREAS the court also granted Counterclaimant's request for a permanent writ of restitution
2 and ordered that a permanent writ of restitution should be issued that states it is effective as of November
3 15, 2021 if no supersedeas bond was posted by November 12, 2021.

4 WHEREAS pursuant to the Order Counterclaimant should have permanent restitution of the
5 Property effective as of November 15, 2021.

6
7 WHEREAS, so long as this writ is delivered to you on or after November 15, 2021 and there has
8 been no supersedeas bond posted with the Court:

9 YOU ARE THEREFORE COMMANDED to take with you the force of the County, if necessary,
10 and cause the said Albert Ellis Lincicome, Jr. and Vicenta Lincicome and any tenants or sub-tenants to
11 be removed from the Property on November 16, 2021 at 9:00 a.m. or as soon as reasonably possible
12 thereafter and allow the Counterclaimant to have permanent peaceable restitution of the same.


13
14 GIVEN UNDER MY HAND this 17th day of November, 2021.

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DISTRICT COURT JUDGE

1 Affirmation pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding document
2 filed in this court does not contain the social security number of any person

3 Respectfully Submitted:
4 HUTCHISON & STEFFEN, PLLC

5 
6
7 John T. Steffen (4390)
8 Brenoch R. Wirthlin (10282)
9 Alex R. Velto (14961)
10 10080 West Alta Drive, Suite 200
11 Las Vegas, NV 89145
12 bwirthlin@hutchlegal.com

13 Wedgewood, LLC
14 Office of the General Counsel
15 Casey J. Nelson, Esq. (12259)
16 2320 Potosi Street, Suite 130
17 Las Vegas, Nevada 89146
18 E-mail: caseynelson@wedgewood-inc.com
19 *Attorney for Defendant, Counterclaimant, and Cross-Plaintiff*
20 *Breckenridge Property Fund 2016, LLC*
21
22
23
24
25
26
27
28