

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 ALBERT ELLIS LINCICOME, JR., AND
4 VICENTA LINCICOME,

5 Appellants,

6 v.

7
8 SABLES, LLC A NEVADA LIMITED
9 LIABILITY COMPANY, AS TRUSTEE OF
10 THE DEED OF TRUST GIVEN BY
11 VICENTA LINCICOME AND DATED
12 5/23/2007; FAY SERVICING, LLC, A
13 DELAWARE LIMITED LIABILITY
14 COMPANY AND SUBSIDIARY OF FAY
15 FINANCIAL, LLC; PROF-2013-M4 LEGAL
16 TITLE TRUST BY U.S. BANK, N.A., AS
17 LEGAL TITLE TRUSTEE; BANK OF
18 AMERICA, N.A.; BRECKENRIDGE
19 PROPERTY FUND 2016, LLC, A UTAH
20 LIMITED LIABILITY COMPANY;
21 NEWREZ, LLC, D/B/A SHELLPOINT
22 MORTGAGE SERVICING, LLC; 1900
23 CAPITAL TRUST II, BY U.S. BANK TRUST
24 NATIONAL ASSOCIATION; AND MCM-
25 2018-NPL2,

26 Respondents.

Supreme Court Case No.
83261

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Clerk of Supreme Court
Court Case No. 83261-
01332

27 **RESPONDENT BRECKENRIDGE PROPERTY FUND 2016, LLC’S
OMNIBUS REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL**

 Comes now Respondent Breckenridge Property Fund 2016, LLC

 (“Breckenridge”), by and through its undersigned counsel of record, Hutchison &
 Steffen, and hereby submits its reply in support of its Motion to Dismiss Appeal
 (“Motion”) as follows:

1 **I. SUMMARY OF REPLY ARGUMENT**

2 In response to the limited oppositions of BANA¹ (“BANA Response”) and
3 the Shellpoint Defendants² (“Shellpoint Response”), Breckenridge confirms it does
4 not seek dismissal of the entirety of the appeal filed by Appellants Albert Ellis
5 Lincicome, Jr., and Vicenta Lincicome (“Appellants”). Rather, Breckenridge
6 seeks dismissal as to Breckenridge and its claims only (“Breckenridge Claims”).³
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9 Regarding the Appellants’ Opposition (“Opposition”) to the Motion, The
10 Appellants’ arguments fail for at least three (3) reasons.
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12 First, the Breckenridge MSJ Order did not receive NRCP 54(b) certification.
13 Unlike the BANA Summary Judgment Order⁴, the Breckenridge MSJ Order did
14 not contain any purported Rule 54(b) certification.
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16 Second, even if there had been a purported Rule 54(b) certification of the
17 Breckenridge MSJ Order, which there was not, such a certification would be
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21 ¹ The term “BANA” is defined as Bank of America, N.A.

22 ² The term “Shellpoint Defendants” is defined to include Prof-2013 M4-Legal Title
23 Trust, by U.S. Bank, National Association, as Legal Title Trustee (“Prof-2013”),
24 NewRez LLC, d/b/a Shellpoint Mortgage Servicing, LLC and Fay Servicing LLC.

25 ³ Defined to include, without limitation, Breckenridge’s Counterclaims (as defined
26 in the Motion) and its crossclaim filed against Prof-2013 (“Crossclaim”).

27 ⁴ Defined as the Order Denying Plaintiffs’ Motion for Partial Summary
Judgment/Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4
Legal Trust, U.S. Bank and Fay Servicing LLC.

1 ineffective as a trial court lacks the authority to certify an order which is not
2 amenable to certification.

3
4 Finally, the Appellants' desire to continue the appeal and improperly include
5 Breckenridge's Claims is a transparent attempt to avoid posting a supersedeas
6 appeal bond. Appellants know that right now, because Breckenridge's Claims
7 have not been fully adjudicated – including without limitation its claim for rents
8 owed by the Appellants – Breckenridge has no monetary judgment on which it can
9 execute. Thus, while Appellants' appeal remains improperly pending against
10 Breckenridge, Appellants can avoid posting an appeal bond because they know
11 Breckenridge has no final judgment on which to collect. Accordingly, the appeal
12 must be dismissed as to Breckenridge and its Claims.
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16 **II. ARGUMENT**

17 **A. The Breckenridge MSJ Order did not receive NRCP 54(b)** 18 **certification, nor could it have. Appellants are simply attempting** 19 **to avoid the requirement to post a supersedeas bond by** 20 **improperly continuing their appeal against Breckenridge.**

21 As noted previously, the Breckenridge MSJ Order is not a final appealable
22 judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424 (2000). The MSJ Order does not
23 contain an award of damages and the trial court has been unable to conduct the
24 necessary proceedings to ascertain the proper amount of damages because of this
25 improperly filed appeal as to Breckenridge. In addition, the Crossclaim has not
26 been resolved.
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1 As the Shellpoint Defendants correctly note in their Response, the Trial
2 Court granted NRCP 54(b) certification as to them as well as BANA. No such
3 certification was granted as to the Breckenridge MSJ Order or Breckenridge, nor
4 was it ever requested by the Appellants. Even if it had been, it could not have been
5 granted, as discussed below.
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8 Appellants argue that simply because the Breckenridge MSJ Order contains
9 language incorporating “legal findings, factual findings and analysis” from the
10 BANA Summary Judgment Order, that somehow constitutes NRCP 54(b)
11 certification as to the Breckenridge MSJ Order, despite the fact that no party ever
12 requested such certification, and the Breckenridge MSJ Order does not contain any
13 such certification. This is inaccurate, and contrary to Nevada law. As this Court is
14 aware, NRCP 54(b) certification requires that the Trial Court “expressly
15 determine” that there is no just reason for delay. *See* NRCP 54(b). As Appellants
16 correctly note, the Trial Court granted “BANA’s request for NRCP Rule 54(b)
17 certification.” *See* Opposition at p. 11. No such request was made, or given, as to
18 the Breckenridge MSJ Order.
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22 The truth is that while the Breckenridge MSJ Order resolved the Appellants’
23 claims against Breckenridge in Breckenridge’s favor, and also resolved
24 Breckenridge’s Counterclaims in Breckenridge’s favor, it did not reduce
25 Breckenridge’s Counterclaim for unpaid rent to judgment. Thus, there is no “final
26 judgment” with respect to Breckenridge’s Counterclaims, specifically for rents
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1 owed. *See Mid-Century Ins. Co. v. Pavlikowski*, 94 Nev. 162, 163, 576 P.2d 748,
2 749 (1978) (“The issue of damages has not been tried. NRCP 56(c). The judgment,
3 therefore, is not a final judgment...”). Rather than admit this fact and dismiss the
4 appeal as to Breckenridge, Appellants attempt to continue on with their appeal in a
5 transparent attempt to avoid the need to post a supersedeas bond. While
6 Breckenridge’s Counterclaim for unpaid rents remains undetermined by the Trial
7 Court, Appellants have no need to post a supersedeas bond. Breckenridge cannot
8 collect on its Counterclaim if it has not been reduced to judgment. Appellants are
9 improperly trying to take advantage of this fact.
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13 Finally, even if the Rule 54(b) certification of the BANA Summary
14 Judgment Order could apply to the Breckenridge MSJ Order, which it cannot, such
15 a purported “certification” would not be effective, as this Court has unequivocally
16 recognized:
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19 The district court, through such certification, cannot create finality
20 when the order is not amenable to certification. *See Mid-Century Ins.*
21 *Co. v. Cherubini*, 95 Nev. 293, 593 P.2d 1068 (1979); *Las Vegas*
22 *Hacienda v. G.L.M.M. Corp.*, 93 Nev. 177, 561 P.2d 1334 (1977). The
23 district court does not have the power, even when a motion for
24 certification is unopposed, to transform an interlocutory order which
25 does not come within the rule, into a final judgment. An NRCP 54(b)
26 certification is not available to provide interlocutory appellate review of
27 an order which does not constitute a final adjudication of fewer than all
claims or the rights and liabilities of fewer than all the parties in an
action. *Painton & Company v. Bourns, Inc.*, 442 F.2d 216, 234 (2d
Cir.1971).

1 *Taylor Const. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153
2 (1984). Thus, the appeal should be dismissed as to Breckenridge and its Claims.
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4 **III. CONCLUSION**

5 For all these reasons, Respondent Breckenridge respectfully requests that this
6 Court dismiss the instant appeal as to Breckenridge and its Claims, and grant such
7 other and further relief as the Court deems appropriate.
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9 Dated this 30th day of December, 2021.

10 HUTCHISON & STEFFEN, PLLC
11

12 /s/ Brenoch R. Wirthlin

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24
25
26
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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served
3 the foregoing **RESPONDENT BRECKENRIDGE PROPERTY FUND 2016,**
4 **LLC'S OMNIBUS REPLY IN SUPPORT OF MOTION TO DISMISS**
5 **APPEAL** on the following parties, via the manner of service indicated below, on
6 December 31, 2021:
7

8
9 ***Via Electronic Service through E-***
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22 ***Via US Mail:***

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24 Settlement Judge
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27 Dated: December 31, 2021.

By: /s/ Jon Linder
An Employee of Hutchison & Steffen