IN THE SUPREME COURT OF THE STATE OF NEVADA

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 CASE NO.: 83261 APPEAL FROM THIRD JUDICIAL DISTRICT COURT CASE NO.: 18-CV-01332

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons and entities as described in *NRAP 26.1(a)* that must be disclosed.

Millward Law, LTD is not owned by any parent corporation nor does any publicly held company own 10% or more of an interest in Millward Law, LTD. Justin Clouser of J.M. Clouser and Associates, and the undersigned are the only lawyers who have appeared in this matter on behalf of Appellants.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 2nd day of February, 2022.

MILLWARD LAW, LTD

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JURISDICTIONAL STATEMENT

This is an appeal from two separate district court orders: (1) the district court's 5/30/2019 *Order*; and (2) the district court's 6/23/2021 *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.*

A. May 30, 2019 Order

Review of the district court's 5/30/2019 Order is sought concerning the district court's grant of *Sables, LLC's Declaration of Non-Monetary Status* ("Sables' Declaration") filed by Respondent Sables, LLC ("Sables"). AA01122-01126, Vol.V; AA00805-00808, Vol.IV. Sables Declaration sought for Sables to be removed from the case and not required to "participate any further" or be subject to "money damages or attorney's fees or costs" pursuant to NRS 107.029(5). AA00868-00871, Vol.IV.

Even though the district court had previously found that Sables had likely violated the Homeowner's Bill of Rights, the district court granted Sables' Declaration upon its determination that Sables had relied upon information given by the beneficiary of the deed of trust. AA00809-00816, Vol.IV; AA04181-04187, Vol.XVII.

This Court has jurisdiction to review the district court's 5/30/2019 *Order*, because the Order was dispositional as to all of Appellants' claims brought against Sables.[1] [2] [3] [4]

Because the district court's 6/23/2021 summary judgment order is a final order, this Court has jurisdiction to consider the district court's 5/30/2019 Order. *See* NRAP 3(a)(1); AA01122-01126, Vol.V. Appellants filed their timely Notice of Appeal on 7/16/2021, and the 5/30/2019 Order is now properly before this Court for review. AA03812-03814, Vol.XVI.

B. June 23, 2021 Summary Judgment Order

The district court entered its 6/23/2021 *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* ("Summary

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[1] NRS 107.029 provides that upon a grant of non-monetary status "the trustee is not required to participate any further in the action and is not subject to any money damages or attorney's fees or costs."

[2] *See* NRS 2.090(1) stating that the Supreme Court has jurisdiction to review "any intermediate order or decision involving the merits and necessarily affecting the judgment."

[3] *See* AA00906-00907, Vol.IV. (Claim for Wrongful Foreclosure alleged in the draft of the First Amended Complaint attached as Exhibit 12 of *Plaintiffs' Motion for Leave to File Amended Complaint to Substitute Parties and Add Additional Claims for Relief* AA00836-00917, Vol.IV.).

[4] *See* AA01553-01696, Vol.VII (Appellants' *Second Amended Complaint* filed on 12/20/2019); AA01565-01566, Vol.VII. (Appellants' claim for Wrongful Foreclosure); AA01570-01571, Vol.,VII (Appellants' claim for Violation of Homeowner's Bill of Rights under NRS 107.400-NRS 107.560).

Judgment Order"), therein declaring the order to be a final judgment pursuant to NRCP 54(b). [5] [6] [7]

Appellants filed their timely *Notice of Appeal* on 7/16/2021. AA03812-03814, Vol.XVI. Accordingly, this Court has jurisdiction to review the district court's 6/23/2021 summary judgment order.[8]

[5] NRCP 54(b) provides that "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

[6] The district court's Summary Judgment Order adjudicates all motions except for Breckenridge Property Fund, LLC's motion which was granted by separate order. AA03751-03768, Vol.XVI; AA03743-03750, Vol.XV.

[7] AA03751-03768, Vol.XVI.

[8] NRS 2.090(1) providing jurisdiction to review a judgment.

ROUTING STATEMENT

This appeal involves issues of first impression, and matters of statewide public importance, and it is presumptively retained by the Nevada Supreme Court. NRAP 17(a)(11); NRAP 17(a)(12).

Respondents' conduct underlying Appellants' claims is both shocking and abhorrent. Appellants have been lied to, manipulated, bullied, wrongfully foreclosed upon, and most recently unjustly evicted from their home. AA02230-02539, Vols.IX-X; AA03671-03697, Vol.XV; AA01553-01696, Vol.VII; AA00809-00816, Vol.IV.

Appellants' home was foreclosed upon on 1/4/2019, not because of any lack of performance on their part, but upon Bank of America, N.A. ("BANA") and its successors in interest's breach of a modified mortgage agreement by refusing payment on the modified mortgage, concealing the validity of the modification, and thereafter, causing the foreclosure of Appellants' home upon the original unmodified mortgage terms. AA00001-00125, Vol.I; AA01553-01696, Vol.VII; AA02304-02305, Vol.X; AA02235-02244, Vols.IX-X; AA02419-02424, Vol.X; AA02467-02506, Vols.X-XI.

The issues presented in this appeal raise issues of significant statewide importance regarding wrongful foreclosure, duties of trustees under deeds of trust, and debtors' rights upon a secured creditor's breach of contract.

A. Declaration of Non-Monetary Status & Substantial Compliance

The district court's determination of the validity of Sables' declaration of non-monetary status under NRS 107.028 over Appellants' objection, and the district court's determination that NRS 107.080 and NRS 107.0805 have been substantially complied with, raise issues of significant statewide importance as to the interpretation of those statutes.

This Court has not addressed what constitutes a valid objection to a declaration of non-monetary status under NRS 107.029, or whether a trustee has properly performed its duties when it has been found to report inaccurate information required to be accurate under NRS 107.080, NRS 107.0805, and NRS 107.400 through NRS 107.560.

Because it is of statewide importance that Nevada mortgage law be used to protect homeowners against wrongful foreclosure, this Court's review of the district court's determination of the validity of Sables' declaration of non-monetary status and the review of the district court's determination that Sables, US Bank, Fay Servicing, LLC ("Fay Servicing"), and Shellpoint Mortgage Servicing, LLC ("Shellpoint") substantially complied with the requirements of NRS 107.080 should be found to be presumptively retained by this Court.

B. Debtor's Rights upon Rejection of Payment by Secured Creditors

A review of the issues resulting from the district court's 6/23/2021 summary judgment order raises issues pertaining to debtors' rights in the circumstance that a creditor rejects payments. AA03763-03764, Vol.XVI.

In this case, Appellants believe that BANA's rejection of payment, and BANA and its successors in interest's failure to provide Appellants the opportunity to make payments under the Appellants' modified mortgage constituted a breach of the mortgage and excused their performance.[9]

It is undisputed in this case that Appellants' mortgage was modified, that BANA had refused payment, and that BANA and its successors in interest never gave Appellants the opportunity to make payment under the modified mortgage.[10]

Upon the district court' errant determination that Appellants' knew of BANA's breach of the loan modification agreement in 2009, when no evidence supports that conclusion and when the fact is disputed, the district court improperly determined that Appellants were not excused from payment, and no violation of NRS 107.080 had occurred by the foreclosure of Appellants' home. The district

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[9] AA02247-2248, Vol.IX; Appellants rely upon *Cain v. Price*, 134 Nev. Adv. 26, 415 P.3d 25 (2018) (*citing* Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981), and *Cladianos v. Friedhoff*, 69. Nev. 41, 240 P.2d 208 (1952), for the propositions that "a material breach of one party's promise discharges the non-breaching party's duty to perform" and that "an affirmative tender of performance of one party is excused where the other party prevents performance."

[10] AA03380, Vol.XIV; AA03455-03456, Vol.XIV; AA03023, Vol.XIV; AA03443-03444, Vol.XIV; AA02467-02500, Vol.X.

court came to such conclusion upon its faulty determination that Appellants "never intended to make a tender of any amount" and that Respondents had substantially complied with the notice requirements of NRS 107.080. AA03768, Vol.XVI; AA03766, Vol.XVI.

This Court's examination and determination of what contract rights a debtor has when the debtor's payment is rejected by a secured creditor is a matter of statewide importance and would clarify Nevada contract law. Additionally, such guidance may very well help prevent impropriety, fraud, and unjust enrichment.

C. Effect of Nevada Foreclosure Mediation Program Agreements

The district court determined that the Mediator's Statement executed by Appellants and executed on behalf of Fay Servicing, LLC ("Fay Servicing") "settled all claims regarding [their] mortgage." AA03765-03766, Vol.XVI. The district court also found, that by Appellants' agreement to the Mediator's Statement, they had waived their rights to the legal protections provided under Chapter 107 and that Appellants had agreed to "surrender [their] property." AA03765-03766, Vol.XVI.

A determination of whether the simple terms in the mediator's statement can constitute an agreement settling all claims and waiving a debtor's legal rights under Chapter 107 would have statewide implications as to the Foreclosure Mediation Program. Based upon the foregoing, the Nevada Supreme Court should

conclude that this appeal is presumptively retained pursuant to NRAP 17(a)(11) and NRAP 17(a)(12).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the district court committed Reversible Error by Granting Sables, LLC's *Declaration of Nonmonetary Status* over the Appellants' Objection.

B. Whether the district court erred in its 6/23/2021 summary judgment orders in its determination of undisputable fact and in applying the summary judgment standard to the evidence.

C. Whether the district court erred in its 6/23/2021 summary judgment order by denying Appellants' motion for partial summary judgment, and determining Respondents are entitled to judgment as a matter of law.

D. Whether district court erred in its 6/23/2021 *Order Denying Plaintiffs' Motion for Partial Summary Judgment / Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust* by sanctioning Appellants.

I. STATEMENT OF THE CASE

This is an appeal from two district court orders: the district court's 5/30/2019 *Order* ("Non-monetary Status Order"); and the district court's 6/23/2021 *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* ("Summary Judgment Order"). The respective orders concern the issue of validity of the foreclosure of Appellants' home, and any liability resulting therefrom.

On 11/7/2018, Appellants filed their Complaint and *Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction* ("TRO Application"). The district court thereafter entered its order granting Appellants' TRO Application. AA00001-00125, Vol.I; AA00126-00254, Vols.I-II; AA00259-00261, Vol.II. At the 11/20/2018 hearing upon the TRO Application, the district court determined that Appellants were entitled to an injunction and enjoined Sables' foreclosure of Appellants' home. AA00809-00815, Vol.IV. The district court required Appellants to post a bond of $172,610.67 by 12/21/2018. *Id.* The district court's written order was filed 12/31/2018. *Id.*

Even though the district court temporarily enjoined Sables from exercising the power of sale upon its finding that Appellants were likely to succeed upon their

claim that Sables had violated the Homeowner's Bill of Rights ("HBOR") pursuant to NRS 107.400 through NRS 107.560, Sables proceeded with the foreclosure sale on 1/4/2019, and sold Appellants' home to Breckenridge Property Fund 2016, LLC ("Breckenridge").[11] [12]

On 4/15/2019, the district court held a hearing on outstanding motions including *Sables, LLC's Declaration of Non-Monetary Status*. AA00805-00808, Vol.IV; AA00817-00820, Vol.IV; AA01122-01126 Vol.V; AA04110-04193, Vol.XVII. At the hearing and in its written order, the district court determined that Sables' declaration of non-monetary status was valid over Appellants' verbal and written objections. AA01122-01126, Vol.V; AA04181-04186, Vol.XVII; AA00817-00820, Vol.IV.

In spite of the district court's determination in its 12/31/2018 Order that Sables "had violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure," the Court affirmed

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[11] AA00814, Vol.IV; AA00809-00816, Vol.IV; The district court's 12/31/2018 Order provides findings that Sables failed to accurately report the principal obligation, the date through which the mortgage was paid, or the applicable interest rate and concluded that Appellants "have established that they will succeed on their claim that Defendants have violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure."

[12] AA03372-03374; Sables caused the foreclosure sale of Appellants' Home on 1/04/2019.

Sables' declaration of non-monetary status over Appellants' objection. AA00809-00816, Vol.IV.

Between March and April of 2021, Appellants, BANA, PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee ("US Bank"), Fay Servicing, Shellpoint, and Breckenridge all filed their respective motions for summary judgment, and related oppositions and responsive papers. AA01869-03742, Vols.VIII-XV.

On 6/23/2021, without hearing argument upon the pending motions, the district court entered its 6/23/2021 Order Denying Plaintiffs' Motion for Partial Summary Judgment / Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust ("Summary Judgment Order").[13] Also on 6/23/2021, the district court entered its Order on Breckenridge Motion for Summary Judgment ("Breckenridge Order").[14] Without any explanation provided, the district court's finding in its Summary Judgment Order are inconsistent with its findings in its 12/31/2018 Order determining that Appellants were likely to succeed on the merits of their claim for violation of the HBOR. [15] This timely appeal followed.

Appellants seek a determination of the following:

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[13] AA03751-03768, Vol.XVI.
[14] AA03743-03750, Vol.XV.
[15] *Cf.* AA00809-00816, Vol.IV; AA03751-03768, Vol.XVI; AA03743-03750, Vol.XV.

1. The district court erred in its interpretation of NRS 107.028(6) and NRS 107.029 as to its determination that Sables, as Trustee of the Deed of Trust, was entitled to nonmonetary status, when it proceeded with the foreclosure of Appellants' home;

2. That the district court erred by granting summary judgment in favor of Respondents upon determinations that material facts are not in dispute;

3. That the district court erred by determining that Respondents Sables, LLC, Fay Servicing, US Bank and Shellpoint had substantially complied with the NRS 107.080, when none of those entities had ever given Appellants the opportunity to make payment upon the mortgage as modified by the recorded loan modification agreement;

4. That the district court erred by interpreting the mediation agreement between Appellants and Fay Servicing to provide that Appellants had forfeited their rights to enforce the provisions of Chapter 107 of the Nevada Revised Statutes; and

5. That the district court erred by failing to review and address Appellants' claim for violation of the Homeowners Bill of Rights, when the district court had previously found that Appellants were likely to succeed on the merits of the claim.

II. PROCEDURAL AND FACTUAL HISTORY

1. In May of 2007, Appellants purchased their home located at 70 Riverside Dr., Dayton, NV 89403 ("Home"). AA02261-02262, Vol.X. On 5/23/2007, Appellant Vicenta Lincicome (individually referred to herein as "Vicenta") executed an Adjustable Rate Note ("2007 Note") for $381,150 in favor of Sierra Pacific Mortgage Company and a Deed of Trust ("2007 DOT"). AA02264-02288, Vol.X. The 2007 Note was amortized over 30 years with an initial interest rate of 6.875% and monthly payment of $2,183.67. AA02264, Vol.X.

2. Appellants failed to make their 6/1/2008 mortgage payment, and on 1/23/2009, BANA (the successor beneficiary of the Note) accelerated the Note and caused Recontrust Company, N.A. to record its *Notice of Default and Election to Sell Under Deed of Trust* with the Lyon County Recorder. AA02290-02291, Vol.X.

3. Appellants applied for a loan modification and on 7/11/2009, they received a loan modification agreement ("2009 LMA") and were informed it would become "valid upon signing and returning the documents provided." AA02295-02297, Vol.X.

4. The 2009 LMA provided a new maturity date of 8/1/2049, an interest rate of 4.875%, and a monthly payment of $1,977.29, which were all effective as

of 9/1/2009. *Id.* Arrears were to be capitalized as of 9/1/2009, and the new principal balance owed would be $417,196.58 instead of $381,150.00. *Id*. The terms of the 2009 LMA compared to the 2007 Note would save Appellants $7,623.00 per year from 2009 through 2014 ($381,150 x .06875 (APR) vs. $381,150 x .04875 (APR)).[16] From September 2014 through September of 2018, Appellants would save an additional $5,717.25 per year over the terms of the 2007 Note.[17]

5. Vicenta executed the 2009 LMA and returned the documents in the Fed Ex envelope provided by BANA on 7/31/2009. AA02302-02305, Vol.X.

6. On 9/1/2009, Appellants met "Crystal" at the Carson City branch of Bank of America and made a payment of $2,267.62. Crystal was unable to find any record of the 2009 LMA in BANA's system, but accepted payment and provided a receipt indicating that the loan payment was made upon account no. "162304785." *Id.*; AA02307, Vol.X.

7. On 10/1/2009, Vicenta went again to the Carson City branch to make her second payment on the 2009 LMA. AA02302-02305, Vol.X. The bank teller

[16] *Cf.* AA02265-02289, Vol.X (compare with terms of the 2009 LMA) AA-2296-2298, Vol.X.
[17] *Id.*

refused the second payment and indicated that there was no record of the 2009 LMA.[18] [19]

8. On BANA's 10/29/2009 mortgage statement, only the terms applicable to the 2007 Note appeared. AA02309, Vol.X.

9. Appellants continued to contact Bank of America by phone from 10/01/2009 to December of 2011, to inquire as to the status of the LMA and make payment, but BANA at no time provided any information to Appellants that would indicate the disposition of the 2009 LMA. [20] [21]

10. At the encouragement of a HUD Counselor, Appellants filed for Chapter 13 Bankruptcy protection on 4/06/2010, and listed BANA as a secured creditor on their Petition. AA02304, Vol.X.

11. On 3/22/2011, BANA Senior Vice President James S. Smith executed the 2009 LMA. Thereafter, on 5/4/2011, BANA caused the 2009 LMA to be recorded with the Lyon County Recorder's Office. AA03189-03191, Vol.XIII.

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[18] *See id.*

[19] *See* AA03023, Vol.XIII (BANA's admission to rejecting payment "because there was no record of the LMA in BANA's system").

[20] AA02303, Vol.X.

[21] *See* AA03379-03381, Vol.XIV (BANA's response to Appellants' Requests for Admissions 4, 5, 6, 7, and 8 admitting that it did not communicate with Appellants regarding the 2009 LMA).

12. Appellants requested information on the status of the 2009 LMA between October 2009 and December 2011. AA00246-00254, Vol.I-II.

13. From 10/19/2011 to 12/23/2011, BANA sent the Appellants three separate acknowledgments indicating that Appellants had requested information, and further indicating that BANA would be providing a response. AA03223, Vol.XIII; AA03225, Vol.XIII; AA03224, Vol.XIII.

14. Appellants never received any information as to the ultimate disposition of the 2009 LMA until they received the 11/3/2017 Notice of Default. AA00246-00254, Vols.I-II.

15. BANA did not give Appellants notice that the 2009 LMA had been found, executed, or recorded. AA03195, Vol.XIII.

16. On 11/26/2014, BANA filed its *Motion for Relief of Stay* in Appellants' bankruptcy case seeking relief from the automatic stay to permit it to foreclose upon the 2007 DOT. AA03230-03266, Vols.XIII-XIV. BANA did not inform the Bankruptcy Court of the 2009 LMA, or that it had not sought payment under its terms. *See id.*

17. Between 2011 and early 2018, Appellants, not knowing that BANA had accepted, executed, and recorded the 2009 LMA, continued to work towards saving their home by way of obtaining a modification of their mortgage. AA02302, Vol.X. However, contrary to the district court's findings, Appellants

did not enter into any other permanent modifications of the 2007 DOT that superseded or in any way affected the 2009 LMA.[22]

18. Appellants did not make payment towards the mortgage loan following BANA's rejection of their payment on 10/1/2009, and at no time between 10/01/2009 and November of 2015 did BANA provide Appellants with an opportunity to make payment under the modified terms of the mortgage loan. AA00246-00254, Vols.I-II; AA02467-02500, Vol.X.

19. On 11/10/2015, BANA assigned its interest in Appellants' property to PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee ("US Bank"). AA03302-03303, Vol.XIV. Notably, BANA did not inform US Bank within BANA's *Assignment of Deed of Trust* that the 2007 DOT was modified by the 2009 LMA. *Id.*

20. An informal notice of default was prepared by Fay Servicing on or about 12/15/2015 therein alleging that Appellants are in default of their mortgage.

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[22] AA00007-00008, Vol.I; AA00126-00254, Vols.I-II; AA00901-00902, Vol.IV; AA01196-01197, Vol.V; AA02239-02240, Vol.IX; AA02377, Vol.X; AA02302-02305, Vol.X; The district court findings as to Appellants not being "ready, willing, and able to perform" are not supported by the undisputed facts. AA03757, Vol.XVI. Appellants' have alleged continuously in this matter that they made payment on two separate trial modifications: (1) 2015 trial modification offered by BANA, where Appellants' third and final payment was rejected by Fay Servicing for not honoring BANA's modification; and (2) three completed trial payments upon Fay Servicing's trial modification which was abandoned by Appellants after their third payment upon receipt of the permanent modification agreement that they believed they would be unable to afford.

The notice reflects the terms of the original mortgage and does not reflect the terms of the 2009 LMA. AA03446-3451, Vol.XIV.

21. On 11/3/2017, Sables, as Trustee under the modified deed of trust, recorded its *Notice of Breach and Default and Election to Sell the Real Property under Deed of Trust* ("NOD" or "Notice of Default"). AA03318-03323, Vol.XIV. The NOD provides that the 2007 DOT "was modified by Loan Modification Agreement recorded as Instrument 475808 . . . recorded on 5/4/2011." *Id.*

22. However, the NOD also provides that as of 10/31/2017, $265,572.39 is owed in arrears and that all monthly installments from "9/1/2008" forward are due. *Id*. The NOD does not reflect the terms of the 2009 LMA, which would have, by its own terms, become effective on 9/1/2009.[23]

23. The NOD included an Affidavit of Authority signed on 10/5/2016, by Veronica Talley, as a "Foreclosure Specialist IV" ("Talley Affidavit"), 13 months prior to the recording of the NOD, stating under oath that Fay Servicing had complied with the requirements of NRS 107.080. AA03321-03322, Vol.XIV.

24. Appellants filed a Petition to participate in Nevada's Mediation Program on 12/01/2017. AA02434-02439, Vol.X. At the 4/3/2018 foreclosure mediation, Appellants agreed to resolve the mediation by agreement to provide

[23] Compare 2009 LMA terms AA02295-02297, Vol.X with terms noted applicable in Sables' NOD AA03318-03323, Vol.XIV.

Appellants the opportunity to participate in Fay Servicing's deed in lieu of foreclosure ("DIL") program, which terms were attached to the Mediator's Statement. *See* AA03340-03355, Vol.XIV. The Mediator's Statement provides that Appellants would have until 7/04/2018 to apply under the DIL program before a Certificate of Mediation would issue. *Id*.

25. Appellants did not apply through the DIL Program, and on 10/4/2018, Sables recorded the Home Means Nevada Mediation Certificate with the Lyon County Recorder. AA02927, Vol.XII.

26. On 10/12/2018, Sables recorded its Notice of Trustee's Sale ("NOS") therein setting the date for the foreclosure sale of Appellants' home to occur 11/9/2018. AA03357-03359, Vol.XIV. Notably, the NOS also provides that the 2007 DOT "was modified by Loan Modification Agreement." AA02458-02460, Vol.X.

27. On 11/7/2018, Appellants filed their Complaint and their TRO Application with the district court, and on 11/8/2018, the district court entered its order granting Appellants' TRO Application and setting the matter for hearing to occur 11/20/2018. AA01132, Vol.V; AA00126-00254, Vols.I-II; AA00259-00261, Vol.II.

28. At the hearing on 11/20/2018, counsel in attendance stipulated to the admission of the evidence and affidavits presented in the TRO Application and the

Response to the TRO Application in lieu of a presentation of evidence and testimony. *See* AA03989-03990, Vol.XVI. Thereafter, the district court granted Appellants' TRO Application for a preliminary injunction, but required bond be posted in the amount of $172,610.67 by 12/20/2018. AA00814, Vol.IV.

29. Appellants were unable to acquire and post a bond by the 12/20/2018 deadline.

30. On 12/24/2018, Sables filed its Declaration of Non-Monetary Status seeking to alleviate itself of any duty to participate in the action. AA00813-00816, Vol.IV.

31. On 12/31/2018, the district court entered its written order upon its finding and conclusions of law resulting from the 11/20/2018 hearing. AA00809-00816, Vol.IV.

32. The 12/31/2018 Order enjoined Sables from selling Appellants' home "until further order of the Court." AA00814, Vol.IV.

33. On 1/4/2019, six days after the district court entered its Order, Sables sold the Appellants' home by foreclosure sale. AA00884-00885, Vol.IV.

34. On 1/9/2019, Appellants filed their Objection to Sables' Declaration of Non-Monetary Status (hereinafter "Objection") and on 4/15/2019, the district court held a hearing on outstanding motions including Sables' Declaration of

Non-Monetary Status, and on Appellants' motion to amend their Complaint. AA00821-00825, Vol.IV; AA04110-04207, VolXVII.

35. On 5/30/2019, the district court entered its written order granting *Sables, LLC's Motion to Set Aside Default* and granting *Sables, LLC's Declaration of Non-Monetary Status*. AA01122-01126, Vol.V.

36. On 7/12/2019, Appellants filed their Petition for Writ of Mandamus with the Nevada Supreme Court challenging the district court's 5/28/2019 Order granting Sables' Declaration and denying Appellants' motion for leave to amend complaint. AA01244-01279, Vols.V-VI. The Writ Petition was transferred to the Nevada Court of Appeals which ultimately denied the same on procedural grounds on 1/22/2020. AA01726-01727, Vol.VII.

37. On 12/6/2019, the district court entered its Order granting Appellants leave to file their Second Amended Complaint, and on 12/20/2019, Appellants filed their Second Amended Complaint. AA01544-01545, Vol.VII; AA01553-01694, Vol.VII.

38. On 3/17/2021, BANA filed its *Motion for Summary Judgment and Motion for Sanctions*. AA01869-02178, Vols.VIII-IX. On 3/18/2021, Breckenridge filed its *Motion for Summary Judgment Against Plaintiff*. AA02179-02229,Vol.IX. On 3/19/2021, Appellants filed their *Motion for Partial Summary Judgment*. AA02230-02539, Vols.IX-X. On 3/25/2021, Shellpoint

filed its Motion for Summary Judgment, and US Bank and Fay Servicing also filed their respective motions for summary judgment. AA02540-02763, Vols.XI-XII; AA02764-02778, Vol.XII.

39. On 6/23/2021, 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* ("Summary Judgment Order.") On the same day the district court entered its *Order on Breckenridge Motion for Summary Judgment* ("Breckenridge Order"). AA03743-03750, Vol.XV; AA03751-03768, Vol.XVI.

40. On 7/19/2021, Appellants filed their Notice of Appeal with the Nevada Supreme Court. AA03812-03814, Vol.XVI.

41. On 9/9/2021, Breckenridge filed its Motion for Entry of Order Granting Permanent Writ of Restitution and Payment of Overdue Rent, and on 9/15/2021, Appellants filed their Motion for Stay Pending Appeal. AA-03826-03887, Vol.XVI; AA03888-03903, Vol.XVI.

42. On 11/5/2021, the district court entered its *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*. AA04257-04266, Vol.XVIII.

43. On 11/15/2021, Appellants filed their *Ex Parte Motion for Additional Time to Obtain Supersedeas Bond*. AA04267-04273, Vol.XVIII. On 11/17/2021, the district court entered its *Order Denying Ex Parte Motion*, and on 11/22/2021, the district court entered a *Permanent Writ of Restitution*. AA04301-04303, Vol.XVIII; AA04304-04307, Vol.XVIII.

44. On 12/15/2021, Appellants were removed from their home by the Lyon County Sheriff's Department.

45. On 1/19/22, the district court entered its *Order on Attorney's Fees and Costs*, entering judgment in favor of Breckenridge. AA04308-04320, Vol.XVIII.

III. SUMMARY OF ARGUMENTS

The district court erred for the following reasons:

i. For determining that Appellants' objection to Sables, LLC's declaration of non-monetary status was invalid even though Sables was liable to Appellants:

1. By exercising the power of sale when Appellants were not in default under the modified mortgage;

2. By failing to provide Appellants with accurate documents as required by HBOR; and

3. By failing to correct the Notice of Default and Notice of Sale within 20 days of being informed of inaccuracies in those documents as required by NRS 107.028(6).

ii. For granting Respondents' respective motions for summary judgment and denying Appellants' motion for partial summary judgment:

1. When the district court erred in finding that it was undisputed that Appellants were aware of BANA's breach of the 2009 loan modification agreement, even though the same is disputed;

2. When the district court erred in finding that Appellants had not challenged or repudiated BANA's breach of the 2009 loan modification agreement, even though Appellants were not aware of BANA's breach of the agreement;

3. When the district court failed to correctly apply the summary judgment standard to all available undisputed evidence, including BANA's misrepresentations and concealment of the 2009 loan modification agreement from the federal bankruptcy court;

4. When the district court failed to correctly apply the summary judgment standard to all representations and admissions, and errors stated within Sables' Notice of Default; and

5. When the district court erred by finding that Appellants had forfeited their right to the protections under Chapter 107 of the Nevada Revised Statutes by Appellants' execution of the Mediator's Statement.

iii. For determining that Respondents were entitled to judgment as a matter of law:

1. Upon the issues of claim preclusion when the criteria for claim preclusion has not been met, and is not applicable on the basis of Appellants' filing for chapter 13 bankruptcy relief;

2. Upon a determination that Appellants' claims for breach of contract against BANA are time barred, even though Appellants relied upon BANA's statements and did not discover BANA's breach of contract until after the Notice of Default was recorded several years later;

3. Upon a determination that Appellants are not excused from performance upon the 2009 loan modification agreement, even though BANA and its successors never gave Appellants the opportunity to make payment under the terms of the modification; and

4. Upon a determination that Appellants' execution of the 4/3/2018 foreclosure Mediator's Statement entitled US Bank and Fay Servicing to a deed in lieu of foreclosure and constituted a waiver by Appellants of their rights and protections under Chapter 107 of Nevada Revised Statutes.

IV. ARGUMENT

A. Standard of Review

This Court reviews "a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Additionally, "[t]his Court reviews district court's legal determinations, including matters of statutory interpretation, de novo." *In re Frei Irrevocable Trust*, 133 Nev. 50, 52 (2017).

The district court's summary judgment order and its 5/30/2019 Order interpreting Nevada law are subject to *de novo* review by this Court. *See id.*

B. The District Court Erred by Determining Appellants' Objection to Declaration of Non-Monetary Status Was Invalid

The district court committed reversible error in determining that Appellants' objection to *Sables, LLC's Declaration of Non-Monetary Status* was invalid.

A trustee may make a declaration of non-monetary status to avoid unnecessary involvement in litigation pursuant to NRS 107.029(1).[24]

[24] NRS 107.029(1) provides in pertinent part that 1. If the trustee . . . is named in an action . . . and the trustee has a reasonable belief that he or she has been named in the action solely in his or her capacity as trustee and not as a result of any wrongful act or omission made in the performance of his or her duties as trustee, the trustee may, at any time, file a declaration of nonmonetary status. . .

Pursuant to NRS 107.029(4), once a timely objection to a declaration of nonmonetary status is received, the district court is simply tasked with determining the "validity of the objection." NRS 107.029(4).

In this case, Sables filed its *Declaration of Non-Monetary Status* on 12/24/2018, and its counsel therein declared:

> . . . it is my reasonable belief that Sables, LLC was named solely in its capacity as trustee . . . and not as a result of any wrongful act or omission . . .

AA00806, Vol.IV.

Appellants filed their objection to Sables' declaration on 1/09/2019, objecting upon the basis of Sables' liability to Appellants for its violations of NRS 107.080 and HBOR. AA00001-00125, Vol.I; AA00126-00254, Vols.I-II; AA00817-00820, Vol.IV.

In Sables' response to Appellants' Objection, it took issue with Appellants' assertion of liability. AA00821-00825, Vol.IV. However, unbeknownst to Appellants when they filed their objection, Sables had already foreclosed upon Appellants' home even though the NOD was completely inaccurate. AA03372-03384, Vol.XIV; AA00817-00820, Vol.IV; NRS 107.080(2): NRS 107.080(5); NRS 107.028(6).

At the 4/13/2019 hearing, Appellants' counsel asserted that Appellants seek to amend their Complaint to include claims for wrongful foreclosure, and slander of title for Sables' and the other Respondents' conduct. AA04180-04181, Vol.XVIII. Appellants argued that Sables could not escape liability under NRS 107.028(6) because the statutes required Sables to correct the NOD within 20 days upon notice of errors in the document and Sables had not done so.[25] [26]

Sables' counsel twisted NRS 107.028(6) by arguing that NRS 107.028(6) supports its position because any error was made in good faith and was a result of information provided by the beneficiary. AA04185, Vol.XVII. Appellants' counsel thereafter pointed out that NRS 107.028(6) would be "meaningless" if Sables is not required to correct the NOD. AA04186, Vol.XVII.

The district court determined that Appellants' objection was invalid and granted Sables' declaration of non-monetary status. AA04187, Vol.XVII. The district court also instructed Appellants to resubmit their motion to amend their Complaint and remove the claims against Sables. *Id.*

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[25] AA04182-04183, Vol.XVII.

[26] NRS 107.028(6) provides in pertinent part that "[t]he trustee shall act impartially and in good faith with respect to the deed of trust . . . In performing acts required by NRS 107.080, the trustee incurs no liability. . . if the trustee corrects the good faith error not later than 20 days after discovering the error.

This Court should conclude as a matter of law that NRS 107.028(6) establishes that potential trustee liability exists for errors contained in a notice of default when the trustee has failed to correct the errors within 20 days of notice. *See* NRS 107.028(6).

Appellants' Complaint and TRO Application, as well as the district court's determinations at the 11/20/2018 hearing, and the district court's 12/31/2018 Order determining that Sables had violated HBOR, establishes that it had notice of errors in the NOD at least 20 days before it foreclosed upon Appellants' home. AA0001-00125, Vol.I; AA00126-00254, Vols.I-II; AA03982-04093, Vols.XVI-XVII; AA00809-00816, Vol.IV; AA04323-0426, Vol.XVIII.

Therefore, this Court should conclude that the district court committed reversible error when it determined that Appellants' objection to Sables' declaration of non-monetary status was invalid when Sables was subject to potential liability for claims of wrongful foreclosure for violations of NRS 107.028(6) and NRS 107.080(2), and HBOR pursuant to NRS 107.500(1)(b) and NRS 107.560(2).[27] [28]

[27] NRS 107.560(2) provides in part, "[i]f the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, beneficiary of the deed of trust or an authorized agent of such a person, the court may award the borrower the greater of treble actual damages or statutory damages of $50,000."

C. The District Court Erred in Its Application of the Summary Judgment Standard and by Determining that Disputed Issues of Material Fact Are Not in Dispute

This Court has established that in instances of a motion for summary judgment "all evidence, and any reasonable inferences drawn from it must be viewed in a light most favorable to the nonmoving party." *Wood,* 121 Nev. at 729, 121 P.3d at 1029.

Under this standard, the district court was required to view Respondents' Motion for Summary Judgment in the light most favorable to Appellants. *Id.* The district court made determinations of material fact that serve as the basis for its legal conclusions, even though many of the district court's determined facts are not supported by the record or are contrary to the undisputed evidence in the record.

The Nevada constitution guarantees Appellant's "the right to have factual issues determined by a jury." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 238 (2015) (internal quotation marks omitted).

To the extent that the district court made determinations of material fact that are contrary to Appellants' uncontroverted and supported allegations, those facts are disputed.

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[28] NRS 107.080(7) provides upon a determination that the trustee failed to substantially comply with the provisions of NRS 107.080(2), the trustee will be liable in damages for the greater of $5,000 or treble the amount of actual damages, and reasonable attorney's fees and costs.

Therefore, the district court's determination of the issues should have been reserved for a determination of a jury, and the district court's error in making such findings upon motions for summary judgment constitutes reversible error.[29]

1. Finding Nos. 7 & 8: Knowledge of BANA's Breach

In the district court's Findings of Facts, in Findings no. 7 and no. 8 of the 6/23/2021 summary judgment order, the district court found that Appellants knew of and were aware of BANA's breach of the 2009 LMA in 2009. [30] In doing so, the district court failed to support its findings with any citation to any particular exhibit or deposition testimony. *See* AA03746, Vol.XV.

The issue pertaining to what Appellants knew and when, as to BANA's breach of the 2009 LMA, is disputed and is material to the district court's determination that Appellants' claim against BANA for breach of contract is time barred. AA03751-03768, Vol.XVI.

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[29] Appellants filed their *Demand for Jury Trial* with the district court clerk on 2/04/2020.

[30] AA03746, Vol.XV. The district court found as follows: "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. . . . BANA then notified the Plaintiffs in October of 2009 stating that the loan had not been modified."

In BANA's *Motion for Summary Judgment* and for Sanctions ("BANA's MSJ") BANA argues that Appellants knew that BANA had breached the 2009 LMA based upon its cited exhibits. AA03743-03750, Vol.XV.

To establish the fact, BANA quotes response 20 of Appellants' Responses to BANA's Interrogatories out of context, and in doing so, it altered the word "understand" to read "understood." AA01877, Vol.VIII. BANA's Interrogatory 20 actually requested that Appellants "[p]lease present all facts describing the **current status** of the loan." AA02175, Vol.IX.

Appellants' original response reads in pertinent part:

> Plaintiffs assert that the loan terms applicable to their mortgage are . . . the 2007 Deed of Trust as modified by the 2009 Loan Modification Agreement. However, Plaintiffs also understand that their mortgage agreement was breached by Bank of America on October 1, 2009, by way of Bank of America's refusal to accept loan payments under the terms of the Loan Modification Agreement. . .

AA02175, Vol.IX.

In US Bank's *Motion for Summary Judgment* it alleges Appellants admitted in paragraph 154 of their *Second Amended Complaint* that they discovered BANA's breach of the 2009 LMA in 2009. AA02773, Vol.XII. However, paragraph 154 makes no such admission.[31]

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[31] AA01572, Vol.VII (Paragraph 154 of Appellants' *Second Amended Complaint*) provides as follows: "Upon information and belief, Defendant Bank of America failed to process the 2009 LMA in its system."

All of Appellants' admissions and their deposition testimony cited herein support their factual contention that they were not aware of BANA's breach of the modification agreement in 2009, nor did they have reason to be. [32] [33] [34]

The testimony and admissions cited by BANA clearly establish that Appellants believed the documents were "lost" and "not in the system." *See id.* The testimony cited by BANA does not in any way indicate that Appellants knew or believed in 2009 that BANA had breached the 2009 LMA. *See id.*

In Response to BANA's Motion to Dismiss filed on 12/21/2018, and opposed by Appellants, cited in Appellants' Opposition to BANA's MSJ,

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[32] *See* AA01968, Vol.VIII (BANA's Ex. D, Appellants' Response no. 24 to BANA's Request for Admission) which provides in pertinent part: "The Lincicomes admit that they were informed by BANA customers service agents that they could not find the loan modification in their computer systems, and that BANA was investigating."

[33] *See* AA01944-01945, Vol.VIII (BANA's Ex. C, Vicenta Lincicome's Deposition at p.211-212) which provided in pertinent part as follows: "I was already informed that they didn't want to accept it because our loan was not in the system. So they said we cannot post your payment. Even if you make the payment, we cannot post your payment because your loan is not in the system. . . . But in October, before - - after they said they will receive the check, but won't post it until they can find the - - they can find the loan agreement."

[34] *See* AA02001, Vol.IX (BANA's Ex. F, Vicenta Lincicome's Deposition at p.34) which provided in pertinent part as follows: ". . . the lady at the bank said they cannot accept my payment because there was no account showing in the computer . . . they said, our documents were lost and they were trying very hard to locate it . . . on October 1st, none of them would accept the payment at all. They now verified that . . . I cannot make the payment because the documents are lost. . . And so that was why we started contacting the manager, Barbara Keady, to make the payments . . . she said, they're lost, and they are trying hard to the locate the deed or the account."

Appellants argued that the statute of limitations had not run as to their breach of contract claim against BANA because Appellants had no reason to believe that they had a claim against BANA for breach of the 2009 LMA. *See* AA00976, Vol.IV; AA00981, Vol.IV; AA00985, Vol.IV.

In both Ellis Lincicome and Vicenta Lincicome's Affidavits attached to their 4/04/2019 opposition to BANA's motion, they declared not to know of BANA's breach of the 2009 LMA.[35]

Contrary to the district court's findings, Appellants' respective uncontroverted testimony provided in BANA's MSJ Exhibit F on pages 35, 37, and 143 further establish that Vicenta Lincicome was informed by BANA that the 2009 LMA was lost.[36] [37] [38]

Notably, in BANA's opposition to Appellants' motion for partial summary judgment, it admits that it is undisputed that Appellants' October payment was

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[35] AA01082-01084, Vol.V (Appellants respective Affidavits provides in pertinent part: "I did not have any reason to believe at the time that Bank of America was committing fraud, withholding information from me, or intentionally refusing to honor the Loan Modification Agreement for any inappropriate purpose."

[36] *See* AA02004, Vol.IX. (BANA Ex. F, Vincenta Lincicome's Deposition Testimony) which provides: "the lady at the bank said they cannot accept my payment because there was no account showing in the computer."

[37] *See* AA02004, Vol.IX, footnote 25 above.

[38] AA02023, Vol.IX (BANA Ex. F, Vincenta Lincicome's Deposition Testimony) provides: " . . . the only correspondence that they sent, mostly on a weekly basis, was when they said they lost the document. And I keep on asking every week, I have to check if they found it. Then they keep on answering us that they haven't found the document and they were still trying."

rejected by BANA "because there was no record of the LMA in BANA's system." AA03023, Vol.XIII. BANA's admission is in harmony with Appellants' testimony and allegations set forth in Appellants' Second Amended Complaint. [39]

Based upon the foregoing, this Court should conclude that the district court erred in determining that Appellants knew of and were aware of BANA's breach of the 2009 LMA in 2009, when the uncontroverted evidence set forth in the record establishes the opposite conclusion. Accordingly, to the extent there is any evidence supporting the factual issue, such evidence is disputed, and the district court's determination of this material factual issue on summary judgment must be reversed.

2. Finding No. 9: No Challenge to Obligation

The district court's Finding no. 9, which provides that "Plaintiffs did not challenge the underlying obligation" in their Chapter 13 bankruptcy, is inaccurate in as much as it assumes that Appellants "were aware of [BANA's] breach at the time," and would have challenged the 2007 DOT as applicable to mortgage had they known that the loan modification was not "lost" or not in BANA's system. AA03761, Vol.XVI.

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[39] *Cf.* AA03023, Vol.XIII (compare with Vicenta Lincicome's Deposition testimony and allegations of Second Amended Complaint) in AA01944-01945, Vol.VIII, AA02001, Vol.IX, AA02004. Vol.IX, AA02023. Vol.IX, AA1553-01557, Vol.VII.

Based upon the evidence cited in the foregoing section, the district court's Finding no. 9 is inaccurate and not supported by any evidence. [40]

Therefore, the district court's determination that Respondents are entitled to summary judgment upon the district court's finding that Appellants failed to challenge the applicability of the 2007 DOT to their mortgage must be reversed.

3. Finding No. 11: BANA's Fraud upon Bankruptcy Court

In Finding no. 11, the district court found in part as follows:

> In January 2011 the Bankruptcy court terminated the automatic stay as to BANA. A Final decree was filed by the Bankruptcy Court in July of 2015.

AA03761, Vol.XVI.

Finding no. 11, providing that the automatic stay terminated "January 2011," is false. BANA filed for relief of stay in Appellants' Chapter 13 Bankruptcy case on 11/25/2014, and the stay was terminated as to BANA on 1/05/2015. *See* AA03222-03259, Vols.XIII-XIV.

Additionally, the district court erred in not concluding that it is undisputed that BANA made false statements to the federal Bankruptcy Court in BANA's motion for Chapter 13 Relief. *See id.*

Even though BANA has admitted that it received the 2009 LMA in 2009, that it rejected Appellants' October 2009 payment "because there was no record of

[40] *See id.*

the LMA in BANA's system," and that it caused the 2009 LMA to be signed and recorded in March of 2011, as established hereinabove, BANA chose not to disclose any of that information to the federal Bankruptcy Court when it sought relief of stay. [41]

While it is true that BANA provided a copy of the 2007 DOT with its motion for relief of stay, it failed to inform the Bankruptcy Court that the 2009 LMA modified the loan terms applicable to the 2007 DOT. *See* AA03222-03259, Vols.XIII-XIV. BANA falsely informed the Bankruptcy Court that Appellants have "missed" making post-petition payments under the terms of the Note. *See id.* On the contrary, BANA had not given Appellants the opportunity to make payments by providing them with statements seeking payment under the terms of the 2009 LMA. [42]

BANA's representation to the Bankruptcy Court that it was entitled to relief from the automatic stay is patently false. *See* AA03229-03266, Vols.XIII-XIV.

Therefore, this Court must conclude that the district court failed to make the reasonable inferences from the undisputed facts in a light most favorable to

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[41] *See* AA0323, Vol.II; AA03230-03231, Vol.XIII (BANA falsely alleges that as of 11/10/2014, Appellants owe unpaid principal of $381,150.00, unpaid accrued interest of $170,972.39, costs of $17,384.92, that the total obligation owed by Appellants was $567,324.69, and that Appellants have "missed" making post-petition payments under the terms of the applicable terms of the mortgage).

[42] *See* AA03379-03381, Vol.XIV (BANA's response to Appellants' Requests for Admissions 4, 5, 6, 7, and 8).

Appellants as the non-moving party. In so doing, the district court erred in not concluding that BANA had concealed the recording of the 2009 LMA, not only from the Bankruptcy Court, but also Appellants.

4. Finding No. 12: No Default Upon the 2009 LMA

The district court's Finding no. 12 pertaining to Sables' recording of the Notice of Default is inaccurate as to the implication that Appellants had defaulted upon their mortgage loan as modified by the 2009 LMA.

Finding no. 12 pertaining to the recording of the 11/3/2017 Notice of Default, and the district court's summary judgment order in general makes the assumption that Appellants had defaulted upon their obligation, even though it is undisputed Appellants were never given the opportunity to make payment upon the modified mortgage.[43] [44]

All statements issued by BANA and Fay Servicing prior to the foreclosure of Appellants home reflect the terms applicable to the 2007 DOT as if Appellants' mortgage had not been modified.[45]

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[43] AA00809-00815, Vol.IV.

[44] *See* AA03379-03381, Vol.XIV (BANA's response to Appellants Requests for Admissions 4, 5, 6, 7, and 8).

[45] AA02508-02528, Vol.XI (BANA and Fay Servicing post modification mortgage statements reflecting terms of the 2007 DOT and not the 2009 LMA).

Appellants were unaware that BANA had found, executed, and recorded 2009 LMA, because they were never provided with any statement or other request for payment under the terms of the 2009 LMA.[46]

Finding no. 12 is also incomplete in as much as it fails to find that the 11/3/2017 NOD admits that the 2009 LMA modified the terms of the original 2007 DOT. [47]

Likewise, the terms recited in the 11/3/2017 NOD do not reflect the terms applicable to the 2009 LMA.[48] [49]

Accordingly, the district court erred in not concluding that the 11/3/2017 NOD establishes that the terms applicable to mortgage are the modified terms of the 2009 LMA. Additionally, the district court erred in concluding the Appellants had defaulted upon their mortgage when they had never been given the opportunity to make payment under the modified terms of the loan. By failing to incorporate the above undisputed facts, as it pertains to Respondents' respective motions for summary judgment, the district court failed to view the undisputed facts in a light most favorable to Appellants. Accordingly, the district court's order must be reversed.

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[46] *See id.*
[47] AA03318-03323, Vol.XIV.
[48] AA00809-00815, Vol.IV.
[49] AA01751-01775, Vol.VIII; AA01728-01747, Vol.VII; AA01721-01725, Vol.VII.

5. Finding No. 14 & 15: Mediation Agreement

The district court erred in making Findings no. 14 and 15, as to the terms and facts pertaining to the 4/3/2018 Mediator's Statement. [50] [51]

Additionally, on page 15 and 26 of its Summary Judgment Order, the district court declared as follows in regard to the Mediator's Statement:

> . . . Plaintiffs seem to believe that they can game the system to avoid repaying the money borrowed and to remain in a house rent free. Albert Ellis Lincicome, Jr.'s testimony clearly establishes that Plaintiffs want more time to continue their free ride. If they have to abuse the mediation program to get more time then so be it. The Plaintiffs admit to engaging in bad faith. . . . The Plaintiffs admitted that they chose not to enter into the offered terms. The agreement settled all claims regarding the mortgage. The Plaintiffs have an obligation under the agreement to surrender the property.

AA03765-03766, Vol.XVI.

The terms of the 4/3/2018 Mediator's Statement are straight-forward. *See* AA03340-03355,Vols.XIII-XIV. The terms constituting the agreement are found

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[50] AA03761, Vol.XVI; Finding no. 14 provides in pertinent part: " . . . The Plaintiffs agreed to a Deed in Lieu of Foreclosure. All parties signed the statement on April 3, 2018. The Plaintiffs had the opportunity to make three payments of $2462.30 as an offered trial period plan. The payments had to be made on April 1, 2018, May 1, 2018 and June 1, 2018."

[51] Finding no. 15 provides: "15. The Plaintiffs decided not to make the payments. The Plaintiffs did not provide the deed in lieu of foreclosure. A certificate for foreclosure was issued."

on page 5 of the Mediator's Statement and consist of two checked check boxes and handwritten comments.[52]

The comments section references the DIL program requirements on Attachment B of the Meditator's Statement.[53]

Based upon agreement and the attachment, Appellants agreed to have until 7/4/2018 to apply for a deed in lieu pursuant to the requirements of Fay Servicing's DIL program, or a mediation certificate would issue on 7/5/2018.[54] There is no statement within the Mediator's Statement that explicitly or implicitly establishes that Appellants agreed to "settle all claims regarding the mortgage."[55]

The simple agreement does not require the relinquishment or surrender of Appellants' property in light of Fay Servicing's DIL terms and the date the mediation certificate was stated to issue. *See id.*

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[52] AA03344, Vol.XIV (Checked checkbox next to "1. Deed in Lieu of Foreclosure" under the heading "3B. RELINQUISH THE HOME," checked checkbox next to "9. Certificate Date: 7/5/2018," and comments which state "PURSUANT TO DIL REQUIREMENTS ON P. 6 OF TTP DATED 3/6/2018 – ATTACHED HERETO").

[53] AA03352-03353, Vol.XIV; Attachment B provides in pertinent part: " . . . you will have until 7/4/2018 to complete a DIL for the Property. . . If you have not completed a DIL for the Property by 7/4/2018, or otherwise fail to meet the requirements of the DIL program as described in this notice, please be advised that any pending foreclosure action or proceeding may continue and a foreclosure sale may occur."

[54] *See* AA03344, Vol.XIV; AA03352-03353, Vol.XIV.

[55] *Cf.* AA003766, Vol. XVI; AA03340-3355, Vol.XIV.

Nowhere in the mediator's statement, or in Fay Servicing's DIL terms in Attachment B (page 6), does the agreement provide that Appellants would make payments. *See id.*

As to the district court's determination that Appellants "believe they can game the system," that they want more time to continue a "free ride," or that they have admitted to acting in "bad faith" and abused the mediation program, the district court is mistaken. AA03765-03766, Vol.XVI.

The district court's statements quoted above are not supported by any citation to the record before the court, and appear to be solely the district court's personal opinion.

Accordingly, this Court must conclude that the district court has erred in determining the terms of the mediation agreement, and as to Appellants' motivations in this case because the district court's conclusions are not supported by the evidence. Additionally, based upon the foregoing, the district court's determination that Respondents are entitled to summary judgment upon its findings of "undisputed facts" cited herein must be reversed.

D. The District Court Erred in Denying Appellants' Motion for Partial Summary Judgment and Determining that Respondents Were Entitled to Summary Judgment as a Matter of Law.

1. Breach of Contract Claim Against BANA Not Time Barred

The district court erred in determining that Appellants' claims against BANA for breach of contract and breach of covenant of good faith and fair dealing are time barred.

BANA's actions to conceal its receipt, execution and recording of the 2009 LMA from Appellants, provides a basis under the discovery rule and under the theory of equitable tolling to toll the statute of limitations.

Under the "Discovery Rule" and "Equitable Tolling," a claim for breach of contract is tolled until the breach is or should have been discovered. *See Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Whereas, equitable tolling will excuse a delay by the plaintiff where "a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period." *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) (*quoting Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir.2002)).

In this case, there is no evidence relied upon by the district court establishing that a reasonable person would have known that they have a cause of action based upon BANA's representation that the 2009 LMA was lost or not in its system. *See e.g.* AA02001, Vol.IX.

Accordingly, this Court should determine that Appellants were entitled to have the applicable six-year statute of limitations tolled until no sooner than 11/03/2017, the date Sables recorded the NOD, which is the first document provided to Appellants acknowledging the execution and recording of the 2009 LMA.

2. Breach of Contract Claims Not Precluded

The district court erred in determining that the legal defense of "claim preclusion" is applicable to Appellants' Breach of Contract claims against BANA and US Bank.

Claim preclusion applies to a matter when: "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit . . ." *Weddell v. Sharp*, 131 Nev. 233, 235, 350 P.3d 80, 81 (2015).

None of the requirements to establish that Appellants' claims are precluded have been met. Appellants' petition for bankruptcy relief did not establish a "civil action" for the purposes of adjudicating relief.[56] *See* FRBP 11 7001. Furthermore,

[56] *See* FRBP 11 7001 defining proceeding that are "adversarial proceedings" before the federal bankruptcy courts.

there is no evidence provided by Respondents that establish that Appellants have ever filed a separate adversarial matter with the Nevada Bankruptcy Court.

This Court should conclude that the district court erred in determining that "claim preclusion was applicable" in this case. The district court further erred in its determination that Respondents were entitled to judgment as a matter of law upon Appellants' claims for breach of contract upon the theory that Appellants are precluded from bringing their claims.

Accordingly, this Court should conclude that these determinations of the district court must be reversed.

3. Appellants' Performance Excused

The district court erred in determining Appellants were not excused from performance in 2009 under the terms of the 2009 LMA.

Appellants' second and last payment made under the 2009 LMA was rejected by BANA. AA00246-00254, Vols.I-II. Furthermore, it is undisputed that BANA and its successors in interest did not in any way implement, enforce, or otherwise give Appellants the opportunity to make payment under the terms of the 2009 LMA. AA03136, Vol.XIII.

This Court has held that a material breach of one party's promise discharges the non-breaching party's duty to perform. *Cain v. Price*, 134 Nev. Adv. 26, 415

P.3d 25 (2018) (*citing* Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981).

As well, this Court has held that an affirmative tender of performance of one party is excused where the other party prevents performance. *See Cladianos v. Friedhoff*, 69. Nev. 41, 240 P.2d 208 (1952).

It is clear under Nevada law that Appellants' duty to perform ended when BANA rejected their payment and misrepresented to Appellants that the 2009 LMA was "lost" and "not in its system." [57].

As "a principal of fundamental justice," BANA and its successors in interest cannot use their own breach and failure to implement the 2009 LMA as a shield, and also seek to unfairly recover against Appellants by the foreclosure of their home.[58]

Therefore, based upon the foregoing cited case law, this Court must conclude that Appellants' performance, being payment of their mortgage pursuant to the 2009 LMA, was excused when their payment was rejected by BANA and Appellants performance continued to be excused when BANA and its successor in

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[57]

[58] *See Cladianos v. Friedhoff*, 69. Nev. at 46, 240 P.2d at 210 (*quoting* Williston on Contracts, Rev. Ed., 1952, "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."

interest did not give Appellants the opportunity to make payment under term of the modified loan agreement. Thus, this Court must conclude that the district court's determination that Respondents are entitled to judgment as a matter of law was in error and requires reversal.

4. No Waiver of Appellants Rights under Chapter 107

The district court's determination that Appellants agreement to the foreclosure mediation Mediator's Statement entitled US Bank and Fay Servicing to a deed in lieu of foreclosure and constituted a waiver by Appellants of their rights and protections under Chapter 107 of Nevada Revised Statutes was in error.

As previously addressed, the Mediator's Statement does not include any explicit waiver for rights and furthermore only provided that Appellants were given until 7/4/2017 to apply for Sables' DIL program.

If the Mediator's Statement operated to supersede the 2009 LMA, and thereby transfer a property interest in itself, it would violate the requirements of NRS 40.453.

Pursuant to NRS 40.453, any agreement relating to the sale of real property that contains provisions operating as a waiver of rights provided under Nevada law, is unenforceable and against public policy. *See* NRS 40.453.

No term in the Mediator's Statement provides that the agreement supplants or replaces the terms of the 2009 LMA, and there is no explicit or implicit

provision that constitutes a waiver of Appellants' rights to the protections afforded them under Chapter 107 of Nevada Revised Statutes.

Therefore, this Court must conclude that the district court erred in determining that the Mediator's Statement required Appellants to execute a deed in lieu of foreclosure in favor of Fay Servicing or US Bank. This Court must further conclude that the district court erred in determining that Appellants' execution of the Mediator's Statement constituted a waiver of their rights.

5. Wrongful Foreclosure of Appellants Home

The district court erred in its determination that Respondents US Bank, Fay Servicing, Sables, and Shellpoint substantially complied with the requirement of NRS 107.080 and that Appellants' home was not wrongly foreclosed upon.

The district court determined that Respondents US Bank, Fay Servicing and Shellpoint substantially complied with the requirements of NRS 107.080, and that no wrongful foreclosure had occurred by Sables exercise of the power of sale. [59]

However, the district court erred in determining that Appellants had breached their mortgage agreement, even though it is undisputed that Appellants have never been given the opportunity to make payments under the mortgage as modified by the 2009 LMA. AA02467-02500, Vol.X; AA00246-00254, Vols.I-II.

[59] AA03758-03759, Vol.XVI.

The district court determined that BANA and its successors in interest repudiated the 2009 loan modification agreement, even though it is undisputed that the 2009 LMA was offered by BANA in July of 2009, executed and recorded by BANA in 2011, and then it is admitted in the 11/3/2017 NOD that the 2009 LMA modified the original 2007 DOT. [60] [61] [62] [63]

"A repudiation is . . . a statement by the obligor to the obligee indicating that the obligor will commit a breach . . . ." *State Dep't of Transp. v. Eighth Judicial Dist. Court*, 402 P.3d 677, 682 (Nev. 2017) (*quoting Bernard v. Rockhill* Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987)).

The district court determined that Appellants "did not act upon the failure of BANA or its successors to accept the payment and repudiate the LMA or modification in a reasonable time . . ." [64]

The district court further determined that payment could be demanded by BANA and its successors because Appellants failed to "repudiate the agreement." [65]

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[60] AA03796, Vol.XV;
[61] AA02295-02297, Vol.X (2009 LMA).
[62] AA03189-03191, Vol.XIII (2011 Recording of 2009 LMA).
[63] AA03318-03323, Vol. XIV (11/3/2017 NOD).
[64] AA03796, Vol.XVI.
[65] AA03797, Vol.XVI.

Appellants interpret the district court's order to mean that because of BANA's rejection of Appellants' 10/01/2009 payment, and Appellants' failure to bring an action to enforce the 2009 LMA in "a reasonable time," BANA and its successors did not have to honor the terms of the 2009 LMA, and could seek payment under the 2007 DOT. [66]

The district court's analysis is unworkable to the extent that it fails to take into account BANA's 2011 recording of the 2009 LMA and Sables' 11/3/2017 admission in the NOD that the 2009 LMA modified the 2007 DOT.

If BANA had repudiated the 2009 LMA it would not have executed the same and recorded the modification with the Lyon County Recorder's office. AA00087-00092, Vol.I.

As such the district court's analysis fails to consider the undisputed facts. BANA's refusal to accept payment under the modified terms of the 2009 LMA amounts to a breach of contract. Such breach does not provide BANA and its successors in interest the right to enforce the prior mortgage agreement, and foreclose upon the same.

The court's determination of substantial compliance under NRS 107.080 was also in error.

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[66] *See* AA03796-03797, Vol.XVI.

NRS 107.080(1) confers "a power of sale . . . upon a trustee to be exercised after a breach of [payment upon] the obligation for which the transfer is security." NRS 107.080(1). Thus, in order for a trustee to have authority to exercise the power of sale, the homeowner must be in default under the applicable agreement. *See id.*

NRS 107.080(2) authorizes a Trustee to conduct a sale when and only when the provisions of NRS 107.080(2)(a)-(d) have been complied with by the beneficiary or Trustee. NRS 107.080(2).

NRS 107 080(2) provides that "[t]he power of sale must not be exercised . . . until . . . the grantor . . . has, for a period of 35 days . . . failed to make good the deficiency in performance or payment." NRS 107.080(2)(emphasis added).

The 11/3/2017 NOD provides that the "Deed of Trust was modified by Loan Modification Agreement recorded as instrument 475808 and recorded on 5/4/2011. . . " [67]

However, the Affidavit of Authority attached to the NOD only recounts the terms applicable to the 2007 DOT, as if the mortgage loan had never been modified by the 2009 LMA. [68]

[67] AA03318-03323, Vol.XIV.
[68] AA03321-03322, Vol.XIV.

US Bank, Fay Servicing, and Shellpoint Financial were made aware of the error pertaining to the Notice of Default by way of Appellants Complaint and TRO Application filed and they were served on said Respondents on 11/07/2018.[69]

In order for Sables, the Trustee of the modified DOT, to avoid liability, it was required to correct "a good faith error not later than 20 days after discovering the error." [70]

Rather than rescinding the NOD so that the beneficiary could execute a new affidavit of authority reflecting the terms of the 2009 LMA, the Trustee conducted the foreclosure sale instead.[71]

A sale "must be declared void" pursuant to NRS 107.080(5) where the trustee "does not substantially comply with the provisions of [NRS 107.080]." *See* NRS 107.080(5).

In determining that Sables, US Bank, Fay Servicing, and Shellpoint had substantially complied with NRS 107.080, the district court relied upon *Daygo Funding Corporation v Mona*, 134 Nev. 929 (2018), for the proposition that "substantial compliance exists if title holder 'had actual knowledge of the default

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[69] AA00001-00126, Vol.I.
[70] NRS 107.028(6) pertaining to trustee liability when the trustee has relied upon information provided by the beneficiary.
[71] AA00884-0885, Vol.IV.

and the pending foreclosure sale' and 'was not prejudiced by the lack of statutory notice.'" [72]

The issue before the district court is not whether Appellants received notice of the NOD. The relevant issue was whether wholly inaccurate documents constitute substantial compliance. [73]

The NOD and the attached Affidavit does not give Appellants any notice of the date that they were given the opportunity to make payment under the modified loan or the arrearage owed if any under the modified terms.[74]

However, the district court determined that the substantial compliance does not require that the Notice of Default or the attached Affidavit be accurate. [75]

As support for this conclusion, the district court cited *Kehoe v Aurora Loan Services LLC*, 2010 WL 4286331 (US Dst. Ct. D. Nev 2010).

The district court's reliance on *Kehoe* is misplaced. *Kehoe* was decided in 2010, prior to the Nevada legislatures recent revisions and additions to Chapter 107. In 2017 the Nevada legislature passed SB 490 adding NRS 107.0805

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[72] *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018)(*quoting "Schleining v. Cap One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 8 (2014))."

[73] AA01565-01566, Vol.VII.
[74] AA01682-1687, Vol.VII.
[75] AA03758-03759, Vol.XVI.

requiring that an Affidavit of Authority be prepared and recorded with the Notice of Default. SB 490, p.483; NRS 107.0805(1)(b).[76]

The newly created NRS 107.0805 required Sables to establish its compliance with NRS107.0805 before exercising the power of sale. NRS 107.0805(1).

Pursuant to NRS 107.0805(3), Sables was required to record the notice of default with an affidavit of authority that includes a statement that the borrower has been provided with the following:

> (I) That amount of payment required to make good the deficiency in performance or 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 exercise of the power of sale . . .

NRS 107.0805(3).

Rather than a simple statement of the facts pertaining to the loan, the Nevada Legislature sought to have the information attached to the notice of default be truthful, accurate, and verified by affidavit upon personal knowledge.[77]

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[76] SB 490 became effective on 7/01/2017, prior to Sables recording of the 11/3/2017 Notice of Default.

At the time *Kehoe* was decided, a notice of default was not required to include an affidavit of authority or any specific arrearage information regarding the obligation of the mortgage loan. [78]

In this case, Sables was required to record the NOD with an Affidavit of Authority accurately reflecting the information required under NRS 107.0805(3). *See* NRS 107.0805.

It is undisputed that Sables' NOD and Affidavit do not reflect the terms of the 2009 LMA even though the NOD admits the 2009 LMA modified the mortgage. Upon receipt of Appellants' Complaint and TRO Application specifically noting the errors in the NOD and Affidavit, US Bank, Sables, Fay Servicing and Shellpoint were on notice that NRS 107.0805(3) had not been complied with and that Sables did not have authority to proceed with the foreclosure of Appellants' home. [79] [80]

The district court erred in overlooking the duties owed under NRS 107.080 and NRS 107.0805 by determining that US Bank, Fay Servicing, Sables, and Shellpoint had substantially complied with the requirements of NRS 107.080 and that no wrongful foreclosure had occurred.

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[77] NRS 107.0805(1)(b) requires the affidavit be established by a person with "personal knowledge" and stated "under penalty of perjury."
[78] *Kehoe*, 2010 WL 4286331, pp.10-11.
[79] *See* AA00001-00126, Vol.I; NRS 107.0805(1).
[80] *See* NRS 107.0805(1).

6. No Consideration of Appellants' Homeowner's Bill of Rights Claim

The district court erred in failing to consider or analyze Appellants' claim for violations of the Homeowners' Bill of Rights in determining that Respondents were entitled to judgment as a matter of law. [81] [82]

Appellants' Seconded Amended Complaint sought relief for Respondents' violation of the HBOR for failing to provide accurate information and for failing to provide notice that complied with NRS 107.500(1).[83]

Even though Appellants sought summary judgment upon their claim for violation of HBOR, the district court's order failed to address Appellants' HBOR claim.[84]

The basis for the district court's 12/31/2018 order enjoining foreclosure of Appellants' home was that Appellants had established that Respondents "had violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure." AA00814, Vol.IV.

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[81] HBOR is codified in Chapter 107 in NRS 107.400 to NRS 107.560.
[82] NRS 107.560(2) provides a private right of action "to recover his or her actual economic damages resulting from a material violation of NRS 107.400 to NRS 107.560.
[83] AA01570-01571, Vol.VII.
[84] AA03743-03768, Vols.XV-XVI.

Pursuant to NRS 107.480, a trustee's authority to conduct a sale under NRS 107.080 is conditioned upon compliance with NRS 107.400 through NRS 107.560. [85]

NRS 107.500(1)(b) requires that at least 30 days prior to recording a notice of default, the servicer or beneficiary must mail a statement to the homeowner that includes: (1) the total amount of payment necessary to cure the default and reinstate the loan; (2) the amount of the principal obligation owed; (3) the date through which the mortgage loan is paid (4); the current interest rate; (5) the amount of any prepayment fee; and (6) the description of any late payment fee. [86]

The requirements of NRS 107.500 are mandatory and must be complied with prior to the trustee's recording of the notice of default and election to sell. [87]

In the case *Malcolm v. MTC Fin.*, Inc., before the U.S. District Court of the District of Nevada, the federal district court was tasked with determining a motion to dismiss a claim for wrongful foreclosure brought pursuant to the Homeowner's Bill of Rights. [88] As to the purpose of HBOR, the district court stated that "[t]he Nevada legislature enacted the Homeowner's Bill of Rights in response to 'predatory and illegal practices by mortgage servicers and outside firms hired by

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[85] *See* NRS 107.480.
[86] *See* NRS 107.500(1)(b).
[87] *See Malcolm v. MTC Fin., Inc*., 3:14-cv-00359-MMD-WGC, (D. Nev. Mar. 20 2015).
[88] *Id.*

mortgage servicers' for the purpose of providing Nevada homeowners with 'fair and honest treatment in the servicing of mortgage loans in default.'" [89]

In Respondent Fay Servicing's opposition to Appellants' motion for partial summary judgment, it argued that it had substantially complied with NRS 107.500(1) by providing the required notice on 12/15/2015. [90]

However, Fay Servicing's letter is wholly inaccurate and does not reflect the terms of the 2009 LMA applicable to the mortgage loan as demonstrated below:

	12/15/2015 Letter [91]	**2009 Loan Modification Agreement** [92]
Date of Next Payment	9/1/2008	9/1/2009 (Date of 1st payment due under 2009 LMA)
Total of Payments Due	$214,933.59	$1,977.29 (10/1/2009 Payment Refused by BANA
Principal Balance:	$381,150.00	$417,196.58
Interest Rate	6.88%	4.875%
Total to Cure Default	$214,642.49	$0.00 [93]

[89] *Malcolm,* 3:14-cv-00359-MMD-WGC, p.6 (*citing* S.B. 321, Nev. 77th Reg. Sess. (2013)).
[90] AA03488-3489, Vol.XIV.
[91] AA03446-3451, Vol.XIV.
[92] AA02295-02297, Vol.X.
[93] Reflecting refusal of last payment by BANA refused Payment 10/1/2009; No Bank or Servicer has sought payment from the Lincicomes under the terms of the 2009 LMA).

See AA003718, Vol.XV; AA03446-3451, Vol.XIV.

Based upon the inaccuracies demonstrated above, the very purpose underlying NRS 107.500, being to ensure "fair and honest treatment" of homeowners was not complied with by Fay Servicing's 12/15/2015 notice. [94]

Fay Servicing's argument that Appellants failed to provide "any facts that they suffered harm from violations of NRS 107.500(1)" is ludicrous under the circumstances that Appellants have had their home foreclosed upon without ever being given the opportunity to make payment upon their modified mortgage following BANA's rejection of their 10/01/2009 payment. Apparently, the foreclosure and eviction of Appellants from their home does not fall within Respondents' understanding of "harm." [95] [96]

Compliance with the requirements of NRS 107.500(1) cannot simply constitute sending a notice where only the loan number and the name and mailing address are accurate.[97]

This Court has defined "substantial compliance" to be "'compliance with essential matters necessary to ensure that every reasonable objective of the statute is met.'" [98]

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[94] *See* AA03446-3451, Vol.XIV.
[95] *See* AA03494, Vol.XIV.
[96] AA03494, Vol.XIV.
[97] See NRS 107.500(1).

Even if a substantial compliance standard were applicable to NRS 107.500, it cannot be said that Fay Servicing's wholly inaccurate notice complies with the "reasonable objective of the statute" to ensure that Appellants received fair and honest treatment.

The district court recently provided an explanation for its 12/31/2018 Order determining that Appellants were likely to succeed on their HBOR claim in its 1/19/2022 *Order on Attorney's Fees and Costs.* [99] In that order the district court stated that even though it found that Appellants were likely to succeed during the injunction hearing "[b]ased upon the limited evidence and case law provided . . . [100] However, the district court stated that the "[f]acts raised in discovery clearly presented a picture wholly different than what had been presented to the Court during the preliminary injunction hearing." [101]

The district court provides no analysis of the requirements of NRS 107.500 or a comparison of Fay Servicing's 12/15/2015 notice, the terms of the 11/3/2017 NOD, or the terms of the 2009 LMA.[102]

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[98] *Redl v. Secretary of State*, 120 Nev. 75, 85 P.3d 797, 801-802 (Nev. 2004)(quoting *Williams v. Clark County Dist. Attorney*, 118 Nev. 473, 480, 50 P.3d 536, 541 (2002).
[99] AA04308-04319, Vol.XVIII.
[100] AA04317, Vol.XVIII.
[101] *Id.*
[102] AA04308-AA04320, Vol.XVII.

Rather, in awarding judgment against Appellants for attorney's fees and costs upon the conclusion that Appellants had "no reasonable basis" for bringing an action upon their claims, the district court found that Appellants "abused the foreclosure mediation program" and "never had the ability or desire to make payments on the loan obligation." [103] The district court stated that Appellants' action was maintained only to "prolong [their] ability to live rent free." [104]

Appellants have no explanation for the district court's conclusion that they are not entitled to relief upon their claim for violation of HBOR, or how Respondents could be entitled to judgment as a matter of law upon Appellants' claim when the NOD is patently inaccurate.

Accordingly, this Court should conclude that the district court erred by failing to consider and analyze Appellants' claim for violation of the Homeowner's Bill of Rights when it denied Appellants' motion for partial summary judgment and when it granted Respondents' respective motions for summary judgment.

E. The District Court Erred in Granting BANA's Request for Sanctions.

The district court abused its discretion in granting BANA's request for sanctions.

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[103] AA04317, Vol.XVIII.
[104] AA04318, Vol.XVIII.

The district court determined that BANA was entitled to sanctions for Appellants' failure to provide a calculation for damages.[105]

This Court reviews discovery sanctions for an abuse of discretion. *Foster v. Dingwall*, 126 Nev. 57, 65, 227 P.3d 1042, 1048 (2010). Sanctions resulting in the striking of an answer as to liability and damages are subject to ""a somewhat heightened standard of review." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

In this case, the district court determined that the appropriate sanction was to strike all allegations concerning monetary damages from the Complaint as the failure appears to be made in bad faith and in an effort to prolong this matter further.[106]

The striking of all monetary damages is excessive.

This Court has stated that the "fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." [107]

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[105] AA03766, Vol.XVI.
[106] *Id.*
[107] *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990)(*citing Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir.1983).

Appellants argued to the district court that they were unable to calculate damages to be attributed to BANA because of possible statutory damages, and other theories of liability being pursued against the other Respondents.[108]

Appellants also argued that they could have simply alleged that the damages sought were the value of their home, minus the principal balance of the 2009 LMA, however, those damages would not be appropriate if the district court determined that it was appropriate that the foreclosure of Appellants' home be set aside under Appellants' claim of wrongful foreclosure asserted against the other Respondents.[109]

Appellants were unable to give BANA an estimation of damages that would include all of the consequential damages Appellants would be entitled as a result of BANA's conduct.[110]

This Court should conclude that the district court's sanction imposed upon Appellants' for their failure to estimate economic damages in this matter was excessive and not proportionally related to Appellants failure to estimate damages. Accordingly, this Court should conclude that the district Court abused its discretion in sanctioning Appellants by striking all allegations concerning monetary damages from Appellants' Complaint.

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[108] AA03117-03118, Vol.XIII.
[109] *See id.*
[110] *See id.*

V. CONCLUSION

For the reasons stated hereinabove, Appellants respectfully request that this Court conclude that the Third Judicial district court erred in determining that Appellants' objection to Sables' declaration of non-monetary status was invalid, and that the district court further erred in determining that Respondents were entitled to judgment as a matter of law by granting Respondents' respective motions for summary judgment and denying Appellants' *Motion for Partial Summary Judgment*.

Respectfully submitted this 2nd day of February, 2022.

MILLWARD LAW, LTD

By: _____
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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
)ss.:
COUNTY OF DOUGLAS)

I, Michael G. Millward, Esq., hereby certify that this opening brief is filed in compliance with the formatting requirements of NRAP 32. The opening brief is prepared for 8 ½ by 11 inch paper, and the text is double spaced in compliance with NRAP 32(a)(4). The brief is written in 14-point Times New Roman font in the body and footnotes, and it fully complies with the formatting and style requirements of NRAP 32(a)(5) and NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010. While the brief exceeds 30 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 13,161 words. I further hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before me this 2nd day of February, 2022.

NOTARY PUBIC in and for said COUNTY AND STATE

NOTARY PUBLIC
STATE OF NEVADA
County of Douglas
18-3944-5 REBEKAH HIGGINBOTHAM
My Appointment Expires October 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2022, I filed the foregoing APPELLANTS' OPENING BRIEF and APPELLANTS' APPENDIX 1-18, which shall be served via electronic service from the Court's eFlex system to:

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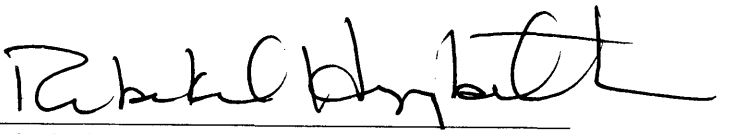

Rebekah Higginbotham