IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME,

Appellants,

vs.

SABLES, LLC, AS TRUSTEE OF THE DEED OF TRUST GIVEN BY VICENTA LINCICOME AND DATED 5/23/2007; FAY SERVICING, LLC; PROF-2013 M4 LEGAL TITLE TRUST BY U.S. BANK N.A., AS LEGAL TITLE TRUSTEE; BANK OF AMERICA, N.A.; 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.

Supreme Court Case No.: 83261
District Court Case No.: 18-cv-01332

RESPONDENTS' PROF-2013 M4-LEGAL TITLE TRUST, BY U.S. BANK, NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE, FAY SERVICING LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC'S ANSWERING BRIEF

Respectfully Submitted by:
WRIGHT, FINLAY & ZAK, LLP
Darren T. Brenner, Esq.
Nevada Bar No. 8386
Ramir M Hernandez, Esq.
Nevada Bar No. 13146
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89148
702-475-7964; Fax 702-946-1345
Attorneys for Defendants, Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and NewRez, LLC, d/b/a Shellpoint Mortgage Servicing, LLC

NRAP RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent, Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee ("U.S. Bank Trustee") is a wholly-owned subsidiary of U.S. Bancorp and there are currently no owners holding in excess of 10% of the outstanding stock.

Respondent, Fay Servicing, LLC is wholly owned by Fay Management, LLC, its single member. Fay Management, LLC is a Delaware LLC, with principal place of business in Tampa, FL.

New Residential Mortgage, LLC d/b/a Shellpoint Mortgage Servicing is a wholly-owned subsidiary of Shellpoint Partners LLC, a Delaware limited liability company. Shellpoint Partners LLC is a wholly-owned subsidiary of NRM Acquisition LLC and NRM Acquisition II LLC, Delaware privately held corporations. Both NRM Acquisition entities are wholly-owned subsidiaries of New Residential Mortgage LLC, a Delaware limited liability company. New Residential Mortgage LLC is a wholly-owned subsidiary of New Residential Investment Corporation, a Delaware corporation. New Residential Investment

Corporation is publicly traded on the New York Stock Exchange under the ticker symbol: NRZ.

The following attorneys have appeared or are expected to appear on behalf of Appellants in this case: R. Samuel Ehlers, Esq., Darren T. Brenner, Esq., and Ramir M. Hernandez, Esq.

DATED this 5th day of April, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Ramir M. Hernandez, Esq.
Darren T. Brenner, Esq.
Nevada Bar No. 8386
Ramir M. Hernandez, Esq.
Nevada Bar No. 13146
Attorneys for Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to NRAP 3A(b)(1) because Appellants Albert Ellis Lincicome, Jr., and Vicenta Lincicome (the "Lincicomes") appeal from a final judgment and orders entered in the lower court. The district court certified the judgment under NRCP 54(b). NRAP 4(a)(1) provides a notice of appeal must be filed no later than 30 days after service of written notice of entry of the judgment or order from which the appeal is made. Here, written notice of entry of the order from which Springer appeals was served on July 6, 2021. The Lincicomes timely filed their Notice of Appeal on July 19, 2021. Initially, Defendant Breckenridge Property Fund 2016, LLC ("Breckenridge") was named as a Respondent to the Appeal. Per the Order Partially Dismissing Appeal filed on January 19, 2022, this Court dismissed Breckenridge from this Appeal.

II. ROUTING STATEMENT

Pursuant to NRAP Rule 17(a)(11)-(12), this matter should remain with the Nevada Supreme Court because it involves a matter of public importance and first impression. To date, the Nevada Supreme Court has not ruled on any issues related to NRS 107.400 *et seq.* (the Nevada Homeowners Bill of Rights).

III. STATEMENT OF ISSUES ON APPEAL

1) In *Jones v. Sun Trust*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012), the Nevada Supreme Court held that a settlement at foreclosure mediation is a

binding agreement between the parties. A deed-in-lieu constitutes transfer of the mortgagor's rights in the property to the mortgagee, including all right, title, and interest in the property. Did the district court correctly grant Respondents' Motion for Summary Judgment when it found that the Lincicomes could not contest the foreclosure of the subject property because they agreed to provide a deed-in-lieu and surrender the subject property at a foreclosure mediation?

2) In Nevada, the doctrine of judicial estoppel precludes a party from stating a position in one case that is contrary to a position in a previous case. *Kaur v. Singh*, 477 P.3d 358, 362. Did the district court correctly grant Respondents' Motion for Summary Judgment when it held that the Lincicomes repudiated a 2009 Loan Modification Agreement between them and Bank of America in their bankruptcy when they refused to acknowledge its existence and made claims based on the original terms of the Note?

3) In Nevada, "[a]n action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). A

wrongful foreclosure claim fails if the plaintiff fails to allege that they were not in default at the time of the foreclosure. *Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230, 1237 (D. Nev. 2009). Did the district court correctly grant Respondents' Motion for Summary Judgment when it determined that the Lincicomes could not sustain a wrongful foreclosure after they admitted they were in default on the subject loan?

4) In Nevada, a party has six years to bring forth a cause of action for violation of a written contractual agreement. *See* NRS 11.190(1)(b). The cause of action accrues when a party discovered or should have discovered the facts giving rise to the cause of action. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). Did the district court correctly grant Respondents' Motion for Summary Judgment when it held that the Lincicomes failed to bring a breach of contract claim until nine years after they discovered the alleged breach had occurred?

IV. STATEMENT OF THE CASE

This appeal arises out of an order granting summary judgment against the Lincicomes on their wrongful foreclosure and related claims. The Lincicomes owned residential property in Dayton, Nevada. They financed their purchase of the property with a loan secured by a deed of trust. Like many following the Great Recession, the Lincicomes became delinquent, and the loan went into default. After

successfully attempting to modify the loan, the Lincicomes filed for bankruptcy and obtained a discharge of their personal obligation to repay the loan.

The Lincicomes continued to live in the Property after the discharge. Following additional failed modification attempts, in 2018, the Lincicomes participated in a Chapter 107 foreclosure mediation. At the mediation, the Lincicomes agreed to a deed-in-lieu of foreclosure, where they executed an agreement confirming the same. The Lincicomes then reneged on their promise to provide a deed-in-lieu, prompting a Notice of Foreclosure Sale to issue. The Lincicomes filed suit, with a request for a primary injunction to halt the sale. The lower court granted the request, on condition that the Lincicomes post a bond that covered 72 months of delinquent payments. The Lincicomes did not post the bond. The foreclosure sale went forward at which time the property was sold to Breckenridge.

After discovery, the parties filed cross-motions for summary judgment. On June 23, 2021, the district court entered separate summary judgment orders in favor of Respondents (including BANA) and Breckenridge. The district court certified the judgment as a final judgment under NRCP 54(b) as to Respondents.

V. STATEMENT OF RELEVANT FACTS

A. The Subject Loan and the Loan Modification

On May 23, 2007, Appellant Vicenta Lincicome took out a loan for the

purpose of real property commonly known as 70 Riverside Drive, Dayton, Nevada 89403; APN 29-401-17 (the "Property").[1] A deed of trust with a face value of $381,150.00 secured the loan.[2] US Bank was assigned beneficial interest in the deed of trust November 25, 2014.[3]

The Lincicomes subsequently fell behind on their mortgage.[4] Bank of America, the loan servicer at the time, offered the Lincicomes a loan modification.[5] and the Lincicomes executed the loan modification on June 11, 2009 ("2009 LMA").[6] The loan modification was recorded on March 2, 2011.[7]

B. The 2010 Bankruptcy

The Lincicomes claim they attempted to make payments on the loan modification, but BANA allegedly refused the payments at a local branch on the basis that it could not find the modification.[8]

Rather than attempt to resolve or sort out what transpired with the modification in 2010, the Lincicomes field for bankruptcy.[9] The bankruptcy petition

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[1] XII:AA02807-AA02810.
[2] XII:AA02811-AA02821.
[3] XII:AA02824-AA02832.
[4] VII:AA01557.
[5] XII:AA02836-AA02839.
[6] *Id.*
[7] XII:AA02836-AA02839.
[8] VII:AA01558.
[9] XII:AA02840-AA02861.

abandoned any claim that the loan was subject to the terms of the 2009 LMA. The Bankruptcy Petition lists a secured claim in the amount of $381,000.00 which is the value found in the Note, not the 2009 LMA.[10] Moreover, in their confirmed bankruptcy plan, the Lincicomes listed the original terms of the loan including the original a monthly payment of $2,325.00, an interest amount of 4.5%, and a maturity date of March 2040.[11] The Lincicomes also asserted that at the time of the filing of the petition, they were "current" on the loan and would continue to make payments after the confirmation of the plan.[12]

On November 26, 2014, BANA filed a Motion for Relief from the Automatic Stay.[13] The Motion was based on the original terms of the Note.[14] The Lincicomes did not oppose the Motion for Relief, which the bankruptcy court granted on January 5, 2015.[15] On July 1, 2015, the bankruptcy court entered a Final Decree, which discharged the Lincicomes personal obligations under the note.[16] The Deed of Trust remained in full force based on the original terms of the loan.

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[10] XII:AA02849.
[11] XII:AA02863.
[12] XII:AA02849.
[13] XII:AA02866-AA02884.
[14] *Id.*
[15] XII:AA02885-02886.
[16] XII:AA02887.

C. The Post-Discharge Loss Mitigation Process

After the discharge, the Lincicomes applied for a new loan modification with BANA and received a trial modification.[17] They made two payments on the trial modification before the loan service transferred to Fay.[18] Fay offered a new trial loan modification on September 15, 2016.[19] The Lincicomes successfully made three trial payments qualifying them for a permanent loan modification.[20] However, they refused to sign the permanent modification because they could not afford it going forward.[21]

After the Lincicome had exhausted their foreclosure alternative efforts, on November 3, 2017, the Trustee of the Deed of Trust, Sables, LLC, recorded a Notice of Default.[22] Following receipt of the Notice of Default, the Lincicomes exercised their right to foreclosure mediation.[23]

On March 6, 2018, Fay offered the Lincicomes another trial loan modification with a monthly payment of $2,462.30, or a deed in lieu of foreclosure in exchange for relocation assistance in advance of the foreclosure mediation.[24] At the April 3,

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[17] VII:AA01560.
[18] *Id.*
[19] XII:AA02900.
[20] XII:AA02901-AA02904.
[21] VII:AA01562.
[22] XII:AA02901-AA02904.
[23] XII:AA02905-AA02909.
[24] XII:AA02913-AA02916.

2018, mediation, the Lincicomes declined the loan modification offer and opted instead for the deed-in-lieu of foreclosure as outlined in the March 6 letter.[25] The parties also agreed to a foreclosure certificate issue date of July 5, 2018.[26] The agreement was signed by all parties, including their attorneys.[27]

On May 21, 2018, Ms. Lincicome sent Fay a letter attempting to back out of the deed-in-lieu that she had agreed to at mediation and demanding that Fay renegotiate the loan with her.[28] Fay declined.[29] On October 12, 2018, Sables recorded a Notice of Trustee's Sale.[30]

D. The Litigation and Foreclosure of the Property

On November 7, 2018, the Lincicomes filed suit against the Fay, the U.S. Bank Trust, and BANA.[31] The Complaint alleged that the U.S. Bank Trust and Fay did not provide the correct amount of default as the Notice of Default did not consider the 2009 Loan Modification Agreement.[32] It also sought a temporary restraining order and preliminary injunction to stop the non-judicial foreclosure

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[25] XII:AA02907.
[26] *Id.*
[27] XII:AA02908.
[28] XII:AA02921.
[29] XII:AA02928-AA02930.
[30] I:AA00146-AA00148.
[31] I:AA00001-AA00125.
[32] I:AA00011.

sale.[33] On November 20, 2018, the district court granted the Motion for Preliminary Injunction to enjoin the foreclosure sale, on condition that the Lincicomes post 72 months of payments to the Court as a bond within 30 days.[34] The Lincicomes did not appeal or post the required bond. Accordingly, the injunction never took effect, and the Property went to foreclosure sale on January 4, 2019.[35] Breckenridge was the winning bidder at the January 4, 2019, sale.[36]

Just before the sale on December 26, 2018, U.S. Bank Trust assigned beneficial its interest in the Deed of Trust to 1900 Capital Trust II, by U.S. Bank Trust National Association,.[37] The Assignment was recorded on February 19, 2019.[38] On January 17, 2019, servicing transferred from Fay to Shellpoint.[39]

On December 20, 2019, the Lincicomes filed their Second Amended Complaint, which stood as the operative complaint until discovery closed.[40] In the Second Amended Complaint, the Lincicomes sought relief for wrongful foreclosure, declaratory relief, quiet title, violation of the Homeowner's Bill of Rights, breach of

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[33] I:AA00126-II:AA00254.
[34] IV:AA00809-AA00816.
[35] V:AA01119-AA01121.
[36] *Id.*
[37] XII:AA02826.
[38] *Id.*
[39] XII:AA02827-AA02828.
[40] VII:AA01553-AA01696.

contract and breach of fair dealing, slander of title, and attorneys' fees and costs.[41]

After discovery closed, the parties filed cross-motions for summary judgment. On June 23, 2021, the district court granted all defendants' Motions for Summary Judgment and denied Plaintiffs' Motion for Partial Summary Judgment.[42] As to the Respondents, the district court held: 1) the Lincicomes could not contest the foreclosure of the Property because they agreed to provide a deed-in-lieu and surrender the Property at a foreclosure mediation; 2) the Lincicomes repudiated the 2009 Loan Modification Agreement between them and Bank of America in their bankruptcy when they refused to acknowledge its existence and made claims based on the original terms of the Note; 3) they could not sustain a wrongful foreclosure claim after they admitted they were in default on the subject loan; and 4) they failed to bring a breach of contract claim until nine years after they discovered the breach had occurred in 2009 and the statute of limitations bared them from bringing their breach of contract claims.[43] This appeal then followed.[44]

VI. SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order granting summary judgment for four reasons:

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[41] *Id.*
[42] XVI:AA03751-AA003768.
[43] XVI:AA03762-AA03766.
[44] XVI:AA03812-AA03814.

First, the Lincicomes entered into an agreement at a foreclosure mediation whereby they agreed to surrender the Property. Under this Court's decision in *Jones v. SunTrust Mortg., Inc.*, *supra,* an agreement entered into at a foreclosure mediation is binding on the parties. As a result, the Lincicomes were estopped from contesting the foreclosure.

Second, the Lincicomes repudiated and/or abandoned the 2009 LMA in their bankruptcy. Under the principles of judicial estoppel, they cannot use the 2009 LMA as a basis to contest the foreclosure notices.

Third, the Lincicomes cannot sustain a wrongful foreclosure claim under this Court's precedent in *Collins v. Union Fed. Sav. & Loan Ass'n* because they were admittedly in default at the time of the foreclosure sale.

Fourth, the Lincicomes' failed to bring their breach of contract claims within the six-year statute of limitation period for written contracts under NRS 11.190(1)(b).

For each these reasons, the district court's order correctly granted summary judgment to Respondents and this Court should affirm this order.

VII. STANDARD FOR REVIEW

An order granting summary judgment is reviewed *de novo*.[45] "Summary

[45] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[46] The plain language of the rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[47] Parties resisting summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials.[48] Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment must show that he can produce evidence at trial to support his claim.[49]

VIII. LEGAL ARGUMENT

A. The District Court did not err in holding that the parties had entered into an enforceable Settlement Agreement at foreclosure mediation, which estopped the Lincicomes from contesting the foreclosure sale.

The district court correctly held that the Lincicomes could not challenge foreclosure because they had already agreed to a deed-in-lieu at mediation. An

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[46] NRCP 56(c); *DTJ Design, Inc. v. First Republic Bank*, 318 P.3d 709, 710 (Nev. 2014).
[47] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986).
[48] NRCP 56(e).
[49] *Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222 (Nev. 1981).

agreement made at a foreclosure mediation is an enforceable contract as to the parties.[50] This Court's decision in *Jones v. SunTrust* is instructive. In *Jones* the borrower and the beneficiary entered into a settlement agreement at foreclosure mediation where the borrower would be allowed to short sale the property in exchange for the suspension of foreclosure proceedings for two months.[51] The Court found the agreement was enforceable because the borrower, his attorney, and the beneficiary signed the agreement.[52]

Jones is applicable here. The Lincicomes agreed to a deed-in-lieu of foreclosure. A deed-in-lieu constitutes transfer of the mortgage's rights in the property to the mortgagee, including all right, title, and interest in the property.[53] Once they Lincicomes agreed to relinquish all right and title to the property, they no longer had standing and were otherwise estopped from challenging foreclosure.

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[50] *Jones*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012) ("Substantial evidence supports the district court's finding that the mediator's statement containing the written short-sale terms, signed by all parties, including Mr. Jones and the attorney representing the Joneses, constitutes an enforceable settlement agreement.").
[51] *Id.*
[52] *Id.*
[53] *See*, *Beasley v. Mellon Fin. Servs. Corp.*, 569 So. 2d 389, 393 (Ala. 1990) ("A deed in lieu of foreclosure is any instrument, however denominated, whereby a mortgagor transfers to a mortgagee the mortgagor's rights in the mortgaged property. Such an instrument transfers to the mortgagee all right, title, and interest of the mortgagor in the mortgaged property, including, but not limited to, all rights of redemption, statutory or equitable, unless expressly otherwise provided therein.") (internal citations *omitted*).

The Lincicomes argue that the agreement at foreclosure mediation was only an option for them to apply for a deed-in-lieu and that they never agreed to "settle all claims regarding the mortgage."[54] The Lincicomes argument is without merit. As memorialized in the mediator's statement executed by all parties, the Lincicomes expressly agreed to a "Deed in Lieu of Foreclosure" in the section of the agreement entitled "Relinquish the Home".[55] They also agreed to a certificate date of July 5, 2018.[56] Similar to *Jones*, the parties agreed to foreclosure should a deed-in-lieu (instead of a short sale as in *Jones*) not take place. Even though they did not execute the deed-in-lieu, they nonetheless consented to foreclosure. By agreeing to surrender the Property, the Lincicomes relinquished any right they had to contest the foreclosure sale.

The Lincicomes also argue that NRS 40.453 prevents the Mediator's Statement from superseding their rights under the 2009 LMA to contest the foreclosure.[57] Not so. NRS 40.453 simply prohibits including provisions in mortgage contracts that require a mortgagor to waive their rights under state law (*i.e.,* waiving foreclosure mediation, HOBR, or the notice requirements of

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[54] *See* Opening Brief at 33.
[55] *See* XII:AA0290.
[56] *Id.*
[57] *See* Opening Brief at 39-40.

foreclosure). NRS 40.453 does not prohibit a party post-contract formation from giving up its rights to the property in exchange for other consideration. In this case, the consideration was Fay's agreement to delay the foreclosure sale. Moreover, the agreement did not include any express waiver of right. As such, NRS 40.453 did not prevent the parties' settlement at mediation.

In *Lowe Enters. Residential Ptnrs., Ltd. P'ship v. Eighth Judicial Dist. Court*, the Nevada Supreme Court rejected a similar overly broad interpretation of this statute when the mortgagor argued this statute prohibited jury waiver provisions.[58] Specifically, the Court held:

> The language of NRS 40.453 is ambiguous to the extent that a strict application of the extremely broad language of NRS 40.453 would lead to an absurd result. In particular, if the legislature actually intended to prohibit the waiver of any right secured by law, then such things as arbitration agreements, to the text of the note forum selection clauses to the text of the note and choice-of-law provisions to the text of the note would be unenforceable. The Nevada Legislature could not have intended such a result when it enacted NRS 40.453.[59]

Accordingly, *Lowe* held that a jury waiver provision in a loan contract, similar to the Lincicomes, was not voided by NRS 40.453. Similarly, the Lincicomes agreement to relinquish all right and title to the property at foreclosure mediation (to

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[58] 118 Nev. 92, 102, 40 P.3d 405, 412 (2002).
[59] *Id.*

the extent it was an express waiver) is valid because the statute was not intended to be an absolute waiver of all rights, especially when something is given in return (*i.e.* additional time in the property) as was the case here.[60] The Lincicomes provide no applicable authority to the contrary.

B. The District Court did not err when it found the Lincicomes repudiated the 2009 Loan Modification Agreement in their bankruptcy.

The Lincicomes also claim that foreclosure notices were defective because they did not reflect the terms of the 2009 LMA.[61] As a result, they argue that they could not have defaulted on their mortgage because they were not given the opportunity to make payment under the modified terms of the loan.[62] The district court rejected this assertion because the Lincicomes themselves abandoned the 2009 LMA through their 2010 bankruptcy when they sought relief based solely on the original terms of their loan.

In Nevada, a party is estopped from asserting claims in a new case that have already been determined in a previous one.[63] Moreover, the doctrine of judicial

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[60] *Id.*
[61] *See* Opening Brief at 31.
[62] *Id.*
[63] *See*, *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994) ("Collateral estoppel is generally invoked when separate causes of action are presented in the first and second suits. The doctrine provides that any issue that was actually and necessarily litigated in one action will be estopped from being relitigated in a subsequent suit.").

estoppel precludes a party from stating a position in one case that is contrary to a position in a previous case.[64] The district court correctly applied these principals here.

The Lincicomes repudiated the 2009 LMA in their bankruptcy when they failed to acknowledge its existence and sought relief based solely on the original terms of the loan. In reliance on the Lincicomes claims, the bankruptcy court affirmed the original debt both in the Order Confirming the Plan and the Motion for Relief from Stay. Because of judicial estoppel, they cannot now claim that the 2009 LMA is the operative loan agreement

The Lincicomes also claim that they had no knowledge that the 2009 LMA was recorded when they made their representations in the bankruptcy court.[65] That lack of knowledge makes no difference. The recording merely puts third parties on notice of the purported modification.[66] The Lincicomes did not need constructive notice of their own modification because they were on actual notice when they

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[64] *Kaur v. Singh*, 477 P.3d 358, 362 (Nev. 2020) ("Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding.").

[65] *See* Opening Brief at 31.

[66] *See* NRS 111.320; *White v. Moore*, 84 Nev. 708, 709, 448 P.2d 35, 36 (1968)("[T]he appellants by reason of the knowledge imputed to them by virtue of our recording statutes are deemed to have had knowledge of the provisions of the Richfield encumbrance of record, and they are not now permitted to disclaim that knowledge.").

signed the 2009 LMA.[67]

Further, while the LMA may not have been recorded at the beginning of the bankruptcy, the Lincicomes knew about the 2009 LMA and should have amended their bankruptcy plan and schedules to reflect the same.[68] They did not, and the terms of the Chapter 13 plan became the contract of the parties for the treatment of the loan moving forward.[69] Because the 2009 LMA was not part of the bankruptcy court's order, it had no impact on the rights and responsibilities of the parties post-discharge. Accordingly, the Lincicomes cannot make a claim based on the alleged failure to include the terms of the 2009 LMA in the foreclosure notices.

C. The District Court did not err when it found that the Lincicomes could not sustain a wrongful foreclosure claim because they were in default on the loan.

The district court also correctly held that the Lincicomes could not sustain a claim for wrongful foreclosure because they admitted they were in default. In

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[67] *See*, *Reno Elec. Works v. United States Fid. & Guar. Co.*, 43 Nev. 191, 194, 183 P. 386, 387 (1919) (holding that party is bound to a written contract when the party consents to terms); *Pravorne v. McLeod*, 79 Nev. 341, 347, 383 P.2d 855 (1963) (same).

[68] *See* NRS 111.320; *White*, fn. 66, *supra.*

[69] *See*, *Turek v. DeHart* (*In re Turek*), 346 B.R. 350, 354 (Bankr. M.D. Pa. 2006) ("A chapter 13 plan "is essentially a new and binding contract, sanctioned by the court, between the debtors and their pre-confirmation creditor."); *In re Penrod*, 169 B.R. 910, 916 (Bankr. N.D. Ind. 1994), *citing In re L & V Realty Corp.*, 76 B.R. 35 (Bankr. E.D. N.Y. 1987); *In re Water Gap Village*, 99 B.R. 226, 229 (Bankr. D. N.J. 1989); *In re Ernst*, 45 B.R. 700, 702 (Bankr. D. Minn. 1985).

Nevada, "[a]n action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale."[70] A wrongful foreclosure claim fails if the plaintiff fails to allege that they were not in default at the time of the foreclosure.[71] The Lincicomes admit they were in default. Accordingly, the district court correctly dismissed the wrongful foreclosure claim.

The district court also correctly found Respondents had substantially complied with NRS 107 notice requirements. The notice provisions of NRS 107 do not require strict compliance.[72] Substantial compliance is sufficient and requires that

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[70] *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983).

[71] *See*, *Larson v. Homecomings Fin.*, LLC, 680 F. Supp. 2d 1230, 1237 (D. Nev. 2009) ("Plaintiffs' claim for wrongful foreclosure falls short because they have failed to allege that they were not in default on their loan obligations when Defendant initiated the foreclosure proceedings. Although Plaintiffs claim that Defendants' actions were fraudulent, malicious, and oppressive, Plaintiffs do not affirmatively allege that they breached no condition of the mortgage agreement sufficient to permit foreclosure proceedings against them.").

[72] *Saticoy Bay LLC v. Nev. Ass'n Servs*., 444 P.3d 428, 435 (Nev. 2019)(*citing* to *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010)) (holding that substantial compliance requires that a party (1) have actual knowledge, and (2) not suffer prejudice.).

a party not suffer prejudice as a result of the error.[73] Here, the Lincicomes claim that the foreclosure notices do not reflect the 2009 LMA and thus do not provide an accurate payoff or a valid affidavit of authority from the beneficiary as required under NRS 107.0805.[74] But as noted above, the Lincicomes repudiated the 2009 LMA and consented to foreclosure. And at the time the Notice of Default was recorded, Ms. Lincicome admits that she was in default on the loan and for the amounts stated on the notice of default.[75] Thus, the Lincicomes did not suffer any prejudice.

Importantly, the Lincicomes were not entitled to a free house and still contractually obligated to pay what they owed on the loan.[76] They failed to cure any arrears even after the district court gave them the opportunity to do so.[77] Even if Respondents were to start the foreclosure process over again, the Lincicomes have

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[73] *Id.*
[74] *See* Opening Brief at 44-47.
[75] XXIII:AA03006.
[76] *See*, *Singh v. Wells Fargo Bank, N.A.* (*In re Singh*), No. NC-17-1217-FBTa, 2018 Bankr. LEXIS 1653, at *11 (B.A.P. 9th Cir. June 5, 2018) ("In short, Wells Fargo's errors in its first attempt to foreclose do not entitle Mr. Singh to a free house."); *Wilczak v. Select Portfolio Servicing, Inc.* (*In re Wilczak*), No. NC-19-1038-FBG, 2019 Bankr. LEXIS 3524, at *15 (B.A.P. 9th Cir. Nov. 13, 2019) ("Rescission of a contract does not mean that the victims get to keep the benefits of the contract while avoiding their obligations. In other words, even if we were to declare the loan documents invalid, the Wilczaks would not be entitled to retain the $1.3 million.") (internal citations *omitted*).
[77] *See* fn. 34-35, supra.

no plan to make up the arrears,[78] so any violation of NRS 107.080 or NRS 107.0805 constitutes harmless error because it would not have changed the fact that Respondents had the right to foreclose on the Property.[79] As a result, the district court correctly entered summary judgment in favor of Respondents on the wrongful foreclosure cause of action.

D. The District Court did not err when it held that the six-year statute of limitations barred the Lincicomes' breach of contract claims.

In Nevada, a party has six years to bring forth a cause of action for violation of a written contractual agreement.[80] The cause of action accrues when a party discovered or should have discovered the facts giving rise to the cause of action.[81]

The Lincicomes argue that they had no knowledge of BANA's breach of the 2009 LMA in 2009.[82] This argument is without merit. The Lincicomes concede that the allegations of breach as based on BANA rejection of their payment in 2009. That the Lincicomes submitted after-the-fact declarations claiming they did not realize in

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[78] *See* XIII:AA03007.
[79] *See* NRCP 61; *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 573, 779 P.2d 967, 969 (1989) ("No error in any court order is ground for disturbing the order, unless refusal to disturb the order denies a party substantial justice.").
[80] NRS 11.190(1)(b).
[81] *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998)("Dismissal on statute of limitations grounds is only appropriate 'when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered' the facts giving rise to the cause of action.")(internal citations *omitted*).
[82] *See* Opening Brief at 26.

2009 the 2009 LMA was breached is irrelevant because the rejected payment put them on notice.[83]

Because the Lincicomes knew about the breach in October 2009, any action for violation of the LMA expired in October 2015. The Lincicomes did not file this action until November 7, 2018, more than three years after the statute of limitation expired on their breach of contract claim. For these reasons, the district court properly granted summary judgment to Respondents on the breach of contract claim.

E. The District Court did not need to address the Homeowners Bill of Rights claims.

Finally, the district court correctly found that there was no violation of the NRS 107.560(2), also known as the Homeowners Bill of Rights ("HOBR"). HOBR requires a material violation in order for a borrower to have standing to pursue a claim of damages.[84] The Nevada Supreme Court has not made any rulings on what

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[83] *See*, *Carson Meadows v. Pease*, 91 Nev. 187, 195, 533 P.2d 458, 463 (1975) (holding that a breach occurs upon default under the contract).

[84] The statute states:

> After a trustee's deed upon sale has been recorded or after a sheriff has recorded the certificate of the sale of the property, a borrower may bring a civil action in the district court in the county in which the property is located to recover his or her actual economic damages resulting from a material violation of NRS 107.400 to 107.560, inclusive,

constitutes a material violation of HOBR. Case law in California—addressing a materially identical California statute—holds that in order to sustain a HOBR claim a homeowner must allege how the lack of the lender's due diligence in the declaration would cause him or her harm or "have had a different legal or factual consequence in the foreclosure process from the one that was attached."[85]

The Lincicomes complain that the district court failed to consider or analyze their HOBR claims in the summary judgment order.[86] That is an argument of form over substance.

The district court found the Lincicomes consented to foreclosure at the mediation and repudiated the 2009 LMA. Thus, any errors in the foreclosure notices were irrelevant. Moreover, the Lincicomes suffered no harm from Fay's alleged

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> by the mortgage servicer, mortgagee, beneficiary of the deed of trust or an authorized agent of such a person, if the material violation was not corrected and remedied before the recording of the trustee's deed upon sale or the recording of the certificate of sale of the property pursuant to NRS 40.430. If 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.

[85] *Travis v. Nationstar Mortg., LLC*, 733 F. App'x 371, 374 (9th Cir. 2018).
[86] *See* Opening Brief at 48-51.

violation of NRS 107.500(1). As noted in *Travis*, a borrower is required to show a different outcome would have resulted from full compliance with HOBR statue. During discovery, the Lincicomes admitted they lacked sufficient income to make a regular mortgage payment because their monthly bills did not provide sufficient left-over income to pay a mortgage bill.[87] It does not matter what the notices said in this instance because the Lincicomes could not make the payment.

The Lincicomes' alleged HOBR claims also fail as to Shellpoint because the purported violations took place long before Shellpoint began servicing the loan on January 17, 2019—after the foreclosure sale.[88] For this reason as well, the district court's omission of HOBR in its summary judgment order does not constitute grounds for reversal as to Shellpoint.

In sum, the Lincicomes fail to present a material violation of HOBR. If there is a violation, such violations are excused because Fay substantially complied with the HOBR scheme so as to avoid liability because it provided numerous opportunities for the Lincicomes to save their home.[89] For this reason, the district court's omission of HOBR in its summary judgment does not constitute grounds for reversal.

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[87] *See* XIII:AA3005.
[88] *See* VII:AA01553-AA01696; XII:AA02827-AA02828.
[89] *See* Section V.C, *supra.*

IX. CONCLUSION

The Lincicomes fail to demonstrate how the district court committed any error in granting Respondents' Motion for Summary Judgment. For all these reasons, this Court should affirm the lower's court's ruling.

DATED this 5th day of April, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Ramir M. Hernandez, Esq.
Ramir M. Hernandez, Esq.
Nevada Bar No. 13146
7785 W. Sahara Avenue, Suite 200
Attorneys for Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,481 words.

Finally, I hereby certify that I have read this appellate 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of April, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Ramir M. Hernandez
Darren T. Brenner, Esq.
Nevada Bar No. 8386
Ramir M. Hernandez, Esq.
Nevada Bar No. 13146
7785 W. Sahara Ave, Suite 200
Las Vegas, NV 89117
Attorneys for Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and Shellpoint Mortgage Servicing, LLC

PROOF OF SERVICE

I certify that I electronically filed on the 5th day of April, 2022, the foregoing **RESPONDENTS' PROF-2013 M4-LEGAL TITLE TRUST, BY U.S. BANK, NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE, FAY SERVICING LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal were served with a true and correct copy via the following means:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Lisa Cox
An Employee of Wright, Finlay & Zak, LLP