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.; BRECKENRIDGE PROPERTY FUND 2016, LLC; NEWREZ, LLC, D/B/A SHELLPOINT MORTGAGE SERVICING, LLC; 1900 CAPITAL TRUST II, BY U.S. BANK TRUST NATIONAL ASSOCIATION; AND MCM-2018-NPL2

Respondents.

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Case No. 83261
Related Case Nos. 79125, 79152-COA, 83261

APPEAL

From the Third Judicial District Court, Department II
The Honorable Leon Aberasturi, District Judge

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

Bank of America, N.A.

BAC North America Holding Company

NB Holdings Corporation

Bank of America Corporation

Berkshire Hathaway Inc.

Akerman LLP

These representations are made so the justices of this court may evaluate possible disqualification or recusal.

DATED this 5th day of April, 2022.

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JURISDICTIONAL STATEMENT

The district court entered judgment for respondent Bank of America, N.A. (**BANA**) and certified the judgment as final under NRCP 54(b) on July 6, 2021. 16 AA 3751-71. Albert and Vicenta Lincicome appealed on July 19, 2021. 16 AA 3812-14. This court has jurisdiction under NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal should be assigned to the Court of Appeals because that Court is already familiar with the facts of this case. *See Lincicome v. Third Judicial Dist. Court*, Case No. 79125-COA. Assignment to the Court of Appeals is also appropriate because it involves the federal mediation program, and does not inmvolve questions of first impression or statewide public importance,. *See* NRAP 17(a)(11-12), NRAP (b)(15). The case involves an alleged breach of contract in 2009, a decade-long failure to make a mortgage payment, a properly conducted foreclosure of real property, and the failure to compute damages Whether the Lincicomes should recover an unknown damages stemming from their own misconduct is resolved by established Nevada law about real property and contracts.

RELATED CASES

Lincicome v. Third Judicial Dist. Court, Case No. 79125-COA (writ denied)

Lincicome v. Third Judicial Dist. Court, Case No. 79125 (review denied)

Lincicome v. Sables, LLC, Case No. 84138

ISSUES PRESENTED

1. **Failure to Provide a Damages Computation**: Whether the district court abused its discretion in sanctioning the Lincicomes for failing to provide a damages computation during discovery.

2. **Summary Judgment**: Whether the district court correctly granted summary judgment for BANA based on the six-year statute of limitations for breach of contract and, alternatively, based on claim preclusion.

STATEMENT OF THE CASE

The Lincicomes stopped making mortgage payments in 2009 and knew BANA failed to record a loan modification agreement that same year. They sued BANA for breach of contract in 2018 and failed to provide a damages computation during discovery. The district court correctly granted summary judgment for BANA since their suit is clearly time-barred under the six-year statute of limitations for breach of contract. The district court also correctly imposed sanctions against the Lincicomes for failing to compute their damages. This court should affirm.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

1. In May 2007, Vicenta Lincicome financed a property known as 70 Riverside Drive, Dayton, Nevada 89403 with a loan in the amount of $381,150, secured by recorded deed of trust. 10 AA 2264-88. The deed of trust identifies

Sierra Pacific Mortgage Company, Inc. as the lender and Mortgage Electronic Registration Systems, Inc. (**MERS**) as the beneficiary and nominee for the lender. 10 AA 2264. The note identifies a monthly mortgage amount and states the amount may change. *Id.* At the time of signing, the Lincicomes understood they took out a loan with a 30-year maturity date. *Id.*

2. On August 15, 2011, MERS recorded an assignment of the deed of trust, transferring its interest in the deed of trust to BANA. 15 AA 3550.

3. In mid-2008, the Lincicomes defaulted on the loan after making less than ten payments. 10 AA 2290-91.

4. In January 2009, the trustee under the deed of trust at the time recorded a notice of default. *Id.*

5. In July 2009, BANA offered the Lincicomes a loan modification agreement (**LMA**), identifying the new loan balance as $417,198.58 and a post office box address in California to make payments. 10 AA 2295-97.

6. BANA accepted a first modified payment from the Lincicomes, in person at a Bank of America branch in Carson City, on September 1, 2009. 10 AA 2307.

7. In October 2009, the Lincicomes attempted to make a second modified payment in person, but the payment was rejected because there was no record of the LMA in BANA's system. 10 AA 2302-05; 13 AA 3023. The

Linicomes did not bring a copy of the LMA to the branch. 13 AA 3080. They never tried to make a third payment in person or by mail. 10 AA 2467-2500. Nor did they put monthly mortgage payments into a separate account. 13 AA 3077. Despite correspondence to BANA, they never requested BANA honor the LMA or provided BANA with a copy of the LMA. 13 AA 3080.

8. The Lincicomes received a statement from BANA in October 2009 establishing the loan had not been modified. 10 AA 2309.

9. In March 2011, BANA signed and recorded the LMA. 13 AA 3189 91.

10. BANA offered another modification in April 2015, but the loan was service released to Fay Servicing prior to the final trial payment. 14 AA 3268.

11. In April 2010, the Lincicomes filed for chapter 13 bankruptcy, listing the total amount of the secured claim for the property as $381,000—the amount of the original loan, not the loan balance in the LMA. 10 AA 2304.

12. In January 2015, the bankruptcy court terminated, without objection, the automatic stay as to BANA. 13/14 AA 3222-59.

13. In July 2015, the bankruptcy court entered a final decree. *Id.*

14. In November 2015, BANA recorded an assignment of the deed of trust, transferring its interest to U.S. Bank. 14 AA 3302-03.

15. In November 2017, Sables, as trustee under the deed of trust, recorded a notice of default. 14 AA 3318-23.

16. In December 2017, the Lincicomes filed a petition for foreclosure mediation assistance. 10 AA 2434-59.

17. In April 2018, the Lincicomes participated in the foreclosure mediation, where they agreed to relinquish the property to the lender by participating in Fay Servicing's deed in lieu of foreclosure program. 14 AA 3340-55. The Lincicomes never applied for the deed in lieu of foreclosure program. 12 AA 2927.

18. In October 2018, Sables recorded a notice of trustee sale. 14 AA 3357-59.

19. In January 2019, Sables sold the property to Breckenridge Property Fund 2016. 4 AA 884-85.

II. PROCEDURAL POSTURE

1. In November 2018, the Lincicomes filed a complaint against a number of bank defendants, including BANA. 1 AA 1-18. The Lincicomes asserted claims for breach of contract and breach of the duty of good faith and fair dealing, alleging BANA failed to record the LMA in 2009. 1 AA 12-15.

2. In December 2019, the Lincicomes filed a second amended complaint. 7 AA 1553-94.

3. In March 2021, BANA moved for summary judgment and for sanctions for failure to compute damages. 8/9 AA 1869-2178. The Lincicomes also moved for summary judgment. 9/10 AA 2230-2539.

4. In June 2021, the district court entered summary judgment for BANA and issued sanctions against the Lincicomes. 16 AA 3751-71.

5. On July 19, 2021, the Lincicomes appealed. 16 AA 3812-14.

SUMMARY OF ARGUMENT

The court should affirm the district court's judgment. Substantial evidence established that the Lincicomes knew BANA was breaching the LMA in October 2009 when BANA rejected the modified payment amount and sent the Lincicomes a monthly mortgage statement with the original loan terms. Neither the discovery rule nor equitable tolling operate to toll the statute of limitations. The Lincicomes "discovered" their injury when they had facts before them that would have led an ordinarily prudent person to investigate whether BANA breached the contract. That was in October 2009, when BANA rejected the modified payment, informed the Lincicomes it had no record of the signed LMA, and sent a mortgage statement reflecting the terms of the original loan.

Equitable tolling only applies when a defendant's wrongful conduct prevents a plaintiff from asserting a claim, or when extraordinary circumstances beyond the plaintiff's control make it impossible to file a claim on time. The Lincicomes have

not provided a single shred of evidence that they were prevented by BANA's wrongful conduct from discovering the breach. The statute of limitations for breach of contract and breach of the duty of good faith and fair dealing is six years, yet the Lincicomes did not file their complaint until 2018. The statute of limitations had run, and the district court properly found these claims fail as a matter of law.

The district court properly determined claim preclusion also barred the breach of contract claim. In 2017, the Lincicomes filed a foreclosure mediation petition. The foreclosure mediation action dealt with the same loan and property at issue in this matter, and the claims against BANA could have been brought in the foreclosure mediation action but were not. The foreclosure mediation resulted in a "final judgment"—a signed agreement between the Lincicomes and the interested parties that the Lincicomes would relinquish the property to the lender via a deed in lieu of foreclosure. The elements of claims preclusion have been met. BANA is in privity with U.S. Bank as a result of the assignment of the deed of trust. And the current action is based on the same claims that were brought or could have been brought in the foreclosure mediation. The district court did not err in finding claim preclusion bars the Lincicomes' claims against BANA.

The Lincicomes were not excused from performing under the terms of the original 2007 deed of trust. Until BANA signed the LMA, it was not effective. Despite that Vincenta Lincicome signed the LMA in July 2009 and the first payment

was supposed to be made in September 2009 pursuant to its terms, the Lincicomes were still obligated to make monthly payments of the unmodified amount pursuant to the original 2007 deed of trust until BANA signed the LMA.

Even if the LMA was effective once Vincenta Lincicome executed it, the Lincicomes were still not excused from performing based on BANA's breach. Once BANA repudiated the LMA in October 2009, the Lincicomes had to elect a remedy within a reasonable time and remain ready, willing, and able to perform (i.e., pay the modified monthly mortgage payment). The Lincicomes instead did nothing. They did not attempt to make the monthly mortgage payment. They did not save the monthly mortgage payment in an account for future performance. The district court correctly ruled the Lincicomes were not excused from performance.

The district court did not address the Homeowner's Bill of Rights (**HBOR**) claim because the Lincicomes never opposed BANA's HBOR argument. The HBOR claim fails as to BANA because the Lincicomes allegations of wrongdoing by BANA occurred prior to the statute's October 1, 2013, effective date, and would apply only prospectively in the absence of clear legislative intent that it apply retroactively. The statute does not state it applies retroactively, and the legislative history indicates it applies only to notices of default recorded after its effective date. This claim further fails because BANA was not the "mortgage servicer" as defined

by NRS 107.440 at the time the most recent foreclosure was initiated, and should not be statutorily liable for anything other defendants did or did not do.

The district court did not abuse its discretion in sanctioning the Lincicomes for failing to disclose a damages computation. The Lincicomes did not comply with the mandatory pretrial disclosure requirements. Their failure to respond to written discovery compounded this deficiency. The Lincicomes could not even provide BANA with a computation at their depositions toward the close of discovery. The district court was well within its discretion when it concluded an appropriate sanction for this discovery violation was to strike all allegations of monetary damages against BANA. Even if the district court erred as to the substantive issues, the Lincicomes should not be permitted to claim damages against BANA.

This court should affirm.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews an appeal from a discovery sanctions award for abuse of discretion. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). A somewhat heightened standard of review applies where the sanction strikes the pleadings, resulting in dismissal with prejudice. *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not

just and do not relate to the claims at issue in the discovery order that was violated. *Id.* at 92, 787 P.2d at 779-80.

This court reviews an appeal from an order granting a motion for summary judgment *de novo*. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). "Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Although evidence presented in support of a motion for summary judgment must be construed in the light most favorable to the nonmoving party, that party must set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment. *Id.* A factual dispute is genuine when the evidence is such that a rational jury could return a verdict in the nonmoving party's favor. *Id.*

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BANA'S REQUEST FOR SANCTIONS

The Lincicomes spend little time addressing the discovery sanctions against them. The district court did not abuse its discretion in granting BANA's request for sanctions. The Lincicomes did not disclose a computation of damages at any time, nor did they disclose a theory of damages against BANA. *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 (D. Nev. 2011) (Parties have a

"duty to diligently obtain the necessary information and prepare and provide its damages computation within the discovery period."); *CCR/AG Showcase Phase I Owner, L.L.C. v. United Artists Theatre Circuit, Inc*., 2010 WL 1947016, at *5 (D. Nev. May 13, 2010) ("The party seeking damages must also timely disclose its theory of damages as well as the computation of those damages.").

The Lincicomes served initial disclosures in April 2020. 8/9 AA 1889-98. These disclosures were void of a damages computation. *Id*. The Lincicomes did not serve any supplemental disclosures to include a damages computation. *See* NRCP 26(e)(1). The Lincicomes failed to comply with the mandatory pretrial disclosures requirements. *See* NRCP 16.1(a)(1)(A) (requiring a party to produce, "without awaiting a discovery request . . . [a] computation of any category of damages claimed"). Their failure to respond to written discovery compounded this discovery violation. The Lincicomes could not even provide BANA with a computation at their depositions toward the close of discovery. 8 AA 1927, 1962.

The Lincicomes argued to the district court that they were unable to calculate damages attributable to BANA because of possible statutory damages, and other theories of liability being pursued against the other defendants. 13 AA 3117-18. The Lincicomes now argue that because they're unable to compute all the possible damages that may be available to them due to BANA's conduct,

they're exempt from the disclosure requirement. AOB 55. The Lincicomes further argue that striking all of the damages against BANA is excessive. *Id*.

Nevada's discovery rules regarding the disclosure of the computation of damages applies to all parties seeking damages—including in matters, like the present one, where there are multiple defendants and multiple theories of liability. Other courts in Nevada have not merely struck damages, but granted summary judgment for failure to disclose a damages computation; thus, the argument that striking damages is too severe a punishment for failing to provide a damages computation misses the mark. *See Coronado Med. Cen. Owners Ass'n v. United Ins. Co. of Am.*, Nos. 77943/78447, 2020 WL 6882719, at *1 (Nev. Nov. 23, 2020) (unpublished) (affirming summary judgment based on failure to disclose a damages computation); *see, e.g.*, *Hulihan v. Reg. Trans. Com'n of S. Nev.*, 833 F.Supp.2d 1226, 1234 (D. Nev. June 21, 2011) ("Plaintiff has not provided a computation of damages as required under Federal Rule of Civil Procedure 26(a)(1)(A)(iii) . . . As such, there is no issue of material fact as to whether Plaintiff suffered damages as a result of Defendants' negligence.").

BANA has been prejudiced by the lack of a damages computation. Such a computation should have been made at the start of discovery and supplemented thereafter so BANA could "understand the contours of [its] potential exposure and make informed decisions regarding settlement and discovery." *Calvert v. Ellis*,

2015 WL 631284, at *2 (D. Nev. Feb. 12, 2015) (quotations omitted); *see Silvagni v. Wal-Mart Stores, Inc.*, 320 F.R.D. 237, 240-41 (D. Nev. 2017) (explaining the purpose of damages computations, which should be more detailed as the case progresses). A computation is especially important here, where there are multiple defendants with divergent positions and where BANA is no longer the loan servicer, was not involved in the foreclosure, and its purported servicing errors are remote in time. The Lincicomes failure to compute their damages is not substantially justified, even if they could not determine an exact dollar amount.

The Lincicomes not only ignored their obligations under Rule 16.1, but also refused to respond to the request for a damages computation in discovery and the request for a damages computation during their depositions. The district court was well within its discretion when it concluded that an appropriate sanction for this discovery violation was to strike all allegations of monetary damages against BANA. *See* NRCP 37(c)(1); *see also Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 797 (2017); *Gallardo-Recendez v. Ely*, No. 78077, 2020 WL 5888031, at *1 (Nev. Oct. 1, 2020) (unpublished).

Even though the somewhat heightened standard of review does not apply here, because the district court did not strike the entire matter with prejudice, the striking of all allegations concerning monetary damages as a sanction for failing to disclose a computation of damages would not be an abuse of discretion under the somewhat

heightened standard of review. This sanction relates directly to the discovery order that was violated and as such survives the somewhat heightened standard of review. *Young*, 106 Nev. at 92, 787 P.2d at 779-80.

This court should conclude the district court did not abuse its discretion by striking all allegations of monetary damages against BANA from the complaint.

III. THE DISTRICT COURT PROPERLY DETERMINED THERE WERE NO MATERIAL ISSUES OF FACT

On summary judgment, the nonmoving party must do more than simply show there is some metaphysical doubt as to the operative facts, relying upon more than general allegations and conclusions set forth in the pleadings, and must present specific facts demonstrating the existence of a genuine issue. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 439 (2019). Here, the district court properly found there were no issues of material fact, as the version of the "facts" advanced by the Lincicomes was unsupported by the uncontroverted evidence and their own deposition testimony.

A. Findings of Fact 7 & 8: Knowledge of BANA's Breach

The district court found as follows: "7. BANA accepted the first modified payment from the [Lincicomes] in person at a BANA branch in Carson City on September 1, 2009. [The Lincicomes] 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 [Lincicomes] 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 [Lincicomes] in October of 2009 stating that the loan had not been modified." 15 AA 3746.

Vincenta Lincicome signed the LMA in July 2009 and mailed it back to BANA to sign and record. 10 AA 2295-97. When she went to make the first payment, which was due on September 1, 2009, she was informed that BANA had no record of the LMA. 10 AA 2307. On October 1, 2009, when she attempted to make the second modified payment, she was again informed that BANA had no record of the LMA. 10 AA 2302-05; 13 AA 3023. When the Lincicomes received their October 2009 monthly mortgage statement, the payment amount and loan balance were that of the original, unmodified mortgage. 10 AA 2309.

The Lincicomes claim BANA told them the LMA was lost. AOB 25. Whether the LMA was lost or thrown in the trash upon receipt, the result is exactly the same: The loan was not modified as outlined in the LMA and the Lincicomes were aware the loan was not modified in October 2009 at the latest.

A breach of the LMA does not require BANA to call or write the Lincicomes and state the LMA will not be implemented; it merely requires conduct by BANA showing that the LMA is not being implemented. Which is precisely what occurred in September and October of 2009, when the Lincicomes were informed BANA did not have a record of the LMA and their monthly mortgage statement showed the

original loan terms. The Lincicomes are attempting to make a factual dispute where none exists by giving special meaning to the word "lost." A breach of contract occurs when one party fails to perform—whether that failure is due to having lost the contract and being unable to sign and record it, or having a change of heart and not wanting to go through with the agreement. That BANA "lost" the LMA does not in any way change its breach of the LMA into something else.

The Lincicomes admit they knew about the September and October 2009 payments being rejected because BANA had no record of the LMA in its system. They further admit to receiving the October 2009 monthly mortgage statement and seeing the original loan terms. Yet the Lincicomes **still** argue the undisputed facts show they were unaware of BANA's breach of the LMA in 2009. While the facts must be taken in the light most favorable to the Lincicomes, as the nonmoving party, the district court was not required to believe the Lincicomes' self-serving statements, contrary to all the evidence presented, that they did not know BANA had breached the LMA in 2009 when it refused to accept payments of the modified amount and refused to update the loan terms on the monthly mortgage statement. Simply stating there is a factual dispute does not create a genuine issue of material fact.

The district court properly found the Lincicomes were aware of BANA's breach of the LMA in 2009.

B. Finding of Fact 9: No Challenge to Obligation in Bankruptcy

The Lincicomes claim the district court's finding they did not challenge the obligation in their 2010 bankruptcy proceedings is inaccurate and unsupported by the evidence. AOB 27. The district court found that, "[i]n April of 2010, the [Lincicomes] filed for Chapter 13 bankruptcy and listed the debt for the property at $381,000." 16 AA 03761. This was the amount of the original loan. The LMA had a new loan balance of $417,198.58.

If the Lincicomes truly believed the loan had been modified, they would have included the new LMA loan balance of $417,198.58 as the debt for the property and not the original loan amount. 16 AA 3760. The Lincicomes claim they were unaware of BANA's breach in April 2010 and would have challenged the 2007 deed of trust as applicable to the mortgage had they known. AOB 27. However, this argument is nonsensical. If the Lincicomes believed there was no breach and the LMA was the operative contract for the mortgage, they would have listed the balance of the LMA as the secured claim, not the balance from the 2007 deed of trust.

By listing the secured claim as the original amount from the 2007 deed of trust and not the 2009 LMA, the Lincicomes did not challenge the underlying obligation in the 2010 bankruptcy proceedings. The district court properly found the Lincicomes did not challenge the obligation in their 2010 bankruptcy proceedings.

C. Finding of Fact 11: The Automatic Stay

In what BANA can only assume is a reading comprehension error, the Lincicome's claim finding of fact 11 is incorrect because it states the automatic stay was terminated as to BANA in January 2011. AOB 28. Had finding of fact 11 stated this, the Lincicomes would be correct. However, finding of fact 11 states: "In January 2015, the Bankruptcy court terminated the automatic stay as to BANA. A final decree was filed by the Bankruptcy Court in July of 2015." 16 AA 3761. It is undisputed the bankruptcy court terminated the automatic stay as to BANA in January 2015, so there is no error with this finding. 13/14 AA 3222-59.

Despite this finding of fact stating nothing other than the date the automatic stay was terminated as to BANA and the date of the final decree, the Lincicomes use this as a launching point to decry the district court's failure to determine that BANA had "concealed the recording of the 2009 LMA, not only from the Bankruptcy Court, but also Appellants." AOB 30. The Lincicomes claim the district court's failure to find BANA acted in bad faith shows the district court "failed to make the reasonable inferences from the undisputed facts in the light most favorable to [the Lincicomes] as the non-moving party." AOB 29-30.

However, the Lincicomes fail to explain how this finding would have changed the summary judgment outcome. Even if BANA acted in bad faith and had been untruthful with the bankruptcy court, which it adamantly denies, that would not

change that the Lincicomes knew about BANA's breach of the LMA in 2009 and yet did not file suit against BANA until 2018, after the statute of limitations had run.

The district court is not required to make findings of fact on immaterial issues. This case is not about BANA's conduct during the Lincicomes' 2010 bankruptcy proceeding, but the 2009 LMA and subsequent foreclosure proceedings and sale. The Lincicomes have not shown (and cannot show) that any of their causes of action would survive a summary judgment motion had the district court held that BANA concealed the recording of the 2009 LMA from the bankruptcy court and the Lincicomes. This argument is nothing more than a red herring.

The district court's finding of fact 11 is objectively correct based on the bankruptcy documents and the Lincicomes' own admission. The district court did not make a finding of fact regarding BANA's conduct during the bankruptcy proceedings, but that does not invalidate the grant of summary judgment on issues unrelated to the bankruptcy proceedings.

D. Finding of Fact 12; No Default on 2009 LMA.

The Lincicomes argue finding of fact 12 is incorrect because it implies they had defaulted on their mortgage loan as modified by the 2009 LMA. AOB 30. Finding of fact 12 states: "On November 3, 2017, Sables, as trustee under the deed of trust, recorded a notice of default." 16 AA 3761. How the Lincicomes can read an implication they defaulted on their mortgage as modified by the 2009 LMA

agreement out of this statement is mindboggling. Especially since the Lincicomes admit the November 3, 2017, notice did not show the terms of the 2009 LMA, but instead those of the original 2007 deed of trust, and that "[a]ll statements issued by BANA and Fay Servicing prior to the foreclosure . . . reflect the terms applicable to the 2007 deed of trust as if [the Lincicomes'] mortgage had not been modified." AOB 30. The facts clearly establish the 2009 LMA was never put into effect by BANA and the Lincicomes' loan was not modified.

The Lincicomes further allege "the district court erred in not concluding that the [November 3, 2017, default notice] establishes that the terms applicable to the mortgage are the modified terms of the 2009 LMA." AOB 31. Additionally, they allege "the district court erred in concluding the [Lincicomes] had defaulted upon their mortgage when they had never been given the opportunity to make payment under the modified terms of the loan." *Id.* As the notice contains the 2007 deed of trust terms, but states the loan was modified, the district court was unable to conclusively determine the terms to which the notice was referring. The district court properly abstained from making any conclusion regarding the November 3, 2017, notice, other than to note it was recorded by the trustee.

Further, the district court never concluded in finding of fact 12 that the Lincicomes had defaulted on their mortgage. The finding merely states a notice of default was recorded, which is accurate. The only reference to the Lincicomes being

in default is in finding of fact 4, which states "[i]n mid-2008, the Plaintiffs defaulted on the loan making less than ten payments." 16 AA 03760. The Lincicomes admit this factually accurate statement. AOB 5. The Lincicomes are trying to find fault with these accurate statements by reading implications and insinuations into the findings of fact that simply are not there. The district court never found the Lincicomes defaulted on the terms of the 2009 LMA.

Finding of fact 12 is objectively accurate, and the district court made no error in finding that Sables, as the trustee, recorded a notice of default on November 3, 2017. The district court was not required to opine about the notice's contents.

E. Finding of Fact 14 & 15: Mediation Agreement

The Lincicomes' complaints as to the mediation agreement reflect a fundamental misunderstanding regarding the foreclosure mediation program. This quasi-judicial proceeding resulted in a signed, binding contract. The Lincicomes were not required to come to an agreement and sign a mediation statement, but once they did, this document was binding, and they were required to abide by the terms. *Jones v. SunTrust Mortgage, Inc.*, 128 Nev. 188, 192, 274 P.3d 762, 765 (2012).

The Lincicomes claim the "simple agreement does not require the relinquishment or surrender of [the Lincicomes'] property in light of Fay Servicing's [deed in lieu] terms," when that is exactly what the agreement requires and states. AOB 33. The foreclosure mediation agreement explicitly states the

Lincicomes are relinquishing the property via a deed in lieu of foreclosure. 14 AA 3344. The foreclosure mediation agreement was signed by the Lincicomes, who then did not follow through with the deed in lieu of foreclosure. The Lincicomes admitted during their respective depositions that they did not have the financial resources to pay any amount towards their mortgage. 16 AA 03762.

To file a lawsuit alleging damages for failing to implement a loan modification nine years prior when you never, at any point in those nine years, had the ability to make the modified monthly payment, reeks of bad faith and provides more than enough factual support for the district court's finding that the Lincicomes were merely attempting to game the system in order to continue living rent-free in their home for as long as possible.

The district court did not err in holding the Lincicomes agreed to relinquish the property and then failed to do so.

IV. THE DISTRICT COURT PROPERLY DECIDED SUMMARY JUDGMENT

A. The District Court Properly Found the Breach of Contract and Breach of Duty of Good Faith and Fair Dealing Claims Against BANA were Time-Barred

A six-year statute of limitations applies to breach of contract and breach of the duty of good faith and fair dealing claims. NRS 11.190(1)(b); s*ee Ocwen Loan Servs., LLC v. BFP Invs. 5, LLC*, 2020 WL 1866267, at *4 n.6 (D. Nev. April 14, 2020) ("Plaintiff's breach of contract and breach of covenant of good faith and fair

dealing claims are based on . . . an instrument in writing, and carry a six-year statute of limitations"); *Deutsche Bank Nat'l Tr. Co. v. SFR Invs. Pool 1, LLC*, 2019 WL 1446956, at *2 (D. Nev. Mar. 31, 2019) (same). This limitations period bars the Lincicomes' severely untimely suit against BANA.

The Lincicomes claim the district court erred in finding their "breach" claims against BANA were time barred because the discovery rule and equitable tolling stopped the limitations period from running. AOB 35. They claim, "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." *Id.* The Lincicomes assert the statute of limitations must be tolled until November 3, 2017, when the default notice was recorded and the Lincicomes learned the LMA had been found and recorded. *Id.*

The Lincicomes are essentially arguing that even though BANA refused the modified payment in October 2009 and told the Lincicomes the LMA was not in the system, because BANA said the LMA was lost, a reasonable person would have believed that BANA was not breaching the LMA, but was instead going to find and implement the LMA, no matter how many years passed. They are also arguing they had no obligation to make any payments nor any reason to believe they had a breach of contract or duty of good faith and fair dealing claim against BANA, which flies in the face of the clear and unequivocal facts.

BANA's execution and recording of the LMA has nothing to do with the Lincicomes' breach of contract claim. Had BANA never executed the LMA, the Lincicomes would still have a breach of contract claim, because the claim is that BANA offered Vincenta Lincicome a loan modification on specific terms, which she accepted by signing and sending the LMA back to BANA, and BANA refused to honor it. Whether BANA refused to honor the LMA because it changed its mind or it could not find the LMA to process is immaterial. The breach the Lincicomes allege—that BANA refused to honor the LMA—was indisputably discovered in October 2009 when BANA refused their mortgage payment and the monthly mortgage statement reflected the old loan terms. The Lincicomes' attempt to extend the statute of limitations by claiming the real breach was BANA's execution of the LMA and never informing them lacks merit.

If the Lincicomes did not believe the LMA was valid until executed by BANA, then they should have still made the original monthly mortgage payments. The Lincicomes have not, and cannot, point to a single clause in the LMA that states BANA will notify them when it is executed and recorded. The breach was in refusing to accept payments beginning in October 2009, not in failing to notify the Lincicomes of the execution in 2011. The Lincicomes' assertion that the discovery rule tolls the statute of limitations for their "breach" claims fails.

The discovery rule tolls "the statutory period of limitations . . . until the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). This rule requires a plaintiff to use due diligence in determining the existence of a cause of action and delays a claim's accrual until the plaintiff obtains inquiry notice. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (applying the inquiry notice standard to determine when the applicable statute of limitations ran).

The Lincicomes "discovered" their injury when they had facts before them that would have led an ordinarily prudent person to investigate whether BANA breached the contract. This discovery was in October 2009 when BANA rejected the Lincicomes' modified monthly payment. Their mere ignorance should not toll the accrual date. *See Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 807 (1998) ("mere ignorance" as to reasonably accessible information will not delay or stop accrual of a discovery-based statute of limitation if the fact finder determines the party failed to exercise diligence).

Equitable tolling only applies when a plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control make it impossible to file a claim on time. *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999); *Alvarez–Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996). The party seeking equitable tolling

bears the burden of establishing either circumstance. *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013).

The Lincicomes have not carried their burden to justify equitable tolling because BANA did not prevent the Lincicomes from filing claims, and there were no extraordinary circumstances preventing the Lincicomes from diligently suing BANA. This is not a "rare and exceptional" case where tolling should apply. *See Acosta v. Wellfleet Comm's., LLC,* 2018 WL 4682316, at *9 (D. Nev. Sept. 29, 2018); *Alexander v. Aurora Loan Servs*., 2010 WL 2773796, at *4 (D. Nev. July 8, 2010) ("equitable tolling would not stay the statute of limitations here because plaintiff has not adequately alleged facts showing that she was prevented from discovering this claim earlier").

The Lincicomes keep going back to their claim that BANA did not inform them the LMA was executed and recorded in 2011. 13 AA 3119-21. None of that has any bearing on their breach of contract claim. The breach occurred in October 2009 when BANA refused the Lincicomes' mortgage payment. BANA's failure to disclose to the Lincicomes that the LMA was eventually found and executed did not prevent the Lincicomes from discovering their breach of contract claim. They discovered the claim the moment it occurred. While the Lincicomes may not have been aware of the legal ramifications of BANA's refusal to accept their payment, the statute of limitations does not run from the time a plaintiff obtains legal counsel who

explains the law, but instead when the facts constituting the claim were discovered. The Lincicomes cannot rely on equitable tolling to save their late "breach" claims, especially when they admit "BANA breached the contract in 2009." 13 AA 3106.

The application of tolling under the facts here would be contrary to the main purpose of a statute of limitations: "to encourage the plaintiff to pursue [their] rights diligently." *Fausto v. Sanchez-Flores*, 137 Nev. Adv. Op. 11, 482 P.3d 677, 680 (2021); *see City of N. Las Vegas v. State, EMRB*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011) (equitable tolling will only extend a statute of limitations if a reasonable plaintiff would not have known of the existence of their claim within the limitations period); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (the time of discovery may be determined as a matter of law where "'uncontroverted evidence irrefutably demonstrates [that the] plaintiff discovered or should have discovered' the facts giving rise to the cause of action" (quoting *Nev. Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307 (9th Cir. 1992))); *see also Sierra Pac. Power Co. v. Nye*, 80 Nev. 88, 95, 389 P.2d 387, 390 (1964) (holding that the statute of limitations is not tolled "if the facts may be ascertained by inquiry or diligence").

It is unquestionable that the Lincicomes did not pursue their rights diligently and were aware of the facts giving rise to their causes of action by October 2009. They waited almost a decade to sue BANA, years after BANA had no interest in the property. Their claims against BANA are time-barred as a matter of law. Summary

judgment is appropriate when claims are time-barred. *Stalk v. Mushkin*, 125 Nev. 21, 27, 199 P.3d 868, 872 (2009). The district court properly granted BANA's summary judgment motion on the Lincicomes' breach of contract and breach of the duty of good faith and fair dealing claims.

B. The Breach of Contract Claim is Barred by Claim Preclusion

The Lincicomes claim the district court erred in finding their breach of contract claim was barred by claim preclusion. AOB 36. Claim preclusion applies when "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008).

In December 2017, Vicenta Lincicome filed a petition for foreclosure mediation assistance, naming Sables, U.S. Bank, and Fay Serving as interested parties. 10 AA 2434-59. The result of that action, which arose out of the loan transaction and property at issue in this matter, was an agreement by the Lincicomes to surrender the property and pursue a deed in lieu of foreclosure. 14 AA 3340-55.

Although the standard formulation of the doctrine presupposes the existence of two separate suits—and the foreclosure mediation proceedings at issue do not constitute a civil suit in the traditional sense—the same basic principles apply. *Cf. Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 169, 368 P.3d 1219, 1224-25 (Ct.

App. 2016) (claim preclusion applies even when one of the proceedings in question was not a traditional lawsuit, but was instead a dispute before an administrative agency, so long as the agency acted in a judicial capacity and resolved disputed issues of fact that the parties had the opportunity to litigate).

Here, all the elements of claim preclusion have been met. BANA is in privity with U.S. Bank as a result of the assignment. 15 AA 3550. Vicenta Lincicome is in privity with her husband, Albert Ellis Lincicome, Jr. *See Zaragosa v. Craven*, 202 P.2d 73, 75 (Cal. 1949) (a wife is in privity with her husband even if she is not a named party). The foreclosure mediation resulted in a "final judgment"—a resolution between the Lincicomes and the interested parties. 14 AA 3340-55. Finally, the foreclosure mediation action dealt with the same loan and property at issue in this matter, and the claims against BANA could have been brought in foreclosure mediation action. The district court did not err in finding the Lincicomes' breach of contract claim against BANA is barred by claim preclusion.

C. The Lincicomes' Performance Was Not Excused

The Lincicomes allege they were relieved of their obligation to make payments under the LMA by BANA's breach. AOB 38. However, the Lincicomes fail to grasp an important point—the LMA was not an enforceable contract until BANA signed it in 2011. *Morrill v. Tehama Consolidated Mill & Mining Co.*, 10 Nev. 125, 1875 WL 4018 (Nev. 1875) ("A contract purporting to be made between

several parties, containing mutual covenants, of which those of one party are the consideration of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute.") (quotations omitted). Until the LMA was fully executed, the Lincicomes were still bound by the terms of the original 2007 deed of trust and obligated to make payments thereunder. There is no question the LMA was not fully executed until March 2011. AOB 7. And there is no question the Lincicomes did not attempt to make any loan payments in the amount required by the 2007 deed of trust. 13 AA 3079.

The Lincicomes admit they were told BANA could not find the LMA executed by Vicenta Lincicome. 13 AA 3078. Vincenta Lincicome admits she never sent BANA a copy of the executed LMA. 13 AA 3080. The Lincicomes never once attempted to pay their original mortgage payment. 13 AA 03079. In fact, while the Lincicomes claim they spent years asking BANA about the loan modification and trying to make payments, they admit they stopped trying to make mortgage payments in October 2009. 10 AA 2467-2500. They claim their old checkbooks were shredded, during the course of litigation, and they were unsure if there would be evidence of attempted mortgage payments in them. 13 AA 3080.

The Lincicomes ask this court to relieve them of an obligation they never actually undertook—to make payments due under the terms of their loan. They were not relieved of their obligations under the 2007 deed of trust until the LMA was fully

executed in March 2011. They made no attempts to pay the modified amount or original amount after October 2009. They cannot reasonably claim they were excused from performance from a contract that was not in existence. They also cannot reasonably claim they were excused from making payments under the LMA based on BANA's alleged misrepresentations since they stopped making payments after just one teller did not accept their October 2009 payment.[1]

Even if the 2009 LMA was an enforceable contract, the Lincicomes failed to act upon BANA's repudiation of the contract, as evidenced by its refusal to accept the modified payment amount in October 2009, in a timely manner and elect a remedy. Instead, the Lincicomes spent the money earmarked for their monthly mortgage payment—be it the modified payment under the 2009 LMA or the original payment under the 2007 deed of trust—and assumed that their payment obligations would begin once BANA decided to perform. Under the Lincicomes' theory, they were not only excused from performing, but also insulated from a foreclosure sale, because their payment obligations had not started.

[1] The Lincicomes cannot show by this one example that BANA had a known policy of rejecting the Lincicomes' payments. *See Bank of New York Mellon v. CKVC Invs., LLC*, Nos. 76888/77495, 2020 WL 1903153, at *1 (Nev. April 16, 2020) (unpublished). Much more would need to be shown to excuse the Lincicomes' obligation to make loan payments. The Lincicomes cannot show, nor did they disclose, the requisite evidence to allow them to skirt their obligation and to avoid foreclosure years later.

The Lincicomes comically claim "[a]s '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 [them] by the foreclosure of their home." AOB 38. This assertion entirely ignores the fact the Lincicomes borrowed money to purchase their home in 2007. Money they have never repaid. The Lincicomes are due for the July 2008 mortgage payment. To claim it is unfair to foreclose on a property that is nearly twelve years in arrears and that any of the bank defendants somehow obtained a financial benefit to which they were not entitled through the foreclosure sale is absurd. The district court properly held the Lincicomes' performance was not excused.

D. The District Court Did Not Err in Granting BANA Summary Judgment on the Homeowner's Bill of Rights Claim

The Lincicomes claim BANA violated the Homeowner's Bill of Rights (**HBOR**), codified as NRS 107.400 through 107.560, based on the January 2009 notice of default and the fact BANA did not accept their payment in October 2009. 12 AA 1203. The Lincicomes made no opposition to BANA's request to dismiss the HBOR claim in its motion for summary judgment. Pursuant to local rule 7(d), this constitutes consent to the granting of BANA's motion as to the HBOR claim. The district court did not need to analyze the HBOR claim as to BANA since the Lincicomes consented to dismissal of this claim as to BANA.

In any event, the HBOR claim fails because the Lincicomes allegations of wrongdoing by BANA occurred prior to the statute's October 1, 2013, effective date. HBOR would apply only prospectively in the absence of clear legislative intent that it apply retroactively. *See Public Employees' Benefits Program v. LVMPD*, 124 Nev. 138, 154, 179 P.3d 542 (2008). The statute does not state it applies retroactively, and the legislative history indicates it applies only to notices of default recorded after that date. S.B. 321, 2013 Leg., 77th Reg. Sess. (2013).

This claim also fails because BANA was not the "mortgage servicer" as defined by NRS 107.440 when the most recent foreclosure was initiated, and should not be held statutorily liable for anything other defendants did or did not do. Servicing transferred from BANA to Fay, and BANA assigned its beneficial interest in the deed of trust to U.S. Bank years before the foreclosure. 14 AA 3302-03. The Lincicomes have not pointed to any conduct by BANA that violates the HBOR since its enactment in October 2013.

Finally, even if HBOR could be applied to BANA for conduct in 2009, the Lincicomes claim is untimely. They did not sue BANA until November 2018 and waited to raise their HBOR claim until December 2019. The Lincicomes' time to sue BANA for HBOR violations expired in 2012. *See* NRS 11.090(3)(a) (a three-year limitations period applies to '[a]n action upon a liability created by statute").

CONCLUSION

BANA respectfully requests this court affirm the district court's summary judgment and sanctions order.

DATED this 5th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY 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 in Times New Roman and 14 point font size.

I FURTHER CERTIFY this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 7,706 words.

FINALLY, I CERTIFY I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify 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 of the transcript or appendix where the matter relied on is to be found.

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

DATED this 5th day of April, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on April 5, 2022, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP