IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME,

Appellants,

v.

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

Respondents.

NEVADA SUPREME COURT
CASE NO.: 83261

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

APPELLANTS' REPLY BRIEF TO ANSWERING BRIEFS FILED BY BANK OF AMERICA, NA AND PROF-2013 M4-LEGAL TITLE TRUST, FAY SERVICING, LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC

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NRAP 26.1 DISCLOSURE

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

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

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

Dated this 19th day of May, 2022.

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I. ISSUES ADDRESSED BY RESPONDENTS

Bank of America, N.A. (hereinafter "BANA") and Respondents Prof-2013-M4 Legal Title Trust by U.S. Bank, N.A., as Legal Title Trustee (hereinafter "US Bank"), Fay Servicing, LLC (hereinafter "Fay"), and Shellpoint Mortgage Servicing, LLC (hereinafter "Shellpoint" and together with US Bank and Fay as "Respondents") address the issues stated in their respective Answering Briefs.[1]

Whether the district court erred in determining that the Foreclosure Mediation Agreement prevented Appellants from enforcing their rights under Chapter 107.

Whether the district court erred in finding that the Foreclosure Mediation Agreement required Appellants to execute a deed-in-lieu of foreclosure and surrender their property.

Whether the district court error in determining that the Lincicomes repudiated their 2009 Loan Modification Agreement when they did not assert that it was applicable to their mortgage.

Whether the district court erred in determining that the Lincicomes were in default of their mortgage.

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[1] Reference to "Respondents" herein is only to US Bank, Fay Servicing, and Shellpoint, and does not include Bank of America, N.A. ("BANA") or Sables, LLC ("Sables"). For the purposes of this reply brief, when referring to Bank of America, N.A or Sables, LLC, they will be referred to by name.

Whether the district court erred in concluding that Appellants could not sustain a claim for wrongful foreclosure.

Whether the district court erred in determining that Appellants' breach of contract claims were barred by the statute of limitations.

Whether the district court erred by not addressing the Appellants' claim for violation of the Homeowner's Bill of Rights.

II. SUMMARY OF ARGUMENT

In response to the arguments presented by BANA and Respondents, Appellants present the following Arguments.

Appellants argue that the district court committed reversible error when it found that that the Foreclosure Mediation Agreement required Appellants to execute a deed-in-lieu of foreclosure and surrender their property.

As set forth more fully here, the district court clearly erred in determining that the Foreclosure Mediation Agreement prevented Appellants from enforcing their rights under Chapter 107.

Additionally, Appellants argue that the district court erred in determining that they repudiated their 2009 Loan Modification Agreement when they did not assert that it was applicable to their mortgage.

The district court clearly erred in further determining that the Lincicomes were in default of their mortgage and that Appellants' breach of contract claims were barred by the statute of limitations

The district court erred in concluding that Appellants could not sustain a claim for wrongful foreclosure.

Finally, Appellants argue that the district court erred by failing to address the Appellants' claim for Respondents violations of the Homeowner's Bill of Rights.

III. STANDARD OF REVIEW

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

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

IV. ARGUMENT

A. Whether the district court erred in finding that the Foreclosure Mediation Agreement required Appellants to execute a deed-in-lieu of foreclosure and surrender their property?

Respondents and BANA assert that the district court did not err in determining that the Mediation Agreement settled all claims, even though no such

language exists in the agreement, and even though Fay repudiated the Mediation Agreement prior to July 5, 2018.[2]

On page 26 of the Summary Judgment Order, the district court entered the following findings of fact and conclusions of law:

> The [foreclosure mediation] agreement settled all claims regarding the mortgage. The Plaintiffs have an obligation under the agreement to surrender the property.[3]

The straight forward terms on page 5 of the 4/3/2018 Mediator's Statement consist of two checked check boxes and handwritten comments, establishing an agreement that Appellants had until 7/4/2018 to apply and provide a deed-in-lieu pursuant to the requirements of Fay's DIL program, or a mediation certificate would issue on 7/5/2018.[4]

Based upon the Mediator's Statement and the Foreclosure Mediation Agreement provided therein, Appellants and Respondents agreed that Appellants

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[2] *See* US Bank, et al. Answering Br., pp. 4, 7-8, 12-14, 16, 33, 39-40.
[3] Vol.XVI:AA03765-03766.
[4] *See* Vol.XIV:AA03340-03355; Vol.XIV:AA03344 (Checked checkbox next to "1. Deed in Lieu of Foreclosure" under the heading "3B. RELINQUISH THE HOME," checked checkbox next to "9. Certificate Date: 7/5/2018," and comments which state "PURSUANT TO DIL REQUIREMENTS ON P. 6 OF TTP DATED 3/6/2018 – ATTACHED HERETO").

would have until 7/4/2018 to apply and provide a deed-in-lieu pursuant to Fay's DIL program, or a mediation certificate would issue on 7/5/2018.[5]

Respondents assert that the "Lincicomes . . . agreed to a deed-in-lieu of foreclosure . . . then reneged on their promise to provide a deed-in-lieu . . ."[6]

Respondents assert Appellants agreed that a certificate of mediation could issue if Appellants did not provide a deed-in-lieu of foreclosure thereby agreeing to relinquish "any right they had to contest the foreclosure sale."[7]

However, there is nothing in the Mediator's Statement that explicitly or implicitly establishes that Appellants agreed to waive their rights under NRS 107, or to "settle all claims regarding the mortgage."[8]

Respondents' position is remarkable in light of the fact that Fay repudiated the Foreclosure Mediation Agreement before the July 4, 2018 deadline.[9]

A letter dated July 16, 2018, which was included as "Exhibit FF" to Respondents' Undisputed Statement of Facts in Support of Motion for Summary Judgment admits that on May 16, 2018, Fay mailed to Appellants a "Deed In Lieu

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[5] *See* Vol.XIV:AA03344; Vol.XIV:AA03352-03353.
[6] US Bank, et al. Answering Br., p. 4
[7] US Bank, *et al.* Answering Br., p 14.
[8] *Cf.* Vol.XVI:AA003766; Vol.XIV:AA03340-3355.
[9] Vol.XII:AA02980 (May 16, 2018 Letter from Fay Servicing to Vicenta Lincicome therein terminating eligibility under the Deed In Lieu Program).

Program Closing Letter" which therein indicated that their "eligibility to participate in the Deed In Lieu [Program] had been terminated."[10]

According to the May 16, 2018 letter, Appellants' eligibility to complete the paperwork for a deed-in-lieu was terminated six weeks before the July 4, 2018 deadline.[11]

As such, there is no basis in fact supporting the district court's conclusion that the Lincicomes were required to surrender their home when: (1) the terms of the Mediation Agreement do not include any such provision; (2) the agreement provided Fay discretion to accept or reject the deed-in-lieu; and (3) when Fay had repudiated the Foreclosure Mediation Agreement by prematurely terminating Appellants' eligibility under the DIL Program six weeks prior to July 4, 2018.

Therefore, based upon the Mediator's Statement and the May 18, 2018 correspondence from Fay to Vicenta Lincicome, both of which were presented to the district court in support of Respondents' Motion for Summary Judgment, this Court must conclude that the district court erred in finding that the Mediation Agreement "settled all claims" and established an obligation in Appellants to surrender their home and a waiver of their rights under Chapter 107.

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[10] Vol.XII:AA02931 (a copy of the May 16, 2018 Deed In Lieu Program Closing Letter is included in the appendix at AA02980).
[11] I*d.*

B. The district court erred in concluding that the Foreclosure Mediation Agreement bars Appellants' claims and prevented Appellants from enforcing the requirements of Chapter 107.

BANA and Respondents argue that by entering into the Mediation Agreement, Appellants "relinquished any right they had to contest the foreclosure sale." [12]

In support of the position, Respondents rely upon *Jones v. Suntrust Mortgage Inc.,*128 Nev. 188, 274 P.3d 762 (2012), for the holding that a mediation agreement permitting an extension of time for the homeowner to conduct a short sale in exchange for issuance of a certificate of mediation to the lender estops the homeowner from challenging the foreclosure.[13] [14]

Jones is distinguishable from the facts and the agreement at issue in this case. In *Jones*, this Court reviewed an appeal of the district court's order denying a petition for judicial review, where the foreclosure mediation was resolved with an agreement that gave the Joneses the opportunity to seek to short sale their home in exchange for a two-month extension of time for the issuance of a foreclosure

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[12] US Bank, et al. Answering Br., p. 14.
[13] *Id*. at 13.
[14] J*ones*, 128 Nev. at 191, 274 P.3d at 764.

mediation certificate in favor of SunTrust.[15] The mediation agreement at issue in *Jones* provided as follows:

> "14 days from 11/12/10, borrower will return short-sale package of documents to lender, including listing agreement for sale of the property. On or after 1/16/2011, lender shall have the right to seek a certificate from the FMP to proceed with foreclosure regardless of the status of the pending short sale. Borrower shall still have the right to make a short sale up to the time of foreclosure."[16]

Based upon the agreement, SunTrust's right to proceed with the foreclosure sale was agreed upon by the parties, "regardless of the status of the pending short sale."[17] This Court's holding that the mediation agreement was an enforceable agreement was the basis for determining that the Joneses resolved their claims of alleged violations of NRS 107.086 and the foreclosure mediation rules by their agreement to resolve the foreclosure mediation.[18]

Here, unlike the Joneses, Appellants have not challenged the validity of the Mediation Agreement. Additionally, Appellants' claims underlying this action pertain to violations of NRS 107.080, Nevada's Homeowner's Bill of Rights

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[15] *Id.* at 13; J*ones*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012).
[16] Suntrust Mortgage Inc., 6/6/2011 Answering Brief, p.3., (*Jones v. SunTrust Mortgage Inc.*, Nev. Sup. Ct. No. 57748, ECF Doc #11-16574).
[17] See id.
[18] *See* J*ones*, 128 Nev. at 192, 274 P.3d at 765.

(HOBR) and not NRS 107.086 relating to the Nevada Foreclosure Mediation Program.[19]

Furthermore, the terms of the Mediation Agreement are significantly different than those of the agreement reached in *Jones.*[20] In this case the agreement provided Appellants with the opportunity to seek a deed-in-lieu of foreclosure, but it did not include a provision whereby Appellants expressly agreed to waive their rights to enforce the provisions of Chapter 107 if a deed-in-lieu was not provided.[21] Lastly, unlike here as discussed *supra*, in *Jones*, SunTrust did not "terminate eligibility" for Joneses to conduct a short sale, as Fay did here.[22]

Because Fay repudiated the Mediation Agreement by providing Appellants with a letter denying their eligibility under the DIL Program, Respondents are estopped from asserting any defense to Appellants' claims because according to Fay's own communications with Appellants, they were not eligible to apply for and provide a deed-in-lieu by the July 4, 2018, deadline.[23] As such, any determination that an implied waiver of Appellants' rights to enforce the

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[19] Vol.VII: A01570-01571.
[20] *Cf.* Suntrust Mortgage Inc., 6/6/2011 Answering Brief, p.3., (*Jones v. SunTrust Mortgage Inc.*, Nev. Sup. Ct. No. 57748, ECF Doc #11-16574); AA03340-3355.
[21] *See id.*
[22] Vol.XII:AA02931; Vol.XII:AA02980.
[23] *See id.*

provisions of Chapter 107 would violate public policy as provided under NRS 40.453.[24]

In response to this argument, Respondents assert that NRS 40.453 is not applicable to the Mediation Agreement because "the agreement did not include any express waiver of right."[25]

Under this logic, NRS 40.453 is only applicable to an "express waiver of right" and not a waiver that may be implied to exist under the terms of an agreement. Respondents' argument is absurd and not supported by NRS 40.453, or any case law interpreting it.

In *John Schleining, Inc., v. Cap One, Inc.*, 130 Nev. 323, 326 p.3d 4 (2014), this Court determined that a contract provision waiving the right "to be mailed a notice of default" under NRS 107.095 was invalid because the notice statute "falls within the scope of NRS 40.453."[26]

In its discussion, this Court reviewed *Lowe Enterprises Residential Partners v. Eighth Judicial District Court*, 118 Nev. 92, 40 P.3d 405 (2002), previously

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[24] NRS 40.453(1) is a declaration by Nevada's Legislature providing that it is "against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness secured thereby, waives any right secured to the person by the laws of this state."

[25] *Id.* at 15.

[26] *John Schleining*, 130 Nev at 325, 326 P.3d at 8.

determining that NRS 40.453 does not prohibit a waiver of the right to trial by jury.[27]

The Court distinguished the waiver of the right to jury from that of a waiver of a notice of default pertaining to a foreclosure.[28] This Court stated that "[u]nlike the right to a trial by jury, the . . . right to be mailed a notice of default [under NRS 107.095] . . . relates directly to the policy underlying the statutory scheme of which NRS 40.453 is a part."[29]

In this case, BANA and Respondents' assertion that the Appellants' entry in to the Mediation Agreement amounts to a relinquishment of their right to contest the foreclosure, would interfere with not only rights contained in NRS 107.095, but also nearly every legal requirement and protection that lenders, servicers and trustees must abide by as part of the statutory scheme the Legislature has established to protect Homeowner's from improper foreclosure sales. As such, NRS 40.453 must be triggered to prevent an implied relinquishment of the right to enforce the mandatory requirements of Chapter 107.

Accordingly, this Court should conclude in light of the distinguishing facts in *Jones* and the clarification of the application of NRS 40.453 made in *John*

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[27] *Id*. (*citing Lowe*, 118 Nev at 102-103, 40 P.3d at 412).
[28] *Id*. at 326; 326 P.3d at 7-8.
[29] *Id*.

Schleining, that the district court erred in concluding that the Foreclosure Mediation Agreement bars Appellants' claims and prevented them from enforcing the requirements of Chapter 107.

C. Whether the district court erred in determining that Appellants' claims are barred by claim preclusion.

Respondents argue in support of the district court's finding that Appellants "believed they were under the original agreement and represented such to the bankruptcy court."[30] Specifically, Respondents assert that Appellants' use of the original loan terms in their bankruptcy petition effectively repudiated and abandoned the 2009 Loan Modification Agreement ("LMA").[31] Respondents argue that by abandoning the LMA, Appellants are now estopped from seeking to recover upon Appellants' claim for wrongful foreclosure of the LMA.[32]

Respondents' argument is ridiculous in light of the fact that Respondents and BANA have admitted in their respective answers to Appellants' *Second Amended Complaint* that the LMA modified the Deed of Trust ("DOT").[33] [34] [35] Based upon

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[30] Vol.XV:AA03765, lns.1-2.
[31] US Bank, et al. Answering Br., p. 16.
[32] *Id.*
[33] Vol.VII:AA01699-1702 (Ans. Second Am. Compl.: US Bank and Fay admit the contents of the LMA, that BANA failed to provide notice of the LMA to the Bankruptcy Court in its Motion for Relief of Stay, and that the LMA modified the 2007 Deed of Trust as provided in the Notice of Default; ¶¶ 23, 24, 43, 64).
[34] Vol.VII:AA01730-Vol.VIII:AA01767 (BANA admits the contents of the LMA,

the fact that Respondents and BANA do not deny that, according to the Notice of Default ("NOD"), the LMA modified the DOT, and was the operative document at the time of foreclosure, as is also supported by the *Trustee's Deed Upon Sale,* it would be inequitable for Respondents to be allowed to foreclose upon Appellants' home. This is especially true under the allegation that Appellants breached the LMA, even though Respondents and BANA had previously not ever sought payment upon the same and now seek to declare that Appellants are precluded from contesting that they were in breach of the LMA.[36]

The district court's determination that Appellants are precluded from enforcing the LMA based upon the contents of their bankruptcy petition was

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that it received the LMA, that it executed the LMA, that it recorded the LMA, that it failed to inform the Bankruptcy Court of the LMA in its Motion for Relief of Stay, that the LMA modified the 2007 Deed of Trust as provided in the Notice of Default, that the Notice of Default does not reflect the terms of the LMA; ¶¶ 23, 24, 25, 38, 39, 42, 43, 64, 65, 153, 155, 156).

[35] Vol.VIIAA01751-1754 (Shellpoint admits the contents of the LMA, that BANA failed to provide notice of the LMA to the Bankruptcy Court in its Motion for Relief of Stay, and that the LMA modified the 2007 Deed of Trust as provided in the Notice of Default; ¶¶ 23, 24, 43, 64).

[36]Vol.VII:AA01553-AA01730-Vol.VIIIAA01767;Vol.VIII:AA01751-54; Vol.VII:AA01699-1702; AA01694-1696 (*Trustee's Deed Upon Sale* provides that the 2007 "Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/4/2011, of official records."

clearly in error, when no party has denied that the LMA did in fact modify the DOT, and when the NOD and *Trustee's Deed Upon Sale* admit the same.[37]

The following analysis of judicial estoppel and collateral estoppel establish that Respondents cannot use judicial estoppel or collateral estoppel as a sword to preclude Appellants' claims so that they can evade liability for their respective violations of NRS 107.080.

Judicial Estoppel. Respondents cite *Kaur v. Singh*, 477 P.3d 358 (Nev. 2020), for the proposition that Appellants are estopped from prosecuting their claim for wrongful foreclosure upon the doctrine of judicial estoppel because of the representations in Appellants' bankruptcy case.

In *Kaur*, this Court cited the five-factor test to be considered when determining whether judicial estoppel is applicable in a particular case.

A court is to consider whether:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not

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[37] *See id.* (For the purposes of brevity, Appellants omit a discussion here that Appellants representations to the bankruptcy court as the DOT and LMA was the result of BANA's representations and conduct which lead Appellants to believe that the no formation of the LMA had occurred; *see* Vol.XV:AA03681, lns.6-8; Vol.XV:AA03689-3690).

taken as a result of ignorance, fraud, or mistake.[38]

While the factors are helpful in determining whether judicial estoppel is applicable, the doctrine "should be applied only when a party's inconsistent position arises from intentional wrongdoing or an attempt to obtain unfair advantage." [39]

Application of the judicial estoppel factors here easily establishes that the doctrine is not in any way applicable under the facts alleged by Respondents for the simple reason that Appellants have not taken separate positions as to whether the DOT or the LMA was applicable to their mortgage.

Even though Appellants have admitted that at the time of filing their bankruptcy petition that they believed that the LMA was lost, and their mortgage had not been modified, contrary to the "findings" of the district court and the assertions of Respondents, Appellants did not make a statement in their 4/6/2020 bankruptcy petition as to whether the DOT or the LMA was controlling their mortgage.[40] While it's true that Appellants referenced the initial principal balance

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[38] *Id. (quoting In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (quotations marks omitted)).
[39] *Id.* (*quoting NOLM, LLC v. Cty of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)).
[40] *Cf.* Vol.IX:AA02047; Vol.IX:AA02053.

on Schedule D, and the date of the inception of the underlying debt, the listing of the balance alone is not definitive.[41]

Notably, Appellants' chapter 13 plan does not reflect the terms of the DOT or the LMA.[42] Appellants' chapter 13 plan provides that interest accrues at 4.5% APR instead of 6.875% under the 2007 DOT or 4.875% under the LMA; the payoff date is listed as 03/2040 instead of 06/2037 under the DOT or 08/2049 under the LMA; and the monthly payment amount in the plan is stated as $2,325 and not $2,183 as noted in BANA's October 29, 2009 mortgage statement, or $1,977.29 as provided under the LMA.[43]

Accordingly, the Appellants' chapter 13 plan was not in itself an adoption of any particular position on the issue.[44] However, even if it were determined based upon BANA's 11/26/2014 *Motion for Relief of Stay* that the bankruptcy court had already decided the issue that Appellants had defaulted upon the DOT, the resolution of the issue would not have any preclusive effect here.[45]

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[41] *See id.*
[42] Vol.XII:AA02862-2863; Vol.I:AA00021-46; Vol.I:AA00087-92.
[43] Vol.XIII:AA03200; Vol.XII:AA02862-2863; Vol.I:AA00021-46; Vol.I:AA00087-92.
[44] *See id.*
[45] *See In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. at 56, 390 P.3d at 652 (determining that collateral estoppel is not applicable as to a contrary position where the first position was made as "result of ignorance, fraud, or mistake").

This is because judicial estoppel factor 5 excuses the bankruptcy court's determination of the issue when BANA's relief of stay motion was brought upon false information.[46]

BANA's *Motion for Relief of Stay* is direct evidence of its efforts to keep Appellants and the bankruptcy court in the dark as to the existence, execution, and recording of the LMA.[47] Furthermore, resolution of the issue by the bankruptcy court could not be given preclusive effect, when BANA withheld all information pertaining to the LMA and BANA's rejection of Appellants' payments in its motion.[48]

It is notable though, that BANA has taken inconsistent positions in this case. In BANA's Answer to the second Amended Compliant, it admits the following: (1) that it received the executed LMA from Vicenta Lincome (AA01731: ¶25); (2) that the LMA was signed and recorded (AA01732: ¶38); (3) that it sent communications indicating that it was investigating the status of the Appellants concerns (AA01731: ¶30); and (4) that the DOT was modified by the LMA (AA01734:¶64).

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[46] *See In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. at 56, 390 P.3d at 652.
[47] *See* Vol.IV:AA00811-812 (Ct. 12/31/2018 Ord., pp.3-4; Vol.IX:AA02239, lns.5-15.
[48] *Kaur,* 477 P.3d at 363.

Contrary to the admissions and denials in its complaint, BANA later admitted that "between July 31, 2009 and November 10, 2015, BANA did not provide Vicenta Lincicome with payment coupon, a statement reflecting the terms of the LMA, a financial statement referencing the LMA."[49] As well BANA admits that it "did not provide Vicenta Lincicome with any form of written notice by US Mail or otherwise . . . which in any way indicate that the 2009 LMA was rejected, or otherwise in default for any reason including non-payment."[50]

BANA also admits that it "did not prove Vicenta Lincicome with any form of written notice stating or otherwise indicating that the 2009 LMA . . . was received by BANA."[51]

Now, contrary to its own admissions, BANA asserts it breached the LMA and that Appellants had reason to be on notice that it had received the LMA.[52]

Accordingly, because BANA is culpable of intentional wrongdoing in order to obtain an unfair advantage over Appellants in this matter as it pertains to the LMA and in its relief of stay motion, it would be manifestly injudicious for this Court to uphold the district court's determination that judicial estoppel is

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[49] Vol.XIV:AA03380-3381 (Resp 7& 8)
[50] Vol.XIV:AA03383 (Resp. 12)
[51] Vol.XIV:AA03383 (Resp. 13)
[52] BANA Answering Br., pp. 22-32.

applicable here, thereby impeding Appellants' recovery upon their claim for wrongful foreclosure.[53]

Collateral Estoppel. Respondents cite *University of Nevada v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180 (1994), for the proposition that Appellants are estopped from litigating "any issue that was actually and necessarily litigated" in Appellants' bankruptcy case.[54]

As discussed *supra*, Appellants took no position in their bankruptcy case as to the LMA.[55] Even though Appellants did not oppose BANA's *Motion for Relief of Stay*, the bankruptcy court's decision that relief of stay was warranted does not now serve to estop Appellants from seeking to enforce the LMA, because BANA withheld a copy of the executed and recorded LMA from the court and Appellants.[56]

Notably, the district court supported its determination that Appellants are estopped from now seeking to enforce the LMA by "not challeng[ing] the underlying obligation."[57] In order to make it clear that Appellants were not being

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[53] *See NOLM*, 120 Nev. at 743, 100 P.3d at 663.
[54] US Bank, et al. Answering Br., p. 16, fn.63. (*citing Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191).
[55] *See* Vol.I:AA00048-85 (BANA's *Motion for Relief of Stay*); Vol.IV:AA00765-767 (*Order Terminating Automatic Stay*).
[56] *See* Vol.I:AA00006; Vol.I:AA00048-85;
[57] Vol.XVI:AA03775, lns.25.

singled out, the district court stated that "BANA would be bound as well by any representation made in the bankruptcy proceedings."[58]

BANA and its successors in interest should be bound by their prior representations. BANA is culpable for its impropriety in making false representations to the bankruptcy court via its *Motion for Relief of Stay* by failing to inform not only Appellants, but also the court, that the LMA had modified the DOT.[59]

BANA's failure to be forthcoming to the bankruptcy court substantiates Appellants' allegation that they were unaware that the LMA was received by BANA. Accordingly, the district court should have given BANA's misrepresentations preclusive effect to conclude that BANA and its successor in interest, and not Appellants, are culpable of wrongdoing.[60]

Therefore, this Court should conclude that the district court erred in concluding that Appellants are estopped from seeking to enforce the terms of the LMA.

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[58] Vol.XVI:AA03765, lns.22-24.
[59] Vol.I:AA00006, ¶¶ 35-37.
[60] *Id.*

D. Whether the district court erred in determining that Appellants had defaulted upon their mortgage.

In support of the district court's finding no. 12, Respondents assert that the Lincicomes have admitted that they were in default.[61]

As support for this conclusion, Respondents cite to pages 86-89 of Vicenta Lincicome's January 6, 2021 Deposition Testimony which provides as follows in pertinent part:

> Page 88
> Q Can you go down to Page -- actually, we are on the right page, on Page 40. On Page 40, there's an amount -- the amount on the Notice of Default that's in default there, it says $265,572.39; is that correct?
> A I see that. Yes.
> Q Was that the correct amount of default at the time this document was recorded?
> A I suppose so. I don't have any -- I never did calculations on what I have and haven't paid, because we were just trying to -- okay. But anyway...
> Q Do you have any reason to believe that that
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> Page 89
> amount was incorrect?
> A No. It might be correct.
> Q Okay. Now, let me ask you, at the time this Notice of Default was recorded, could you have paid that amount?
> A Oh, no.[62]

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[61] US Bank, et al. Answering Br., p.20, fn.75 (referencing Vol.XIII:AA03006).
[62] Vol.XIII:AA03006

During the deposition, Ms. Lincicome was not feeling well and "had a very bad headache" that ultimately caused the deposition to be continued.[63] As demonstrated above, her answers given at times during the deposition show that she was confused and unable to answer clearly.[64] Additionally, at the time of the deposition, Appellants gave answers to many of the questions based upon the belief that they held during the time frame of the question.[65]

As a result, Ms. Lincicome made several corrections to her deposition testimony.[66]

On page 202 her deposition testimony, Ms. Lincicome corrected her answers given on pages 83 through 91.[67] Ms. Lincicome's corrections to Page 88, lines 21-24 are pertinent to the allegation that she admitted that she was in default. The correction to Page 88, lines 21-24, is as follows:

> A No. We are not in default and it does not reflect what would be owed under the terms of the 2009 Loan Modification, but I do believe it reflects what would have been owed if Bank of America had not ever offered us the loan modification in 2009.[68]

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[63] *Id.*
[64] *See id.*
[65] *See* Vol.XIII:AA3106, lns.13-18.
[66] *See* Vol.XIV:AA03453-3464.
[67] Vol.XIV:AA03457.
[68] *Id.*

Additionally, Ms. Lincicome's correction to page 89, line 2, is as follows:

> A Yes, it is not the amount owed under the terms of the Loan Modification Agreement which modified our loan.[69]

As shown above, Ms. Lincicome has not admitted that she was in default of the mortgage. Respondents cite to no other evidence that Appellants have admitted that they were in default of their mortgage.

Furthermore, it is undisputed that Appellants were never given the opportunity to make payment upon the modified mortgage.[70] [71]

Accordingly, the district court failed to view the undisputed facts in a light most favorable to Appellants, and therefore erred in finding that Appellants were in default of their mortgage. Appellants respectfully request that this Court conclude that the district court's order must be reversed.

E. Whether the district court erred in concluding that Appellants could not sustain a claim for wrongful foreclosure.

Respondents argue that the district court did not error in determining that Respondents had substantially complied with the provisions of NRS 107.080 and that Appellants have suffered no prejudice by way of the foreclosure of their home.

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[69] *Id.*
[70] Vol.IV:AA00809-00815.
[71] *See* Vol.XIV: AA03379-03381 (BANA's response to Appellants Requests for Admissions 4, 5, 6, 7, and 8).

In making this argument, Respondents focus solely on the notice requirements of NRS 107.080, and not the overarching requirement that the homeowner actually must be in default.[72]

There is no question that notice was given. However, beyond the fact that the Notice of Default and the Notice of Sale are inaccurate as to the terms of the LMA, and the alleged default, the real issue concerning NRS 107.080 in this case is whether the LMA, which all parties admit modified the DOT, was in fact never breached by Appellants.[73] Notably, BANA has admitted it rejected Appellants' second payment upon the modification, and thereafter Respondents did not once seek payment upon the modified terms.[74]

As to prejudice, the Lincicomes have been foreclosed upon and evicted, while never being given the opportunity to make payment upon the modified mortgage. The Lincicomes have been forced to live through the worst nightmare of their lives at a significant cost to their health and well-being. Respondents' assertions that Appellants have not suffered any prejudice by way of BANA's and

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[72] US Bank, et al. Answering Br., pp.19-20; NRS 107.080(1) (conferring the "power of sale . . . upon a trustee to be exercised after a breach of [payment upon] the obligation for which the transfer is security").

[73] *See* Vol.XIV:AA03379-03381 (BANA's response to Appellants' Requests for Admissions 4, 5, 6, 7, and 8); Vol.XIV:AA03455-03456; Vol.XIV:AA03023; Vol.XIV:AA03443-03444; Vol.X:AA02467-02500.

[74] *See id.*

Respondents actions is incredibly insulting to Appellants, and is not supported by the undisputed facts.

Respondents also argue that because Appellants "admit they were in default" and have not "affirmatively allege[d] that they breached no condition of the mortgage agreement sufficient to permit foreclosure proceedings against them," they are unable to sustain a claim for wrongful foreclosure.[75]

As established *supra*, Appellants have not admitted to have been in default of the terms of the LMA. Furthermore, Appellants have affirmatively alleged that they have not breached the terms of the LMA.[76]

In Appellants' Second Amended Complaint, they allege as follows:

> 131. Bank of America breached the Deed of Trust, as modified by the 2009 LMA, when it rejected Plaintiffs' payment in October of 2009.
> 132. Bank of America and US Bank have not cured the October 2009 breach.
> 133. Plaintiffs were not in breach of the 2009 LMA at the time of the recording of the NOD on November 3, 2017.
> 134. Plaintiffs were not in breach of the 2009 LMA at the time of the recording of the Notice of Trustee's Sale on October 12, 2018.
> . . .
> 136. Plaintiffs were not in breach of the 2009 LMA at the time of sale on January 4, 2019.
> 137. Sables, LLC, the Trustee in this matter had no legal

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[75] US Bank, et al. Answering Br., p.20, fn.71 (*quoting Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230, 1237 (D. Nev. 2009)).

[76]

> right pursuant to NRS 107.080 to foreclose on Plaintiffs when they were not in breach of the Deed of Trust as modified by the 2009 LMA.[77]

Appellants clearly have met the pleading standard for bringing an action for wrongful foreclosure pursuant to NRS 107.080.

Accordingly, based upon the foregoing, this Court should conclude that the district court erred in its determination that Respondents substantially complied with the requirement of NRS 107.080 and that Appellants' home was not wrongly foreclosed upon.

F. Whether the district court erred in determining that Appellants' breach of contract claims were barred by the statute of limitations.

BANA and Respondents argue that BANA's rejection of Appellants' payment upon the 2009 LMA put them on notice of their claim for breach of contract beyond the statute of limitations.[78]

In so arguing, Respondents assume Appellants' knowledge that BANA had timely received the signed modification agreement.[79] Respondents do not address the fact that Appellants had not been given any notice as to the existence of BANA's timely receipt of their acceptance. When Appellants made their first payment under the LMA, they assumed that their acceptance of the modification

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[77] Vol.VII:AA01569-1570.
[78] US Bank, et al. Answering Br., p.21.
[79] *See id.*

agreement was received timely. However, after their second payment was rejected and Appellants were informed by BANA that the modification was "lost," or "not in their system," Appellants could not be on notice that BANA had breached the LMA, because they had no reason to believe that a valid contract had been formed.

In this regard, it is undisputed that BANA never provided Appellants with any notice that the LMA was received, executed, and effectively modified their mortgage.[80]

The element to establish the existence of an enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration."[81]

To establish a cognizable claim for breach of contract in Nevada, a plaintiff is required to allege: "(1) formation of a valid contract; (2) performance or excuse of performance by plaintiff; (3) material breach by the defendant; and (4) damages."[82]

Prior to being provided with the NOD, Appellants could not have alleged, based upon the information and communications given by BANA, even the first

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[80] Vol.XIV:AA03380-3383 (Resp 7, 8, 12, & 13)
[81] *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).
[82] *Laguerre v. Nev. Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011).

element to establish a claim for breach of contract without also violating NRCP 11(b).[83]

There is no evidence before the district court that Appellants were on notice that their modification was timely received and that formation of the contract was complete. Had such been given, Appellants would have been on notice of their claim for breach of contract and would have been obligated to bring an action within six years as required by NRS 11.190(1)(b).[84]

Accordingly, based upon the foregoing, this Court should conclude that the district court erred in determining that Appellants' action was filed untimely because Appellants lacked the requisite knowledge of the existence of a formed contract, and therefore, could not be on notice of a breach of the same.

G. Whether the district court erred in not addressing the Appellants' claim for violation of the Homeowner's Bill of Rights.

Respondents assert that the district court did not error when it failed to address Appellants' claim for violation of the Homeowner's Bill of Rights

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[83] NRCP 11(b)(3) (requiring a party or counsel for a party to certify " the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

[84] Vol.IX: AA02001

("HOBR"), because Appellants "consented to foreclosure and repudiated the LMA."[85] [86]

As addressed *supra*, at no time did Appellants consent to the foreclosure of their home, at best they consented to the issuance of a mediation certificate, which by its very nature is not a waiver or forfeiture of rights. Furthermore, as also addressed *supra*, Appellants have at no time repudiated the LMA.

Respondents further argue that the district court did not error because Appellants have failed to present a material violation of HOBR. In so arguing, Respondents ignore Appellants' argument that Respondents could not have substantially complied with NRS 107.500(1) by sending a notice where only the loan number and the name and mailing address are accurate.[87]

Respondents additionally do not address how the foreclosure and eviction of Appellants from their home does not constitute an actual and cognizable "harm,"

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[85] US Bank, et al. Answering Br., p.24.
[86] HBOR is codified in Chapter 107 in NRS 107.400 to NRS 107.560.
[86] NRS 107.560(2) (Provides a private right of action "to recover his or her actual economic damages resulting from a material violation of NRS 107.400 to NRS 107.560).

[87] See NRS 107.500(1).

when Appellants have never been given the opportunity to make payment upon their modified mortgage.[88] [89]

It is a material violation of the Homeowner's Bill of Rights any time a trustee, beneficiary, and servicer seeks to foreclose within the confines of NRS 107.080 upon inaccurate information provided under NRS 107.500(1)(c).[90]

It is a material violation of NRS 107.510 where a mortgage beneficiary or servicer records a notice of default which fails to comply with NRS 107.500(1)(a).[91]

It is a material violation of NRS 107.550 to record a notice of trustee's sale more than nine months after the recording of the notice of default.

The most serious material violation pertains to the Respondents' violation of NRS 107.560(1).[92] The district court in this case issued an order enjoining the sale of Appellants' home as a result of violations of HOBR.[93]

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[88] *See* AA03494, Vol.XIV.
[89] AA03494, Vol.XIV.
[90] *See* NRS 107.560; NRS 107.500(1)(c).
[91] *See* NRS 107.510(1)(a) (Requiring compliance with section 1 of NRS 107.500).
[92] Vol.VII:AA01566,¶¶90-102; Vol.VII:AA01570-1571,¶¶ 140-149 (Appellants alleged that they are entitled to treble damages for violation of NRS 107.560 in their Second Amended Complaint).
[93] Vol.II:AA00260 (December 31, 2018 Order).

NRS 107.560(1) provides in pertinent part as follows:

> An injunction issued pursuant to this subsection remains in place and any foreclosure sale must be enjoined until the court determines that the mortgage servicer, mortgagee, beneficiary of the deed of trust or an authorized agent of such a person has corrected and remedied the violation giving rise to the action for injunctive relief. An enjoined person may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.[94]

Here, even though the district court's order in effect at the time stated that the preliminary injunction in effect remain in place until further order of the court, Respondents moved forward with the foreclosure of Appellants' home without ever remedying any stated HOBR violations noted in the district court's order.[95]

This reckless conduct by Respondents which resulted in the sale of Appellants' home has caused Appellants significant and mounting economic harm.

In this regard, NRS 107.560(2) requires that where a "material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, [or] beneficiary of a deed of trust, . . . the court may award the borrower the greater of treble actual damages or statutory damages of $50,000."[96]

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[94] NRS 107.560(1).
[95] Vol.II:AA00260 (December 31, 2018 Order).

Respondents could have easily avoided liability pursuant to NRS 107.560(3), if they had corrected and remedied the violations stated in the district court's order.[97]

The circumstances of this case clearly establish that HOBR has been violated not only by the inaccurate documents prepared and provided to Appellants, but also by Respondents' failure to remedy the same to establish that foreclosure upon the modified deed of trust is warranted under NRS 107.080.

Therefore, this Court should conclude that the district court erred by not considering Appellants' claim for violation of the Homeowner's Bill of Rights when it denied Appellants' motion for partial summary judgment.

V. CONCLUSION

This Court should conclude that the district court erred (1) in determining that the Foreclosure Mediation Agreement prevented Appellants from enforcing their rights under Chapter 107; (2) in finding that that the Foreclosure Mediation Agreement required Appellants to execute a deed-in-lieu of foreclosure and surrender their property; (3) in determining that Appellants repudiated their 2009 Loan Modification Agreement when they did not assert that it was applicable to their mortgage; (4) in determining that Appellants were in default of their

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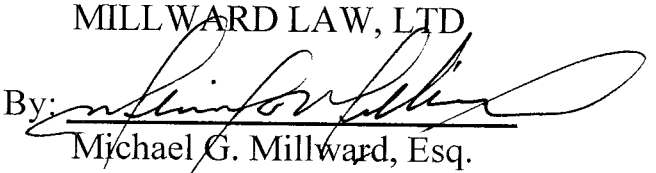
[97] NRS 107.560(3) (Providing that a beneficiary or servicer is not liable for "any violation of NRS 107.400 to 107.560 . . . that it has corrected and remedied . . ."

mortgage; (5) in concluding that Appellants could not sustain a claim for wrongful foreclosure; (6) in determining that Appellants' breach of contract claims were barred by the statute of limitations; and (7) by in not addressing the Appellants' claim for violation of the Homeowner's Bill of Rights.

Dated this 19th day of May, 2022.

MILLWARD LAW, LTD

By: 

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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
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I, Michael G. Millward, Esq., hereby certify that this reply brief is filed in compliance with the formatting requirements of NRAP 32. The reply brief is prepared for 8 ½ by 11 inch paper, and the text is double spaced in compliance with NRAP 32(a)(4). The brief is written in 14-point Times New Roman font in the body and footnotes, and it fully complies with the formatting and style requirements of NRAP 32(a)(5) and NRAP 32(a)(6). While the brief exceeds 15 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 6763 words. I further hereby certify that I have read this reply brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed of any improper purpose. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before
me this 19th day of May, 2022.

NOTARY PUBIC in and for said
COUNTY AND STATE

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

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2022, I filed the foregoing APPELLANTS' REPLY BRIEF TO TO ANSWERING BRIEFS FILED BY BANK OF AMERICA, NA AND PROF-2013 M4-LEGAL TITLE TRUST, FAY SERVICING, LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC, which shall be served via electronic service from the Court's eFlex system to:

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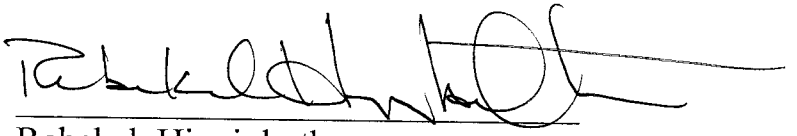

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