IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME,

Appellants,

vs.

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

Respondents.

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

RESPONDENTS PROF-2013 M4-LEGAL TITLE TRUST, BY U.S. BANK, NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE, FAY SERVICING LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC'S ANSWER TO PETITION FOR REHEARING

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I. INTRODUCTION

In its Order Directing Answer to Petition for Rehearing, this Court raised two distinct questions for Respondents Prof-2013 M4-Legal Title Trust, by U.S. Bank, National Association, as Legal Title Trustee, Fay Servicing LLC, and NewRez, LLC, d/b/a Shellpoint Mortgage Servicing, LLC (collectively "Respondents") to address: 1) whether the settlement agreement of the parties included in the Mediator's Statement ("Mediation Agreement") is enforceable; and 2) whether the deed-in-lieu of foreclosure concluded all claims or only those related to the lender not seeking a deficiency.

As to the first question, the answer is "yes". In *Jones v. SunTrust*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012), this Court held that a settlement agreement entered into at a foreclosure mediation is an enforceable agreement. In this instance, Appellants Albert Ellis Lincicome, Jr. and Vicenta Lincicome (hereinafter the "Lincicomes") consented to foreclosure and waived their right to contest it because they agreed to a deed-in-lieu at the foreclosure mediation.

As to the second question, the deed-in-lieu concluded all claims as to the subject real property. First, the parties never contracted regarding a deficiency and did not address it in the Mediation Agreement. Notwithstanding this, the deficiency question is moot because the bankruptcy discharge obtained by the Lincicomes prohibited the Respondents from collecting a deficiency. For these reasons, this

Court should deny the Petition for Rehearing.

II. STANDARD FOR REVIEW

Pursuant to NRAP 40(c), "[t]he court may consider rehearing in the following circumstances: (1) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (2) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." Where a litigant can show that this Court "has overlooked material matters and that rehearing will promote substantial justice," rehearing by the panel is warranted.[1] Where this Court "neglect[s] to decide an issue presented in the briefs," and that issue may require that the issue be decided differently, this Court has historically granted requests for rehearing.[2]

III. LEGAL ARGUMENT

A. The Mediation Agreement is an enforceable agreement.

The first issue that that this Court wanted addressed in the Petition for Rehearing is whether the Mediation Agreement was enforceable. In *Jones*, this Court held that an agreement made at a foreclosure mediation is an enforceable contract as

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[1] *Calloway v. City of Reno*, 114 Nev. 1157, 1158, 971 P.2d 1250, 1250 (1998) (granting petition for rehearing).
[2] See *Am. Cas. Co. of Reading, Pa. v. Hotel & Rest. Employees & Bartenders Int'l Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997).

to the parties thereto.[3] In *Jones*, the borrower and the beneficiary entered into a settlement agreement at foreclosure mediation whereby the borrower would be allowed to short sell the property in exchange for the suspension of foreclosure proceedings for a period of two months.[4] The Court found the agreement was enforceable because the borrower, his attorney, and the beneficiary all signed the agreement.[5] Therefore, as a matter of law, this Court has held that mediation agreements are enforceable instruments.

In its Order of Affirmance, this Court held that settlement agreement entered into at the mediation (the "Mediation Agreement") was enforceable and that based on the manner on which the parties filled out the settlement form in the Mediation Agreement that "the Lincicomes not only agreed to surrender possession of the property, but to relinquish all rights to the home."[6] In support of this finding, this court cited to *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 254 P.3d 641 (2011), which requires this Court to look at the language of the agreement

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[3] 128 Nev. at 191, 274 P.3d at 764 ("Substantial evidence supports the district court's finding that the mediator's statement containing the written short-sale terms, signed by all parties, including Mr. Jones and the attorney representing the Joneses, constitutes an enforceable settlement agreement.").
[4] *Id.*
[5] *Id.*
[6] *See* Order of Affirmance at 7.

and the surrounding circumstances.[7]

The Lincicomes contend that this court committed an error in finding that "Certificate Date" meant the "'certificate date for the deed in lieu of foreclosure would be July 5, 2008' instead of the date the foreclosure certificate would issue as required by NRS 107.086."[8] Respondents do not dispute that such a statement is on its face erroneous. The certificate date is the date when the foreclosure mediation certificate would issue, not the date when a certificate for a deed-in-lieu would issue. There is no such date for when a certificate for a deed-in-lieu would issue.

However, this finding is harmless error that is not grounds for reversal.[9] The purpose of the mediation certificate date is to provide Respondents with the authority to foreclose if for some reason the Lincicomes did not provide a deed-in-lieu by the certificate date. Without that certificate, Respondents would be unable to foreclose under NRS 107.086(2)(e)(2), as obtaining the foreclosure mediation certificate is a prerequisite to recording a Notice of Sale.[10] This alternative was needed not only

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[7] *Id.* at 6-7.
[8] *See* Petition for Rehearing at 17.
[9] See *Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008) (providing that an error is not grounds for reversal where it is harmless and has no injurious effect on the jury's verdict).
[10] NRS 107.086(2)(e)(2) provides that a trustee cannot exercise the power of sale unless the trustee "Causes to be recorded in the office of the recorder of the county

because the Lincicomes could renege on the deal (which they did) but also because a deed-in-lieu may not be viable if there are junior liens recorded against title to the real property which would affect the priority of the deed in lieu. Either way, the Lincicomes agreed to foreclosure in exchange for additional time to reside in the Property[11] before a foreclosure would occur. That extra time was the consideration contemplated in *Jones* and *Rock Valley Ranch* that led this Court to find that the Agreement in this case was enforceable.

A key distinction from *Jones* is that, in that case, the lender agreed to suspend foreclosure proceedings to allow the homeowners to complete a short sale. Here, the consideration is the deed-in-lieu. Arguably in *Jones*, the agreement to complete a short sale is not the equivalent of surrendering real property and there is a colorable claim that the homeowners did not waive their right to contest the foreclosure. A deed-in-lieu is a different story. As pointed out in the Answering Brief, a deed-in-lieu constitutes a transfer of the mortgagor's rights in the property to the mortgagee,

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in which the trust property, or some part thereof, is situated: (2) The certificate provided to the trustee by Home Means Nevada, Inc., or its successor organization, pursuant to subsection 8 which provides that mediation has been completed in the matter."

[11] The "Property" refers to the property that is the subject of this appeal: 70 Riverside Drive, Dayton, Nevada 89403; APN 29-401-17.

including all right, title, and interest in the property.[12] In other words, a deed-in-lieu is a complete surrender of a mortgagor's rights to the Property. Thus, there is no wiggle room here to claim that the Lincicomes offered anything but a complete waiver of their rights.

Notwithstanding the facts that they waived all their rights as to the Property, the Lincicomes assert that the letters Fay Servicing, LLC, the loan servicer, sent to the Lincicomes contradict the Mediation Agreement because there is no mention of a binding agreement in those letters.[13] But those letters are consistent with the Mediation Agreement because they offered to settle the matter with Lincicomes by offering a deed-in-lieu. Although the Lincicomes repudiated those offers, those repudiations do not invalidate the Mediation Agreement.[14]

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[12] *See* Answering Brief at 13, *citing* to *Beasley v. Mellon Fin. Servs. Corp.*, 569 So. 2d 389, 393 (Ala. 1990) ("A deed in lieu of foreclosure is any instrument, however denominated, whereby a mortgagor transfers to a mortgagee the mortgagor's rights in the mortgaged property. Such an instrument transfers to the mortgagee all right, title, and interest of the mortgagor in the mortgaged property, including, but not limited to, all rights of redemption, statutory or equitable, unless expressly otherwise provided therein.") (internal citations *omitted*).

[13] *See* Petition for Rehearing at 17-18.

[14] See *Tonopah Sewer & Drainage Co. v. Nye Cty.*, 50 Nev. 173, 176, 254 P. 696, 696 (1927) ("Neither by constitutional provision nor legislative act can state impair existing contract . . . Where city, acting through its authority, has contracted for public utility service, its contract is binding and may not be repudiated even though performance results in loss. Parties, including municipalities, must be left free to

Finally, the Lincicomes argue that they could not possibly waive their rights under NRS 40.453 to contest the foreclosure by agreeing to a deed-in-lieu.[15] Effectively, the Lincicomes are arguing that all deeds-in-lieu are invalid. However, the Nevada Revised Statutes define and allow for deeds-in-lieu of foreclosure. Specifically, NRS 40.429 states that "'Sale in lieu of a foreclosure sale' means a sale of real property pursuant to an agreement between a person to whom an obligation secured by a mortgage or other lien on real property is owed and the debtor of that obligation in which the sales price of the real property is insufficient to pay the full outstanding balance of the obligation and the costs of the sale. The term includes, without limitation, a deed in lieu of a foreclosure sale."

Nonetheless, the Lincicomes believe that deeds-in-lieu violate public policy under NRS 40.453 because they require borrowers to waive their rights to contest a foreclosure. But NRS 40.453 could not possibly refer to deeds-in-lieu because NRS 40.429 provides for them. Indeed, "it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same

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make lawful contracts, and it is duty of courts to enforce them.") (internal citations *omitted*); *NLRB v. Hyde*, 339 F.2d 568, 572 (9th Cir. 1964) (holding that the remedy for a repudiated contract is to enforce the contract).

[15] *See* Petition for Rehearing at 19-20.

subject."[16] Absent any evidence to the contrary, of which there is none here, the Lincicomes cannot claim that the waiver provisions of NRS 40.453 include the deed-in-lieu to which they agreed.

In the end, the Mediation Agreement is binding. The Lincicomes consented to foreclosure and waived their right to contest the foreclosure through proceeding the deed-in-lieu thereof. The Court's erroneous finding regarding the "certificate date" had no injurious effect on its holding and constitutes nothing more than harmless error that does not warrant rehearing.

B. The Mediation Agreement resolved all issues regarding the Property and not just those related to the deficiency.

The second question this Court asks Respondents to address is whether the deed-in-lieu of foreclosure concluded all claims or those related to the lender not seeking a deficiency. It appears that the Court is presuming that the purpose of a deed-in-lieu is to prevent the lender from seeking a deficiency. But as noted above, a deed-in-lieu is a surrender of all claims to the Property. It does not require the lender to waive the deficiency.

Importantly, the record in this case is bereft of any waiver on the part of the lender as to a deficiency. Indeed, the Mediation Agreement has a check box for

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[16] *Boulder City v. Gen. Sales Drivers, Local Union No. 14*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)

"Waiver of Deficiency" on the same page as the "Deed in Lieu" check box. On that page, the "Waiver of Deficiency" check box is left blank.[17] Thus, the question of whether the parties agreed to waive the deficiency is immaterial because it was not an agreed upon part of the bargain.

Moreover, whether a deficiency waiver applies is immaterial because there was no deficiency for Respondents to waive. Specifically, the Lincicomes' bankruptcy discharge eliminated any deficiency.[18] The discharge precluded Respondents from collecting any deficiency; therefore, the parties would have been prevented from contracting as to that provision.[19] Ultimately, the Mediation Agreement was a discharge of all issues regarding the Property and must be upheld.

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[17] *See* Excerpts of Record Volume II: AA00452.
[18] *See* Excerpts of Record Volume VII: AA0670.
[19] See *Lopez v. Doral Bank* (*In re Lopez*), 500 B.R. 322, 327 (Bankr. D.P.R. 2013) ("Once there is a discharge injunction in place, even after the foreclosure sale, there will be no recourse available against the debtor for any deficiency.").

IV. CONCLUSION

Based on the foregoing, this Court should deny the Petition for Rehearing.

DATED this 16th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 (a)(7) and Rule 32 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2786 words.

Finally, I hereby certify that I have read this Answer to Petition for Rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 16th day of March, 2023.

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PROOF OF SERVICE

I certify that I electronically filed on the 16th day of March, 2023, the foregoing **RESPONDENTS' PROF-2013 M4-LEGAL TITLE TRUST, BY U.S. BANK, NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE, FAY SERVICING LLC, AND SHELLPOINT MORTGAGE SERVICING, LLC'S ANSWER TO PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal were served with a true and correct copy via the following means:

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

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

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