IN THE SUPREME COURT OF THE STATE OF NEVADA

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| ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME,<br>Appellants,<br>v.<br>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,<br>Respondents. | NEVADA SUPREME COURT<br>CASE NO.: 86324<br><br>APPEAL FROM<br>THIRD JUDICIAL DISTRICT<br>COURT CASE NO.: 18-CV-01332 |



# APPELLANTS' OPENING BRIEF

Counsel for Appellants:

Michael G. Millward, Esq.
NSB# 11212
MILLWARD LAW, LTD
1591 Mono Ave
Minden, NV 89423
Phone: (775) 600-2776
Email: Michael@MillwardLaw.com

## NRAP 26.1 DISCLOSURE

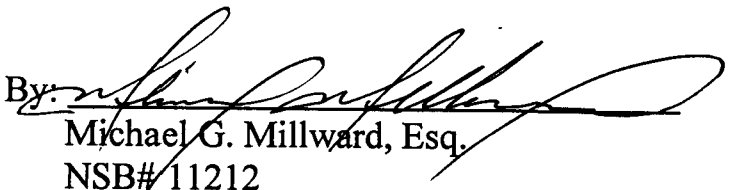
The undersigned counsel of record certifies that there are no persons and entities as described in *NRAP 26.1(a)* that must be disclosed.

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 20th day of September, 2023.

MILLWARD LAW, LTD

By: 

Michael G. Millward, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Appellants

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## JURISDICTIONAL STATEMENT

This is an appeal from four separate Orders: (1) the district court's June 23, 2021 *Order on Breckenridge Motion for Summary Judgment* ("First MSJ Order"); (2) the district court's January 19, 2021 *Order on Attorney's Fees and Costs* ("Attorney's Fees Order"); (3) the district court's November 17, 2021 *Permanent Writ of Restitution* ("Writ of Restitution")*;* (4) and the district court's February 10, 2023 *Order Granting in Part Breckenridge Property Fund 2016's Motion for Judgment on it Remaining Claims ("Judgment on Remaining Claims").*

Breckenridge sought summary judgment upon two of its claims for relief, to wit: quiet title and possession of the Lincicomes' Home. The district court incorporated the findings of facts and conclusions of law from the *Order Denying Plaintiffs' Motion for Partial Summary Judgment / Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust* ("Second MSJ Order") also entered June 23, 2021.[1] The district court concluded that "Breckenridge is entitled to summary judgment regarding their claims to title of the property."[2]

On February 10, 2023, the district court entered the Judgment on Remaining Claims. The Judgment on Remaining Claims resolved all remaining claims in

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[1] AA00010, Vol.I.
[2] *Id.*

Breckenridge's favor excepting only the "Slander of Title Claim" on which the Court determined Breckenridge "cannot succeed" and concluded that the court "cannot award damages under the slander of title cause of action."[3]

Because the district court's February 10, 2023 Judgment on Remaining Claims is a final order fully resolving all remaining claims in the action, this Court now has jurisdiction to consider the district court's June 23, 2021 *Order*. *See* NRAP 3(a)(1).

The Lincicomes filed their timely Notice of Appeal on March 24, 2023, and the Breckenridge Orders are now properly before the Court, including the district court's November 22, 2021 *Permanent Writ of Restitution* and the district court's January 19, 2022 *Order on Attorney's Fees and Costs.*[4]

## ROUTING STATEMENT

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

The Lincicomes seek review of the efficacy of a foreclosure where the provisions of NRS 107.080 were not substantially complied with. This appeal raises

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[3] AA00034-35, Vol, I.
[4] AA00001-4, Vol.I; AA00013-25, Vol.I.

issues of significant statewide importance regarding the Homeowners' Bill of Rights, NRS 107.400-107.560, and to what extent a trustee owes a duty to a homeowner to act in good faith during the foreclosure process. Specifically, whether the trustee owed a duty to the Lincicomes to correct inaccurate notices and in making its determination of whether the Lincicomes were in default under the applicable modified mortgage terms prior to the exercise of the power of sale under NRS 107.080.

### A. Foreclosure was Void

This Court determined in the prior appeal in this matter, Case No. 83261, that the Lincicomes' mortgage and 2007 Deed of Trust ("DOT") was modified. This Court has determined that the 2009 modification agreement entered into between Bank of America, N.A., and the Lincicomes ("2009 LMA" or "LMA") was breached by Bank of America, N.A. ("BANA") in 2009 by its refusal to accept payment. BANA and its successors in interest have never provided the Lincicomes with notice of any intention of reinstating the LMA since BANA's breach of the same. Additionally, BANA and its successors in interest have not ever provided the Lincicomes with any statement reflecting the actual amount due, the correct interest rate applicable to the modified loan, or even the actual principal balance of the loan, since the Lincicomes accepted the LMA in 2009.

Because the LMA was a valid modification of the DOT, the Lincicomes' asserted that BANA and US Bank's failure to recognize and honor the applicable terms of the modified mortgage after BANA's refusal of payment resulted in an ongoing breach of contract. However, this Court affirmed the district court's conclusion that the Lincicomes' execution of a foreclosure mediation Mediator's Statement ("Mediation Agreement") resolved all of the Lincicomes' claims against US Bank and Fay Servicing.

What remains at issue in this appeal is whether the non-judicial foreclosure sale conducted by Sables, LLC ("Sables"), the trustee of the modified mortgage, was void when the district court enjoined the sale pursuant to NRS 107.560(1) and the sale proceeded without first correcting the notices sent to the borrower which did not in any way accurately describe the "deficiency in performance or payment" as mandated under NRS 107.080, NRS 107.0805(1)(b)(3), and NRS 107.500(1)(b).

The Lincicomes' Home was foreclosed upon on January 4, 2019. The foreclosure was pursued by US Bank because BANA did not inform it of the 2009 modification of the DOT. Thus, in 2017 when US Bank caused the Notice of Default to be recorded, it had not incorporated the applicable modified terms of the mortgage into its computer system, and believed that the Lincicomes were in default under the terms of the original DOT.

The primary issue presented in this appeal is of significant statewide importance because it will define what standard applies to lenders that fail to keep accurate records. As well, the case may very well define what, if any, duties a Trustee of a deed of trust actually owes the borrower. Lastly, it will define whether a homeowner can waive their rights to have the requirements of Chapter 107 apply to the non-judicial foreclosure of their home.

**B. District Court Abused Discretion as to Attorney's Fees.**

Also at issue in this matter is an award of attorney's fees pursuant to NRS 18.010(2) upon the district court's findings that the Lincicomes' claims were frivolous and maintained without reasonable basis.

The district court so concluded in the face of a considerable record and theory supported by statute and public records establishing clear irrefutable evidence. The issue before this Court is whether the district court abused its discretion when it awarded attorney's fees under NRS 18.010(2) even though the same is not supported by the record before the court.

**C. Remaining Claims**

The remaining issues before the Court will primarily be resolved upon this Court's determination of whether the foreclosure sale in this matter was void, or remains effective, and does not present issues of statewide importance.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in concluding that the foreclosure sale was effective entitling Breckenridge to have title quieted in its name.

B. Whether the district court erred by awarding attorney's fees to Breckenridge upon the basis that the Lincicomes' claims were maintained without reasonable basis.

C. Whether the district court erred in issuing its *Writ of Permanent Restitution* when the sale was void for being conducted in violation of the district court's December 31, 2018 *Order After Hearing* ("Order After Hearing") and in violation of NRS 107.080 and 107.560.

D. Whether the district court erred in entering judgment in favor of Breckenridge upon its fourth cause of action, unjust enrichment, and its fifth cause of action, rent or monies for possession of the Lincicomes' Home when Breckenridge was not entitled to possession because the sale was void for being conducted in violation of the district court's December 31, 2018 *Order After Hearing* ("Order After Hearing") and in violation of NRS 107.080 and 107.560.

## I. STATEMENT OF THE CASE

This is an appeal from four district court orders: (1) the district court's June 23, 2021 *Order on Breckenridge Motion for Summary Judgment* ("First MSJ Order"); (2) the district court's January 19, 2021 *Order on Attorney's Fees and Costs* ("Attorney's Fees Order"); (3) the district court's November 17, 2021 *Permanent Writ of Restitution* ("Writ of Restitution"); (4) and its February 10, 2023 *Order Granting in part Breckenridge Property Fund 2016's Motion for Judgment on it Remaining Claims* ("Judgment on Remaining Claims").

Whether the district court erred in entering all four of its orders, hinges initially upon whether the foreclosure sale conducted in this matter was void, or whether Breckenridge was entitled to have title quieted in the Lincicomes' Home located at 70 Riverside Dr., Dayton, Nevada 89403 ("Home").

At the November 20, 2018 hearing upon the Lincicomes' *Application for Temporary Restraining Order*, the district court determined that the Lincicomes were entitled to an injunction pursuant to NRS 107.560(1) and enjoined the Trustee, Sables, LLC ("Sables") from foreclosing upon the Lincicomes' Home.[5]

[5] AA000857-864, Vol.V.

The district court enjoined the Trustee, Sables, from exercising the power of sale upon its finding that the Lincicomes were likely to succeed upon their claim that the Homeowner's Bill of Rights ("HOBR") had been violated.[6]

Sables proceeded with the foreclosure sale on January 4, 2019, even though it was required pursuant to NRS 107.560(1) to remedy and rectify the errors in the notices prior to the release of the injunction.[7] Sables sold Lincicomes' Home to Breckenridge Property Fund 2016, LLC ("Breckenridge").[8] [9]

After seeking leave of court for nearly a year, on December 20, 2019, leave was granted and the Lincicomes filed their *Second Amended Complaint* naming Breckenridge as a defendant and asserting claims for quiet title and declaratory relief.

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[6] AA000862, Vol.V.
[7] NRS 107.560(1).
[8] AA000862, Vol.V; AA000857-864, Vol.V; (The district court's December 31, 2018 Order provides findings that Sables, LLC "Sables" failed to accurately report the principal obligation, the date through which the mortgage was paid, or the applicable interest rate and concluded that the Lincicomes "have established that they will succeed on their claim that Defendants have violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure.").
[9] AA002769-2771, Vol.XIV; Sables caused the foreclosure sale of Lincicomes' Home on January 4, 2019.

On March 18, 2021, Breckenridge filed its Motion for Summary Judgment and on April 15, 2021, the Lincicomes filed their Opposition.[10] [11] Breckenridge filed its Reply to Lincicomes' Opposition on May 10, 2021.[12]

On June 23, 2021, without hearing argument, the district court entered two orders. The district court entered its First MSJ Order granting Breckenridge's Motion for Summary Judgment, and the Court entered its Second MSJ Order granting the respective motions for summary judgment filed by BANA and US Bank (Prof-2013 M4 Legal Trust).[13] [14]

Without any explanation, the district court contradicted its findings made during the November 18, 2018 hearing as well as those stated in its December 31, 2018 *Order After Hearing* determining that the Lincicomes were likely to succeed on the merits of their claim for violation of the HBOR.[15]

The district court made the following errors:

1. That the district court erred by concluding that the foreclosure of the Lincicomes' Home was conducted in substantial compliance with NRS 107.080;

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[10] AA002485-2535, Vol.XII.
[11] AA003433-3441, Vol. XVII.
[12] AA004043-4048, XIX.
[13] AA004049-4066, Vol.XX.
[14] AA000005-12, Vol.I.
[15] *Cf.* AA000857-864, Vol.V; AA004049-4066, Vol.XX; AA000005-12, Vol.I.

2. That the district court erred in concluding that Breckenridge held title to the Lincicomes' Home even though the foreclosure was enjoined by the district court and NRS 107.560(1).

3. That the district court erred in concluding the Lincicomes' action was brought without reasonable basis or novel legal theory.

4. That the district court erred in concluding that Breckenridge was entitled to possession of the Lincicomes' Home.

5. That the district court erred in concluding that Breckenridge was entitled to summary judgment upon its remaining claims.

## II. PROCEDURAL AND FACTUAL HISTORY

1. In May of 2007, the Lincicomes purchased their home located at 70 Riverside Dr., Dayton, Nevada 89403.[16] On May 23, 2007, Appellant Vicenta Lincicome (individually referred to herein as "Vicenta") executed an Adjustable Rate Note ("2007 Note") for $381,150 in favor of Sierra Pacific Mortgage Company and a Deed of Trust ("2007 DOT").[17] The 2007 Note was amortized over 30 years with an initial interest rate of 6.875% and monthly payment of $2,183.67.[18]

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[16] AA002567-2568, Vol.XIII.
[17] AA002570-2594, Vol.XIII.
[18] AA002570, Vol.XIII.

2. The Lincicomes failed to make their June 1, 2008 mortgage payment, and on January 23, 2009, BANA (the successor beneficiary of the Note) accelerated the Note and caused Recontrust Company, N.A. to record its *Notice of Default and Election to Sell Under Deed of Trust* with the Lyon County Recorder.[19]

3. The Lincicomes applied for a loan modification and on July 11, 2009, they received a loan modification agreement ("2009 LMA" or "LMA") and were informed it would become "valid upon signing and returning the documents provided."[20]

4. The 2009 LMA provided a new maturity date of August 1, 2049, an interest rate of 4.875%, and a monthly payment of $1,977.29, which were all effective as of September 1, 2009. *Id.* Arrears were to be capitalized as of September 1, 2009, and the new principal balance owed would be $417,196.58 instead of $381,150.00. *Id*. The terms of the 2009 LMA compared to the 2007 Note would save the Lincicomes $7,623.00 per year from 2009 through 2014 ($381,150 x .06875 (APR) vs. $381,150 x .04875 (APR)).[21] From September 2014 through September of 2018, the Lincicomes would save an additional $5,717.25 per

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[19] AA002596-2597, Vol.XII.
[20] AA002601-2603, Vol.XIII.
[21] *Cf.* AA002571-2594, Vol.XIII (compare with terms of the 2009 LMA) AA002601-2603, Vol.XIII.

year over the terms of the 2007 Note.[22]

5. The original mortgage terms provided that the principal balance owed was $381,150.00, and had an interest rate of .06875 APR.[23]

6. Vicenta Lincicome (individually "Vicenta") accepted the 2009 LMA by executing and returning the same by Fed Ex on July 31, 2009.[24]

7. On September 1, 2009, the Lincicomes met "Crystal" of BANA's Carson City branch to make a payment of $2,267.62. Crystal was unable to find any record of the 2009 LMA in BANA's system, but accepted payment and provided a receipt indicating that payment was made on account no. "162304785." *Id.*[25]

8. On October 1, 2009, Vicenta went again to the Carson City branch to make her second payment on the 2009 LMA.[26] However, this time the bank teller refused the Lincicomes' payment.[27] [28] BANA repudiated the LMA on October 1, 2009 when "BANA failed to perform under the LMA by refusing to accept the

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[22] *Id.*
[23] AA002570, XIII.
[24] AA002608-2611, Vol.XIII.
[25] AA002613, Vol.XIII.
[26] AA002608-2611, Vol.XIII.
[27] See id.
[28] See AA003327, Vol.XVII (Bank of America, N.A. "BANA" admission to rejecting payment "because there was no record of the LMA in BANA's system").

Lincicomes' second modified payment, as well as subsequent modified payments, at the time that these payments were due under the agreement."[29]

9. The LMA provides that the "Borrower and Lender will be bound by, and comply with all terms and provisions [of the Note and Deed of Trust], as amended by this Agreement."[30] The 2009 LMA modified material terms of the mortgage including interest rate, principal balance, and date of first payment, as well as the term of the loan.[31] While the original unmodified terms of the original mortgage loan remained effective as to the agreement, BANA and its successor had a duty to "comply with all terms . . . as amended by [the LMA]."[32]

10. On March 22, 2011, BANA retracted its October 1, 2009 repudiation by BANA Vice President James S. Smith's execution of the 2009 LMA on behalf of BANA.[33] Thereafter, on May 4, 2011, BANA caused the 2009 LMA to be recorded with the Lyon County Recorder's Office.[34]

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[29] AA000041, Vol.I.
[30] AA000038-48, Vol.I.
[31] AA002631-2636, Vol. XIII.
[32] AA000135-140, Vol.I.
[33] *Id.*
[34] AA002631-2636, Vol. XIII.

11. The Lincicomes were given notice that BANA had retracted its repudiation of the 2009 LMA when they received Notice of Default.[35]

12. Between 2011 and late 2017, the Lincicomes, not knowing that BANA had retracted its repudiation of the 2009 LMA on March 22, 2011, continued to seek to modify their mortgage.[36] However, contrary to the district court's findings, the Lincicomes did not enter into any other permanent modifications that superseded the 2009 LMA.[37]

13. At no time between March 22, 2011, and the foreclosure of their Home did BANA or its successors provide the Lincicomes with a statement, invoice, or other document which sought payment under any of the material terms of the 2009 LMA.[38]

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[35] AA000294-302, Vol.I.

[36] AA000294, Vol.I.

[37] AA00055-000056, Vol.I; AA00174-00302, Vol.II; AA00949-00950, Vol.III; AA01328-01329, Vol.VII; AA02545-02546, Vol.XIII; AA02683, Vol.XIV; AA02608-02611, Vol.XIII; The district court findings as to the Lincicomes not being "ready, willing, and able to perform" are not supported by the undisputed facts. AA04055, Vol.XX. The Lincicomes' have alleged continuously in this matter that they made payment on two separate trial modifications: (1) 2015 trial modification offered by BANA, where the Lincicomes' third and final payment was rejected by Fay Servicing for not honoring BANA's modification; and (2) three completed trial payments upon Fay Servicing's trial modification which was abandoned by the Lincicomes after their third payment upon receipt of the permanent modification agreement that they believed they would be unable to afford.

[38] AA00294-00302, Vol.II; AA02773-02806, Vol.XIV.

14. On November 10, 2015, BANA assigned its security interest to PROF-2013-M4 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee ("US Bank").[39] BANA did not inform US Bank within BANA's *Assignment of Deed of Trust* that the 2007 DOT was modified by the 2009 LMA.[40]

15. An informal notice of default was prepared by the loan servicer, Fay Servicing, LLC ("Fay Servicing") on or about December 15, 2015 therein falsely alleging that the Lincicomes were in breach of the original mortgage. The notice does not reflect the terms of the 2009 LMA.[41]

16. On November 3, 2017, Sables, as Trustee under the modified deed of trust, recorded its *Notice of Breach and Default and Election to Sell the Real Property under Deed of Trust* ("NOD" or "Notice of Default").[42] The NOD provides that the 2007 DOT "was modified by Loan Modification Agreement recorded as Instrument 475808 . . . recorded on May 4, 2011."[43]

17. However, the NOD also provides that as of October 31, 2017, $265,572.39 is owed in arrears and that all monthly installments from "9/1/2008"

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[39] AA03608-03609, Vol.XVIII.
[40] *Id.*
[41] AA03752-3757, Vol.XVIII.
[42] AA03624-03629, Vol.XVIII.
[43] *Id.*

forward are due. *Id*. The NOD does not reflect the terms of the 2009 LMA, which would have, by its own terms, become effective on September 1, 2009, and after retracting BANA's October 1, 2009 breach, it was effective March 22, 2011.

18. The NOD included an Affidavit of Authority signed on October 5, 2016, by Veronica Talley, as a "Foreclosure Specialist IV" ("Talley Affidavit"), 13 months prior to the recording of the NOD, stating under oath that Fay Servicing had complied with the requirements of NRS 107.080.[44]

19. The NOD was provided in breach of Section 22 of the modified 2007 DOT and NRS 107.080 by falsely stating that the Lincicomes were in default for nonpayment and by not providing accurate information pertaining to the loan.[45]

20. The Lincicomes filed a Petition to participate in Nevada's Mediation Program on December 1, 2017.[46] At the April 3, 2018 foreclosure mediation, the Lincicomes agreed to resolve the mediation by agreement to provide them with the opportunity to participate in Fay Servicing's deed in lieu of foreclosure program ("DIL" or "DIL Program ), which terms were attached to the Mediator's

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[44] AA03627-03628, Vol.XVIII.
[45] AA00481, Vol.III (2017 Notice of Default, p.1); AA02150, Vol.XI, lns.15-18 (November 20, 2018 Hearing Transcript finding that if US Bank wishes "to use a nonjudicial foreclosure, then it has to be based upon number[s]of the . . . 2009 [LMA]."
[46] AA02740-02745, Vol.XIV.

Statement.[47] The Mediator's Statement provides that the Lincicomes would have until July 4, 2018 to apply under the DIL Program before a Certificate of Mediation would issue. *Id*.

21. The Lincicomes did not apply through the DIL Program, and on October 4, 2018, Sables recorded the Home Means Nevada Mediation Certificate with the Lyon County Recorder. [48]

22. This Court in Case no. 83261 has determined that the agreement reached at the foreclosure mediation constituted a waiver of the Lincicomes' claims for wrongful foreclosure.

23. On October 12, 2018, Sables recorded its Notice of Trustee's Sale ("NOS") therein setting the date for the foreclosure sale of the Lincicomes' Home to occur November 9, 2018.[49] Notably, the NOS also provides that the 2007 DOT "was modified by Loan Modification Agreement."[50]

24. On November 7, 2018, The Lincicomes filed their Complaint and their TRO Application with the district court, and on November 8, 2018, the district court

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[47] AA03646-3661, Vol.XVIII.
[48] AA03233, Vol.XVI.
[49] AA03663-3665, Vol.XVIII.
[50] AA02764-2766, Vol.XIV.

entered its order granting the Lincicomes' TRO Application and setting the matter for hearing to occur November 20, 2018.[51]

25. At the hearing on November 20, 2018, counsel in attendance stipulated to the admission of the evidence and affidavits presented in the TRO Application and the Response to the TRO Application in lieu of a presentation of evidence and testimony.[52] The district court granted the Lincicomes' TRO Application for a preliminary injunction, and required bond be posted in the amount of $172,610.67 by December 20, 2018.[53]

26. On December 31, 2018, the district court entered its written order upon its finding and conclusions of law resulting from the November 20, 2018 hearing.[54]

27. The December 31, 2018 Order enjoined Sables from selling the Lincicomes' Home "until further order of the Court" and also required the Lincicomes to post bond.[55]

28. On January 4, 2019, six days after the district court entered its Order, Sables sold the Lincicomes' Home by foreclosure sale.[56]

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[51] AA01264, Vol.VII; AA00174-302, Vol.II; AA00307-309, Vol.II.
[52] AA04379-4380 Vol.XXI.
[53] AA00862, Vol.V.
[54] AA00857-864, Vol.V.
[55] AA00862, Vol.V.
[56] AA00932-933, Vol.V.

29. On December 6, 2019, the district court entered its Order granting the Lincicomes leave to file their Second Amended Complaint, and on December 20, 2019, the Lincicomes filed their Second Amended Complaint.[57]

30. On March 18, 2021, Breckenridge filed its Motion for Summary Judgment and on April 15, 2021, the Lincicomes filed their Opposition.[58] [59] Breckenridge filed its Reply to Lincicomes' Opposition on May 10, 2021.[60]

31. On June 23, 2021, the district court entered its *Order Denying Plaintiffs' Motion for Partial Summary Judgment/Granting Motions for Summary Judgment filed by BANA, Prof-2013 M4 Legal Trust, US Bank and Fay Servicing, LLC* ("Second MSJ Order.") On the same day the district court entered its *Order on Breckenridge Motion for Summary Judgment* ("First MSJ Order").[61]

32. On July 20, 2021, Breckenridge filed its Motion for Attorney's Fees and Costs. [62] On August 5, 2021, the Lincicomes filed the Opposition to the Motion and on September 2, 2021, Breckenridge filed its Reply.[63] [64]

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[57] AA01676-1677, Vol.IX; AA01685-1826, Vol.IX.
[58] AA002485-2535, Vol.XIII.
[59] AA003433-3441, Vol.XVII.
[60] AA04043-4048, Vol. XIX.
[61] AA00005-00012, Vol.I; AA04049-4066, Vol.XX.
[62] AA004113-4187, Vol.XX
[63] AA004196-4206, Vol. XX.
[64] AA004210-4215, Vol.XX.

33. On September 9, 2021, Breckenridge filed its Motion for Entry of Order Granting Permanent Writ of Restitution and Payment of Overdue Rent.[65] On September 24, 2021, the Lincicomes filed their Opposition to the Motion, and on October 6, 2021, Breckenridge filed its Reply.

34. On November 5, 2021, the district court entered its *Order Concerning: Breckenridge Property Fund 2016, LLC's Motion for Entry of Order Granting Permanent Writ of Restitution and Payment of Overdue Rents* and *Plaintiffs' Motion for Stay Pending Appeal*.[66]

35. On November 15, 2021, the Lincicomes filed their *Ex Parte Motion for Additional Time to Obtain Supersedeas Bond*.[67] On November 17, 2021, the district court entered its *Order Denying Ex Parte Motion*, and on November 22, 2021, the district court entered a *Permanent Writ of Restitution*.[68]

36. On December 15, 2021, the Lincicomes were removed from their Home by the Lyon County Sheriff's Department.

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[65] AA-04216-4277, Vol.XX; AA04278-4293, Vol.XX.
[66] AA04647-4656, Vol.XVII.
[67] AA04657-4663, Vol.XVII.
[68] AA04691-4693, Vol.XXII; AA00001-4, Vol.I.

37. On January 19, 2022, the district court entered its *Order on Attorney's Fees and Costs*, and entered judgment in favor of Breckenridge.[69]

38. On December 29, 2022 the Nevada Supreme Court ("this Court") entered its *Order of Affirmance* establishing that the loan modification agreement effectively modified the original 2007 DOT.[70] The *Order of Affirmance* also provided that by executing the Mediation Agreement, the Lincicomes effectively fully resolved all claims they had against US Bank and Fay Servicing.[71]

39. The *Order of Affirmance* however was factually incorrect in concluding that the Lincicomes agreed to provide "Sables a deed in lieu of foreclosure."[72] That conclusion, however, is not supported anywhere by the record or by the Mediation Agreement. In fact, Sables is not mentioned in the Mediation Agreement, and did not sign the agreement.[73] Furthermore, the agreement actually provides that a deed-in-lieu was "to be provided to the owner of the loan" which would have been US Bank.[74]

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[69] AA000013-25, Vol.I.
[70] AA00041, Vol.I, fn.1 (Concluding that the modification agreement was validly accepted).
[71] AA00047, Vol.I.
[72] *Id.*
[73] *Cf.* AA02747-2762
[74] *See* AA02747-2762 (Section 5 of the Attachment to the Mediation Agreement provides that "upon your conveyance of your property to the owner of the loan by

## III. SUMMARY OF ARGUMENTS

The district court erred for the following reasons:

### A. The district court erred in quieting title in favor of Breckenridge when the January 4, 2019 foreclosure was conducted in violation of the district court's order, NRS 107.560(1), NRS 107.028(6).

#### 1. 2009 Modification Agreement Modified the Deed of Trust

The district court determined in its December 31, 2018, *Order After Hearing* that the Lincicomes had established that they were likely to prevail upon the merits of their claim that HOBR had been violated. However, the district court reversed its position by concluding that the LMA did not operate to modify the Lincicomes' mortgage under several theories.

This Court, in the Lincicomes' prior appeal, found the LMA to be valid and to have modified the terms of the mortgage. The material terms applicable to the mortgage were those stated within the LMA.

This Court also determined that Defendants "were not liable for wrongful foreclosure because . . . the foreclosure mediation agreement" resolved "all claims under the mortgage."

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general warranty deed . . . we will prepare and record a lien release in full satisfaction of the mortgage forgoing all rights to pursue a deficiency." (*See* AA02747-2762; AA02762 (Section 5)).

However, Sables was not a signatory to the Mediation Agreement, and the terms of the agreement were not a waiver of rights as to Sables duties under NRS 107.028(6).

### 2. The District Court Erred by Not Addressing HOBR

The Homeowner's Bill of Rights ("HOBR") under NRS 107.500 sets forth the requirements that a lender must meet before proceeding with foreclosure. NRS 107.500(1) requires that before a "notice of default and election to sell" is recorded the lender "shall" provide to the borrower a statement including a "summary of the borrower's account." NRS 107.560(1) sets forth the remedies and consequences for violations of HOBR including the continuation of an injunction until violations of HOBR have been corrected and remedied.

The district court correctly ruled at the November 18, 2018 hearing upon the Lincicomes' TRO Application. The court found that the Lincicomes established that the LMA between the Lincicomes and BANA modified the original 2007 DOT.

The court concluded that the Lincicomes had "established that that they will succeed on their claim" and that HOBR had been violated.

At the hearing, the Court said if the 2009 LMA is controlling, and if the notices US Bank sent were incorrect, "I can't allow the foreclosure to go forward."

The district court ruled at the hearing in favor of the Lincicomes and extended the temporary injunction. In the district court's written order, and keeping with the

requirement that an injunction issued pursuant to NRS 107.560(1) "remains in place" until the violation has been "corrected and remedied," the district court specifically stated that "Sables, LLC, is hereby enjoined from selling at public auction the real property located at 70 Riverside Drive, Dayton, Lyon County, Nevada . . . until further order of the Court."

However, on January 4, 2019, Sables violated the injunction and NRS 107.560(1), and because it foreclosed without correcting and remedying the NRS 107.500(1) violation, it also violated its duties to the Lincicomes under NRS 107.028(6).

### 3. Failure to Substantially Comply with NRS 107.080.

The district court erred in concluding that the requirements of NRS 107.080, had been substantially complied with. The district court further erred in concluding that the Lincicomes were in default under their mortgage agreement.

Pursuant to NRS 107.080(5), a sale "must be declared void" where the trustee "does not substantially comply with the provisions of [NRS 107.080(2)]." Sables was bound by the requirements of NRS 107.080(2) in proceeding with a non-judicial foreclosure at the request of the beneficiary. Sables was served with the Complaint and TRO Application and was notified of its duty to correct the description of the deficiency in performance or payment in the NOD and attached Affidavit of Authority.

Rather than rescinding the NOD so that the beneficiary could execute a new affidavit of authority reflecting the terms of the LMA, as the beneficiary was instructed at the November 18, 2018 hearing, Sables foreclosed on the property instead.

In reviewing Sables' conduct and whether NRS 107.080 had been substantially complied with, the district court limited its analysis to whether actual notice of default and pending foreclosure was given.

The district court did not consider that Sables was required to establish its compliance with NRS107.0805 before exercising the power of sale. The district court's limited analysis does not reflect the legislature's intention that borrowers be given verified information, substantiated by an Affidavit of Authority prior to foreclosure.

The Lincicomes request that this Court conclude that NRS 107.080 and NRS 107.0805 were not substantially complied with, and determine that the January 4, 2019 foreclosure sale is void.

**4. Breckenridge Not an Innocent Purchaser.**

NRS 107.560(4) provides that a bona fide purchaser of property at a foreclosure sale without notice of a violation of HOBR purchases without risk that the violation HOBR would affect the validity of the sale. NRS 107.080(7) provides that violation of NRS 107.080 does not affect a bona fide purchaser so long as the

foreclosed party failed to file and record a lis pendens and failed to initiate an action within 30 days of the Trustee's deed being recorded.

The Lincicomes filed and recorded a *Notice of Lis Pendens* on November 8, 2018. Breckenridge also has admitted that it had actual knowledge of the *Notice of the Lis Pendens* and the *Order After Hearing*.

Based upon Breckenridge's admissions, the Lincicomes request the Court find that Breckenridge had sufficient knowledge of the defects in the notices and recorded document that it was subjecting itself to substantial risk that the sale could be declared void pursuant to NRS 107.080 and NRS 107.560(4).

**5. Mediation Agreement Did Not Waive Legal Protections**

The district court erred to the extent it determined that the provisions of Chapter 107 were not applicable to the non-judicial foreclosure of the Lincicomes' Home because the foreclosure Mediation Agreement constituted a waiver by the Lincicomes of their rights and protections under Chapter 107.

By entering into the Foreclosure Mediation Agreement, the Lincicomes did not waive their rights or release the trustee from its duties under the law. Sables was not a signer upon the agreement.

This Court concluded that the Mediation Agreement "settled all claims regarding the mortgage" and that the "Lincicomes' breach [of] the agreement

permitted the foreclosing respondents to proceed with the foreclosure of the property.

However, in reaching this conclusion, this Court did not indicate that the Mediation Agreement operated as a knowing and voluntary waiver or abandonment of their rights under Chapter 107.

Additionally, pursuant to NRS 111.240, in order for the Mediation Agreement to alter or amend the rights of the parties the agreement "must be acknowledged" by a notary public.

Because Sables foreclosed upon the Lincicomes by way of non-judicial foreclosure, it was obligated satisfy the requirements of Chapter 107, including verifying that the Lincicomes were in default under the LMA. Once Sables knew that the US Bank and BANA had sought to enforce the wrong terms, it had a duty to verify that the Lincicomes had defaulted upon the terms of the LMA.

This Court must conclude that the district court erred to the extent it concluded that the Mediation Agreement constituted a waiver of the Lincicomes' rights and statutory protections, as it pertains to non-judicial foreclosure.

### B. The District Court Erred in Awarding Attorney's Fees

The district court erred in awarding Attorney's Fees when the Lincicomes' claims were brought upon reasonable grounds.

The district court concluded that it could not find that "Plaintiffs presented novel legal theories concerning NRS 107.080 or concerning wrongful foreclosure."

The Lincicomes' claims were reasonable under NRS 18.010(2). The district court noted that it was improper for the Lincicomes to "maintain the action" for wrongful foreclosure when "the foreclosing parties had substantially complied with NRS 107.080."

However, nothing in the record, including this Court's *Order of Affirmance* in Case No. 83261, establishes that US Bank, Fay Servicing, BANA, or Sables had "substantially complied with the requirements of NRS 107.080."

Because the LMA was effective, all notices required to be provided to the Lincicomes under Chapter 107 including the NOD were wholly inaccurate as the district court found in its December 31, 2018 *Order After Hearing*.

The Trustee foreclosed even though it owed a duty to the Lincicomes under NRS 107.028(6) to correct the notices.

The district court in this matter previously concluded that the Lincicomes were likely to prevail upon their claims concerning violations of HOBR and ruled in the Lincicomes' favor on several matters including their Motion for Leave to Amend their Complaint to assert claims against Breckenridge.

The Lincicomes had a good faith belief that NRS 107.080(2) could not have been substantially complied with when all material terms stated in the NOD were incorrect and based wholly upon terms that were supplanted by the LMA.

The district court did not consider the Defendants' own wrongful conduct in foreclosing in violation of NRS 107.560 and the court's December 31, 2018 *Order After Hearing*.

None of the Defendants, including Sables, sought to correct the NOD or Affidavit of Authority, or the NRS 107.500(1)(b). The improper actions of Defendants after the Court entered its temporary injunction established cognizable claims for wrongful foreclosure.

The Court should conclude, based upon the record before it, that the Lincicomes had sufficient basis to bring their claims for relief and that the district court erred in awarding attorney's fees to Breckenridge.

### C. Whether District Court Erred in Determining Breckenridge was Entitled to Possession and Judgment on its Remaining Claims

Whether the district court erred in determining Breckenridge's remaining claims will be decided upon whether the foreclosure sale was void.

The Lincicomes incorporate their other prior arguments and request that this Court conclude that the district court erred in determining that Breckenridge was entitled to permanent restitution to the Lincicomes' Home when the foreclosure sale

was void for being conducted violation of the district court's injunction, as well as NRS 107.560(1), NRS 107.080(2), NRS 107.500(1)(b), and NRS 107.0805(1)(b)(3).

## IV. ARGUMENT

### A. Standard of Review

This Court reviews "a district court's grant of summary judgment de novo, without deference to the findings of the lower court."[75]

Interpretation of provisions of Chapter 107 of the Nevada Revised Statutes, and the legal basis for the award of attorney fees and costs are subject to de novo review.[76]

"Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.[77]

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[75] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).
[76] JED Prop., LLC v. Coastline Re Holdings NV Corp., 131 Nev. 91 343 P.3d 1239 (2015)(interpreting NRS 107.082; (citing *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298 1302, 148 P.3d 790, 792 (2006); *Thomas v. City of N. Las Vegas,* 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (denial of attorney fees is generally reviewed for abuse of discretion but de novo review applies when issues of attorney fees concerns questions of law)).
[77] *Id*.

When interpreting "an unambiguous statute" this Court reads the statute as a whole for its plain meaning "giv[ing] effect to each ... word [ ] and phrase[ ]"[78] Review of other sources such as legislative history should only be done when "statutory ambiguity requires us to look beyond the statute's language to determine the legislative intent."[79]

This Court is tasked with reviewing the district court's interpretation of Nevada statutory authority *de novo,* which includes sections of Chapters 107, 40, and 18 of Nevada Revised Statutes.

### B. The District Court Erred in Quieting Title When Breckenridge had Notice that the Foreclosure Violated HOBR and NRS 107.080.

The district court erred in quieting title in favor of Breckenridge when the January 4, 2019 foreclosure was enjoined by the district court's December 31, 2018 *Order After Hearing* pursuant to NRS 107.560(1) and thereafter conducted in violation of NRS 107.028(6) and NRS 107.080.[80]

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[78] *JED Prop., LLC*, 131 Nev. 91, 94, 343 P.3d 1239 (2015)(*quoting Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012)).
[79] *Id*. (*citing State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000)).
[80] AA00862, Vol.V (Conclusion ¶3).

Breckenridge was not an innocent purchaser because it has admitted that it had actual notice as well as constructive notice of the suit and the December 31, 2018 *Order After Hearing*.[81]

The district court entered its *Order on Breckenridge's Motion for Summary Judgment* ("First MSJ Order"), on June 23, 2021, therein granting Breckenridge's Motion for Summary Judgment and concluding that because "Breckenridge purchased the subject property at the foreclosure sale, Breckenridge is entitled to summary judgment regarding their claims to title of the property."[82]

### 1. 2009 Modification Agreement Modified the Deed of Trust

The district court determined in its *Order After Hearing* that the Lincicomes had established that they were likely to prevail upon the merits of their claim that HOBR had been violated because the NRS 107.500(1)(b) Notice or the Notice of Default reflected the original terms of the loan rather than the terms of the 2009 Loan Modification Agreement ("LMA" or "2009 LMA").[83]

Thereafter, upon Breckenridge's Motion for Summary Judgment, the district court reversed its position by concluding that the LMA did not operate to modify the

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[81] AA00862, Vol.V.
[82] AA04107, Vol.XX.
[83] AA00857-863, Vol.5.

Lincicomes' mortgage under several theories.[84] The district court did not consider the Lincicomes' claims for violation of HOBR and quiet title, and instead quieted title in Breckenridge.[85]

However, this Court, in the Lincicomes' prior appeal, found that the 2009 Loan Modification Agreement was "validly accepted . . . and . . . LMA became valid upon mailing in July 2009." [86]

This Court also found that because "BANA failed to perform under the LMA by refusing to accept the Lincicomes' second modified payment as well as subsequent modified payments. . . . [it] breached the LMA and . . . the Lincicomes were entitled to damages."[87]

Accordingly, this Court concluded that the material terms applicable to the mortgage were those stated within the LMA.[88] However, even though Sables was not a signer to the Mediation Agreement, this Court determined that "US Bank, Fay, and Sables were not liable for wrongful foreclosure because the foreclosure

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[84] *See* AA04099-4109, Vol.XX, (incorporating the findings and conclusions in the district court's *Order Denying Plaintiffs Motion for Partial Summary Judgment / Granting Motions for Summary Judgment Filed by BANA, POF-2013 M4 Legal Trust, US Bank and Fay Servicing LLC* (sic), AA04081-4098).
[85] *See id.*
[86] AA00041, Vol.I, fn.1.
[87] AA00041, Vol.I.
[88] *See id.*

mediation agreement, which the Lincicomes breached." [89] As well, this Court did not address whether Sables, the Trustee, had a duty to comply with the requirements of HOBR and NRS 107.080, when Sables was a non-party to the Mediation Agreement.[90]

Likewise, this Court also did not address in its *Order of Affirmance* whether the Lincicomes had knowingly and voluntarily waived their rights under HOBR and NRS 107.080 based upon the two check boxes and the words "the parties resolved this matter."[91]

### 2. Homeowner's Bill of Rights was Violated

The district court erred by failing to address violations of the Homeowner's Bill of Rights ("HOBR") as it pertains to the fact that the sale was made in violation of the district court's temporary injunction that was required by law to remain in place until violation of HOBR had been corrected.

HOBR is set forth in NRS 107.400 through NRS 107.560. NRS 107.500 sets forth the requirements that a lender must meet before the lender can proceed with a foreclosure under NRS 107.080.

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[89] AA00040, Vol.I.
[90] AA00040, Vol.I; *cf.* AA00038-AA00048, Vol.I.
[91] *Id.*

Pursuant to NRS 107.480, a trustee's authority to conduct a sale under NRS 107.080 is conditioned upon compliance with NRS 107.400 through NRS 107.560.[92]

NRS 107.500(1) requires that before a notice of default and election to sell is recorded the lender "shall" provide to the borrower a statement including a "summary of the borrower's account" including the following:

> (1) The total amount of payment necessary to cure the default and reinstate the residential mortgage loan . . . ;
> (2) The amount of the principal obligation under the residential mortgage loan;
> (3) The date through which the borrower's obligation under the residential mortgage loan is paid;
> (4) The date of the last payment by the borrower;
> (5) The current interest rate in effect for the residential mortgage loan . . . ;
> (6) The date on which the interest rate for the residential mortgage loan may next reset or adjust . . . ;
> . . . [93]

Additionally, NRS 107.500(1) required that the lender provide "[a] statement of the facts establishing the right of the mortgage servicer, mortgagee or beneficiary of the deed of trust to cause the trustee to exercise the trustee's power of sale pursuant to NRS 107.080 . . ."[94]

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[92] *See* NRS 107.480.
[93] NRS 107.500(1)(b)(1)-(6).
[94] NRS 107.500(1)(c)

NRS 107.560 sets forth the remedies and consequences for the violations of HOBR including the continuation of an injunction until violation of HOBR have been corrected and remedied.

NRS 107.560(1) provides 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.[95]

In considering the foregoing, the district court correctly ruled at the November 18, 2018 hearing upon the Lincicomes' November 7, 2018 *Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction* and ordered the temporary injunction entered on November be extended.[96]

In the district court's December 31, 2019 *Order After Hearing*, the court found that the Lincicomes established that the 2009 Loan Modification Agreement between the Lincicomes and BANA, recorded on May 4, 2011, modified the original material terms of the original deed of trust.[97] The district court also concluded that

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[95] NRS 107.560(1).
[96] AA00310-311, Vol.II
of America until 2017.").
[97] AA00859, Vol.V. (December 31, 2018 Ord., Finding ¶¶ 6-7, ¶12, ¶¶21-22, ¶27).

the "Homeowner's Bill of Rights codified under NRS 107.400 through NRS 107.560 [was] applicable to this foreclosure matter."[98]

In the TRO Application, the Lincicomes alleged that they were not provided with the NRS 107.500(1)(b) Notice.[99] US Bank submitted as an exhibit to its *Response to Application for Ex Parte Restraining Order, Preliminary Injunction, and Permanent Injunction* ("Response to TRO"), a copy of Fay Servicing's December 15, 2015 NRS 107.500(1)(b) *Notice of Default and Intent to Accelerate* ("NRS 107.500(1)(b) Notice").[100]

Even if it had been found that Fay Servicing had sent the NRS 107.500(1)(b) Notice, the notice submitted to the court was completely inaccurate only reflecting the original terms of the loan, thereby misstating all the essential details required by NRS 107.500(1)(b)(1)-(6).[101]

The differences between what the NRS 107.500(1) Notice provided and the terms actually applicable under the LMA are as follows:

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[98] AA00862, Vol.V (Conclusion ¶1).
[99] AA00294-297; AA00299-302, Vol.II, (*Affidavit of Vicenta Lincicome* and *Affidavit of Ellis Lincicome* which establish that they "were not ever provided with a notice that accurately complies with the requirements of NRS 107.500(1)(b)(1).").
[100] AA00379-382, Vol.III.
[101] *See* AA00377-382, Vol.III

| | 12/15/2015 Letter [102] | 2009 Loan Modification Agreement [103] |
|---|---|---|
| **Date of Next Payment** | 9/1/2008 | 9/1/2009 (Date of 1st payment due under 2009 LMA) |
| **Total of Payments Due** | $214,933.59 | $1,977.29 (10/1/2009 Payment Refused by BANA |
| **Principal Balance:** | $381,150.00 | $417,196.58 |
| **Interest Rate** | 6.88% | 4.875% |
| **Total to Cure Default** | $214,642.49 | $0.00 [104] |

The district court found that the Lincicomes had established that "neither Fay Servicing nor Sables has accurately reported the total balance owed" and that neither party had accurately reported the principal obligation owed, the date through which the modified loan was paid, or the current interest rate of the loan.[105]

The court concluded that the Lincicomes had "established that that they will succeed on their claim" and that HOBR had been violated because Defendants had failed "to provide accurate information required to be provided prior to the initiation of a foreclosure."[106]

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[102] AA03752-3757, Vol.XVIII.
[103] AA02601-02603, Vol.XIII.
[104] *See* AA04024, Vol.XIX; AA03752-3757, Vol.XVIII. (Reflecting refusal of last payment by BANA refused Payment 10/1/2009; No Bank or Servicer has sought payment from the Lincicomes under the terms of the 2009 LMA).
[105] AA00859-861, Vol.V(December 31, 2018 *Order After Hearing*).
[106] AA00861, Vol.V (Conclusion of Law ¶¶1-3).

The district court also concluded that the Lincicomes had "established to the Court's satisfaction that they were likely to succeed on the merits of their claims pertaining to material violations of the Homeowner's Bill of Rights pursuant to NRS 107.400 through NRS 107.560."[107]

At the November 18, 2019, hearing the district court informed the Lincicomes that in order to resolve violation of the H, U.S. Bank, Fay Servicing, and Sables would have to "take it back to 2009 [and] recalculate" what was owed under the terms of the LMA.[108] The district court agreed that if all documents were "corrected," the Lincicomes would not be entitled to a "future injunction."[109]

The district court also agreed that if U.S. Bank were "allowed to move forward with this foreclosure . . . [it] would have to determine the balance owed under the 2009 agreement. . . [and] to determine the interest and the late fees under that agreement."[110] The Court continued in stating "in trying to foreclose, you still have to use the right numbers."[111] Then the Court said if the 2009 LMA is controlling, and if the notices US Bank sent were incorrect, "I can't allow the foreclosure to go

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[107] *Id.* (Conclusion of Law ¶4).
[108] AA02095, Vol.XI.
[109] AA02096, Vol.XI.
[110] AA02139, Vol.XI (Judge Aberasturi stated "I agree with you" and "I agree with you on that point").
[111] AA02143, Vol.XI.

forward."[112]

US Bank argued that the Lincicomes "waived all their other rights" during the mediation when they entered into a Mediation Agreement to provide a Deed in Lieu of Foreclosure.[113] The Lincicomes argued that the Mediation Agreement does not comport with the Statute of Frauds, and, therefore, is ineffective as to a modification of the mortgage, leaving the 2009 LMA terms in place.[114]

The district court ruled at the hearing in favor of the Lincicomes and extended the temporary injunction because "there is a likelihood of success proving that the 2009 agreement modified the 2007 [deed of trust] and that those are the terms." The Court continued, stating that the Lincicomes "are correct that if [US Bank wishes] to use a nonjudicial foreclosure, then it has to be based upon the numbers of the . . . 2009 LMA."[115] The Court also noted that even if the Mediation Agreement entitled US Bank to foreclosure, "the non-judicial foreclosure . . . would have to be based off the 2009 [LMA]."[116]

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[112] AA02121-2122, Vol.XI.
[113] AA02142, Vol.XI.
[114] AA02121, Vol.XI.
[115] AA02150, Vol.XI.
[116] AA02154, Vol.XI.

In the district court's written order, and keeping with the requirement that an injunction issued pursuant to NRS 107.560(1) "remains in place" until the violation has been "corrected and remedied," the district court specifically stated that "Sables, LLC, is hereby enjoined from selling at public auction the real property located at 70 Riverside Drive, Dayton, Lyon County, Nevada . . . until further order of the Court."[117]

Presuming that Sables would follow the district court's directive and quickly remedy and correct the NRS 107.500(1)(b) Notice and the Notice of Default, the court extended the temporary injunction, but as to "Defendants" generally, the district court required that the Lincicomes "post a bond in the amount $172,610.67 by December 20, 2018 . . ." in order for the extended temporary injunction to remain "effective against Defendants."[118]

However, on January 4, 2019, Sables violated the injunction and NRS 107.560(1), as well as its duties to the Lincicomes by conducting the foreclosure sale and selling the property to Breckenridge when it had not "corrected and remedied the violation giving rise to the action for injunctive relief."[119]

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[117] *Id.* (Orders ¶1).
[118] *Id.* (Orders ¶¶ 2-3).
[119] *See* AA02154, Vol.XI., NRS 107.560(2), NRS 107.028(6).

Because it foreclosed without correcting and remedying the NRS 107.500(1) violation, Sables also violated its duty under NRS 107.028, mandating that it "act impartially and in good faith . . . in accordance with the laws of this State."[120] Furthermore, Sables also had a duty under NRS 107.028(6) to correct an error pertaining to the "nature and the amount of the default under the obligation secured by the deed of trust . . . not later than 20 days after discovering the error."[121]

Accordingly, because the LMA effectively modified the original Deed of Trust, the terms of the LMA were required to be correctly stated in the NRS 107.500(1)(b) notice and the Notice of Default to comport with the requirement of HOBR and NRS 107.080.

Thus, because Sables had a duty to correct the notices, and because NRS 107.560(1) requires that an injunction issued remain in effect until the errors had been corrected and remedied, the foreclosure was conducted in violation of the terms of the court's Order After Hearing and also under NRS 107.560(1).

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[120] *See* NRS 107.028(6).
[121] *See id.*

### 3. Trustee Failed to Substantially Comply with NRS 107.080

The district court erred in concluding that the requirements of NRS 107.080 had been substantially complied with.[122] The district court further erred in concluding that the Lincicomes were in default under their mortgage agreement, even though this Court has found that the LMA modified their mortgage, and even though the Lincicomes were not ever given the opportunity to make payments under the LMA following BANA's rejection on October 1, 2009.[123]

Pursuant to NRS 107.080(5) a sale "must be declared void" where the trustee "does not substantially comply with the provisions of [NRS 107.080]."[124]

NRS 107.080(1) confers "a power of sale . . . upon a trustee to be exercised after a breach of [payment upon] the obligation for which the transfer is security."[125] Thus, in order for a trustee to have authority to exercise the power of sale, the homeowner must be in default under the mortgage agreement. *See id.*

This Court, in Case No. 83261, determined that the LMA did modify the 2007 DOT and that BANA failed to incorporate the LMA's terms and rejected

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[122] AA04056-04057, Vol.XX.
[123] AA02773-02776, Vol.XIV; AA00294-00302, Vol.II.
[124] *See* NRS 107.080(5).
[125] NRS 107.080(1).

subsequent payments.[126] According to this Court's *Order of Affirmance*, the LMA is applicable to the Lincicomes' mortgage.

While it is true that this Court determined in the prior case that the Lincicomes breached the Mediation Agreement and that US Bank was entitled to foreclose, Sables, as the Trustee of the DOT, was not bound or otherwise relieved of duties by way of the Mediation Agreement.[127]

Additionally, as noted by the district court at the November 18, 2018 hearing, the Mediation Agreement did not modify the Deed of Trust because it did not comport with the statute of frauds.[128] Thus, Sables was bound by the requirements of NRS 107.080 in proceeding with a non-judicial foreclosure at the request of the beneficiary.[129]

The November 3, 2017 NOD provides that the "Deed of Trust was modified by Loan Modification Agreement recorded as instrument 475808 on May 4, 2011. . ."[130] However, as discussed during the November 18. 2018 TRO Application

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[126] AA00040, Vol.I.
[127] AA002754, Vol.XIV. , (Signature page of Mediation Agreement).
[128] AA02154, Vol. XI (Judge Aberasturi stated in regards to the Mediation Agreement, "I don't have anything that I saw today that looked like it satisfied the statute of frauds to modify a deed of trust and note.").
[129] NRS 107.028(6).
[130] AA03624-3639, Vol.XVIII.

Hearing, the Affidavit of Authority attached to the NOD only recounts the terms applicable to the 2007 DOT, as if the mortgage loan had never been modified by the LMA.[131]

The NOD and Affidavit do not reflect the terms of the 2009 LMA.[132] Thus, upon service of the Lincicomes' Complaint and TRO Application specifically noting the errors in the NOD and Affidavit, Sables was on notice that the description of the "deficiency in performance or payment" mandated by NRS 107.080(3), as well as both the NRS 107.500(1)(b) and also NRS 107.0805(1)(b)(3) notices, were inaccurate and entirely false.[133]

The Lincicomes served their Complaint and TRO Application on Sables by mail on November 7, 2018.[134] Sables was served with the district court's November 8, 2018 Order, entered ex parte on November 8, 2018, therein restraining and temporarily enjoining Sables from "selling at public auction the real property" and informing Sables that the Lincicomes have established to the satisfaction of the court that the Lincicomes "are likely to succeed on the merits of their claim for

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[131] AA03627-3628, Vol.XVIII.
[132] AA00168-173, Vol.I.
[133] AA00049-AA173, Vol.I (Complaint and exhibits); AA00174-302, Vol.I-II. (TRO Application and Exhibits); AA00303-304 (*Affidavit of Counsel* establishing service of the Complaint and TRO Application on November 7, 2018).
[134] AA00049-173, Vol.I.

injunctive relief under NRS 107.560."[135] Sables was personally served with the Lincicomes' Complaint on November 19, 2018.[136]

Accordingly, Sables was required to correct the description of the "deficiency in performance or payment" in the NOD and attached Affidavit of Authority, within 20 days of notice before it could properly exercise the power of sale.[137]

Rather than rescinding the NOD so that the beneficiary could execute a new affidavit of authority reflecting the terms of the LMA, as the district court had instructed the beneficiary at the November 18, 2018 hearing, Sables foreclosed on the property instead.[138] Notably, even though Sables was informed that the sale was enjoined by the Court's November 8, 2018 Order, and was not given notice of the Court's December 31, 2018 *Order After Hearing* until January 8, 2019, it proceeded with the foreclosure sale on January 4, 2019 anyway.[139]

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[135] See AA03452, Vol.XVII (Plaintiffs' Statement of Undisputed Facts noting service of Notice of Entry of Order on November 8, 2018).
[136] AA00874, Vol.V., (*Sables Motion to Set Aside Default* acknowledging service on November 19, 2018).
[137] *See* NRS 107.028(6) (Providing that a trustee has a duty to correct any "good faith error" pertaining to "the amount of the default under the obligation secured by the deed of trust . . . not later than 20 days after discovering the error.").
[138] AA03453, Vol.XVII; AA03679-3681, Vol.XVIII, (Trustee's Deed recorded January 26, 2019; AA00932-933, Vol.V.
[139] AA03667-3676, Vol.XVIII, (January 8, 2019 *Notice of Entry of Order*).

In reviewing Sables' conduct and whether NRS 107.080 had been substantially complied with, the district court limited its analysis to whether actual notice of default and pending foreclosure was given.[140] In so doing, the district court relied upon *Daygo Funding Corporation v Mona*, 134 Nev. 929 (2018), for the proposition that "substantial compliance exists if title holder 'had actual knowledge of the default and the pending foreclosure sale' and 'was not prejudiced by the lack of statutory notice.'" [141]

However, the district court determined that the NOD did not need to describe accurately the deficiency in performance or payment in order to comply substantially with NRS 107.080.[142] For this conclusion, the district court cited *Kehoe v Aurora Loan Services LLC*, 2010 WL 4286331 (US Dst. Ct. D. Nev. 2010).

Notably, the *Kehoe* order is a non-binding decision that was decided in 2010, prior to the Nevada Legislature's recent revisions and additions to Chapter 107.[143]

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[140] AA04088-AA04089, Vol.XX. (Second MSJ Order).
[141] *Dayco Funding Corporation v Mona*, 134 Nev. 929 (2018)(*quoting "Schleining v. Cap One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 8 (2014))."
[142] AA04055-4056, Vol.XX.
[143] *See* SB 490, 2017, p.483; NRS 107.0805(1)(b) (SB 490 became effective on July 1, 2017, prior to Sables recording of the November 3, 2017 Notice of Default).

In regards to the duties owed under Kehoe, in 2017, the Nevada legislature passed SB 490 adding NRS 107.0805 requiring that an Affidavit of Authority be prepared and recorded with the Notice of Default.[144]

The newly created NRS 107.0805 required Sables to establish its compliance with NRS107.0805 before exercising the power of sale.[145] Pursuant to NRS 107.0805(1) and NRS 107.0805(1)(b) the power of sale for a residential foreclosure "must not be exercised until . . . the trustee first executes and causes to be recorded . . . a notice of the breach and of the election to sell . . . the property pursuant to subsection 2 of NRS 107.080, together with a notarized affidavit of authority to exercise the power of sale."

The Affidavit of Authority required under NRS 107.0805(1)(b)(3) must include a statement that the borrower has been provided with:

> (I) That amount of payment required to make good the deficiency in performance or payment, avoid the exercise of the power of sale and reinstate the terms and conditions of the underlying obligation or debt existing before the deficiency in performance or payment, as of the date of the statement;
> (II) The amount in default;
> (III) The principal amount of the obligation or debt secured by the deed of trust;
> (IV) The amount of accrued interest and late charges;

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[144] *See id.*
[145] *See* NRS 107.0805(1).

> (V) A good faith estimate of all fees imposed in connection with the exercise of the power of sale . . . [146]

Based upon the district court's analysis, substantial compliance under NRS 107.080 only requires an allegation of default and notice of the sale.[147]

However, the district court's analysis does not reflect the legislature's intention to provide a borrower with verified information, substantiated by an Affidavit of Authority.[148] Accordingly, this Court should conclude that the district court erred and that NRS 107.080 and 107.0805 were not substantially complied with, and further conclude the January 4, 2019 sale is void.

**4. Breckenridge Not an Innocent Purchaser.**

NRS 107.560(4) provides that a bona fide purchaser of property at a foreclosure sale without notice of a violation of HOBR, purchases without risk that the violation would affect the validity of the sale.[149]

As well, NRS 107.080 (7) provides that violation of NRS 107.080 does not affect a bona fide purchaser so long as a lis pendens was not recorded and an action was not timely commenced 30 days after the date the Trustee's deed is recorded.[150]

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[146] NRS 107.0805(3).
[147] AA04096, Vol.XIX (Second MSJ Order).
[148] See NRS 107.0805(1)(b)(3).
[149] NRS 107.560(4).
[150] NRS 107.080(5)-(7).

A bona fide purchaser, according to NRS 111.180(1), is a purchaser that purchases "in good faith and for valuable consideration and who does not have actual knowledge, constructive notice of, or reasonable cause to know that there exists defect in, or adverse rights, title or interest to, the real property."[151]

In this matter, the Lincicomes filed a *Notice of Lis Pendens* on November 7, 2018, and recorded the same with the Lyon County Recorder on November 8, 2018, as Document No. 588549.[152]

Additionally, Breckenridge has admitted that it had actual knowledge of the *Notice of the Lis Pendens* and the *Order After Hearing*.[153] In Breckenridge's Motion for Summary Judgment filed on March 18, 2021 ("MSJ Motion"), it sought summary judgment upon its claim for quiet title and for possession because the Lincicomes had failed "failed . . . to provide any evidence that supports their allegations the foreclosure sale was not valid."[154]

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[151] NRS 111.180(1) *(emphasis added)*.
[152] AA04092, Vol.XX, (June 23, 2021 Second MSJ Order, ¶20); AA01548, Vol.VIII. (Breckenridge's Interveners Counterclaim, ¶ 9, noting that the Lis Pendens was recorded as document no. 588549 with the county recorder on November 8, 2018).
[153] AA02485-2493, Vol.XIII.
[154] AA02485-2493, Vol.XIII; (quote at AA02490).

However, Breckenridge did not address HOBR or the conclusions reached in the district court's December 31, 2018 *Order After Hearing*. Even so, it is notable that Jason Campbell, a representative of Breckenridge, admitted in his declaration attached to the MSJ Motion that Breckenridge was aware of the suit and *Order After Hearing*, because it had "relied on the fact that the noticed foreclosure sale was valid because Plaintiffs failed to post the court-ordered bond."[155]

In *Breckenridge Property Fund 2016 LLC's Reply in Support of Motion for Summary Judgment Against Plaintiff* ("MSJ Reply"), Breckenridge confirmed Mr. Campbell's admission, but noted that it had limited actual knowledge of suit because it only had knowledge of "the recorded lis pendens and a scheduled foreclosure sale that went forward because the Plaintiffs failed to post the requisite bond."[156]

Accordingly, based upon Breckenridge's admissions, the Court should find that Breckenridge had sufficient knowledge of the defects in the notices and recorded document to understand that by purchasing at foreclosure sale, it was subjecting itself to substantial risk that the sale could be declared void pursuant to NRS 107.080 and NRS 107.560(4).

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[155] AA02529, Vol.XIII. (Declaration of Jason Campbell, authorized representative of Breckenridge Property Fund 2016, LLC, ¶5).
[156] *Id.*

### 5. Mediation Agreement Did Not Waive Legal Protections

The district court erred to the extent it determined that the provisions of Chapter 107 were not applicable to the non-judicial foreclosure of the Lincicomes' Home because the foreclosure mediation Mediator's Statement ("Mediation Agreement") constituted a waiver by the Lincicomes of their rights and protections under Chapter 107 of Nevada Revised Statutes.[157]

By entering into the Foreclosure Mediation Agreement, the Lincicomes did not waive their rights, or release the trustee from its duties under NRS 107.080, NRS 107.0805 or HOBR under NRS 107.400 through NRS 107.560.[158]

In the prior appeal, Case No. 83261, this Court concluded that the Mediation Agreement "settled all claims regarding the mortgage" and that the "Lincicomes' breach [of ] the agreement permitted the foreclosing respondents to proceed with the foreclosure of the property.[159]

However, in reaching this conclusion this Court did not indicate that the Mediation Agreement operated as a knowing and voluntary waiver or abandonment

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[157] AA04064, Vol.XX. (The district court stated that "NRS 40.453 does not apply as argued in other motions.").
[158] See AA03646-3654, Vol.XVIII. (Mediation Agreement); *See* NRS 40.453.
[159] AA00039-47, Vol.I.

of their rights and legal protection under Chapter 107.[160] Likewise, the Mediation Agreement does not include any explicit waiver of rights.[161] As well, as noted above, Sables was not a party to the Mediation Agreement.[162] Additionally, pursuant to NRS 111.240, in order for the Mediation Agreement to alter or amend the rights of the parties concerning the Lincicomes' real property, the agreement "must be acknowledged" by a notary public as provided in NRS 240.161 to 240.169.

If the agreement had included an explicit waiver provision, it would have violated NRS 40.453, which provides that any agreement relating to the sale of real property that contains provisions operating as a waiver of rights provided under Nevada law, is unenforceable and against public policy.[163]

Because Sables foreclosed upon the Lincicomes by way of non-judicial foreclosure, it was obligated to observe and follow the applicable provisions of Chapter 107, including verifying that the Lincicomes were in default under the LMA by confirming that they had missed payment sought by the respective lenders and servicers.[164]

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[160] *Cf. id.*
[161] *Cf.* AA03646-3654, Vol.XVIII. (Mediation Agreement);
[162] *Id.*.
[163] *See* NRS 40.453.
[164] *See* NRS 107.015 (Defining Residential Mortgage); NRS 107.028(6) (Providing that a Trustee must act in accordance with NRS 107.080 to avoid liability).

The fact that the Lincicomes had entered into the Mediation Agreement did not change in any fashion the terms of the mortgage secured by the Home and did not provide the trustee license to disregard any statutory requirement.

In accord with the provisions of Chapter 107, this Court must conclude that the district court erred to the extent it concluded that the Mediation Agreement constituted a waiver of the Lincicomes' rights and statutory protections, as it pertains to non-judicial foreclosure.

### C. The District Court Erred in Awarding Attorney's Fees

The district court erred in awarding attorney's fees when the Lincicomes' claims were brought upon reasonable grounds.

The district court concluded that it could not find that "Plaintiffs presented novel legal theories concerning NRS 107.080 or concerning wrongful foreclosure.[165] The Count further concluded that "Plaintiff's claims were maintained without reasonable grounds as to Breckenridge."[166]

The district court's conclusions are inexplicable in light of its own statements made during the November 18, 2018 hearing noting that US Bank could not

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[165] AA00023, Vol.I. (Attorney's Fees Order).
[166] *Id.*

foreclose if the information in its respective notices is inaccurate.[167]

The Lincicomes' claims were reasonable under NRS 18.010(2). Notably, based upon the district court's Judgment on Remaining Claims postdating its Motion for Attorney's Fees, Breckenridge was awarded damages in the sum of $83,750.00.[168]

In light of this damage award, the district court's award of fees must be entirely based upon NRS 18.010(2)(b) requiring that the court find that the Lincicomes' claims were "brought or maintained without reasonable ground or to harass the prevailing party."[169]

However, the district did not assert that the Lincicomes brought their claims for the purpose of harassing Breckenridge, but rather noted that it was improper for the Lincicomes to "maintain the action" for wrongful foreclosure when "the foreclosing parties had substantially complied with NRS 107.080."[170]

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[167] AA02121-2122, Vol.XI.
[168] AA00036, Vol.I.
[169] NRS 18.010(2)(b).
[170] AA00022, Vol.I.

Nothing in the record, including this Court's *Order of Affirmance* in Case No. 83261, establishes that US Bank, Fay Servicing, BANA, or Sables had "substantially complied with the requirements of NRS 107.080.[171]

However, as argued above, because the LMA was effective, all notices required be provided to the Lincicomes under Chapter 107 including the NOD were wholly inaccurate as the district court found in its December 31, 2018 *Order After Hearing*.[172] It is under this context that the foreclosure proceeded. The trustee had been placed on notice of the inaccuracies.[173] The trustee proceeded with the sale, even when the district court had admonished that the notices must be corrected for the Court to allow the foreclosure to occur.[174] Likewise, the Trustee foreclosed even though it also owed an a duty to the Lincicomes under NRS 107.028(6) to correct the notices.[175]

The district court has in fact ruled on several matters in favor of the Lincicomes. The district court previously concluded that the Lincicomes were likely to prevail upon their claims concerning violations of HOBR.[176] The district court

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[171] *Cf.* AA00038-48, Vol.I.
[172] A00168-173, Vol.I.; AA00857-863, Vol.V.
[173] AA00049-173, Vol.I.
[174] AA02121-2122, Vol.XI.
[175] *See* NRS 107.028(6).
[176] AA00861-863, Vol.V.

ruled in the Lincicomes' favor on BANA's Motion to Dismiss and denied Breckenridge's Motion for Order to Show Cause for possession of the Lincicomes' Home concluding that Breckenridge purchased the Home with knowledge of the suit, and was not then entitled to possession. Most importantly, the district court granted Lincicomes' Motion to Amend their Complaint allowing them to include additional claims including claims against Breckenridge.[177]

In this matter, it is no stretch for the Lincicomes to also believe that because their payments had been refused by BANA, and because the beneficiaries and servicers had failed to implement the loan, or seek payment under the 2009 LMA's terms, that a foreclosure under the same would be wrongful and in violation of NRS 107.080(2).[178]

The Lincicomes had a good faith belief that NRS 107.080(2) could not have been substantially complied with when all material terms stated in the NOD were incorrect and based wholly upon terms that were supplanted by the LMA.[179]

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[177] AA01254-1257, Vol.VI. (Order denying BANA's Motion to Dismiss); AA01676-1677, Vol.IX. (Order Granting Motion for Leave to Amend); AA01923-1924, Vol.XIII. (February 11, 2020 Order Denying Motion for Order to Show Cause Re Writ of Restitution noting that Breckenridge "was aware of the title issues at the time of the property sale");
[178] See NRS 107.080(2).
[179] A00168-173, Vol.I.

As well, the district court did not consider Defendants' own wrongful conduct in foreclosing in violation of NRS 107.560(1) and the court's December 31, 2018 *Order After Hearing.*[180] Additionally, none of the Defendants, including Sables, sought to correct the NOD or Affidavit of Authority, or the NRS 107.500(1)(b) Notice prior to the foreclosure, even though the district court admonished them to do so at the November 18, 2018 hearing.

These improper actions of Defendants after the Court entered its temporary injunction appeared to establish cognizable claims for wrongful foreclosure in light of the requirements of NRS 107.080, NS 107.0805(1)(b)(3) and NRS 107.500(1)(b).

The district court abused its discretion in summarily discounting the Lincicomes' claims and legal arguments, when in fact the Notice of Default did not reflect the operative terms of the LMA, and when the LMA effectively modified the loan, but no lender or servicer under the loan chose to honor its terms and extend to the Lincicomes the opportunity to make payments.[181]

Furthermore, but for the Lincicomes' execution of the Mediation Agreement, and this Court's conclusion that two check boxes and the words "the parties resolved this matter" constituted a voluntary and knowing release of all of the Lincicomes'

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[180] See AA00013-23, Vol.I.
[181] *Id.*

claims brought against US Bank and Fay Servicing," the Lincicomes' claims for Wrongful Foreclosure and violation of HOBR would have remained viable claims.[182]

This Court should conclude based upon the record before it and even its own *Order of Affirmance,* that the Lincicomes had sufficient basis to bring their claims for relief. The Lincicomes respectfully request that this Court conclude that the district court erred in awarding attorney's fees to Breckenridge upon the basis that the nature of the claims were frivolous.

### D. District Court Erred in Determining Breckenridge was Entitled to Possession and Judgment upon Remaining Claims

Whether the district court erred in determining Breckenridge's remaining claims hinges upon whether the foreclosure sale was void.

The Lincicomes incorporate their arguments above, and based upon the same request that this Court conclude that the Lincicomes were not unjustly enriched by being allowed to remain in their Home. Additionally, the Lincicomes request that this Court conclude that the district court erred in determining that Breckenridge was entitled to permanent restitution to the Lincicomes' Home when the foreclosure

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[182] AA002754, Vol.XIV.; AA00047, Vol.I. (*Order of Affirmance* concluding that the Mediation Agreement resolved the wrongful foreclosure claim).

sale was void for violation of the district courts *Order After hearing,* NRS 107.560(1), NRS 107.080(2), NRS 107.500(1)(b), and NRS 107.0805(1)(b)(3).

## CONCLUSION

For the reasons stated hereinabove, the Lincicomes respectfully request that this Court conclude that the Third Judicial District Court erred in granting Breckenridge's respective motions appealed herein and also by its denial of the Lincicoimes' *Motion for Partial Summary Judgment.*

Respectfully submitted this 20th day of September, 2023.

MILLWARD LAW, LTD

By: _____

Michael G. Millward, Esq.
NSB#11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Appellants

## CERTIFICATE OF COMPLIANCE

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

I, Michael G. Millward, Esq., hereby certify that this opening brief is filed in compliance with the formatting requirements of NRAP 32. The opening brief is prepared for 8 ½ by 11 inch paper, and the text is double spaced in compliance with NRAP 32(a)(4). The brief is written in 14-point Times New Roman font in the body and footnotes, and it fully complies with the formatting and style requirements of NRAP 32(a)(5) and NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010. While the brief exceeds 30 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 12,671 words. I further hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of September, 2023

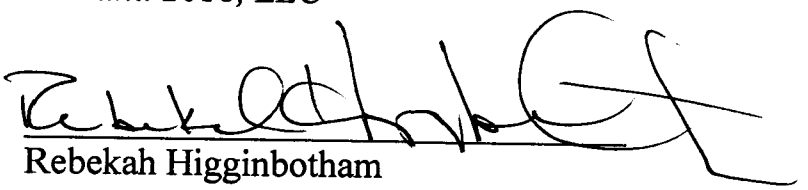
Michael G. Millward, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Appellants

## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2023, I filed the foregoing APPELLANTS' OPENINING BRIEF, which shall be served via electronic service from the Court's eFlex system to:

John T. Steffen, Esq.
Brenoch R. Wirthlin, Esq.
HUTCHINSON & STEFFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
*Attorney for Breckenridge Property Fund 2016, LLC*

Casey J. Nelson, Esq.
WEDGEWOOD, LLC
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, NV 89146
*Attorney for Breckenridge Property Fund 2016, LLC*



Rebekah Higginbotham