IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR. and VICENTA LINCICOME, Appellants, v. SABLES, LLC, A NEVADA LIMITED LIABILITY COMPANY, AS TRUSTEE OF THE DEED OF TRUST GIVEN BY VICENTA LINCICOME AND DATED 5/23/2007; FAY SERVICING, LLC, A DELAWARE LIMITED LIABILITY COMPANY AND SUBSIDIARY OF FAY FINANCIAL, LLC; PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A., AS LEGAL TITLE TRUSTEE; BANK OF AMERICA, N.A.; BRECKENRIDGE PROPERTY FUND 2016, A UTAH LIMITED LIABILITY COMPANY; NEWREZ, LLC, D/B/A SHELLPOINT MORTGAGE SERVICING, LLC,; 1900 CAPITAL TRUST II, BY U.S. BANK TRUST NATIONAL ASSOCIATION; AND MCM-2018-NPL2, Respondents.	NEVADA SUPREME COURT CASE NO.: 86324 APPEAL FROM THIRD JUDICIAL DISTRICT COURT CASE NO.: 18-CV-01332

APPELLANTS' REPLY TO ANSWERING 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 11th day of April, 2024.

MILLWARD LAW, LTD

By: _____

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The principles of upholding the rule of law and equity demand that the 1/4/2019 foreclosure sale of Albert Ellis Lincicome, Jr. and Vicenta Lincicome's ("Lincicomes" or "Appellants") home be recognized for what it was—an unequivocal violation of Nevada law.

Unfortunately, Breckenridge Property Fund 2016, LLC ("Breckenridge"), became enmeshed in this mess by purchasing what has thus far become nothing more than a lawsuit. Nevada law, however, faults Breckenridge for taking the incredible risk of purchasing the property at foreclosure when it was shadowed with the Lincicomes' *Lis Pendens*, and when the district court's 12/31/2018 Order had enjoined the sale upon findings that the Lincicomes "were likely to succeed on the merits of their claims pertaining to material violations of the Homeowners' Bill of Rights."

This Court's *Order of Affirmance* ("Affirmance") entered in Case No. 83261, vindicates the district court's initial findings and conclusions that the 2009 Loan Modification Agreement ("LMA") modified the mortgage. The Affirmance further bolsters the conclusion that foreclosure was void as a result of Bank of America's ("BANA") breach of the LMA.

This finding, coupled with the undisputed fact that the LMA has never been implemented by BANA or its successors, and that the mortgage remains in a state of

breach as a result of BANA's rejection of the Lincicome's payments, should erase all doubt that Sables, LLC ("Sables" or Trustee") had no basis whatsoever to foreclose upon the Lincicomes' home.

Now that the Lincicomes are armed with the findings in this Court's Affirmance, they are hopeful that this Court will untangle the web of errors and complications and restore their confidence that this Court has the integrity and grit to uphold the rule of law and reverse the district court's summary judgment and related orders.

Therefore, it is imperative that this Court recognize the foreclosure sale to be legally void, and uphold the protections of Chapter 107 to protect Nevada homeowners. Otherwise, this case will remain a bewildering debacle; where it would appear that the passage of time and two check boxes on a Mediator's Statement allowed the courts to turn a blind eye to the banks detestable conduct, while derogating the homeowner to the backseat along with the law and equity.

II. ISSUES ADDRESSED BY BRECKENRIDGE

The Lincicomes set forth the issues and arguments raised in the Answering Brief as follows:

A. Whether this Court's Affirmance is mandatory precedent?

B. Whether the Law-of-the-Case Doctrine mandates that the district Court's Orders be affirmed?

C. Whether issue preclusion mandates the district court's orders be affirmed?

D. Whether the district court's findings regarding injunctive relief are binding?

E. Whether the district court's other decisions should be upheld?

F. Whether the district court's award of attorney's fees to Breckenridge should be upheld?

III. ISSUES CONCEDED BY BRECKENRIDGE

Breckenridge, in large part, failed to directly respond to the arguments set forth in Appellants' Opening Brief. Because Breckenridge failed to address most of the Lincicomes' arguments, those arguments are conceded.[1]

A. Breckenridge failed to address the issues and arguments asserted by the Lincicomes regarding quiet title and the validity of foreclosure as it pertains to violations of the Nevada Homeowners Bill of Rights ("HOBR") and NRS 107.080.[2]

---

[1] *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to dispute an argument as conceding the point).

[2] Breckenridge failed to address the following issues regarding quiet title:

(1) Opening Br., p.30, 34-35, arguing that the foreclosure sale was void because NRS 107.560(1) required that the district court's "injunction ... remain in place and any foreclosure ... be enjoined until ... the violation ... [is remedied].";

B. Breckenridge also failed to address the implications of the Lincicomes' argument that it was not a bona fide purchaser of the property.[3] Notably, however, Breckenridge admits that it could not be a bona fide purchaser when it had notice.[4]

C. Breckenridge failed to address the Lincicomes' arguments that HOBR and NRS 107.080 were violated because the Lincicomes did not waive their rights and protections under Chapter 107 of the Nevada Revised Statutes.[5]

---

(2) Opening Br., pp.29-33, arguing the foreclosure sale was invalid because Sables, Fay, and USB, violated notice requirements;
(3) Opening Br., pp.37-38, (arguing that the foreclosure sale was void because Sables could not exercise the power of sale under NRS 107.080 when BANA and not the Lincicomes breached the LMA);
(4) Opening Br., pp.38, (arguing that because Sables was not a party to the Mediation Agreement, it was required to substantially complying with NRS 107.080);
(5) Opening Br., pp.39-40 (arguing that Sables could not have substantially complied with NRS 107.080 without satisfying NRS 107.028.")
(6) Opening Br., pp.41-42, (arguing that Sables could not have substantially complied with NRS 107.080, without providing an NRS 107.0805(1) r affidavit of authority that provided the "amount of payment required to make good the deficiency in performance" before exercising the power of sale).

[3] Opening Br., pp.44-45

[4] Answering Br., p.20 (not otherwise addressing the issue as it deemed the same "irrelevant").

[5] (1) Opening Br., pp.46-47 (arguing that the *Order of Affirmance* ("Affirmance") did not conclude that the Mediation agreement was a knowing and voluntary waiver or abandonment of the Lincicomes' rights and legal protections under Chapter 107;
(2) Opening Br., pp.47, arguing that the Mediation Agreement could not have altered or affected the Lincicomes' rights to their real property without being acknowledged by a notary public.

IV. CORRECTED FACTS

Breckenridge's Answering brief misstated crucial facts which were not supported by the record or contradict the findings in the Affirmance. The Lincicomes correct the following statements:

A. Breckenridge asserts that the Lincicomes "defaulted on the LMA."[6]

Correction: Breckenridge's assertion that the Lincicomes breached the LMA does not comport with the findings of the district court in the Second MSJ Order.[7] Likewise, the assertion is not supported by the *Affirmance*.[8]

B. Breckenridge states that "the foreclosure was deemed valid by ... this Court."[9]

Correction: This Court determined that "the Lincicomes' breach of the [mediation] agreement permitted the foreclosing respondents to proceed with

---

(3) Opening Br., pp.47, arguing that the Mediation Agreement did not provide Sables with any specific license to disregard statutory requirements.

[6] Answering Br., p.2 (no citation to the record is given).

[7] AA004058-4061, Vol. XX; AA004061 (6/23/2021 Second MSJ Order, p.13, finding that no "offer and acceptance of the LMA had occurred" and thereafter concluded that "the original [mortgage] agreement had not been modified" by the LMA; also finding that "even if the 2011 recording could constitute an acceptance ... it makes no difference to the Court's analysis.")

[8] AA00038-39, Vol. I (Affirmance, pp.1-2, finding that "[t]he Lincicomes accepted [the LMA and] ... BANA rejected their October 2009 payment;" also finding that "BANA failed to perform" and breached the LMA).

[9] Answering Br., p.20.

foreclosure of the property ... [which] defeat[ed] the Lincicomes' wrongful foreclosure claim."[10]

Rather, because the district court found that the LMA did not modify the mortgage, the validity of the foreclosure sale was not considered by the district court beyond substantial compliance with the notice requirements.[11] As well, following Breckenridge's dismissal from the prior appeal, this Court's review focused upon the issue of liability upon the Lincicome's common law claims as to the other defendants.[12]

C. Breckenridge asserts that "[t]he evidence brought at the preliminary injunction hearing was in stark contrast to what was brought out in discovery."[13]

---

[10] AA00044-47, Vol.I. (12/29/2022 Affirmance, pp.7-10, finding that "the Lincicomes had to complete a deed in lieu of foreclosure by July 4, 2018 ... [or] the noticed foreclosure would proceed;" the Affirmance does not speak to whether NRS 107.028(6) or NRS 107.560(1) required the district court's injunction to remain in place until all misstatements in the NRS 107.500(1) notice and notice of default had been "corrected and remedied" (*see* AA000183, Vol.II (Pls' 11/7/2018 App. Ex Parte TRO, p. 10, *quoting* NRS 107.560(1)); AA002561, Vol.XIII (Pls' 3/19/2021 Mot. Partial Summ. J., p.26))).

[11] *See* AA004064, Vol. XX (6/23/2021 Second MSJ Order, p.16, finding that "foreclosing defendants substantially complied with the NRS 107.080 notice requirements.")

[12] *See* AA00038-47, Vol.I. (Affirmance); *see also* AA004694-4696, Vol.XXII (*Order Partially Dismissing Appeal*).
See AA00038-47, Vol.I. (Affirmance).

[13] Answering Br., pp.11, 20, 22, 24 (*citing* AA00022, Vol. I,

Correction: In the Affirmance, this Court found that "BANA signed and recorded the LMA" and that the mortgage was modified vindicating the district court's initial findings that the mortgage had in fact been modified.[14]

V. SUMMARY OF ARGUMENT

A. The Law-of-the-Case Doctrine Applies

The Linicomes agree that the law-of-the-case doctrine is applicable to this matter, however, for the doctrine to apply, the court must have explicitly addressed and decided the issue. As well, departure from prior rulings is permitted, but only if they were clearly erroneous or would result in a manifest injustice.

The district court's Second MSJ Order should not be given preclusive effect as its findings are not aligned with those in the Affirmance.

The Lincicomes argue that because this appeal addresses issues not considered in the Affirmance, de novo review of the district court's First MSJ Order and Second MSJ Order is appropriate.

The following findings in the Affirmance are important to this Court's review in this appeal:

---

[14] AA00041, Vol.I. (Affirmance, p.4); AA000857-864, Vol.V., (*12/31/2018 Order*).

1. The Lincicomes "accepted the loan modification agreement" and the agreement modified the original mortgage. The finding is detrimental to the district court's determination that Sables complied with the statutory requirements to foreclosure upon the Lincicome home.

2. BANA breached "the LMA by refusing to accept the Lincicomes' second modified payment, as well as subsequent modified payments."

This finding is contrary to the district court's finding that the Lincicomes breached the mortgage upon BANA and its successor made a demand for payment.

As well, Nevada law relieved the Lincicomes of a duty to continue to tender payments to BANA upon BANA's rejection of the payment because LMA was lost.

The finding weighs against the district court's determination that the Lincicomes "were in default," and vindicates the district court's prior findings in its 12/31/2018 *Order After Hearing* ("12/31/2018 Order").

The finding further substantiates the position that the Lincicomes had not defaulted on the modified mortgage at any time prior to the foreclosure sale.

3. BANA's breach was "a breach by non-performance," and not a repudiation. The finding is contrary to the district court's finding that BANA repudiated the LMA. The finding further establishes that the district court's erred

in determining that the Lincicomes breached the mortgage and weighs in favor of the district court's findings and conclusions in its 12/31/2018 Order.

4. The Lincicomes participated in a foreclosure mediation on April 3, 2018, resulting in an agreement signed by the Lincicomes and Fay Servicing, LLC ("Fay"), the agent and servicer for US Bank, NA, legal title Trustee for PROF-2013-M4 ("USB").

The agreement's terms only apply to Fay, USB and the Lincicomes. The mediation agreement was signed prior to foreclosure requiring all releases of future claims to be clearly intended.

Even if a waiver of rights were not against public policy under NRS 40.453, the Mediator's Statement and Attachment-B do not imply an intention to waive.

5. The Mediation Agreement provides that the Lincicomes would provide Fay with a deed-in-lieu of foreclosure by July 4, 2018, or "any pending foreclosure action or proceeding may continue and a foreclosure sale may occur."

This finding establishes that it was the intention of the parties that Fay "may" proceed with a foreclosure under the requirement of Chapter 107, rather than exclusively seeking specific performance as its sole remedy.

6. A Certificate of Mediation would issue on July 5, 2018. This finding establishes that the parties intended Nevada's nonjudicial foreclosure statutes to apply if the Lincicomes were unable to deliver a deed-in-lieu.

7. Liability as to the Lincicomes' claims against the other defendants was resolved by implication in the Mediation Agreement. The Affirmance did not determine that the Lincicomes waived "any right secured" under Chapter 107 that would violate public policy under NRS 40.453.

Because the Affirmance was limited the implied release to liability alone, a determination that the foreclosure sale was void will not run afoul of the law-of-the-case doctrine.

B. District Court's Findings in its 12/31/2018 Order are Helpful

The district court's 12/31/2018 Order is validated by the Affirmance. Thus 12/31/2018 Order supports the conclusion that the foreclosure sale was void.

C. District Court's "Other Decisions" Should be Reversed

Breckenridge's argument that the Lincicomes' argument be disregarded as irrelevant should not be afforded any weight in light of Breckenridge's avoidance of the Lincicomes' substantive arguments in favor of determining that the foreclosure sale was void.

If this Court determines that the district court erred in granting Breckenridge's Motion for Summary Judgment, the Court must likewise reverse the district court on

Breckenridge's claims for writ of possession, unlawful detainer, and unjust enrichment.

D. District Court's Award of Attorney's Fees was Clearly Erroneous

Breckenridge argues that Lincicomes' appeal is frivolous and its argument that their claims were brought upon a reasonable basis must fail.

In light of the findings in the Affirmance, addressed above, including the determination that the LMA modified the loan, as well as the undisputed evidence that at no time has BANA's breach been rectified, the Lincicomes' claims for wrongful foreclosure and violation of the HOBR, as well as its claim for quiet title were reasonable and not frivolous.

For the reasons argued the Court should conclude 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.

VI. ARGUMENT

A. The Law-of-the-Case Doctrine Applies

Breckenridge argues that this Court's Affirmance is mandatory precedent, that the law-of-the-case doctrine applies to the same, and that the district court's determinations in the Second MSJ Order be given preclusive effect.[15]

---

[15] Answering Br., pp.15-21.

The Lincicomes agree that the law-of-the-doctrine applies concerning this appeal and deference should be given to the findings in the Affirmance. However, because the findings and conclusion in the Affirmance are not entirely aligned with those of the district court, and also because the issues addressed in this appeal were also not at issue in the Affirmance, de novo review of the district court's grant First MSJ Order and Second MSJ Order is appropriate.[16]

The law-of-the-case doctrine is a self-imposed judicial restraint that precludes reconsideration of issues already decided by the same or higher court.[17]

The law-of-the-case doctrine requires that a ruling in a prior appeal be followed in all subsequent proceedings except where an equitable exception applies.[18]

However, this Court has stated that "for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication."[19]

---

[16] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)(holding that this Court reviews "a district court's grant of summary judgment de novo, without deference to the findings of the lower court.")
[17] *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.) (cert. denied 508 U.S. 951 (1993).
[18] *Hsu v. Cnty. of Clark*, 123 Nev. 625, 629–30, 173 P.3d 724, 728 (2007).
[19] *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

Thus, "[t]he doctrine only applies to issues previously determined, not matters left open by the appellate court."[20] However, a court may also depart from its prior rulings where it determined that the same was "clearly erroneous," or where the ruling would work a "manifest injustice."[21]

Breckenridge, however, attempts to push the envelope by seeking to extend the findings and conclusions to issues beyond what was actually stated and determined in the Affirmance. For example, Breckenridge asserts that this Court determined that Sables' "foreclosure sale was ... valid."[22]

However, the Affirmance does not speak to or otherwise analyze the Second SMJ Order as it pertains to the validity of Sables' foreclosure sale.[23]

---

[20] *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003).

[21] *See Clem v. State,* 119 Nev. 615, 620, 81 P.3d 521, 525 (2003); *see also U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)(noting exceptions to the law-of-the case doctrine)*; Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002)(revisiting a prior decision is appropriate to avoid "a fundamental miscarriage of justice"); *Hsu v. County of Clark*, 173 P.3d 724, 123 Nev. 625 (2007)(permitting deviation where a change in controlling law intervenes).

[22] Answering Br., p.20 ("the foreclosure sale was deemed valid by both this Court and the district court").

[23] *Cf*. AA00038-47, Vol.I (Affirmance left open the issue of whether the Trustee sale was conducted in compliance with Chapter 107 of Nevada Revised Statutes or the validity of the foreclosure sale as to Breckenridge as the buyer).

Rather, the conclusion in the Affirmance that the mediation agreement provided "the parties resolved this matter" was interpreted to resolve all claims as to liability of the non-Breckenridge defendants.[24] To conclude otherwise would mean that the words preprinted on every Mediator's Statement form may be construed to be a waiver of all rights and protections under Chapter 107 in clear violation of NRS 40.453.[25]

Rather, because Breckenridge's December 22, 2021 *Motion to Dismiss Appeal* was granted and Breckenridge was dismissed, only the issues of liability for breach of contract and wrongful foreclosure, as it pertained to the other defendants, were considered in the Affirmance.[26] The Affirmance "left open" the issue of the validity of the foreclosure sale.[27]

---

[24] *See* AA00038-47, Vol.I. (Affirmance*)*.
[25] *See* NRS 40.453: (an agreement that "waives any right secured" under Chapter 107" violates public policy; see also *Schleining v. Cap One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 8 (2014)(holding that NRS 40.453 to include protections the Nevada Legislature specifically intended to protect mortgagers, i.e. NRS 107.080, NRS 107.0805, NRS 500(1)(b), as well as NRS 107.400-560).
[26] *See* AA00038-47, Vol.I. (Affirmance); AA004694-4696, Vol.XXII (*Order Partially Dismissing Appeal*).
[27] *Cf*. Vol.I. (Affirmance*);* NRS 40.453: (agreement that "waives any right secured to the person" under Chapter 107 violates public policy).

Under the law-of-the-case doctrine, the findings made in the Affirmance that most dramatically affect this Court's review of the district court's orders under appeal here are as follows:

1. The LMA was a valid modification of the loan. The Lincicomes "accepted the loan modification agreement" offered by BANA in 2009.[28] "[T]he Lincicomes validly accepted BANA's modification offer, and ... the LMA became valid upon mailing in July 2009."[29]

This finding corrects the district court's finding in the Second MSJ Order providing that "the original [mortgage] agreement had not been modified" by the LMA.[30]

As a consequence, all conclusions in the First MSJ Order and the Second MSJ Order which hinge upon or flow from the district court's incorrect finding must be reviewed.[31] Additionally, because the district court determined that Sables

---

[28] AA00038, Vol.I (Affirmance, p.1).
[29] AA00041, Vol.I (Affirmance, p.4, fn. 1).
[30] AA004058-4061, Vol. XX; AA004061 (6/23/2021 Second MSJ Order, p.13, finding that the LMA did not modify the mortgage "even if the 2011 recording could constitute an acceptance ... it makes no difference to the Court's analysis.")
[31] AA000857-864, Vol.V; (12/31/2018 Ord, pp.1-7, finding that all relevant material terms of the LMA were not stated within the required notices, and enjoining Sables from selling the Lincicomes home under NRS 107.560 "until further order of the Court.")

complied with Nevada foreclosure law, including NRS 107.028(6), NRS 107.080(5), NRS 107.0805(4), NRS 107.500(1)(b), NRS 107.560 (1) and NRS 107.560(4), upon the basis that the mortgage had not been modified, the findings and conclusions from the 12/31/2018 Order are revived.[32]

2. BANA Breached the LMA. The finding that BANA breached "the LMA by refusing to accept the Lincicomes' second modified payment, as well as subsequent modified payments, at the time that these payments were due under the agreement" establishes that the district court's conclusion that Lincicomes breached the mortgage is erroneous."[33] [34] [35]

---

[32] *See* AA004064, Vol. XX (6/23/2021 Second MSJ Order, p.16, finding that "foreclosing defendants substantially complied with the NRS 107.080 notice requirements;" *see also* NRS 107.080(5)(providing that "a sale made ... must be declared void if (a) The trustee ... does not substantially comply with the provisions of this section"); NRS 107.0805(4)(providing that a sale must be declared void where the sale does not substantially comply with NRS 107.086 and NRS 107.087); NRS 107.560(1) (providing that an injunction for violation of NRS 107.400-560 must remain in place until the "violation" is "corrected and remedied"; NRS 107.560(4)(providing that a violation of NRS 107.400-560 will not "affect the validity of a sale to a bona fide purchaser ... without notice.")

[33] AA00041, Vol.I (Affirmance, p.4).

[34] AA004063, Vol.XX (6/23/2021 Second MSJ Ord, p.15, lns.13-17).

[35] *Cain v. Price*, 134 Nev. 193, 196, 26, 415 P.3d 25, 29 (2018) (holding that a material breach of one party's promise discharges the non-breaching party's duty to perform)(*citing* Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981); *see also Cladianos v. Friedhoff*, 69. Nev. 41, 240 P.2d 208 (1952)(holding an affirmative tender of performance of one party is excused where the other party prevents performance).

In this regard, the Affirmance notes that paragraphs 4 and 12 of the LMA is not a "release ... [of] liability under the note and deed of trust."[36]

Review of Paragraph 4 of the LMA is helpful:

> Nothing in this agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. Except as otherwise specifically provided for in this Agreement, the Note and Security Instrument will remain unchanged, and the Borrower and Lender will be bound by, and comply with, all terms and provisions thereof, as amended by this Agreement.[37]

Review of the second paragraph of the "Step Rate Loan Modification Addendum to the Loan Modification Agreement" or "Paragraph 12 of the LMA" provides in pertinent part:

> ... the parties hereto agree as follows (notwithstanding anything to the contrary contained in the Agreement, Security Instrument or the promissory note (the "Note"), except as specifically provided for herein.)[38]

However, as the district court determined in its *12/31/2018 Order,* all material terms of the original note and deed of trust were modified by the LMA, i.e., principal

---

[36] AA00042, Vol.I (Affirmance, p.5, "paragraphs 4 and 12 of the LMA made clear that it did not wholly release them from their liability under the note and deed of trust.")

[37] AA003495, Vol.XVII (LMA, p.1)

[38] AA3497, Vol.XVII (LMA, p.3)

balance, maturity date, interest rate, and payment.[39]

In review of whether the Lincicomes' claim for breach of contract was beyond that statute of limitations, the Affirmance concludes that equitable tolling did not excuse the Lincicomes from tendering payments or sue on the claim.[40]

However, outside the context of the statute of limitations, the Lincicomes were excused from having to continue to tender payments to BANA once BANA informed the Lincicomes that it would not accept payment under the modification.[41] Otherwise, the Lincicomes' duty to tender payment would have become a "vain and futile thing."[42]

In *7510 Perla Del Mar Ave Trust v. Bank of Am., N.A.*, 136 Nev. 62, 458 P.3d

---

[39] AA3495-3497, Vol.XVII (LMA, pp.1-3); AA00857-864, Vol. V (*12/31/2018 Order*, finding that "neither Fay Servicing nor Sables has accurately reported the total balance owed Vicenta Lincicome under the 2007 DOT as modified by the LMA."); see also AA000531-532, Vol.III (Fay June 20, 2018 correspondence, providing that "your loan was due August 1, 2008 ... [and] the Unpaid Principal Balance is $381,150").

[40] AA00042, Vol. I (Affirmance, p.5, finding that the Lincicomes' failure to bring an action for breach of contract or tender payments for rejection was not excused for the purposes of equitable tolling).

[41] *Cain* 134 Nev. at 196, 415 P.3d at 29 (material breach discharges the non-breaching party's duty to perform)(*citing* Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981*)*; *Cladianos*, 69. Nev. 41, 240 P.2d 208 (an affirmative tender is excused where the other party prevents performance).

[42] *See Schmitt v. Sapp,* 71 Ariz. 48, 223 P.2d 403, 406-07 (1950)("The law does not require one to do a vain and futile thing"*)*.

348 (2020), this Court recognized actual tender of payment is not necessary where it is known that tender of the payment will be rejected.[43] In *7510 Perla Del Mar*, tender was not required because the rejecting party was known to have an existing business policy of rejecting tender.[44]

Here, the Affirmance found that the Lincicomes were told that the LMA did not exist in BANA's records, and that they could only make payment upon the original mortgage terms.[45]

Thus, until BANA and its successor in interest rectified BANA's breach and provided the Lincicomes evidence that they would no longer reject the Lincicomes'

---

[43] *7510 Perla Del Mar Ave Trust*, 136 Nev. at 66, 458 P.3d at 351(*citing Schmitt,* 71 Ariz. 48, 223 P.2d 403, 406-07 (An actual tender is unnecessary where it is apparent the other party will not accept it."); *Mark Turner Props., Inc. v. Evans*, 274 Ga. 547, 554 S.E.2d 492, 495 (2001) ("Tender of an amount due is waived ... [when] by declaration … tender of the amount due ... will be refused."); *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 350 N.W.2d 1, 5 (1984) ("formal tender is not necessary where a party has shown by act or word that it would not be accepted"); *Alfrey v. Richardson*, 204 Okla. 473, 231 P.2d 363, 368 (1951)(tender was waived where it was clear that "if a strict legal tender had been made, defendant would not have accepted the money"); *Shields v. Harris* , 934 P.2d 653, 655 (Utah Ct. App. 1997) ("If a demand for a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with the tender requirement."); *see also* 74 Am. Jur. 2d Tender § 4 (2012) ("A tender of an amount due is waived when … by declaration or by conduct, [it is] proclaim[ed] that … it will not be accepted."); 86 C.J.S. Tender § 5 (2017)).

[44] *7510 Perla Del Mar*, 136 Nev. at 66, 458 P.3d at 351.

[45] AA00041, Vol.I (Affirmance*,* p.4).

reduced payments under the modified mortgage, the law did not require the Lincicomes to continue to tender payment for rejection.[46] Accordingly, the finding that BANA breached the modified mortgage weighs against the district court's determination that the Lincicomes "were in default."[47]

Whether a party has defaulted under NRS 107.080(1) requires a determination of the existence of a "deficiency ... in payment."[48] Accordingly, how many payments under the modified mortgage have the Lincicomes missed? Maybe a better question is how many times did BANA and its successor seek payment under the modified mortgage?[49] The disturbing answer to which BANA and its successors have all admitted is **NONE**.[50] The Lincicomes have made every single reduced

---

[46] *Cladianos*, 69. Nev. 41, 240 P.2d 208 (Affirmative tender of performance is excused where the other party prevents performance); *see* also 74 Am. Jur. 2d Tender § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted.")

[47] AA004064, Vol.XX (Second MSJ Order, p.16).

[48] NRS 107.080(3)

[49] NRS 107.080(3)

[50] *Cf.* AA001050, Vol.VI (BANA 10/25/2009 Statement reflecting original mortgage terms); AA00191, Vol.I (BANA 8/1/2015 Statement reflecting original mortgage terms); (Fay 8/10/2015 Statement reflecting original mortgage terms); AA001313-1314, Vol.VII (Shellpoint Mortgage Servicing ("Shellpoint") 12/28/2018 Statement reflecting the original mortgage terms); AA001318-1319, Vol.VII (Shellpoint 1/17/2019 Statement reflecting the original mortgage terms).

payment demanded in accordance with the modified mortgage.[51]

Notably, because the LMA was executed and recorded by BANA in 2011, the fact that BANA and its successor never sought payment under the modified mortgage or otherwise gave the Lincicomes' the opportunity to make payment upon the same does not result in some inequity that BANA and its successors did not knowingly risk.[52] Furthermore, BANA's rejection of the mortgage payments alone would not impair the deed of trust.[53]

Accordingly, because this finding vindicates the district court's findings and conclusions in its 12/31/2018 Order, and substantiates the position that Lincicomes had not defaulted on the modified mortgage, the same weighs in favor of a determination that the foreclosure sale was void.

3. The LMA was not Repudiated. The Affirmance points out that BANA's breach was "a breach by non-performance," after it had accepted the first

---

[51] *See id*.
[52] AA00039, Vol.I (Affirmance, finding that "[u]nknown to the Lincicomes, BANA signed and recorded the LMA in 2011."); AA000481, Vol.III (Notice of Default, p.1, providing that the "Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 and recorded on 5/412011 of Official Records in the office of the County recorder of Lyon, County, Nevada ..."
[53] NRS 107.026; see also AA002059, Vol.? (11/20/2018 Hr'g Tr., p.15, the Lincicomes argued they "aren't asking for their house for free," but rather only to given "what they agreed to, which is to be given the right to make payments ... [under] the loan modification agreement ...").

payment under the LMA, and not a repudiation which is applicable where renunciation of a contractual duty is declared before performance is required.[54]

This finding is contrary to the district court's finding that BANA repudiated the LMA and that the Lincicomes failed to elect a remedy for BANA's repudiation of the LMA in a reasonable time.[55]

This finding establishes that the district court erred in determining that the Lincicomes "became the breaching party once BANA and its successor made a demand for payment [under the original terms of the mortgage] and payment did not occur."[56] Rather, the finding supports district court's conclusions made in its 12/31/2018 Order.[57]

4. April 3, 2018 Mediation Agreement and Waiver. The Affirmance found that the Lincicomes participated in a Foreclosure Mediation Program mediation on April 3, 2018, resulting in a mediation agreement signed by the Lincicomes and Fay.[58]

---

[54] AA0045, Vol.I (Affirmance, p.8).
[55] AA004062-4063, Vol.XX (Second MSJ Order, pp.14-15).
[56] AA004063, Vol.XX (6/23/2021 Second MSJ Ord, p.15, lns.13-17).
[57] *See* AA000857-864, Vol.V (*12/31/2018 Order).*
[58] AA00043, Vol.I (Affirmance, p.6).

The Mediator's Statement is binding upon Fay, USB and the Lincicomes, because Fay, acting as USB's agent, and the Lincicomes are the only parties that signed the agreement.[59] As well, because the mediation agreement predates the 1/42019 foreclosure sale, all implied waivers and releases must have clearly intended to waive liability for future conduct.[60]

This Court has recognized a waiver to be "the voluntary and intentional relinquishment of a known right."[61] As well, a waiver of common law claims may be implied from an agreement where the facts and circumstances imply waiver.[62] However, where prohibited, statutory claims, rights, and protections cannot be waived or released by express agreement or by implication.[63]

---

[59] *See* AA00043, Vol.I (Affirmance, p.6).
[60] AA001896, Vol.X (2/4/2020 Hr'g Tr., counsel for Breckenridge declaring that Breckenridge purchased the property at foreclosure sale for $294,000 on 1/4/2019).
[61] *Udevco, Inc. v. Wagner*, 100 Nev. 185, 189 678 P.2d 679 (1984)(*quoting* 5 Williston On Contracts § 678 (3d ed. 1961)).
[62] *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC,* 134 Nev. 570, 578, 427 P.3d 104, 111 (2018)(finding an implied waiver of common law claims in a purchase and sale contract of real property sold "as is.")
[63] *Frederic & Barbara Rosenberg Living Trust*, 134 Nev. at. 579, 427 P.3d at 112 (holding no waiver of statutory claims by implication where waiver is prohibited).

This Court has also held that releases of claims in an express agreement "are only enforceable against claims contemplated at … signing … and do not apply to future causes of action unless expressly contracted for by the parties."[64]

Here, the Mediator's Statement and Attachment-B incorporated therein do not include an express waiver of any rights or express release of existing claims or future claims.[65] [66] As such, the Affirmance must stand as an exception to the requirement that waivers of rights and releases of future claims be expressly stated, such that they may be implied in the context of the foreclosure mediation workout.[67]

However, as to Breckenridge and Sables, the Mediator's Statement and Attachment-B do not in any way imply such a waiver or release in their favor as third-party beneficiaries.[68]

---

[64] *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 223-24 (2001).
[65] *See* AA002761-2762, Vol.XIV (Attachment-B, pp.6-7).
[66] It remains unclear to the Lincicomes under the Affirmance o how the Mediation Agreement was determined by this Court to relieve non-Breckenridge defendants of all liability when the foreclosure mediation and the Mediation Agreement resulting therefrom were procured under the false assertion by Fay that the Lincicomes had breached the mortgage. At the very least, it would appear the USB and the Lincicomes had proceeded under the mistaken belief that the LMA did not modify the original mortgage.
[67] *Cf. Clark*, 117 Nev. at 480, 25 P.3d at 223-24.
[68] *See* AA2747-2762, Vol.XIV (Mediator's Statement and Attachment-B).

Attachment-B provides that the DIL transaction is Fay's "attempt to reach a settlement of the ... mortgage, and further warns that "[t]here is no guarantee that the transaction will be successful ... [and reserves the right in Fay to] exercise ... remedies under the mortgage including foreclosure."[69] The other provisions in Attachment-B also do not imply an intention to release claims or waive rights.[70]

The terms of the Mediator's Statement also weigh against the conclusion that any waiver was intended to benefit Sables or Breckenridge. For example, under Section 3C "Detail" there is no indication that Fay agreed to forgive arrears or waive any fees or penalties in consideration of the Lincicomes providing a Deed-in-Lieu.[71] As well, under Section 3G "Deficiency & Tax Liability" the form is blank and further indicates that Fay did not intend to waive "any deficiency resulting from recovery by the Trustee/Beneficiary of less than the full amount the Trustee/Beneficiary claims now to be due on the loan."[72]

---

[69] AA002762, Vol.XIV (Attachment-B, p.7, ¶9).
[70] AA002762, Vol.XIV (Attachment-B, p.7, ¶5, providing that "upon conveyance of your property ... we will record a lien release in full satisfaction of the mortgage, foregoing all rights to pursue a deficiency;" ¶7, providing that "[t]he terms and conditions of the DIL transaction are subject to the written approval of the mortgage insurer or guarantor, if applicable; ¶8, providing that Fay "may terminate [its] responsibilities ... at any time if ... [y]our financial situation improves significantly").
[71] AA002751, Vol.XIV (Mediator's Statement, p.5, Sec. 3C "Details")
[72] AA002753, Vol.XIV (Mediator's Statement, p.7, Sec. 3G "Deficiency & Tax Liability").

These terms taken together, indicate the Lincicomes agreed to provide a deed-in-lieu solely to avoid any potential foreclosure of their home.[73] The terms, however, do not indicate that the Lincicomes sought any other benefit from the agreement that may imply some release as it may pertain to Breckenridge, Sables, or a waiver of Nevada foreclosure law.[74]

Rather, no provision of the Mediator's Statement or Attachment-B implies a release of future claims.[75] As well, even if complete waiver of rights and protections were not against public policy pursuant to NRS 107.453, nothing in the Mediator's Statement or Attachment-B implies an intention that Breckenridge and Sables' benefit from such a waiver.[76] [77]

5. Deed-in-Lieu of Foreclosure. The Affirmance found that the mediation agreement provided that the Lincicomes would provide Fay with a deed-in-lieu of foreclosure by 7/4/2018, or "any pending foreclosure action or proceeding may continue and a foreclosure sale may occur."[78]

---

[73] *See* AA002751, Vol.XIV (Mediator's Statement, p.5, Sec. 3C "Details"); AA002753, Vol.XIV (Mediator's Statement, p.7, Sec. 3G "Deficiency & Tax Liability").
[74] *See* AA2747-2755, Vol.XIV (Mediator's Statement).
[75] *See* AA2747-2762, Vol.XIV (Mediator's Statement and Attachment-B).
[76] *Id.*
[77] *See* NRS 40.453 analysis *supra.*
[78] AA00044, Vol.I (Affirmance, p.7).

This finding is important as it establishes that Fay "may" proceed with foreclosure under NRS 107.080, rather than specific performance "if the [Lincicomes] have not completed a DIL ... by 7/4/2018."[79] Accordingly, the finding establishes Nevada foreclosure law was intended to apply.

6. Mediation Certificate. The Affirmance found that "the certificate date for the [Mediation Certificate] would be July 5, 2018."[80] This establishes that the NRS 107.086(2)(e) Mediation Certificate would issue 7/5/2018, if no deed-in-lieu was provided. Thus, it was intended under the circumstance that Fay and USB would be able to have Sables seek to foreclose pursuant to Nevada nonjudicial foreclosure law.

7. Common Law Claims Liability Settled: That Affirmance found that "liability" as to the Lincicomes' claims against the other defendants was resolved by the Mediation Agreement.[81]

This finding is important because it limits the Lincicomes' implied release to only their common law claims, and only as to the other defendants.[82] Otherwise, the

---

[79] AA002762, Vol.XIV(Attachment-B, p.7, ¶4).
[80] AA00044, Vol .I (Affirmance, p.7, mistakenly referring to the NRS 107.086(2)(e) Certificate of Mediation as the "certificate date for the deed in lieu of foreclosure").
[81] *See* AA00040, Vol.X (Affirmance, p.3).
[82] *See Schleining*, 130 Nev. at 330, 326 P.3d at 8.

Affirmance would stand as an exception to NRS 40.453 permitting a mortgage workout agreements to be implied to allow for waivers of rights under Chapter 107 without any express agreement of the same.[83] However, because the Affirmance, did not determine that Lincicomes waived "any right secured" under Chapter 107, it does not violate NRS 40.453.

Because the Affirmance was limited in scope and did not review or consider the validity of the 1/4/2019 foreclosure sale, a determination by this Court that the foreclosure sale was void will not run afoul of the law-of-the-case doctrine.[84]

B. District Court's Findings in its 12/31/2018 Order are Helpful

Breckenridge argues that the "findings of facts and conclusions of law made" by the district court in its 12/31/2018 Order are "absolutely void" and are not "binding."[85]

However, in light of the finding that the LMA modified the mortgage and that BANA breached the LMA, the district 12/31/2018 Order is relevant and would be helpful to this Court's analysis in determining that the foreclosure sale is void.[86]

---

[83] Cf. NRS 40.453.
[84] See *Wheeler Springs Plaza, LLC*, 119 Nev. at 266, 71 P.3d at 1262; *Dictor,* 126 Nev. at 44-45, 223 P.3d at 334.
[85] Answering Br., p.21-22.
[86] AA000857-864, Vol.V (*12/31/2018 Order).*

C. District Court's "Other Decisions" Should be Reversed

Breckenridge argues that because the Lincicomes assert that whether the district court erred concerning Breckenridge's claims for writ of possession, unlawful detainer, and unjust enrichment, hinges upon whether the foreclosure sale was void, that the Lincicomes have failed to present a cogent argument, and the same should be disregarded.

Breckenridge's argument is ridiculous in light of its own avoidance of the Lincicomes substantive arguments in support of a determination that the foreclosure sale was void.[87]

Furthermore, if this Court concludes that the foreclosure sale was void, Breckenridge could not possibly be entitled to possession of the property, Breckenridge would not be entitled to relief upon its claim for unlawful detainer, and Breckenridge would not be entitled to any amount of recovery upon its claim for unjust enrichment.

Accordingly, for the reasons and arguments addressed herein, the Court should conclude that the district court's determinations as to Breckenridge's other claims were clearly erroneous.

---

[87] See footnotes 3-6 *supra.*

D. District Court's Award of Attorney's Fees was Clearly Erroneous.

Breckenridge argues that the Lincicomes' appeal is frivolous and its argument that their claims were brought upon a reasonable basis must fail when the Affirmance "conclusively established [that] the Defendant[s] had substantially complied [with NRS 107.080] and the foreclosure was proper."[88]

However, in light of the findings in the Affirmance addressed above, including the determination that the LMA modified the loan, as well as the undisputed evidence that at no time has BANA's breach been rectified, this Court should conclude that the Lincicomes' claims were reasonable and not frivolous.[89]

On the contrary, this case presents the unique and unlikely scenario where a banks' intentional breach of its modified mortgage agreement and refusal to accept payments upon misrepresentations that the agreement was lost, inequitably resulted in the foreclosure of the borrower's home even though the borrower had never been given the opportunity to miss a payment.

More confounding still, is the conclusion that two check boxes on a Mediator's Statement were determined, without any express waiver of rights or

---

[88] Answering Br., pp.23-26.
[89] *See* AA00038-48, Vol.I (Affirmance).

release of claims, to be an implied release of claims resulting from defendants future conduct concerning the Lincicomes' home, including wrongful foreclosure.

The finding in the Affirmance that the mortgage was modified coupled with the district court's 12/31/2018 Order, clearly establishes that the Lincicomes' claims were reasonable under NRS 18.010(2).

Accordingly, for the reasons argued herein, and in the Lincicomes' opening brief, the Court should conclude that the Lincicomes had sufficient basis to bring their claims for relief and that the district court abused its discretion in awarding attorney's fees to Breckenridge.

VII. 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 Lincicomes' *Motion for Partial Summary Judgment*.

Respectfully submitted this 11th day of April, 2024.

MILLWARD LAW, LTD

By: _____
Michael G. Millward, Esq.
NSB# 11212
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

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

I, Michael G. Millward, Esq., hereby certify that this reply brief is filed in compliance with the formatting requirements of NRAP 32. The 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 2016. While the brief exceeds 15 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 6,801 words.

I further hereby certify that I have read this reply brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed 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 11th day of April, 2024

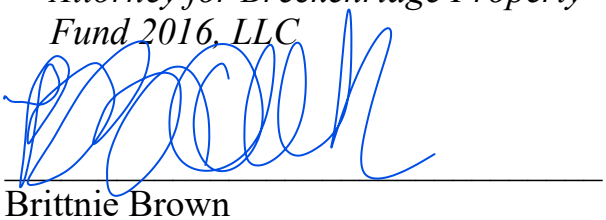
Michael G. Millward, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Appellants

VIII. CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2024, I filed the foregoing APPELLANTS' REPLY 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



Brittnie Brown