IN THE NEW MEXICO SUPREME COURT

KENNETH B. ZANGARA AND KATHY S. ZANGARA, HUSBAND AND WIFE,

Petitioners-Petitioners,

v.

LSF9 MASTER PARTICIPATION TRUST,

Respondent-Respondent.

No. S-1-SC-39679

Consolidated with:

LSF9 MASTER PARTICIPATION TRUST,

Plaintiff-Respondent,

v.

KENNETH B. ZANGARA; KATHY S. ZANGARA,

Defendants-Petitioners.

RESPONDENT'S ANSWER BRIEF

APPEAL FROM THE NEW MEXICO COURT OF APPEALS
Ct. App. No. A-1-CA-38169

[ORAL ARGUMENT REQUESTED]

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), we certify that this Brief complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of the Answer Brief, as defined by Rule 12-318(F)(1), contains 9,414 words.

DATED this 14th day of April, 2023.

/s/ Elizabeth A. Martinez
Elizabeth A. Martinez

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

This case is about affirming a lost note assignee's entitlement to enforce the note and its diligent and timely prosecution of its enforcement claim. Bank of America, N.A. (BANA) extended a multi-million-dollar residential loan to Kenneth and Kathy Zangara evidenced by a promissory note and secured by a mortgage. BANA lost the note when in possession and entitled to enforce it and executed a lost note affidavit. BANA sold the note, assigned the mortgage, and transferred possession of the lost note affidavit to LSF9 Master Participation Trust (LSF9). The Zangaras defaulted, and LSF9 timely initiated a foreclosure suit.

The district court dismissed LSF9's foreclosure suit because it concluded LSF9 lacked the right under the New Mexico Uniform Commercial Code (NMUCC) to enforce the lost note (NMSA 1978, § 55-3-309 (Section 309)) and LSF9 had failed to show standing via a specific assignment from BANA to LSF9 of the right to enforce the lost note. LSF9 cured the technical standing defect and refiled within six months, as the New Mexico "Savings Statute" (NMSA 1978, § 37-1-14) permits. But the district court also dismissed LSF9's second foreclosure suit, this time on limitations grounds because the first suit purportedly was "a nullity," and the Savings Statute ostensibly did not apply to extend the life of LSF9's second suit.

The Court of Appeals correctly held that LSF9 has standing under Section 309 to foreclose as BANA's assignee of the lost note, LSF9's first suit was not a nullity, and LSF9 was not "negligent in its prosecution" of its first suit and accordingly its second suit is not time-barred. This Court should affirm.

LSF9 has standing to enforce the lost note as an assignee. New Mexico requires a plaintiff seeking to foreclose a mortgage that secures a promissory note to demonstrate it has the right to enforce the note. *See HSBC Bank USA, Nat'l Ass'n as Tr. for Wells Fargo Asset Sec. Corp., Mortg. Asset-Back Pass-Through Certificates Series 2007-PA3 v. Wiles*, 2020-NMCA-035, ¶ 9. Under the NMUCC, a person not in possession of a note may enforce it if the person "was in possession of the [note] and entitled to enforce it when loss of possession occurred." NMSA 1978, § 55-3-309(a). BANA indisputably was in possession of the note and entitled to enforce it when the note was lost and then assigned its enforcement rights to LSF9.

The Zangaras incorrectly claim that Section 309 prohibits assignment of lost note enforcement rights. On the contrary, the NMUCC provides that "the principles of law and equity," including the law of assignment, apply to "supplement its provisions" unless specifically "displaced" by a particular provision of the NMUCC. NMSA 1978, § 55-1-103(b). No provision of the NMUCC prohibits assignment of a lost note or displaces general common law assignment principles that a note assignee steps into the assignor's shoes and acquires the same enforcement rights.

Affirming that one otherwise entitled to enforce a lost note may assign its enforcement rights—a common sense conclusion supported by the weight of authority from other jurisdictions—furthers the NMUCC's aims of modernizing, expanding, and harmonizing commercial practices. It also prevents debtors like the Zangaras from unjustly retaining property without fully paying for it.

LSF9's second foreclosure action is timely. New Mexico's Savings Statute provides that a second suit filed within six months after the dismissal of a first suit "for any cause, except negligence in its prosecution," will be deemed a continuation of the first suit for statute-of-limitation purposes. NMSA 1978, § 37-1-14. This Court has consistently opined that this statute is a tolling statute, which suspends the statute of limitations when a timely action is later dismissed except where the dismissal is based on a failure to prosecute the action with reasonable diligence. That very limited exception does not apply here. LSF9 diligently prosecuted its foreclosure action within six months after the dismissal of a timely-filed earlier suit.

There is no basis for the expansive statutory interpretation advanced in *Barbeau v. Hoppenrath*, 2001-NMCA-077, 131 N.M. 124, that the exception for "negligence in … prosecution" under Section 37-1-14 also can be found where a party "knew or reasonably should have known" of a jurisdictional pleading defect when it filed an action. Even if *Barbeau* were good law—this Court should make clear it is not—the Court of Appeals properly applied settled law in holding that this

action was timely filed. Dismissal of the first LSF9 foreclosure suit for lack of prudential standing—a non-jurisdictional and waivable pleading deficiency—did not trigger Section 37-1-14's limited exception for "negligence in … prosecution."

II. STATUTORY BACKGROUND

A. Enforcement of a lost note under the NMUCC

The NMUCC "must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." NMSA 1978, § 55-1-103(a). "Unless displaced by the particular provisions of the [NMUCC], the principles of law and equity … supplement its provisions." NMSA 1978, § 55-1-103(b).

Section 309 of the NMUCC allows for the enforcement of a lost note while also protecting borrowers from double liability. It specifies that "[a] person not in possession of an instrument is entitled to enforce the instrument if":

> (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,
>
> (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and
>
> (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person

> or a person that cannot be found or is not amenable to service of process.

NMSA 1978, § 55-3-309(a). A person seeking to enforce a lost note "must prove the terms of the instrument and the person's right to enforce the instrument." NMSA 1978, § 55-3-309(b). "The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." *Id.*

B. Savings Statute

For a timely-filed suit dismissed for any cause except negligence in its prosecution, New Mexico's Savings Statute provides a six-month grace period for refiling that effectively tolls the statute of limitations. The Savings Statute provides that "[i]f, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes [of the statute of limitations], be deemed a continuation of the first." NMSA 1978, § 37-1-14.

III. FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS

A. The Note and Mortgage

In 2005, the Zangaras signed a note promising to repay BANA a loan of $2.3 million (Note). [RP2[1] 12–17]. The Note was secured by a mortgage recorded in Bernalillo County, New Mexico (Mortgage). [RP2 19–40]. The Zangaras defaulted after the February 1, 2009 installment; filed for personal bankruptcy on October 20, 2009; and by order of the bankruptcy court, BANA was authorized to pursue an in rem action for foreclosure. [RP 157–58].

On March 22, 2011, BANA filed a complaint for foreclosure against the Zangaras seeking unpaid principal of $2,299,544.57, other charges, and accrued interest (BANA Foreclosure Action). [RP 157–61; 389–91]. BANA's filing accelerated the debt and triggered the six-year statute of limitations for actions "founded upon any bond, promissory note, bill of exchange or other contract in writing." *See* NMSA 1978, § 37-1-3(A); *Welty v. W. Bank of Las Cruces*, 1987-NMSC-066, ¶ 9, 106 N.M. 126. [RP 391]. The BANA Foreclosure Action was stayed while the parties explored loss-mitigation options and dismissed in 2013 without prejudice for lack of prosecution. [RP 391].

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[1] Two consolidated actions make up the record on appeal. References to the record proper in case D-202-CV-2018-02476 are cited as "RP [Page(s)]" referring to the relevant page(s) of the record; whereas, references to the record proper for Case No. D-202-CV-2018-06129 are cited as "RP2 [Page(s)]" referring to the relevant page(s) of the record.

B. The loss and sale of the Note

BANA lost the Note. [RP2 9–10]. It executed a "Lost Note Affidavit" attesting that (1) BANA was in possession of the Note when it was lost; (2) BANA's loss of possession was not the result of a rightful transfer or lawful seizure; and (3) BANA could not obtain possession of the Note because its whereabouts could not be determined. [RP2 9–10]. A copy of the Note was attached. [RP2 9–17].

In 2015, BANA sold the Note and assigned the mortgage to LSF9, which acquired the Lost Note Affidavit and copy of the Note as part of the sale. [RP2 3, 42]. But BANA did not initially specifically assign to LSF9 its right to enforce the Note. [RP2 3, 42, 44–45].

C. The First LSF9 Foreclosure Action

On March 23, 2016—almost a full year before the six-year statute of limitations expired—LSF9 filed a complaint for foreclosure against the Zangaras (First LSF9 Foreclosure Action). [RP 148–53, 391–92]. The Zangaras moved to dismiss for lack of standing. [RP 67, 392]. The district court found that LSF9 lacked standing under Section 309 because it was not and never had been in possession of the Note and was not entitled to enforce the Note when it was lost. The district court also ruled that BANA's subsequent transfer of the Lost Note Affidavit "by possession alone" was insufficient to confer enforcement rights on LSF9. [RP 67–

71, 393]. The district court dismissed the First LSF9 Foreclosure Action without prejudice on February 20, 2018. [RP 71, 393].

D. Assignment of the Lost Note Affidavit and Second LSF9 Foreclosure Action

Rather than appeal the dismissal of the First LSF9 Foreclosure Action, LSF9 obtained from BANA an assignment of BANA's right to enforce the lost Note, remedying the technical defect identified in the First LSF9 Foreclosure Action. [RP2 44–45].

On August 20, 2018—six months after the dismissal of the First LSF9 Foreclosure Action—LSF9 filed a second foreclosure action against the Zangaras (Second LSF9 Foreclosure Action). [RP2 1–45; RP 393–95]. LSF9 alleged that BANA was entitled to enforce the Note when the loss of possession occurred; that BANA had assigned its right to enforce the Note to LSF9; and that the Second LSF9 Foreclosure Action was timely filed under the Savings Statute. LSF9 attached to its complaint the Lost Note Affidavit and documented the Note assignment. [RP2 1–45].[2]

[2] The Second LSF9 Foreclosure Action was consolidated into the Zangaras' quiet title action against LSF9 and BANA. [RP 1–3, 186–87, 396; RP2 131–32]. The district court granted the Zangaras' petition to quiet title in the same opinion and order dismissing the Second LSF9 Foreclosure Action. [RP 389–418].

IV. PRESERVATION OF ISSUES AND LOWER COURT DECISIONS

LSF9 argued to the district court its standing to enforce the lost Note as BANA's assignee[3] and that the Second LSF9 Foreclosure Action was timely under the Savings Statute.[4]

The district court dismissed the Second LSF9 Foreclosure Action. [RP 389-418]. The district court held that LSF9 lacked standing to enforce the Note under Section 309 because LSF9 was not "in possession of the instrument and entitled to enforce it when loss of possession occurred." [*See* RP 397–409]. It also held that the Second LSF9 Foreclosure Action was time-barred because the First LSF9 Foreclosure Action purportedly was "no suit at all" and did not trigger the Savings Statute. [*See* RP 409–17].

The Court of Appeals unanimously reversed. *See Zangara v. LSF9 Master Participation Tr.*, No. A-1-CA-38169, 2022 WL 16779801, at *1 (N.M. Ct. App. Nov. 8, 2022). The Court of Appeals held that LSF9 has standing to enforce the lost Note as BANA's assignee for the reasons explained in its published opinion in *CitiMortgage, Inc. v. Garcia*, No. A-1-CA-38418, 2022 WL 2836770 (N.M. Ct.

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[3] *See* 11/01/2018 brief [RP 194–201]; 1/28/19 hearing [TR 22–33]. In particular, LSF9 argued that a party who possesses a note at the time it is lost may assign its right to enforce the note. [RP 199–201].

[4] *See* 06/25/2018 brief [RP 61–66]; 07/27/2018 brief [RP 119–20]; 11/01/2018 brief [RP 194–208]; 1/28/19 hearing [TR 41–45]; 02/11/2019 brief [RP 379–88].

App. July 20, 2022). There, the Court of Appeals observed that Section 309 "does not expressly prohibit or permit assignment of the right to enforce a lost instrument." *Id.* at *3–4. But, the Court of Appeals reasoned, that does not mean that assignment is prohibited. *Id.* at *4. To the contrary, the general rule is that a person may freely transfer or assign property and other rights to an assignee, who then "has the same rights as the assignor did because the law for relevant purposes treats the assignee as the assignor: the assignee stands in the assignor's shoes." *Id.* (cleaned up). The Court of Appeals applied the general rule here because (1) the legislative aims underlying the NMUCC, including the goals of expanding commercial practices and harmonizing the law among various jurisdictions, weigh in favor of permitting assignment; and (2) the NMUCC explicitly authorizes courts to supplement its provisions with legal and equitable principles unless those principles are displaced, and nothing in the NMUCC displaces a general rule permitting the assignee of a lost note to enforce it. *Id.* at *4–9.

The Court of Appeals also properly rejected the Zangaras' assertion that the limited exception to the Savings Statute for "negligence in [a suit's] prosecution" barred the Second LSF9 Foreclosure Action. NMSA 1978, § 37-1-14. The Court of Appeals held that (1) this Court has interpreted "negligence in [the suit's] prosecution" to mean *failure to prosecute the suit* (albeit in passages the Court of Appeals characterized as dicta); and (2) and even if "negligence in [the suit's]

prosecution" could be interpreted more expansively, it would encompass only suits dismissed for nonwaivable defenses (like lack of subject matter jurisdiction), not suits dismissed (as here) for waivable defenses like lack of prudential standing. *See Zangara*, 2022 WL 16779801, at *2.

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *See, e.g.*, *Quynh Truong v. Allstate Ins.*, 2010-NMSC-009, ¶ 22, 147 N.M. 583. In construing a statute, a court's "guiding principle is to determine and give effect to legislative intent." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11. While the plain language of the statute is the primary indicator of legislative intent, courts must "examine the context surrounding a particular statute, such as its history, its apparent object, and other statutes in pari materia, in order to determine whether the language used by the Legislature is indeed plain and unambiguous." *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240 (cleaned up). "It is likewise a cardinal rule that in construing particular statutory provisions to determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act." *Winston v. N.M. State Police Bd.*, 1969-NMSC-066, ¶ 5, 80 N.M. 310.

ARGUMENT

I. LSF9 HAS STANDING TO PURSUE ITS FORECLOSURE CLAIM AGAINST THE ZANGARAS AS BANA'S ASSIGNEE

There is no dispute that BANA, the payee and assignor of the lost Note, was entitled to enforce it under Section 309. BANA satisfied all of Section 309's requirements for enforcing a lost note, including the requirement that it "was in possession of the instrument and entitled to enforce it when loss of possession occurred." NMSA 1978, § 55-3-309(a). The NMUCC does not purport to abrogate New Mexico common law permitting and public policy principles favoring assignment of negotiable instruments. BANA had the right to assign its Section 309 enforcement rights to LSF9 for the reasons the Court of Appeals cogently explained.

A. Section 309 does not expressly prohibit or permit assignment of enforcement rights.

The plain language of Section 309 provides that a person may enforce a lost note if it had possession of the note and the right to enforce it when the note was lost. As the Court of Appeals observed, Section 309's "statutory text says nothing about whether the assignment of a lost instrument by a person who meets [the statute's] conditions carries with it the right of enforcement." *CitiMortgage*, 2022 WL 2836770, at *3. The statute, in other words, "does not expressly prohibit or permit assignment of the right to enforce a lost instrument." *Id.*

B. Construing Section 309 to permit enforcement of lost notes by assignees furthers the NMUCC's underlying purposes and policies.

Since Section 309 says nothing about assignment, the Court of Appeals properly concluded that courts must look to "'the broader act in which [Section 309 is] situated'—i.e., the NMUCC." *CitiMortgage*, 2022 WL 2836770, at *4 (quoting *Chatterjee v. King*, 2012-NMSC-019, ¶ 12). "Critically, the NMUCC provides directives for courts tasked with interpreting its provisions," all of which point towards the Court of Appeals' conclusion that "assignment of a lost instrument carries with it any entitlement to enforce belonging to the assignor." *Id.*

Section 55-1-103 provides that the NMUCC "must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." NMSA 1978, § 55-1-103(a). Permitting assignment of lost-instrument enforcement rights furthers these goals by fostering the market for lost instruments, thus modernizing and expanding commercial practices.[5] Forbidding assignment, by

[5] *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 276 (2008) (anti-assignment rules are inconsistent with commercial needs); 2 James J. White, Robert S. Summers & Robert A. Hillman, *Uniform Commercial Code* § 17:10 (6th ed. 2022 update) ("[T]ransfers on the secondary market help supply capital for home loan lending and are 'an important element of national housing policy.'").

contrast, would constrict commercial practices by rendering lost notes practically unmarketable. As this Court has said, "[i]t would be a poor business transaction indeed if [an assignee] acquired ... [a note] on which [it] could never collect payments"; after all, "'[n]o one likes to pay for a dead horse.'" *Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶¶ 33, 38, 117 N.M. 655 (quoting 4 Arthur L. Corbin, *Corbin on Contracts* § 869, at 472 (1951)). Allowing assignment also promotes uniformity of the law by aligning New Mexico with the vast majority of jurisdictions that allow assignment of the right to enforce a lost note. *See infra* at 22–24.

C. The NMUCC does not displace principles of law and equity favoring assignment of lost instruments.

Section 55-1-103 explicitly authorizes courts to "supplement" the NMUCC with "the principles of law and equity" unless those principles are "displaced by [the NMUCC's] particular provisions." NMSA 1978, § 55-1-103(b). As the Court of Appeals explained, neither Section 309 specifically nor the NMUCC more broadly displaces a rule permitting the assignee of a lost note to enforce it. *See CitiMortgage*, 2022 WL 2836770, at *6–9.

Article 3 of the NMUCC sets forth specific rules only for the negotiation and transfer of *non-lost negotiable instruments*—which in their physical form constitute "a reified right to payment," NMSA 1978, § 55-3-203 cmt. 1—through *physical delivery of possession*. *See, e.g.*, NMSA 1978, § 55-3-201 (negotiation); § 55-3-203 (transfer). Those rules implicitly preclude assignment of the right to enforce *non-*

lost instruments by specifying precisely how such instruments must be transferred—a common sense policy given the risk to borrowers of double liability if both the holder of a physical instrument and the assignee could enforce it. *CitiMortgage*, 2022 WL 2836770, at *6–8.

In contrast, a *lost instrument* cannot be transferred through physical delivery of possession (there is nothing to physically transfer) and cannot be enforced by a holder (there is nothing to physically hold). *See, e.g.*, *Atl. Nat'l Tr., LLC v. McNamee*, 984 So. 2d 375, 378 (Ala. 2007) (explaining that Article 3 does not address the assignability of rights under a promissory note after the note has been lost). Indeed, Section 309 is "an outlier within the statutory scheme governing the enforcement of negotiable instruments" in that it specifically creates a "mechanism by which a person who does not have present possession of an instrument may enforce it." *CitiMortgage*, 2022 WL 2836770, at *8. "The concept that an instrument is a 'reified right to payment' goes out the window the moment the instrument does, and permitting the assignee of a lost instrument to enforce is no more inconsistent with that theory than is permitting a person to bring suit on a lost instrument in the first place." *Id.* at *9.

Accordingly, the Court of Appeals held that the "theoretical and practical reasons for formalistically clinging to the requirement of possession imposed by Article 3's other enforcement provisions do not apply" in the context of *lost notes*.

Id. The theoretical reasons do not apply because possession cannot sensibly be required when a note has been lost. *Id.* The practical reasons do not apply either because Section 309(b) "contains a built-in safeguard against the risk of double liability": it specifies that "[a] court may not enter judgment in favor of the person seeking enforcement [of a lost instrument] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." *Id.* As the Court of Appeals explained, "there is no reason to think that Subsection (b) will be any less effective in preventing double liability in cases brought by assignees of lost instruments than it is in protecting against double liability in cases brought by persons who claim to have lost the instrument themselves." *Id.*

In sum, the rules in NMUCC Article 3 governing *non-lost instruments* do not displace and "can easily coexist with a rule permitting assignment of the right to enforce a *lost instrument*." *Id.* at *8 (emphasis added).

D. New Mexico common law principles permit note assignments.

This Court has said that an assignee usually has "the same rights" as the assignor did because an assignee "stands in the [assignor's] shoes." *Reese*, 1994-NMSC-051, ¶¶ 29–31.[6] In *Reese*, this Court held that the benefit of a federal statute

[6] The Court of Appeals recognized this fundamental principle in *CitiMortgage*, 2022 WL 2836770, at *4.

allowing the Federal Deposit Insurance Corporation (FDIC) six years to sue for repayment of a promissory note could be transferred to the private assignee of that note. *Id.* ¶¶ 1, 14, 28–38. Observing that the statute was silent as to whether the limitations period extended to assignees, the Court found that the common law of assignment filled the void. *Id.* ¶ 29; *see also id.* ("Fortunately, while the statute is quiet, the common law speaks in a loud and consistent voice: An assignee stands in the shoes of his assignor."). The assignee, by stepping into the "shoes of the assignor" per the general law of assignment, "acquired the same rights as those possessed by the FDIC." *Id.* ¶ 30 (quotation marks omitted).

In so holding, this Court explained that rights are generally assignable unless assignment is proscribed by a specific statute or public policy:

> [Debtor] seems to urge the proposition that no right is assignable unless expressly authorized by statute. While it may be too expansive to reply that "assignment is a privilege that can always be asserted unless prohibited by statute," such a statement seems closer to modern legal doctrine than the rule suggested by [debtor]. *American Jurisprudence Second* describes a broad assignment of rights without any indication that it must be expressly authorized by statute: "[A] claim good in the hands of an assignor which is good against the original debtor is ordinarily equally good and free from defenses in the hands of his assignee." 6 Am.Jur.2d *Assignments* § 102 (1963); *see also Restatement (Second) of Contracts* § 317(2) (1981) ("A contractual right can be assigned unless ... the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy...."); *Restatement of Contracts* § 151 (1932).
>
> We have been able to find no authority to support, even indirectly, the notion that assignment—by a government or private entity—cannot occur without statutory authorization. Common sense dictates that the

> limitations period is assignable unless proscribed by specific language or public policy. It is not reasonable to suggest that the FDIC … ever intended to enter an agreement in which a note that was enforceable before it was assigned, became unenforceable simply because it was assigned …. The extended federal statute of limitations was, of necessity, an inherent feature of the assignment agreement. No statutory or policy arguments suggest otherwise.

Reese, 1994-NMSC-051, ¶¶ 37–38 (footnote omitted).

So too here, the right to enforce a lost note should be assignable unless prohibited by statute or public policy. No statutory prohibition exists for the reasons already explained, and public policy not only permits but actively encourages the expansion of commercial practices made possible by assignment. *See supra* at 12–17; *see also infra* at 24–26.

To be sure, "[t]here are sound policy reasons" for "requiring a foreclosure plaintiff to prove that it was entitled to enforce the note when it filed suit." *Deutsche Bank Nat'l Tr. Co. v. Johnston*, 2016-NMSC-013, ¶¶ 21, 23. But BANA satisfied that requirement, and there is no "logical reason to distinguish between a person who was in possession at the time of the loss and one who later comes into possession of the rights to the note." *Dennis Joslin Co. v. Robinson Broad. Corp.*, 977 F. Supp. 491, 495 (D.D.C. 1997); *see also Bobby D. Assocs. v. DiMarcantonio*, 2000 PA Super 132, ¶ 8, 751 A.2d 673 (same). Said differently, the risks to borrowers in allowing enforcement of a lost note—i.e., the possibility that the purported enforcer is not entitled to enforce or the potential that a third party acquires the note and

attempts to enforce it—have nothing to do with *assignment* of the enforcement right. The same risks are present whether the person who lost the note attempts enforcement or whether the assignee of that person attempts enforcement, and Section 309(b)'s protections for borrowers alleviate these risks in both scenarios.[7]

E. The UCC's drafting history confirms that the drafters never intended to prohibit assignment of the right to enforce a lost note.

The legislative history of the UCC confirms that the right to enforce a lost note is assignable. Specifically, an amendment to the version of the UCC operative in New Mexico shows that its drafters, the members of the Permanent Editorial Board for the UCC (PEB), never intended to prohibit assignment of the right to enforce a lost note.

The version of Section 309 operative in New Mexico was the model UCC provision beginning in 1990.[8] In 1997, one district court interpreted the District of

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[7] Indeed, the facts of this case illustrate why the Zangaras' policy arguments are misplaced. *Cf.* Zangaras' Br. at 30–31. LSF9 can prove BANA's right to enforce the Note and LSF9's undisputed status as assignee of BANA's enforcement right. The Lost Note Affidavit includes a copy of the Note setting forth its precise terms. The Zangaras do not dispute the debt at issue. Nor do they dispute that LSF9 is the assignee of both the Note and Mortgage. Any other party who may claim to have "found" and may attempt to enforce the original BANA Note plainly would not be able to meet New Mexico's strict statutory requirements for enforcement. Unlike LSF9, any such purported Note "finder" could not properly prove chain of title from and ownership as BANA's Note transferee.

[8] The Zangaras assert that "[t]he current language of New Mexico's Section 309 replaced a much more permissive assignment clause with regard to negotiable instruments." Zangaras' Br. at 23. Not so. The provision to which the Zangaras refer,

Columbia's version of that provision to prohibit enforcement of a lost note by an assignee. *See Dennis Joslin Co.*, 977 F. Supp. at 494–95.

The PEB amended the UCC to specifically express its disagreement with *Dennis Joslin*'s statutory construction and "reject the result in [*Dennis Joslin*]." *See Uniform Commercial Code* § 3-309 cmt. 2 (1990). As amended in 2002, the model UCC provision now specifically clarifies that an assignee may enforce a lost note:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (1) the person seeking to enforce the instrument:
>
> (A) was entitled to enforce the instrument when loss of possession occurred; or
>
> (B) *has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred*;

Uniform Commercial Code § 3-309(a)(1) (emphasis added). The new language makes clear that "[a] transferee of a lost instrument need prove only that its transferor was entitled to enforce, not that the transferee was in possession at the time the

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"Section 804," provided that the "owner" of a lost instrument could enforce it if certain conditions were satisfied. *See Uniform Commercial Code* § 3-804 (1952). The central change made in replacing Section 804 with the 1990 version of Section 309 was substituting a "person entitled to enforce" for "owner", likely with the modest aim of more accurately reflecting the law of non-lost negotiable instruments. *See* NMSA 1978, § 55-3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."). The Zangaras provide no evidence suggesting that the UCC's drafters intended to disallow assignment in amending Section 804.

instrument was lost." *Uniform Commercial Code* § 3-309 cmt. 2. Indeed, a comment to the NMUCC's Section 309 recites this history and emphasizes that the transferee need not prove that it was in possession at the time the instrument was lost. *See* NMSA 1978, § 55-3-309 cmt. 2.

The PEB's explicit rejection of *Dennis Joslin* thus clarifies the meaning of the 1990 provision currently operative in New Mexico. While an amendment may signal a change in meaning, it may also simply "clarify existing law ... if the statute was ambiguous or unclear prior to the amendment." *Aguilera v. Bd. of Educ. of Hatch Valley Schs.*, 2006-NMSC-015, ¶ 19, 139 N.M. 330.[9] Here, the PEB's disagreement with *Dennis Joslin*'s statutory construction signals that the amendment aimed to "make what was intended all along even more unmistakably clear." *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004). Notably, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770 (1996) (internal quotation marks and citation omitted); *see also Red Lion Broad., Co. v. FCC*, 395 U.S. 367, 381–82 (1969) (collecting cases).

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[9] *See also, e.g.*, *Wasko v. N.M. Dep't of Lab., Emp. Sec. Div.*, 1994-NMSC-076, ¶¶ 8–9, 118 N.M. 82 (holding that an amendment was "meant to clarify the existing law rather than change the law"); *Pina v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 22, 139 N.M. 619 (explaining that an amendment "merely ma[de] clearer what was already implicit" in existing law).

This history demonstrates that the UCC drafters never intended to prohibit assignment of the right to enforce a lost note. *See Cleve*, 1999-NMSC-017, ¶¶ 8–15 (history of cruelty-to-animals statutes in New Mexico reflects that legislature never intended to include wild animals within the protections of such statutes).

The Zangaras can draw no support from the fact that "New Mexico has not adopted the 2002 amendment to Section 309." Zangaras' Br. at 23. This Court has cautioned against "relying on legislative inaction as somehow providing evidence of legislative intent." *Cable One, Inc. v. N.M Tax'n & Revenue Dep't*, 2018-NMCA-017, ¶¶ 24–25; *see also Baker v. Hedstrom*, 2012-NMCA-073, ¶ 37, *aff'd*, 2013-NMSC-043. And for good reason. Legislative inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (cleaned up).

F. The overwhelming majority of jurisdictions permit assignment of the right to enforce a lost note.

The vast majority of jurisdictions that have considered the issue recognize an assignee's right to enforce a lost note. The courts of 12 states (or courts examining the law in those states) interpreting the 1990 version of the UCC (New Mexico's current version of Section 309) have held that the right to enforce a lost note may be

assigned.[10] And 20 states (including five in the first category) plus the District of Columbia have adopted the 2002 version of the UCC clarifying that the assignee of a lost note may enforce it.[11] Thus, 27 states plus the District of Columbia recognize an assignee's ability to enforce a lost note. Only five states prohibit assignees from

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[10] *See Atl. Nat'l Tr., LLC v. McNamee*, 984 So. 2d 375, 375 (Ala. 2007) (Alabama); *Nat'l Loan Invs., L.P. v. Joymar Assocs.*, 767 So. 2d 549, 551 (Fla. Dist. Ct. App. 2000) (Florida); *Mohr v. MLB, SUB I, LLC*, 860 F. App'x 524, 525 (9th Cir.), *cert. denied*, 142 S. Ct. 464 (2021) (Hawaii); *In re Caddo Par.-Villas S., Ltd.*, 250 F.3d 300, 302 (5th Cir. 2001) (Louisiana); *Jones v. Ward*, 270 A.3d 1024, 1032 (Md. App. Ct.), *cert. denied*, 275 A.3d 350 (Md. 2022) (Maryland); *NAB Asset Venture II, L.P. v. Lenertz, Inc.*, No. C4-97-2181, 1998 WL 422207, at *3 (Minn. Ct. App. July 28, 1998) (Minnesota); *YYY Corp. v. Gazda*, 761 A.2d 395, 397–98 (N.H. 2000) (New Hampshire); *Invs. Bank v. Torres*, 233 A.3d 424, 431–37 (N.J. 2020) (New Jersey); *CitiMortgage, Inc. v. Garcia*, No. A-1-CA-38418, 2022 WL 2836770, *4–9 (N.M. Ct. App. July 20, 2022) (New Mexico); *Bobby D. Assocs. v. DiMarcantonio*, 2000 PA Super 132, ¶¶ 6–8, 751 A.2d 673 (Pennsylvania); *Se. Invs., Inc. v. Clade*, No. CIV.A. 3:97–CV–1799–L, 1999 WL 476865, at *2–3 (N.D. Tex. July 7, 1999), *aff'd*, 212 F.3d 595 (5th Cir. 2000) (Texas); *JPMorgan Chase Bank, N.A. v. Stehrenberger*, No. 70295–5–I, 2014 WL 1711765, at *3 (Wash. Ct. App. Apr. 28, 2014) (Washington).

[11] *See* Ala. Code § 7-3-309 (Alabama); Ark. Code Ann. § 4-3-309 (Arkansas); Fla. Stat. § 673.3091 (Florida); Ind. Code § 26-1-3.1-309 (Indiana); Iowa Code § 554.3309 (Iowa); Kan. Stat. Ann. § 84-3-309 (Kansas); Ky. Rev. Stat. Ann. § 355.3-309 (Kentucky); Mich. Comp. Laws § 440.3309 (Michigan); Minn. Stat. § 336.3-309 (Minnesota); Miss. Code. Ann. § 75-3-309 (Mississippi); Mo. Rev. Stat. § 400.3-309 (Missouri); Neb. UCC § 3-309 (Nebraska); Nev. Rev. Stat. § 104.3309 (Nevada); N.H. Rev. Stat. Ann. § 382-A:3-309 (New Hampshire); Ohio Rev. Code Ann. § 1303.38 (Ohio); Okla. Stat. Ann. tit. 12A, § 3-309 (Oklahoma); S.C. Code Ann. § 36-3-309 (South Carolina); Tenn. Code Ann. § 47-3-309 (Tennessee); Tex. Bus. & Com. Code Ann. § 3.309 (Texas); D.C. Code Ann. § 28:3-309 (District of Columbia).

enforcing lost notes,[12] and one of those states recently began a process to amend its law.[13] If the amendment passes, the count will be 29 in favor of assignment versus only 4 against.

As the Court of Appeals observed, "the momentum is on the side of permitting enforcement by a post-loss assignee." *CitiMortgage*, 2022 WL 2836770, at *5. "In view of the current legal landscape," the NMUCC's "goal of uniformity will be best served by allowing assignment of the right to enforce a lost negotiable instrument." *Id.*

G. Allowing LSF9 to enforce the lost Note is necessary to prevent unjust enrichment.

Allowing LSF9 the right to enforce the lost Note is also necessary to prevent the Zangaras' unjust enrichment. *See Atl. Nat'l Tr., LLC*, 984 So. 2d at 382 (Lyons, J., concurring) (explaining that the concurring justices would ground the right of the assignee to enforce a lost note on the equitable doctrines of unjust enrichment and restitution).

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[12] *See Seven Oaks Enters., L.P. v. DeVito*, 198 A.3d 88, 100 (Conn. App. Ct. 2018) (Connecticut); *In Re Harborhouse of Gloucester, LLC*, 505 B.R. 365, 374 (Bankr. D. Mass.), *aff'd*, 523 B.R. 749 (B.A.P. 1st Cir. 2014) (Massachusetts); *Emerald Portfolio, LLC v. Outer Banks/Kinnakeet Assocs., LLC*, 790 S.E.2d 721, 724 (N.C. Ct. App. 2016) (North Carolina); *SMS Fin. XXV, LLC v. Corsetti*, 186 A.3d 1060, 1066 (R.I. 2018) (Rhode Island); *Benkahla v. White*, No. CL–2010–4955, 2011 WL 7478249, at *3 (Va. Cir. Ct. Jan. 18, 2011) (Virginia).

[13] *See* H.B. 1112, 2023–2024 Leg., 193rd General Court (Mass. 2023).

As noted, the NMUCC provides that "the principles of law and equity ... shall supplement its provisions" unless "displaced." NMSA 1978, § 55-1-103(b). Equitable principles "do not merely supplement Code sections; their function is also to carve exceptions from or otherwise modify Code sections." 1 James J. White & Robert S. Summers, *Uniform Commercial Code: Practitioner's Edition* § 5, at 19–20 (3d ed. 1988). They exist alongside the UCC's provisions, and "are only rarely particularly displaced." *Id.* Section 309 does not displace general equitable principles, which "aim at securing substantial justice when the strict rule of common law might work hardship." *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 33. Equitable principles "permit a court to conclude that a party that never possessed a missing instrument may nevertheless enforce it." Timothy R. Zinnecker, *Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments Under U.C.C. Article 3: A Proposal for Reform*, 50 U. Kan. L. Rev. 111, 135 (2001).

To prevail on a claim for unjust enrichment, "one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 129 N.M. 200. Both these elements are satisfied here. The Zangaras bought a house with $2.3 million borrowed from BANA. The Zangaras have lived in the house since 2005 and have been in default under the Note

since 2011. With interest, the Zangaras' debt now exceeds $3.85 million. It would unjustly enrich the Zangaras to allow them to continue enjoying the benefit of living in an expensive house for over 15 years having paid down essentially none of the principal while depriving LSF9 the right to enforce the Zangaras' indisputably defaulted Note. *See, e.g., Invs. Bank v. Torres*, 197 A.3d 686, 693 (N.J. Super. Ct. App. Div. 2018) (concluding that "[i]t would be unjust to preclude enforcement of the obligations [the homeowner] had disregarded"), *aff'd on other grounds by Invs. Bank v. Torres*, 233 A.3d 424, 437 (N.J. 2020) ("[T]he loss or destruction by fire or flood of multiple notes relating to bundled mortgages would deprive assignees of their bargained-for rights and confer a windfall on each defaulting mortgagor."); *Slizyk v. Smilack*, 825 So. 2d 428, 430 (Fla. Dist. Ct. App. 2002) (holding that "a person in possession may assign that right when recognizing that right would prevent a defendant from receiving a windfall by preventing foreclosure").

II. THE SECOND LSF9 FORECLOSURE ACTION IS TIMELY

The Second LSF9 Foreclosure Action (this suit) is timely under New Mexico's Savings Statute. Section 37-1-14 provides that "[i]f, after the commencement of an action, the plaintiff fail therein for any cause, *except negligence in its prosecution*, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." NMSA 1978, § 37-1-14 (emphasis added). The First LSF9

Foreclosure Action was timely filed almost a year before Section 37-1-3(A)'s six-year statute of limitations for actions founded on a "promissory note" or "other contract in writing" and was dismissed for a cause other than negligence in its prosecution (lack of prudential standing). The Second LSF9 Foreclosure Action was commenced within six months thereafter. Accordingly, this action is timely; under the Savings Statute it is a continuation of the First LSF9 Foreclosure Action. The Zangaras' counterarguments are without merit.

A. The Savings Statute applies.

The Zangaras first argue that the Savings Statute does not apply because the First LSF9 Foreclosure Action purportedly was "no suit at all." *See* Zangaras' Br. at 8–15. Not so. The First LSF9 Foreclosure Action was clearly a "suit" or an "action." *See Suit*, BLACK'S LAW DICTIONARY (11th ed. 2019) (a "proceeding by a party or parties against another in a court of law"); *Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A civil or criminal judicial proceeding."). A dismissal for lack of prudential standing does not render a suit void ab initio or a legal nullity; indeed, the UCC's definition of who may enforce a note does not even create a "jurisdictional prerequisite." *See Deutsche Bank Nat'l Tr. Co.*, 2016-NMSC-013, ¶¶ 10, 14.

Foster v. Sun Healthcare Grp., Inc., 2012-NMCA-072, held that even a suit dismissed for lack of subject matter jurisdiction is not "a nullity" for purposes of the Savings Statute. The plaintiff there initially filed suit in federal district court. *Id.*¶ 1.

Holding that complete diversity did not exist, the federal court dismissed plaintiff's suit for lack of subject matter jurisdiction. *Id.* ¶¶ 2, 4. Plaintiff then filed suit in state court within six months of the first suit's dismissal. *Id.* ¶ 5. The Court of Appeals in *Foster* held that the state-court action was timely under the Savings Statute even though the lack of subject matter jurisdiction rendered the federal suit null and void. *Id.* ¶¶ 2, 26; *see also* Charles Alan Wright & Arthur R. Miller, 13 *Federal Practice & Procedure Jurisdiction* § 3522 (3d ed. 2022 update). If a suit dismissed for lack of subject matter jurisdiction is a "suit" under the Savings Statute, a suit dismissed for lack of prudential standing is as well.

The Zangaras erroneously rely on *Mercer v. Morgan*, 1974-NMCA-102, 86 N.M. 711, a nearly 50-year-old case that has largely been limited to its facts, as asserted support for their "no suit at all" theory. In *Mercer*, the Court of Appeals held that a suit filed against a dead person was a nullity and thus did not qualify as a "first action" under the Savings Statute. This Court cast doubt on *Mercer* in holding that the lack of a personal representative at the outset of a wrongful death action does not render the suit a nullity. *Chavez v. Regents of the Univ. of N.M.*, 1985-NMSC-114, ¶¶ 12–20, 103 N.M. 606. The Court also distinguished *Mercer*, emphasizing that New Mexico law "promote[s] the adjudication of a case upon its merits," particularly where the real parties in interest received sufficient notice of the proceedings. *Id.* ¶ 14; *see also Macias v. Jaramillo*, 2000-NMCA-086, ¶ 14, 129

N.M. 578 (noting *Chavez*'s distinguishing of *Mercer*). *Mercer* has no application here—LSF9 did not file suit against a dead person—and does not support the notion that the First LSF9 Foreclosure Action was "no suit at all" for statute-of-limitations purposes.

The Zangaras also cite *DeVargas v. Montoya*, 796 F.2d 1245 (10th Cir. 1986), *overruled on other grounds by Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987), but that case is even less helpful to their position. *DeVargas* simply explains that the Savings Statute operates to extend the time for pursuing only a *timely-filed* suit; if a suit is time-barred from the outset, the Savings Statute cannot cure that defect. 796 F.2d at 1250. "Any holding to the contrary would lead to the absurd result that all limitations statutes are extended indefinitely by the savings statute," because a time-barred action would "need only be filed, dismissed, then refiled within six months of dismissal claiming 'continuation' under the savings statute." *Id. DeVargas* has no bearing here because the First LSF9 Foreclosure Action was timely filed.

B. The First LSF9 Foreclosure Action was not dismissed for negligence in its prosecution.

LSF9 next argues that the Savings Statute does not apply because the First LSF9 Foreclosure Action was dismissed for "negligence in its prosecution." NMSA 1978, § 37-1-14. That is wrong for two reasons.

First, "negligence in [a suit's] prosecution" is limited to a *failure to prosecute the suit with reasonable diligence*—i.e., failure to take the steps

necessary to bring the suit to close. That is clear both from the plain language of the Savings Statute and this Court's consistent statements that the Savings Statute's exception applies only when the dismissal of the first suit "is based on a failure to prosecute the action with reasonable diligence." *Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin., Prop. Control Div.*, 1990-NMSC-013, ¶ 8, 109 N.M. 492; *see also id.* ("[A] dismissal for failure to prosecute is functionally the same as a dismissal for negligence in prosecution."); *id.* ¶ 13 ("Where an action is dismissed for failure to prosecute (negligence in its prosecution), the limitations period will not be interrupted."); *U.S. Fire Ins. v. Aeronautics, Inc.*, 1988-NMSC-051, ¶ 5, 107 N.M. 320 ("[T]he statute of limitations on a cause of action is tolled if a new suit setting forth essentially the same cause of action between the same parties is commenced within six months after a dismissal except when the dismissal was based on the plaintiff's *failure to pursue his claim*.") (emphasis added); *cf. King v. Lujan*, 1982-NMSC-063, ¶ 8, 98 N.M. 179 ("[T]he courts should not distinguish between a plaintiff who takes no action before the limitations period expires and a plaintiff who files a complaint before the period expires but who thereafter *takes no action*.") (emphasis added).

While not necessary to its decision in *Gathman-Matotan*, this Court considered and found without merit plaintiff's argument that there is a difference between a dismissal for failure to prosecute and a dismissal for negligence in

prosecution and that the exception in Section 37-1-14 for negligence in prosecution applies where is "some sort of finding, by some court, of negligence causing the dismissal." 1990-NMSC-013, ¶ 6. This Court stated that plaintiff's distinction "defies common sense and would contravene the purpose of the exception provided in Section 37-1-14." *Id.* at ¶ 8.[14]

That "negligence in [a suit's] prosecution" simply means "failure to prosecute" is also the only sensible construction of the Savings Statue. The statute contemplates that the first action was timely, but flawed in some way—so flawed, in fact, that it "fail[s]." NMSA 1978, § 37-1-14. Section 37-1-14 "saves" a refiled action that seeks to correct the original action's flaw from dismissal on the basis of the statute of limitations so long as the second action is filed within sixth months of the first action's dismissal. *See id.* The only exception is for suits dismissed for "negligence in … prosecution." Construing that exception to encompass only a *failure to act with reasonable diligence* furthers the purpose of the statute, which

[14] *Gathman-Matotan* involved a suit against the Department of Finance and Administration filed a few days before the two-year statute of limitations under Section 37-1-23 for contract actions against the State would have run. *See* NMSA 1978, § 37-1-23(B). Plaintiff took no action to prosecute the action and it was dismissed without prejudice for failure to prosecute. While that dismissal was on appeal, the plaintiff filed an identical second complaint arguing that the statute of limitations did not bar the action, citing the Savings Statute. This Court held that Section 37-1-14 did not apply to breach of contract actions against the State because Section 37-1-17 made Section 37-1-14 inapplicable to extend the two-year statute of limitations. *See* NMSA 1978, § 37-1-17.

gives timely-filed suits a second chance so long as the plaintiff did not simply sit on its hands after filing. By contrast, reading the exception more broadly to include first suits filed with any sort of undefined "negligence" would raise confounding questions of which suit-ending mistakes were sufficiently "negligent" to trigger the exception. Such statutory construction also would contravene the statute's express purpose of tolling the statute of limitations to allow the curing of defects in a timely-filed and diligently prosecuted but failed first action. *See id.*

Under the plain-meaning and common-sense reading of the Savings Statute, the exception for "negligence in [the suit's] prosecution" does not apply here because the First LSF9 Foreclosure Action was timely filed and was not dismissed for failure to prosecute.

Second, even if the exception for "negligence in [a suit's] prosecution" were construed more broadly, it still would not apply here. As the Court of Appeals observed, *Barbeau v. Hoppenrath*, 2001-NMCA-077, and a few New Mexico appellate-court cases following it have suggested that the exception for "negligence in [a suit's] prosecution" may apply to instances of "negligence" beyond negligence in prosecuting the case with reasonable diligence, though they have not explained how to determine what kinds of suit-ending "mistakes" could trigger the exception. In *Barbeau*, for example, the court held that the plaintiffs' first suit filed two days before the New Mexico statute-of-limitations deadline in a federal district

court in Oregon had been negligently prosecuted because plaintiff did not even "arguably" have federal subject matter jurisdiction (diversity was lacking on the face of the complaint) or personal jurisdiction over defendant Hoppenrath (a non-resident of Oregon). *Barbeau* held that the plaintiffs had made no showing that the filing in Oregon federal court was "an innocent mistake or an erroneous guess at an elusive jurisdictional fact" known only to the defendants or any other circumstance that might serve to excuse having prosecuted their first action in a negligent manner. *Id.* ¶¶ 11, 15–16.

LSF9 requests that this Court make clear that Section 37-1-14's exception only applies only where a plaintiff has failed to diligently prosecute its claim and to expressly reject *Barbeau's* expansive statutory interpretation. *See supra* at 29–31. But even under the expansive "negligence" standard postulated in *Barbeau*, the Zangaras cannot show that LSF9 prosecuted the First LSF9 Foreclosure Action negligently, much less with the extreme negligence at issue in *Barbeau*.

Here, LSF9 timely pursued and reasonably believed it had standing to pursue the First LSF9 Foreclosure Action. LSF9 had previously purchased the Note from BANA, and as part of the sale had acquired (i) the Lost Note Affidavit (and a copy of the lost Note), and (ii) the right to foreclose on the Mortgage through assignment. It was reasonable for LSF9 to believe it could pursue a foreclosure under those circumstances. At most, LSF9 made an "innocent mistake" in concluding that LSF9

could pursue foreclosure as the owner of the lost Note and assignee of the Mortgage without also obtaining a specific assignment of the right to enforce the Lost Note Affidavit. *Barbeau*, 2001-NMCA-077, ¶ 15.

Even the few Court of Appeals cases ostensibly following *Barbeau* have declined to extend its reach as far as the Zangaras would have the Court extend it here. In *Foster*, 2012-NMCA-072, ¶ 1, for example, the court declined to apply the "negligence in … prosecution" exception even though plaintiff's federal suit had been dismissed for lack of diversity jurisdiction. Concluding that "a mistake based on confusion does not rise to negligence in prosecution" so long as "plaintiff has been diligent in his prosecution," the court drew a distinction between "filing a complaint that on its face defeats jurisdiction or when the filing attorney knows or reasonably should have known that the chosen forum did not have jurisdiction, and the filing of an action in an improper forum on a reasonable but mistaken belief that there was jurisdiction there." *Id.* ¶¶ 10, 21. Likewise, in *Amica Mut. Ins. v. McRostie*, 2006-NMCA-046, 139 N.M. 486, the court declined to apply the "negligence in … prosecution" exception to a case in which the plaintiff's first suit had been dismissed for improper venue, even though it could not say that the plaintiff "was free of carelessness." *Id.* ¶ 16. The court reasoned that there is "a valid distinction ... between filing a complaint that on its face defeats subject matter jurisdiction, and filing an action without a thorough investigation as to whether venue is proper." *Id.*

The *Amica* court also distinguished between defects that cannot be waived, like lack of subject matter jurisdiction, and defects that can be waived, like improper venue. *Id.* ¶ 17.

The Court of Appeals here properly recognized that lack of prudential standing is also a waivable defense, and even if *Barbeau* were still good law,[15] that the same result as in *Amica* is compelled here. *See Zangara*, 2022 WL 16779801, at *4 ("The distinction this Court has drawn between waivable and nonwaivable defenses dictates the outcome of this appeal because, unlike subject matter jurisdiction, lack of standing is a waivable defense."). And LSF9 timely cured the technical defect of not having initially obtained a specific assignment of Section 309 enforcement rights and timely refiled the Second LSF9 Foreclosure Action under Section 37-1-14.

Accordingly, even if the Court were to interpret the Savings Statute as the appellate court did in *Barbeau* (which it should not), it should affirm the Court of Appeals' conclusion that the exception for "negligence in [the suit's] prosecution" does not apply to bar the Second LSF9 Foreclosure Action because LSF9 did not pursue the timely-filed First LSF9 Foreclosure Action in a negligent manner.

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[15] While the Court of Appeals expressed "reason to doubt that *Barbeau*'s interpretation of the exception can be squared with the plain language and purpose of the Savings Statute," it declined to reconsider the viability of *Barbeau* as precedent. *Zangara*, 2022 WL 16779801, at 10 n.3.

C. Even if the Savings Statute did not apply, equitable tolling renders LSF9's current action timely.

Finally, even if the Savings Statute did not apply for whatever reason, the Second LSF9 Foreclosure Action is timely because the First LSF9 Foreclosure Action equitably tolled the statute of limitations on LSF9's claim during the pendency of the First LSF9 Foreclosure Action.

The applicable statute of limitations for actions founded upon a note or other contract in writing is six years. *See* NMSA 1978, § 37-1-3(A).[16] Almost a full year of that time (364 days) remained when LSF9 filed the First LSF9 Foreclosure Action on March 23, 2016. The First LSF9 Foreclosure Action was pending for nearly two years (699 days) and was dismissed on February 20, 2018. LSF9 filed the Second LSF9 Foreclosure Action on August 20, 2018 (six months later).

The statute of limitations was equitably tolled during the pendency of the First LSF9 Foreclosure Action. As this Court explained in *Gathman-Matotan*, "the filing of a complaint ordinarily tolls the applicable limitations period. In this respect, New Mexico has adopted an 'equitable' or nonstatutory tolling principle alongside" statutory tolling provisions like the Savings Statute. 1990-NMSC-013, ¶ 13

[16] The courts below correctly concluded that the six-year statute of limitations in Section 37-1-3(A) applies here, and the Zangaras have abandoned any argument to the contrary. But even if Section 55-3-118(a) applied, as the Zangaras argued below, the limitations period would still be six years. *See* NMSA 1978, § 55-3-118(a).

(citations omitted); *see also, e.g.*, *City of Rio Rancho v. Amrep Sw. Inc.*, 2011-NMSC-037, ¶ 45, 150 N.M. 428 ("The filing of the federal action tolled the limitations period."); *Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, ¶ 10, 107 N.M. 463 ("When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply.").[17]

Accounting for the 699 days of tolling, the six-year statute of limitations would not expire until February 19, 2019. The Second LSF9 Foreclosure Action was filed 183 days before that, on August 20, 2018. The Second LSF9 Foreclosure Action was thus timely filed well before the expiration of the six-year limitations period.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' holding that LSF9 has standing to pursue its timely-filed foreclosure action.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be granted because this case presents important issues that have not been directly addressed by this Court.

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[17] While suits dismissed for negligence in prosecution do not toll the statute of limitations, the First LSF9 Foreclosure Action was not dismissed for negligence in prosecution. *See supra* at 29–35.

DATED: April 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading was filed via "Odyssey File and Serve" on the 14th day of April, 2023, which caused all counsel of record to be served by electronic means. I hereby further certify that a true and correct copy of the foregoing was also served via e-mail this 14th of April, 2023, as follows:

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