IN THE NEW MEXICO SUPREME COURT

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

Petitioners-Petitioners,

v. No. S-1-SC-39679

LSF9 MASTER PARTICIPATION
TRUST,

Respondent-Respondent.

Consolidated With:

LSF9 MASTER PARTICIPATION
TRUST,

Plaintiff-Respondent.

v. Ct. App. No. A-1-CA-38169

KENNETH B. ZANGARA; KATHY S.
ZANGARA,

Defendants-Petitioners.

PETITIONERS BRIEF IN CHIEF

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
County of Bernalillo
The Honorable Carl Butkus
Case No. D-202-CV-2018-02476
Consolidated with
Case No. D-202-CV-2018-06129

[ORAL ARGUMENT REQUESTED]

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On March 22, 2011, Bank of America initiated a foreclosure action against the Zangaras and accelerated the Note thereby commencing the running of the statute of limitations of six years for enforcement of the Note. NMSA 1978 §37-1-3(A); NMSA 1978 55-3-118.[1] [RP 157-391] The case was dismissed for failure to prosecute. [RP 391] [2]

Bank of America then lost the Note. After loss of the Note, Bank of America sold the loan to LSF9 and purported to transfer enforcement rights for the promissory Note to LSF9 "by delivery of a copy of the lost Note alone". [RP 402] As conceded by LSF9 in its brief in chief in the Court of Appeals, "BANA did not initially assign its right to enforce the Note." (Brief in Chief, p. 5) Notwithstanding no assignment from Bank of America to LSF9 of the enforcement rights to the lost Note and notwithstanding section 309 of the NM UCC which allows enforcement of a lost Note if the person seeking to enforce the Note was in possession of the Note with the right to enforce the Note when loss of the Note occurred, LSF9 then filed its first action to enforce the lost Note and foreclose mortgage. [RP 148-153]

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[1] Section 118 provides a specific statute of limitation of six years for enforcement of a negotiable instrument under article III and there is no Savings Statute. NMSA 55-3-118.

[2] 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__" 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__" referring to the relevant page(s) of the record.

On February 20, 2018 on cross motions for summary judgment, the District Court dismissed LSF9's complaint for absence of prudential standing finding that LSF9 had no assignment of the right to enforce the Note and that LSF9 could not enforce the Note under the version of Section 309 contained in the NM UCC because it was not in possession of the Note with rights of enforcement when the Note was lost. NMSA 5-3-309 (1990). The District Court also entered an order quieting the title to the property which secured the Note against LSF9 and Bank of America in favor of the Zangaras. [RP 389-418]

Exactly six months following the entry of the order of dismissal, LSF9 filed a second action to enforce the Note claiming that it had now obtained from Bank of America an assignment of the right to enforce the lost promissory Note. [RP21-45] In reality, however, LSF9 received an "assignment of lost Note affidavit" which does not on its face purport to assign to LSF9 the right to enforce the lost Note. [RP 408; RP2 44-45] The foreclosure action was consolidated into a Quiet Title Action filed by the Zangaras. [RP 1-3, 186-187, 396]

Although the statute of limitations had expired, LSF9 relied upon the "savings statute" to file its second foreclosure case. The savings statute provides

> "If, after the commencement of an action, Plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be commenced thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." NSMSA 1978 37-1-14

DISPOSITION IN THE COURT BELOW AND FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

The District Court dismissed the second foreclosure action filed by LSF9 finding that the first suit was filed without even an assignment of the right to enforce the lost Note and that the plain language of section 309 which grants the right of enforcement to a person in possession of the Note with rights of enforcement when the Note is lost, results in the first case filed by LSF9 being "no case at all" thereby making unavailable the savings statute. [RP 389-418]

In reaching its decision the District Court noted that the first suit was dismissed due to the absence of standing to sue. The District Court noted that standing is a prerequisite to suit and without standing a mortgagee lacks the authority to sue or accelerate the debt. In other words, LSF9 lacked the power to bring suit. Lacking the capacity to sue, LSF9's first suit was no suit at all. The Court noted that "to satisfy the requirements of prudential standing and civil rule 17(a)(1), the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right (citation omitted)". [RP 416-418]

The district court holding is consistent with this courts opinion in *Deutsche Bank Nat'l Tr. Co. v. Johnston*, 2016-NMSC-013, where this Court held that there are sound policy reasons for requiring strict compliance with the traditional procedural requirement that standing be established at the time of the filing in a mortgage foreclosure action and that the procedural safeguard is vital because the

securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory Notes. Furthermore, allowing an essentially automatic and unfettered extension of the statute of limitations when a case is filed regardless of the strength or lack of strength of the claim to enforce the Note, is in direct contradiction to the requirement established by this Court that prudential standing be shown when the case is filed and defeats the purposes of the prudential standing requirement outlined by this Court in *Deutsche Bank Nat'l Trust Co. v. Johnston*, supra.

The Court of Appeals reversed the District Court finding that NMSA 37-1-14 tolled the statute of limitation for six months thereby making timely LSF9's complaint for foreclosure. In reaching its conclusion the Court of Appeals held that it would not categorically bar a Plaintiff from relying upon the savings statute where a case is dismissed for absence of prudential standing. The Court of Appeals did not discuss the policy considerations which support the requirement of prudential standing, and the court did not discuss the fact that LSF9 had no assignment of enforcement rights to the Note and that the absence of an assignment of the right to enforce the Note was clearly shown by the allegations of LSF9's complaint itself. [Memorandum Opinion, at p.6]

The Court of Appeals considered also the issue of negligence in prosecution and the court categorically concluded that a dismissal for lack of prudential

standing "does not fall within the exception for negligence in the prosecution." The Court drew this conclusion without analyzing whether LSF9 negligently pursued the first action when it filed the case without even an assignment of the right to enforce the Note and that that fact was apparent from the allegations of the complaint. [Memorandum opinion, p.11]

The Court of Appeals drew this conclusion despite the fact that the focus of the Court in prior opinions addressing the Savings Statutes negligence exception was upon the negligent conduct and not the grounds upon which the complaint was dismissed. See, *Barbeau v. Hoppenrath, 2001 NMCA 77, 131 N.M. 124,* (negligence in asserting subject matter jurisdiction disallowed extension) [3]; *Foster v. Sun HealthCare Grp., Inc., 2012-NMCA-072* (non-negligent conduct in incorrectly asserting subject matter jurisdiction allowed extension); and *Amica Mutual Ins. Co. v. Mcrostie*, 2006 NMCA 46, 139 N.M. 486, (court essentially applied negligence analysis to conclude claimed negligent conduct did not outweigh error in selection of venue).

The court of appeals erred in its conclusion that an action dismissed for lack of prudential standing where plaintiff was a stranger to the instrument it was seeking to enforce can support a second action as a continuation of the first under

[3] The Court of Appeals decision in its discussion incorrectly notes that the Court found in Barbeau that Plaintiff said "prosecuted their action in a non-negligent manner." The Court's decision in Barbeau actually finds the opposite.

the savings statute. The court also erred in categorically disallowing the negligence exception in the savings statute where the case is dismissed for absence of prudential standing and in failing to disallow the availability of the savings statute due to the negligence of LSF9 in prosecution.

In a footnote to its decision, the Court of Appeals also held that despite the plain language of NM UCC § 309 allowing enforcement of the lost promissory Note if a person seeking to enforce the instrument had possession of the instrument with the right to enforce the instrument when the loss occurred, enforcement by the assignee of a person who lost the Note was authorized by the NM UCC. In doing so the court relied upon its recent precedential opinion in *CitiMortgage, Inc. v. Garcia*, 2022 No. A-1-CA-38418. Although the Court of Appeals noted in *Garcia* that the plain language of a statute is the best evidence of legislative intent, that the cannon of statutory construction-expressivo unius est exclusive alterious - the inclusion of one thing implies the exclusion of another - supports the conclusion that a common law assignment could not transfer enforcement rights, and that New Mexico had not adopted an amendment to Section 309 of the Uniform UCC which would allow assignment, nonetheless the Court of Appeals in an effort to "develop the market for lost instruments" judicially broadened the category of persons who may enforce a lost instrument beyond those described in the statute to include a person who never had possession of the instrument.

This court should reverse the opinion of the Court of Appeals in this case and overrule *Garcia*. The plain language of Section 309, the legislative rejection of the 2002 amendment to Section 309 and this courts recognition in Johnstone that strict compliance with the transfer and enforcement requirements of the UCC is necessary to protect the land records system and curb abuse of the system compels this Court to correct the error of the Court of Appeals and reverse the judicial expansion of the right to enforce a lost instrument granted by Section 309.

ARGUMENT

STANDARD OF REVIEW

The interpretation of Section 309 requires the Court to analyze the plain language of the statute, the Legislative history of the statute and the policy consideration expressed by this Court in prior opinions to arrive at a decision in the case, de novo. Application of the statute of limitations to the undisputed facts of this case also presents questions of law with should be reviewed *de novo*. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009 147 NM 583.

PRESERVATION OF ISSUES

The District Court dismissed the third foreclosure action and granted the Zangaras Petition to Quiet Title finding that because LSF9 was not in possession of the negotiable instrument and entitled to enforce the instrument when loss of possession occurred, LSF9's foreclosure action could not proceed. The District

Court also concluded that the Statute of Limitations for pursuing the foreclose action had expired because the Savings Statute was unavailable to LSF9 as the second foreclosure action by LSF9 was no suit at all due to LSF9's actions in filing suit without any claim or right of assignment. The Court of Appeals disagreed and reversed the District Court.

The issue of availability of the Savings Statute was briefed by the parties and the District Court's finding that the second foreclosure action was no suit at all necessarily requires analysis of LSF9's negligence in prosecution in filing the second foreclosure action with no ability or argument that it could enforce the promissory Note. The Court of Appeals considered the negligence in prosecution argument advanced by the Zangaras but nonetheless concluded that negligence in prosecution exception to the Savings Statute was categorically unavailable where the first case fails due to absence of prudential standing.

I. THE SAVINGS STATUTE IS NOT AVAILABLE TO TOLL THE STATUTE OF LIMITATIONS BECAUSE THE FIRST FORECLOSURE CASE FILED BY LSF9 WAS FILED WITHOUT PRUDENTIAL STANDING AND WAS NO CASE AT ALL AND CANNOT SUPPORT A SECOND ACTION AS A CONTINUATION OF THE FIRST

It is undisputed that the statute of limitations had expired when plaintiff filed its complaint and the complaint is timely only if LSF9 may rely upon the six month extension granted by the Savings Statute to render timely the complaint filed on the last day of the six month extension.

It is also undisputed that the 2016 foreclosure first filed by LSF9 and upon which it relies to argue the present case is timely under the Savings Statute as an extension of the dismissed 2016 action was dismissed due to the absence of prudential standing. The decision was based upon the District Court determination that LSF9 lacked standing because LSF9 had no assignment of the right to enforce the lost Note and because the District Court in the 2016 action and in this case concluded that NM UCC Section 309 allowed enforcement of a lost Note if the person seeking to enforce the Note was in possession of the Note with rights of enforcement when the Note was lost. [RP 389-418]

The District Court concluded that in such circumstances the case filed by LSF9 without any evidence of assignment of enforcement rights to the lost Note was a "nullity" and "no case at all" and that, therefore, LSF9 could not rely upon the case to argue the present action was a continuation of the first. In reaching its conclusion the District Court stated

> "The 2016 action was dismissed due to the absence of standing to sue. Standing is a prerequisite to suit (citation omitted). Without standing, a mortgagee lacks the authority to sue or accelerate the debt (citation omitted). In other words, LSF9 lacked the power to bring suit. Lacking the capacity to sue, LSF9's 2016 suit was no suit at all. 'To satisfy the requirements of prudential standing and Civil Rule 17(a)(l), 'the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.'(citation omitted). … Compare, Mercer v. Morgan, 86 N.M. 711, 526 P. 2d 1304, 1974NMCA102 (Ct. App. 1974) [suit

> against deceased person was a nullity; savings statute did not apply since there was no 'first action']; [RP 416-417]"

In *Mercer v. Morgan,* 1974-NMCA-102 the Plaintiff filed a claim arising from an automobile accident against a deceased person. The Court of Appeals held that the Savings Statute had no application because an action against a deceased person was a nullity and without legal effect. In reaching its conclusion, the Court stated, "There having been no 'first action,' No. 1317 was not a second suit and the continuation provision of § 23-1-14, supra, did not apply. (citaion omitted*)* Consequently, we hold the continuation suit filed by appellants in No. 1317 to be invalid, and we affirm the order to dismiss." *Mercer* at p.713.

Although LSF9's 2016 foreclosure action was not filed against a deceased person, the action was filed with admittedly no assignment of enforcement rights to the lost Note at all and also based upon a flawed interpretation of NM UCC. If this Court allows the Savings Statute to be available to grant a six-month extension of the statute of limitations in these circumstances, any lender will be free to file a case with no claim or evidence of enforcement rights to the note confident in the knowledge that following dismissal of the groundless claim, a six-month extension of the statute of limitations will be available to file a new action. Such course of action will also cloud property titles and unnecessarily consume judicial resources. Such a result is entirely inconsistent with the requirement expressed by this Court

in Johnstone that a foreclosure complaint must demonstrate prudential standing to enforce the Note when the complaint is filed and that the right cannot be waived. To allow a second untimely suit under the Savings Statute based upon a first suit filed without prudential standing defeats the policies which underly the requirement that prudential standing be shown when the suit is filed.

In *DeVargas v. Montoya*, 796 F.2d 1245 (10th Cir. 1986) Plaintiff attempted to file a second suit under the Savings Statute in federal court relying upon Plaintiffs first suit filed in state court which was dismissed because the statute of limitations had run. In rejecting the argument the 10th Circuit Court of Appeals stated;

> "This stature does not assist plaintiff. One need look no further than the proviso that a second suit is deemed a 'continuation of the first.' As previously indicated, we recognize as valid and binding the New Mexico judgment that plaintiff had nothing to continue. His suit in state court was time-barred. The savings statute could not resurrect what never existed. (Citing *Mercer v. Morgan*, 1974-NMCA-102)"

The Court continued;

> "Any holding to the contrary would lead to the absurd result that all limitations statutes are extended indefinitely by the savings statute. A barred action need only be filed, dismissed, then refiled within six months of dismissal claiming 'continuation' under the savings statute. Furthermore, it is abundantly clear that plaintiff's chances of successfully refiling in state court on that theory were nil." *DeVargas* at p. 1250

In *Deutsche Bank v. Johnston*, Justice Chavez carefully explained the policy reasons requiring that a petitioner demonstrate that it has prudential standing upon the filing of the case to bring the foreclosure action. Those policy considerations preclude tolling of the Statute of Limitations where dismissal occurs due to an absence of prudential standing.

In *Deutsche Bank*, the bank filed its foreclosure action attaching an unendorsed Note and mortgage, both naming a third party as mortgagee. At trial, Deutsche Bank produced an endorsed blank note and a document assigning the mortgage, which was filed after the date the foreclosure complaint was filed. Nonetheless, because the bank did not have standing at the time the foreclosure complaint was filed, this Court remanded the case with directions to vacate the foreclosure judgment entered by the District Court. Id. ¶ 35. The Court required strict compliance with the prudential standing requirements that the lender be in possession of the Note with rights of enforcement pursuant to Section 301 of the UCC and that the mortgage be properly assigned *before* the complaint for foreclosure is filed. Id. ¶ 32. In reaching the decision the Court emphasized the danger that lenders will file suit without proper ownership of the rights necessary to pursue the foreclosure action. Id. ¶ 31 ("[B]ecause falsification of necessary endorsements appears to be a widespread phenomenon … there is reason to believe

that creditors could potentially seek to enforce notes that they do not hold under the law.") (internal quotation marks & citation omitted).

In reaching its conclusion the Court in Johnston stated,

> "{16} Arguments based on a lack of prudential standing are analogous to asserting that a litigant has failed to state a legal cause of action. As we have previously discussed, we generally require "injury in fact, causation, and redressability" to establish standing. If these elements are not met, as a logical matter, a plaintiff generally cannot show that he or she has stated a cause of action entitling him or her to a remedy. ¶ 16 …
>
> "allowing a foreclosure defendant to waive the issue of standing would not only vitiate that homeowner's rights, but could in fact cloud the title of the underlying property and lead to other problems to the detriment of New Mexico's property system as a whole." ¶ 19 …
>
> "This procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property. (citation omitted) ('[T]he failure to deliver the original notes with proper indorsements [to assignees], the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements ... is widespread.')." ¶ 21

The well-established law of New Mexico requiring prudential standing be demonstrated at the time a suit is filed is entirely inconsistent with the conclusion that dismissal of a foreclosure case for failure to demonstrate prudential standing tolls the Statute of Limitation in favor of the lender under the Savings Statute. To

proceed in such fashion would encourage a lender to file a foreclosure case without the elements of prudential standing required by New Mexico law in the hope that the uninformed borrower would not defend the claim. In the event standing is challenged, the lender would then have an extended limitations period solely due to the filing of a case with a frivolous claim of prudential standing. Such should not be the law of New Mexico as allowing such course of conduct would allow lenders to pursue groundless foreclosure cases without the right to enforce the Note and if the savvy borrower defends, simple refile indefinitely thereby harass[ing] and opposing party with a pending action for an unreasonable period of time. *King v. Lujan*, 1982-NMSC-063.

Therefore, for sound policy reasons, including preventing unnecessary clouds upon title and waste of judicial resources, this Court should hold that the Statute of Limitations remains unaffected by a dismissal for absence of prudential standing as occurred in the first LSF9 foreclosure, as well as a dismissal for failure to prosecute which should also not toll and have no effect on, the running of the Statute of Limitations.

The worthy goals advanced by the requirement that prudential standing be shown when the case is filed discussed by this Court in Johnstone will not be advanced if the Court allows the Court of Appeals decision to remain undisturbed. This Court should reverse the Court of Appeals and hold that the Savings Statute is

categorically unavailable where the first action is dismissed for lack of prudential standing and is most certainly unavailable in this case where LSF9 concedes it had no assignment whatsoever of the right to enforce the lost Note when it negligently filed its 2016 foreclosure.

This is not a case where Plaintiff's first action properly states a claim but the action was brough by one without capacity due to "an honest mistake" as in *Chavez v. Regents of University of New Mexico*, 1985 NMSC-114, 103NM 606 where substitution of a personal representative as Plaintiff was permitted in place of the beneficiaries of the wrongful death action. Nor it a case where relation back is allowed under N.M.R.A. Civ. P. 15 where the amended pleading "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." It must be remembered that LSF9's first case was filed without any assignment of the Note and a second case was filed after LSF9 obtained an assignment of lost Note affidavit. Rules N.M.R.A. Civ. P. 15 and N.M.R.A. Civ. P. 17 have no application in these circumstances and LSF9 has not attempted to amend its first case with relation back. On the contrary, LSF9 had no assignment when the first case was filed, and the second case relies upon the actions of LSF9 in obtaining an assignment of lost Note affidavit after the first case was dismissed for absence of prudential standing. Thus, *Chavez* and cases construing Rules N.M.R.A. Civ. P. 15 and N.M.R.A. Civ. P. 17 are of no assistance to LSF9.

II. BY FILING THE 2016 FORECLOSURE WITHOUT EVEN A CLAIM OF ASSIGNMENT TO ENFORCE THE LOST PROMISSORY NOTE, LSF9 WAS NEGLIGENT IN PROSECUTION THEREBY MAKING UNAVAIABLE THE EXTENSIONALLOWED BY THE SAVINGS STATUTE.

The Savings Statute by its terms is unavailable if Plaintiff is negligent in prosecution in its first case. The exception includes failure to prosecute and negligence in prosecution. *Gathman-Matotan Architects and Planers, Inc. v. State, Dept. of Finance and Admin., Property Control Div.*, 1990-NMSC-787. The negligence exception to the savings statute extension is not limited by its terms to any particular category of mistake of law. The Court of Appeals nonetheless construed the negligence exception to the Savings Statute to be categorically unavailable where the first case is dismissed due to absence of prudential standing. The opinion of the Court of Appeals is not supported by the language of the statute and is inconsistent with prior opinions of the Court of Appeals and this courts decision in *Deutsche Bank Nat'l Tr. Co. v. Johnston*. Supra. This Court should reverse the Court of Appeals and hold that where a case is dismissed for lack of prudential standing or where Plaintiff was negligent in prosecution of the case, the Savings Statute is not available to extend or toll the statute of limitations.

The Court of Appeals holding is based upon its interpretation of the holding in *Amica*. In that case, the Court reversed the District Court's finding that the Plaintiff was negligent in filing its case in an improper venue. The Court reviewed

the opinion in *Barbeau* where the Court held negligence in asserting subject matter jurisdiction disallowed reliance on the Savings Statute and the Court distinguished the mistaken venue selection in *Amica* from the mistaken assertion of subject matter jurisdiction in *Barbeau.* Although the Court in *Amica* did note the distinction between venue and subject matter jurisdiction, it nonetheless applied a negligence analysis in finding the mistake in selecting venue did not override the policy consideration favoring trial on the merits. Thus the Court stated

> "When balancing the policy favoring access to judicial resolution of disputes, including that embodied in Section 37-1-14, against the venue mistake in the case, we think it appropriate to hold, and we do hold, that the circumstances do not constitute negligent prosecution." *Amica* ¶ 17.

Although the Court noted the mistake to be a mistake in venue selection and contrasted the mistake to a subject matter jurisdiction error, the Court nonetheless employed a negligence analysis and concluded "the circumstances do not constitute negligence in prosecution." Therefore, the Court in *Amica* did not categorically disallow the negligence exception to the Savings Statute where the error is in selection of venue.

Similarly, in *Foster* the Court found the plaintiff was not negligent although an error was made in selecting a forum without subject matter jurisdiction. In finding no negligence dispute the error in subject matter jurisdiction the Court stated

> "A plaintiff fails to exercise due diligence within the meaning of Section 37-1-14 when he or she brings suit in an improper forum and, at the time of filing, knows or should have reasonably know the facts that defeated that forum's jurisdiction over the plaintiff's case." …
>
> "In other words, to survive dismissal, a plaintiff's complaint must have been filed 'with an honest but mistaken belief that he was doings so in a court of proper jurisdiction.'" ¶ 98 …
>
> "In Barbeau, the only New Mexico case on point here, we determined that the plaintiffs' attorney demonstrated 'a clear disregard of the elementary requirements of [federal] jurisdiction' which rose to the level of negligence in prosecution. 2001-NMCA-07" ¶ 99

The Court in *Foster* also noted "mistaken beliefs that the Court has subject matter jurisdiction stands on the same plain as any other mistake of law." ¶ 97

In the case before the Court, the Court of Appeals concluded, based upon *Amica* and the Court of Appeals mistaken belief that absence of prudential standing could be waived, that negligence in making a claim which results in dismissal for lack of prudential standing does not implicate the negligence exception in the Savings Statute to disallow the statute of limitation extension.

The reasoning of the Court of Appeals is flawed. The availability of the Savings Statute extension of the statute of limitations must turn on whether the plaintiff was negligent irrespective of the subject matter in which the error was made. The gravity of the consequences of the negligence may be considered as it was in *Amica*, but the negligence exception availability does not turn upon the

subject of law in which the error was made or whether waiver of the deficiency may occur. As stated by the Court in *DeVargas*

> "a second action could be a continuation of an earlier action, and not barred by the statute of limitations, when the first dismissal was 'not based upon the discretionary power of the court to dismiss stale claims, nor was there any finding or conclusion that the dismissal of [the first action] was by reason of the negligence of plaintiffs in prosecuting the cause.'" *DeVargas*, at p. 1250

The Court of Appeals conclusion that absence of prudential standing is of such little consequence that negligence in asserting a claim unsupported by prudential standing can never invoke the negligence exception to the Savings Statute is erroneous. The requirement articulated by this Court in Johnstone that prudential standing be shown when the case is filed and that the defense cannot be waived implicates important policy considerations including preserving the integrity of the lands records system and deterring a non-compliance with the formalities of Article III. In fact, the Court of Appeals opinion in directly misrepresents this Courts holding in *Deutsche Bank v. Johnston* where this Court held explicitly that prudential standing cannot be waived. Thus, the Court of Appeals Memorandum Opinion in its reasoning directly contradicts binding precedent of this Court.

Equally important to the analysis of the availability of the negligence exception to the gravity of consequences of the error is the degree of negligence of

the Plaintiff. In *Barbeau* the absence of subject matter jurisdiction was evident form the plaintiff's complaint itself while in *Foster* the case was muti-party and subject matter jurisdiction was more complex.

In the present case, LSF9 filed its foreclosure action by admission without even an assignment of the right to enforce the lost Note. Its argument that Section 309 allows it to enforce the lost Note is immaterial where it has no assignment of such right. If there was no assignment of the right to enforce the Note, there was no case at all and LSF9 was negligent in the prosecution of the foreclosure. This conclusion is compelled because the filing of the case with no right to enforce the Note was as negligent as was the Plaintiff in *Barbeau.* In both cases Plaintiff disregarded clear and elementary principles of law in their initial filings and that fact was evident from the initial filings. If the Court of Appeals decision remains the Savings Stature will be available to extend the Statute of Limitations although the Plaintiff in the first case had no prudential standing to pursue the claim and even in the face of negligence in the prosecution thereby allowing a negligent Plaintiff the unlimited opportunity to refile under the Savings Statute after dismissal.

III. THE PLAIN LANGUAGE OF § 309, THE LEGISLATION HISTORY AND POLICY OF NEW MEXICO REQUIRE THIS COURT OVERULE THE COURT OF APPEALS JUDICIAL EXPANSION OF § 309.

By its terms § 309 allows enforcement of the lost Note if the Note was in possession of the person seeking to enforce the Note with rights of enforcement when the Note was lost.

The preferred method of statutory interpretation, the plain language approach, clearly does not support the argument that the rights to enforce a lost promissory Note may be freely assigned. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11 ("We use the plain language of the statute as the primary indicator of legislative intent."). Section 301 of the New Mexico UCC defines a "[p]erson entitled to enforce an instrument [as] (i) the holder of the instrument, (ii) a non-holder in possession of an instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 55-3-309. " Section 309, as the Court is aware at this point, creates an exception to the foregoing rule for lost or destroyed instruments: "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 an unlawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument."

The plain language of the statute is clear: an assignee of the rights of the person who lost a Note is a person not in possession of the instrument and, therefore, should be subject to the limitations of enforcement rights set forth in §309(a). Furthermore, LSF9's argument fails to give effect to each word of the statute and renders section (a) of 309 meaningless.

Enforcement of a promissory Note has been comprehensively addressed by the Uniform Commercial Code, thereby displacing the common law. The UCC provides for the enforcement of promissory notes by holder in due course, a person in possession of the instrument with rights of a holder in due course, or a person who had possession of the Note with rights of enforcement when the Note was lost. NMSA 1990, § 55-3-309. To allow common law assignment of the right to enforce a lost Note would open a Pandora's Box encouraging loss of Notes to allow simple assignment under the common law and thereby subverting the possession, transfer, negotiation and endorsement requirements of the Uniform Commercial Code. Section 309 is a logical mechanism to protect an innocent lender who lost a Note, but it should not be read to eviscerate the possession, endorsement, negotiation and transfer requirements of the UCC.

The plain language of Section 309 does not allow assignment of the rights to enforce a lost Note. Furthermore, in 2002, an amendment to Section 309 was proposed by the commission on uniform laws that created a mechanism for

assignment of a lost Note. However, New Mexico has not adopted this amendment to Section 309 thereby demonstrating legislative policy consistent with the policy considerations of strict compliance with the requirements of the UCC recognized by this Court.

The current language of New Mexico's Section 309 replaced a much more permissive assignment clause with regard to negotiable instruments. *See* § 50A-3-804, NMSA 1953 (Repl. Vol. 8, Pt. 1). In 1990, the legislature passed the current version of Section 309, which modified the previous Section 804 and disallowed assignment of the rights to a lost negotiable instrument. Official Comment to UCC §309. The fact that the present version of the statute replaced a more permissive version is further evidence of legislative intent to restrict the right of assignment in a lost Note. Del Duca, *Now Where Did That Mortgage Note Go? A Two Act Play Under UCC § 3-301 and U.S.C. 1141(c),* 16 Haw. B.J. 71, 77-81 (2013). It is clear, based upon the legislative language, history and case law that New Mexico has chosen to advance the policies of consumer protection and finality in its current version of Section 309.

New Mexico has not adopted the 2002 amendment to Section 309, which would allow assignment of the rights to a lost Note. In fact, New Mexico considered adopting the amendment, but chose not to do so. Legislation was introduced in the New Mexico Legislature that would have adopted the 2002

amendment and the legislation did not become law. HB182 2017 (RP 2, 73-95, Exhibit B). The legislative history of the New Mexico UCC provides no support for LSF9's position and compels the conclusion that New Mexico does not permit common law assignment of right to enforce a lost Note under Section 309.

The Court of Appeals in *Garcia* described the rules of construction available to determine legislative intent in enacting the New Mexico version of section 309. For instance, the Court of Appeals noted that the ultimate goal in considering a statute is to ascertain and give effect to the intent of the legislature. The Court also acknowledged that the primary indicator of legislative intent is the plain language of the statute giving effect to all of the words of the statute. The Court noted the rule of statutory construction-expresivo unis est exclusive-alterious - the inclusion of one thing implies the exclusion of another-applies in these circumstances noting "that reasoning is generally beyond reproach as applied to Section 309" and the Court continued "limiting those entitled to enforce a lost instrument to persons identified in the statutory language is, by in large, a straight-forward application of the common sense premise that when [legislatures] say one thing, they do not mean something else." *Garcia* at ¶ 910.

After noting these rules of construction which compel the conclusion that the plain language of Section 309 allows enforcement of a lost Note if the person was possession of the Note with rights of enforcement when the Note was lost, the

Court nonetheless proceeded to categorize the right to enforce a lost instrument granted by section 309 as a "outlier" of article III as a whole. The Court then continued, in the interest of expanding the market for lost instruments, to conclude that because Section 309 was a "outlier" the requirements and protections of Article III should be abandoned with respect to section 309 and that the common law, including right of assignment, controls.

By so proceeding, the Court of Appeals assumed a legislative role in determining what it thought was an appropriate class of persons to be permitted to enforce a lost instrument. Notwithstanding the plain language of the New Mexico version of 309, the Court of Appeals appears to have determined that the better rule is to allow assignment and the Court ruled accordingly.

In issuing its decision in *Garcia*, the Court of Appeals oversteps its duty to interpret the law and the Court substituted its judgment for that of the legislature. It is not unreasonable for the legislature to grant to the person who lost the Note the right to enforce it while not intending that right to be expanded to allow assignment. By allowing assignment of the right to enforce the lost instrument and deciding it was the Courts role to develop the market for lost instruments, the Court of Appeals ignored the cautions of this Court in Johnstone that strict compliance with Article III and the rules of prudential standing is necessary to protect the Lands records system from unnecessary clouds upon title and abuse

including the intentional loss of Notes and unnecessary creation of lost Note affidavits. It is for the legislature to determine whether the rights granted by Section 309 should be expanded to third parties who never had possession of the Note and the legislature in New Mexico, based upon the upon the legislative history available, has made that determination.

In any event it is inappropriate for the Court of Appeals to substitute its judgement for that of the legislature and that is precisely what has occurred in the *Garcia* decision. As noted by *Duca*, Courts that have departed from the possession requirement of Section 309 have done so not based upon a valid interpretation of legislative intent, but from Judicial departure from the plain language of the statute. As state by *Duca*,

> "concern over the perceived injustice of the borrower's potential windfall has led to judicially created approaches that allow the transferee to avoid the strictures of a literal application of the pre-2002 version of Section 3-309. Relying upon the common law of contractual assignments, a significant number of courts have held that if the assignor of the promissory note was entitled to enforce the note under Section 3-309 while it owned it, the assignee of the lost note steps into the assignor's shoes and acquires the right to enforce it. Other courts and commentators have reached the same result based upon the application of equitable principals of unjust enrichment and restitution. A third approach distinguishes between the enforcement of the note, which might be barred, and the enforcement of the mortgage that secures repayment. Thus far, no attempt has been made in these cases to harmonize these approaches with the legislative intent reflected by the repeal of former

U.C.C Section 3-804 and to explain how this approach continues to further the goals of the statute in effect, the pre-2002 version of Section 3-309(a)."
Duca, supra, 16 Haw. B.J. at 78-79" …

" 'A second criticism of these decisions is that they employ an approach to the assignment of negotiable instruments that is inconsistent with Article 3 concepts applicable to instruments that are negotiable." …

"A more fundamental criticism of these decisions is that they represent judicial legislation and fail to show a proper deference to the text and policy of the statute. As already noted, subsection (a) of U.C.C. Section 3-309 serves a rational and worthwhile purpose. It encourages more fastidious practices by the custodians of promissory notes and by prospective transferees of negotiable instruments by heightening the consequences of the transferee's failure to obtain possession of the negotiable instrument that it was acquiring. …

Allowing the assignor of a lost note to transfer the right to enforce the note that it lost undercuts the incentives that result from confining the enforcement right to the person who lost the note and leaves little or no purpose to subsection (a).
The decisions that allow the transferee to enforce a note it does not possess and did not either lose or destroy amount, in effect, to the nullification of Section 3-309(a)." …

"A second rule of statutory construction flouted by these cases is the principle that effect must be given, if possible, to every word, clause and sentence of a statute. No part of a statute should be rendered inoperative by a judicial construction of its text. Finally, the decisions that fail to apply Section 3-309(a) in a manner that is consistent with its plain meaning also fail to give significance to or even discuss a key indicator of legislative intent: the fact that this statute replaced Section 3-804, the repealed statute being much more permissive with respect to the enforcement rights of the assignees of lost notes. There is a trade off between the goals of enhancing the marketability of mortgage loans

> and enhancing the protection of borrowers against the possibility of conflicting claims on the notes. Former U.C.C. § 3-804 and the latest version of U.C.C. §3-309 resolve the balance in favor of the marketability of the loans; the pre-2002 version of U.C.C. Section 3-309 resolves it in the opposite direction. Both approaches represent permissible policy choices for legislatures to make and for courts to respect." *Duca*, supra, 16 Haw. B.J. 71, 77-81.

Although there are no New Mexico cases reviewing the requirements of Section 309, cases from other jurisdictions with Statutes identical to New Mexico's recognize that the language of the Statute is mandatory and must be followed. The importance of the Legislature's rejection of the proposed amendment to Section 309 in determining legislative intent was recognized by the court in *Dudley v. Southern Virginia University*, 502 B.R., 259 (US Dist. Ct. WD VA 2013. In that case, the plaintiff could not prove that it ever had possession of a lost Note. Id. The plaintiff relied upon Section 309 to enforce the lost Note and the court rejected the argument finding that the university had not proven that it had possession of the Note and it could, therefore, not prove that it was in possession of the Note with rights of enforcement when the Note was lost. In disallowing enforcement of the Note, the court stated,

> "Section 3-301 provides only one exception to the current possession requirement in the case of a lost or destroyed instrument. By incorporating Section 3-309, Section 3-301 permits an individual to enforce a lost or destroyed negotiable instrument, so long as the conditions of Section 3-309 are met. Of importance to

> this analysis, Section 3-309 permits enforcement of a lost or destroyed instrument only if the person seeking enforcement can establish that he was in possession of the instrument and entitled to enforce it at the time possession was lost or destroyed."

Similarly, the Massachusetts Court of Appeals in *In Re Harbourhouse Gloucester v. Green*, 505 B.R. 365 (U.S. Dist. Ct. E. MA, 2014), concluded that the plain language of the Massachusetts version of Section 309, which is identical to New Mexico Statute, compels the conclusion that assignment should not be permitted. The court stated,

> "Article 3 does address the enforceability of a lost note ... The conditions for enforceability are plainly set out ... where Article 3 specifically governs the situation, it trumps any common law default rule. Id."

The court went on to articulate the policy reasons for the possession requirements of Section 309 stating,

> "Actual possession at the time of loss as a requirement for enforcement of a negotiable instrument under §3-309 provides an objective method to determine a party's right to enforce a negotiable instrument and provides a reliable means to determine the parties' rights. By setting an actual possession requirement, parties on both sides have a clear and established standard. The maker of the note is protected from multiple claims of its ownership and enforcement of the note is still possible by the party who lost it. Id."

The courts of Ohio also enforce the plain language of Section 309. Ohio decisions are cited with approval by the New Mexico Supreme Court in *Deutsche Bank Nat'l Tr. Co. V. Johnston*, 2016-NMSC-013, 12. Ohio, as with New Mexico, has refused to enact the amended version of Section 309. Thus, in *Fannie Mae v. Hicks*, 2015 Ohio 1955 (Ohio App., 2015), the court recognized that enforcement of the Note by Plaintiff was not possible as it could not meet the requirements of Section 309. The plaintiff, nonetheless, sought to enforce the mortgage absent the Note. The court denied the relief and commented upon the possession requirement of Section 309 stating, "[a] party is not entitled to enforce a lost Note unless it was entitled to enforce the instrument when the loss occurred." See also *Secretary of Veterans Affairs of Washington D.C. v. Leonhardt*, 2015 OH 931 (Ohio App. 2015); *Kemp v. Countrywide Homes*, 440 B.R. 624 (U.S. Bankruptcy Court, D. New Jersey, 2010); *Marks v. Braunstein*, 439 B.R. 248 (U.S. Dist. Ct., MA 2010), and *Cadle Co. of Conn. v. Messick*, 30 Conn.L. Rprt. 21 45 UCC Rep. Serv. 2d. 563 (Conn. Super. Ct. 2001).

Finally, cases relied upon by LSF9 focus primarily upon protection of the lenders and preventing a windfall to the borrowers. Cases such as *Beal Bank, S.S.B. v. Caddo Par.-Villas S., Ltd.*, 218 B.R. 851 (N.D. Tex. 1998) freely allow assignment without discussion of the risks of separating enforceability from possession and the benefits recognized by New Mexico cases such as certainty of

ownership and promoting integrity of the lands records system and avoiding the risk of intentional destruction of instruments. The policy considerations which LSF9 offers to support its construction of Section 309, and which the Court of Appeals accepted provide no support for its position. First of all, allowing assignment to "foster efficient commercial transactions in today's modem marketplace" and "develop the market for lost instruments" opens the door to the very dangers explicitly recognized by this Court including "the routine creation of unnecessary lost Note affidavits and the destruction of the original Notes." *Johnston*, 2016-NMSC-013, r 21. Assignment is also not necessary to protect prudent lenders as a lost Note may be enforced through Section 309 which contains requirements to protect the lender and borrower in such circumstances.

CONCLUSION

The Statute of Limitations has expired for the enforcement of the Note. This Court should reverse the Court of Appeals and conclude as did the District Court that the Savings Statute is unavailable to extend or toll the limitations. The first case filed by LSF9 was filed without any claim or right to enforce the lost Note and the case was dismissed for absence of prudential standing. The important policy considerations recognized by this Court in its decision requiring prudential standing be established when a case if filed, preclude the availability of the Savings Statute where the first case is dismissed for absence of prudential standing

as the policies supporting the standing requirement will be defeated if reliance on the Savings Statue is allowed.

Similarly, LSF9 was negligent in prosecution in the first foreclosure case filed by LSF9 as the undisputed facts establish that the case was filed without any claim of right to enforce the Note. LSF9 was negligent in that prosecution and the plain language of the Savings Statute disallows its availability where the Plaintiff is negligent, and this Court should reverse the Court of Appeals on that ground also.

Section 309 of the UCC does not allow assignment of the right to enforce a lost promissory Note. The plain language of this statute, rules of statutory construction and the legislative history of the Statute compel this conclusion. This Court should reverse the Court of Appeals and overrule *Garcia* and correct the error made by the Court of Appeals in its judicial expansion of the category of persons allowed by Section 309 to enforce a lost instrument.

REQUEST FOR ORAL ARGUMENT

Petitioners request the Court grant oral argument as the issue before the Court involves important questions of law including questions of first impression in New Mexico and oral argument is appropriate to allow full development and consideration of the issues before the Court.

DATED: March 15, 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 15th day of March, 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 15th day of March 2023 as follows:

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