IN THE SUPREME COURT OF THE STATE OF NEVADA

MONICA JONES, Appellant, v. U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3, Respondent.	Supreme Court Case No: 78054

APPELLANT'S REPLY BRIEF

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

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MONICA JONES, Appellant, v. U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3, Respondent.	Supreme Court Case No: 78054 **NRAP Rule 26.1 Disclosure**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. Appellant Monica Jones has no parent corporations, no stock, no corporate affiliation, and is present under her true name. She is represented by Robert Kern, Esq., and has been, and expects to be, represented by no other counsel in this matter.

DATED this 26th day of July, 2019.

/s/ Robert Kern

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I.
WHETHER A GRANT OF SUMMARY JUDGMENT IS APPROPRIATE WHEN THE MOVING PARTY FAILED TO ESTABLISH STANDING TO ASSERT THEIR CLAIM.

a. Standard of Review

While Respondent US Bank does not dispute that the overall standard of review should be de novo, more important is examining the overall standard for the grant of a motion for summary judgment, which US Bank correctly states in their brief as the requirement that the moving party must "demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." (Answering Brief p.7). As the order was a grant of summary judgment, the district court was required to "view the evidence presented through the prism of the substantive evidentiary burden" so that there must be sufficient evidence on which a jury could reasonably find for the Plaintiff. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). ; *Cottle v. Storer Communications, Inc.,* 849 F.2d 570, 575 (11th Cir. 1988). Further, all reasonable inferences must be drawn in favor of the non-moving party. Despite admitting this as the standard, US Bank nonetheless argues throughout their brief that despite Jones' challenge to their right to enforce

the note, and their failure to present any evidence whatsoever of the right to enforce the note, that they have somehow met this standard.[1]

b. US Bank's Straw Man Argument is Disingenuous.

Despite Jones' clear arguments that in order to enforce a lost note, US Bank is required to prove their right to enforce some other way, as stated in NRS 104.3309, US Bank continuously states that Jones' position is that a loan can never be enforced without an original promissory note[2]. This is an intentional and disingenuous misstating of Jones' position. At no time in this appeal has Jones made any argument other than that US Bank must satisfy the basic justiciability requirement of standing to enforce the note, and establish the basic elements of their claim before they are granted the right to seize a person's private property. It is not the policy of Nevada courts to hand private property away to anyone who wants it. Anyone who can read the Clark County Recorder's website knows that there is a deed of trust on Jones' property; requiring US Bank to establish that they

[1] US Bank, in a footnote, states that Jones, in her Opening Brief, waived the argument that a genuine issue of fact exists. This is false – this was raised in the standard of review in the Opening brief, as that is a standard of review.

[2] "Jones contends that since the original Note cannot be produced that no one can ever foreclose, and she can continue to live in the residence without paying the Note or the Deed of Trust." Answering Brief p.19.

are the party with the right to enforce that debt, before lending them the power of the courts to do so, is not a scheme or conspiracy theory – it is the most basic element of jurisprudence. Ridiculing a borrower's legitimate arguments that the lender must show standing, as some straw man argument, paired with thinly-veiled accusations of being a deadbeat, have become all too common in legal proceedings, and are inappropriate amongst legal professionals.

c. The Issue of Standing is Properly on Appeal

1. The Issue of Standing was Clearly Raised Below

As stated in the Opening Brief, in the proceedings below, Jones specifically argued that US Bank did not own the note, and that US Bank did not have authority to enforce the note. (Appendix, p.46). US Bank takes the position that since Jones, a pro se litigant, did not use the term "standing," that this means she did not raise the issue. This argument lacks merit. While Nevada courts do not exempt pro se litigants from application of court rules,[3] courts throughout the country have recognized that justice requires that the pleadings and filings of a pro se litigant be interpreted more liberally than those filed by an attorney. *Eldridge v. Block*, 832 F. 2d 1132 (9th Cir. 1987); *Boag v. MacDougall*, 454 U.S. 364, 365,

[3] *Bonnell v. Lawrence*, 282 P. 3d 712 (NV S.Ct. 2012).

102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam). "It is settled law that the allegations of [a pro se litigant's complaint] `however inartfully pleaded' are held `to less stringent standards than formal pleadings drafted by lawyers....'" *Hughes v. Rowe,* 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66 L.Ed.2d 163 (1980) (quoting *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972)); *see also Noll,* 809 F.2d at 1448 ("Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel."); *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir.1986) ("we hold [plaintiff's] pro se pleadings to a less stringent standard than formal pleadings prepared by lawyers."). The reasoning behind this policy was explained by the Court in the Triestman case:

> This policy of liberally construing *pro se* submissions is driven by the understanding that "[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Triestman v. Federal Bureau of Prisons*, 470 F. 3d 471(2nd Cir. 2006).

In the present case, very little interpretation is required to understand that arguing that US Bank does not own the note or have authority to enforce the note[4] is a

[4] "Plaintiff has no lawful authority to act on the note attached to the Property." Appendix p.51

challenge to their right to enforce the note. The fact that the technical term for challenging the right to enforce the note is "standing" does nothing to change that the issue was clearly raised by Jones on the proceedings below, and is now properly before this Court on appeal.

With regard to Jones's argument that standing is non-waivable, Jones stands on the arguments in the Opening Brief.

2. Regardless of Whether Standing was Raised Below, US Bank was Nonetheless Required to Establish the Basic Elements of Their Claim.

The question of whether standing was raised below, or whether it is waivable, is largely irrelevant when US Bank provided literally not a single piece of evidence that they held the right to enforce the note. In its Answering Brief, US Bank admits that in order to grant summary judgment, the burden is on the moving party to provide evidence that demonstrates that no genuine issue of material facts remains. (Answering Brief p.7-8). US Bank also admits that they are required to satisfy the proof of transfer requirement of NRS 104.3309(1)(a)(2) ("Has **directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.**") (emphasis in original brief)(Answering Brief p. 18). As discussed in detail below, US Bank still fails to show that a single piece of evidence (or affidavit) establishes that fact. Without

establishing the most basic element of their right to enforce the note, summary judgment could not be granted.

d. US Bank Failed to Provide any Evidence Whatsoever of its Right to Enforce the Note.

1. Once a Note and Deed of Trust are Split, the Note No Longer Follows the Deed of Trust.

In its Answering Brief, US Bank apparently chose to ignore the portion of the Opening Brief that explained that transfer of the deed of trust does not transfer the note, if the note and deed of trust are split by an assignment to MERS. (Opening Brief p.11). Instead of addressing the fact that *Edelstein* directly declares that MERS language in a deed of trust (which is identical to the MERS language in the present deed of trust – See Appendix p.14) splits the note from the deed of trust, and that thereafter, transfer of the deed of trust is not evidence of transfer of the note, US Bank instead cites the same case, but ignores the portion about splitting the note[5]. *Edelstein v. Bank of New York Mellon*, 286 P. 3d 249, 260 (NV S.Ct. 2012) (Answering Brief p.19). US Bank did not dispute that the deed of trust contained the relevant

[5] In citing the portion of Edelstein that states "[T]ransfer of either the promissory note or the deed of trust generally transfers both documents," despite being aware that Edelstein specifically exempted when a note and deed of trust are split, which is the argument they are arguing against here, US Bank unethically, knowingly, misstates the holding of that case.

MERS language, or that the note and deed of trust were split as a result. As *Edelstein* is clear that once the note and deed of trust are split, transfer of one does not establish transfer of the other, and the assignment of the deed of trust can not evidence a transfer of the note, only of the deed of trust. Further, US Bank also failed to address the fact that even if the assignment of deed of trust did transfer the note, the transfer would not satisfy NRS 104.3309, because it shows a transfer from MERS, and there is no evidence of MERS ever having the right to enforce the note, and thus they are outside the chain of title.

Thus neither the deed of trust, nor its assignment are capable of evidencing a transfer of the note in this case.

2. A Lost Note Affidavit is Only Evidence of the Things That It Testifies to.

US Bank makes the novel argument that "the Affidavit of Lost Note effectively replaced the Note." (Answering Brief p.20). This assertion is made with no citation of authority or explanation. A lost note affidavit is not a magic note replacement; it is simply an affidavit that provides evidence of its contents, like any other affidavit.

In its brief, US Bank admits that the affidavit was made before any alleged transfer to US Bank (Answering Brief p. 18), which means that it would be impossible for the affidavit to establish any element of proving transfer of the note, or its interest, to US Bank, since any such alleged transfer could not have happened yet. US Bank

also does not dispute that the affidavit does not even allege that the party making the affidavit ever owned, possessed, or had the right to enforce the note before it was lost. (Appendix p.78). The affidavit literally establishes no relevant fact other than that the note has been lost. Despite the name, losing the note is not the essential element of proof for a lost note affidavit. The relevant issue is providing evidence of ownership or transfer, as required by the lost note statute. There is no argument to explain how this could possibly be accomplished by any language contained in this affidavit.

With literally no evidence of transfer of the note, or of the right to enforce the note, to US Bank, it is impossible for US Bank to have satisfied the burden of proof for their claim, and thus impossible to have satisfied the requirements of NRCP Rule 56 for the grant of summary judgment.

CONCLUSION

It is clear that Jones raised the issue of standing, in the proceedings below, however even if she had not, it is here undisputed that US Bank was required to establish the basic elements of their claim, by evidence, or affidavit, in order to be entitled to a grant of summary judgment. As it is undisputed that the note and deed of trust were split, and clear under Nevada law that once split, transfer of the note and deed of trust must be proved separately, it is thus an undisputable conclusion that the assignment of the deed of trust can not evidence transfer of the note. It is

also undisputed that the lost note affidavit was executed prior to any alleged transfer, and undisputed that it contains no language indicating transfer to or from any party, nor or any party having current or prior possession of the note, nor or any party whatsoever having the right to enforce the note. It is thus also an undisputable conclusion that the lost note affidavit was incapable of evidencing a transfer of the note or its interest to US Bank.

As US Bank has not cited any other basis to justify its standing to enforce the note, and it is clear above that the two items they do claim are incapable of establishing the necessary element, the District Court clearly had no basis to determine that there were no disputes of fact, or that US Bank had established its right to judgment as a matter of law. As there is no possible interpretation by which US Bank met the requirements for summary judgment, the grant of summary judgment must be reversed.

Dated this 26th of July, 2019.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 97 in Times New Roman 14pt type.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,163 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of July 2019.

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VERIFICATION

I, ROBERT KERN, declare as follows:

1. I am an attorney at Kern Law LTD. and represent Appellant, Monica Jones, in this matter.
2. I verify that I have read this Appellant's Reply Brief, and that it is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, for those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct

Dated this 26th day of July, 2019.

/s/ Robert Kern
Robert Kern Esq.

CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2019 a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

I further certify that the following participants in this case are registered with the Nevada Supreme Court of Nevada's E-Filing System, and that the service of the Reply Brief has been accomplished to the following individuals via electronic service.

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I further certify that the following party was served with a copy of the forgoing Reply Brief by U.S. Mail with postage fully prepaid.

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