

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR., and)
VICENTA LINCICOME,)

Petitioners,)

vs.)

THE THIRD JUDICIAL DISTRICT)
COURT OF NEVADA, IN AND FOR)
COUNTY OF LYON; HONORABLE)
LEON A. ABERASTURI, DISTRICT)
COURT JUDGE,)

Respondent,)

and)

SABLES, LLC, a Nevada limited liability)
company; FAY SERVICING, LLC, a)
Delaware limited liability company and)
subsidiary of Fay Financial, LLC; PROF-)
2013-M4 LEGAL TITLE TRUST by U.S.)
BANK, N.A., as Legal Title Trustee;)
BANK OF AMERICA, N.A.)

Real Parties in Interest.)

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Case No. _____

District Court Case No.: 18-CV-
01332

PETITION FOR WRIT OF MANDAMUS

From the Order of the
Third Judicial District Court of the State of Nevada

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and
VICENTA LINCICOME

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PETITION FOR WRIT OF MANDAMUS

I. Relief Sought

This is an original petition for a writ of mandamus challenging the May 28, 2019 Order of the Third Judicial District Court granting a Declaration of Nonmonetary Status and denying Petitioners ALBERT ELLIS LINCICOME, JR., and VICENTA LINCICOME leave to amend their Complaint as to Sables, LLC.

Petitioners request the issuance of a writ of mandamus instructing the Third Judicial District Court to vacate portions of its May 30, 2019 order granting *Sables, LLC's Declaration of Nonmonetary Status* and further vacate provision of its Order denying Petitioners leave to amend their Complaint to allege additional causes of action against Sables, LLC.

II. Routing Statement

This matter is not a matter that is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17. Accordingly, this writ petition should be retained by the Nevada Supreme Court.

III. Issues Presented

1. Whether the District Court committed Reversible Error by Granting *Sables, LLC's Declaration of Nonmonetary Status* over the Petitioners' Objection.

2. Whether the District Court Abused its Discretion in Denying Petitioners Leave to Amend their Complaint and add Additional Claims for Relief against Sables, LLC.

IV. Relevant Facts

On November 7, 2018, in an effort to enjoin the impending foreclosure of their home, on November 7, 2018, Albert Ellis Lincicome, Jr., and Vicenta Lincicome (hereinafter “Lincicomes” or Petitioners”) filed their Complaint seeking injunctive relief, among other claims. Appendix Volume I to Petition for Writ of Mandamus (hereinafter “App. Vol.”), pp.1-125. The Lincicomes also filed their *Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction* (hereinafter “TRO Application”) along with their *Notice of Lis Pendens* which was also recorded with the Lyon County Recorder as Document No. 588549. App. Vol. I-II, pp.130-255; App. Vol. I, pp.126-127.

On November 8, 2018, the District Court entered its order granting the Lincicomes’ Application for Temporary Restraining Order and set a hearing on the TRO Application for November 20, 2018. App. Vol. II, pp.256-258.

At the hearing on November 20, 2018, counsel in attendance stipulated to the admission of the evidence presented in the TRO Application and the Response to the TRO Application. App. Vol. II, p.309. Additionally, rather than to have testimony presented, counsel in attendance to the hearing stipulated that

Lincicomes' respective Affidavits filed with the TRO Application may be admitted as testimonial evidence before the court. *Id.*

The District Court granted the Lincicomes' Application for a preliminary injunction, but required that bond be posted in the amount of \$172,610.67 by December 20, 2018. App. Vol. II, p.313.

Following the hearing, the District Court Clerk entered a Sables' default on December 21, 2018, for failing to file an answer or otherwise appear in the matter. App. Vol. II, pp.300-301.

Thereafter, on December 24, 2018, *Sables, LLC's Declaration of Non-Monetary Status* was filed therein alleging that Sables is a named party "solely in its capacity as trustee conducting non-judicial foreclosure, and not as a result of any wrongful act." App. Vol. II, pp.304-307.

On December 31, 2018, the District Court entered its written order making specific findings of fact and conclusions of law as to its determination that a preliminary injunction should issue. App. Vol. II, pp.308-315.

Even though the December 31, 2018 Order required a bond be posted, the Order specifically provided that "Sables, LLC, is hereby enjoined from selling at public auction the real property located at 70 Riverside Drive, Dayton, Lyon County, Nevada, and identified in the Notice of Trustee's Sale recorded with the

Office of the Lyon County Recorder as Document No. 587470, until further order of the Court.” App. Vol. II, p.313.

The Lincicomes were unable to post the requisite bond, and on January 4, 2019, six days after the District Court entered its Order, Sables sold the Lincicomes’ home by foreclosure sale. App. Vol. II, p.430.

On January 9, 2019, the Lincicomes filed their *Objection to Declaration of Non-Monetary Status* (hereinafter “Objection”). App. Vol. II, pp.326-329.

Thereafter, *Sables, LLC’s Motion to Set Aside Default* was filed on January 24, 2019. App. Vol. II, pp.339-348.

The District Court entered an Order on February 11, 2019, setting a hearing on all outstanding motions for April 15, 2019.

On March 4, 2019, the Lincicomes filed *Plaintiffs’ Motion for Leave to File Amended Complaint to Substitute Parties and Add Additional Claims for Relief* (hereinafter “Motion to Amend”). App. Vol. II-III, pp.425-506. The proposed *First Amended Complaint*, attached as Exhibit 13 to the Motion to Amend, named substituted necessary parties and added additional claims for relief including claims against Sables for wrongful foreclosure in violation of NRS 107, slander of title, and declaratory relief. App. Vol. II-III, pp.483-506.

On April 15, 2019, the District Court held a hearing on outstanding motions including *Sables, LLC’s Motion to Set Aside Default* and *Sables, LLC’s*

Declaration of Non-Monetary Status, and the Lincicomes’ Motion to Amend. App. Vol.III, pp.713-717.

On May 30, 2019, the District Court entered its written order concerning matters heard on April 15, 2019. *Id.* The District Court’s May 30, 2019 Order granted *Sables, LLC’s Motion to Set Aside Default* and granted *Sables, LLC’s Declaration of Non-Monetary Status*. *Id.* p.715.

The District Court further stated in its order pertaining to the Lincicomes’ Motion to Amend that “Plaintiffs are GRANTED leave to file another Motion for Leave to File an Amended Complaint, but is not granted leave to amend its claims as to Sables.” *Id.*

Notice of Entry of the District Court’s May 30, 2019 Order was served on June 12, 2019. App. Vol. III. pp. 718-726.

V. Analysis

1. Jurisdiction

A writ of mandamus may be issued where “an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.” *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). Likewise, a writ of mandamus may be issued upon “matters of first impression that may be dispositive in the particular case.” *Humboldt Gen Hosp. v. Sixth Judicial Dist. Court.*, 32 Nev. 544, 547, 376

P.3d 167 (2016)(citing *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013)).

A writ of mandamus, as extraordinary relief, may also be issued where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Smith v. District Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991).

A writ of mandamus may be issued by the Supreme Court “to control an arbitrary or capricious exercise of discretion.” *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 85, 312 P.3d 484, 486 (2013) (quoting *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)).

This petition for mandamus presents a matter of first impression pertaining to what standard a District Court should apply when determining whether to grant a declaration of nonmonetary status pursuant to NRS 107.029.

In this matter, the District Court entered an order granting *Sables, LLC’s Declaration of Non-monetary Status*, which, pursuant to NRS 107.029(5), effectively determined that Sables “is not required to participate any further in the action and is not subject to any money damages or attorney’s fees or costs . . .” NRS 107.029(5).

Additionally, by further ordering that the Lincicomes are “not granted leave to amend its claims as to Sables,” the District Court cut off the Lincicomes’ ability to amend its Complaint as to Sables.

If the District Court’s Order stands, Petitioners will have no opportunity to seek redress for their damages against Sables for its wrongful conduct including its violations of various provisions of NRS 107. Accordingly, Petitioners respectfully request that a writ of mandamus issue instructing the District Court to vacate the portions of its May 30, 2019 Order granting *Sables, LLC’s Declaration of Nonmonetary Status* and prohibiting Petitioners from seeking to amend their Complaint to allege additional causes of action against Sables.

2. The District Court’s Grant of Declaration of Non-Monetary Status was Reversible Error

The District Court committed reversible error by granting *Sables, LLC’s Declaration of Non-Monetary Status* when the allegations contained in Lincicomes’ Complaint and Objection, if presumed true, sufficiently make out claims for relief for violations of provisions of NRS 107.

Statutory interpretation is a question of law that is reviewed de novo. *Otak Nev., LLC*, 129 Nev. 799, 312 P.3d at 498. Statutory provisions are to be given their plain meaning so long as it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007).

“An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law.” *State, Dep't of Public Safety v. Coley*, 132 Nev. Adv. Op. 13, 368 P.3d 758, 760 (2016)(*internal quotations omitted*).

Trustees under deeds of trust are subject to the requirements, duties, and limitations set forth in NRS 107.028. Specifically relevant in this matter is the duty of a trustee to “act impartially and in good faith with respect to the deed of trust.” NRS 107.028(6).

Because a trustee is to be an independent and disinterested actor in concerning the exercise of the power of sale in a foreclosure matter, the Nevada legislature established a framework to relieve trustees from unnecessarily participating in foreclosure litigation through the “declaration of nonmonetary status” procedure established in NRS 107.029. *See* NRS 107.028; NRS 107.029.

NRS 107.029 sets forth the procedure for establishing a declaration of nonmonetary status provides as follows in pertinent part:

1. If the trustee under a deed of trust is named in an action in which the deed of trust is the subject and the trustee has a reasonable belief that he or she has been named in the action solely in his or her capacity as trustee and not as a result of any wrongful act or omission made in the performance of his or her duties as trustee, the trustee may, at any time, file a declaration of nonmonetary status. The declaration must be served on the parties in the

manner prescribed by Rule 5 of the Nevada Rules of Civil Procedure and must include:

(a) The status of the trustee as trustee under the deed of trust; and

(b) The basis for the trustee's reasonable belief that he or she has been named as a defendant in the action solely in his or her capacity as trustee and not as a result of any wrongful act or omission made in the performance of his or her duties as trustee.

...

3. Any party that has appeared in an action described in subsection 1 has 15 days after the date of service of the declaration of nonmonetary status to file an objection. Any objection filed pursuant to this subsection must set forth the factual basis on which the objection is based and must be served on the trustee.

4. If a timely objection is made pursuant to subsection 3, the court shall promptly examine the declaration of nonmonetary status and the objection and shall issue an order as to the validity of the objection. If the court determines the objection is valid, the trustee is required to participate in the action.

NRS 107.029(1)-(4).

A declaration of nonmonetary status is akin to a motion to dismiss for failure to state a claim pursuant to NRCP 12(b)(5), inasmuch as the defendant trustee is asking the court to determine whether sufficient factual allegations exist of a “wrongful act or omission made in the performance of [the trustee’s] duties” for the plaintiff to make out a claim for relief. *See* NRS 107.029(1)(b); NRS 12(b)(5).

The Nevada Supreme Court reviews orders granting a motion to dismiss under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *see also Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014).

In consideration of a decision to dismiss claims under NRCP 12(b)(5), all alleged facts are presumed true with all inferences drawn in favor of the complaint. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Under NRCP 12(b)(5), a decision to dismiss a complaint is appropriate "only where it appears beyond a doubt" that the plaintiff could not prove sufficient facts to establish that the plaintiff is entitled to the relief sought. *Id.* at 228, 181 P.3d at 672.

Under NRS 107.029, in light of NRCP 12(b)(5), once a timely objection to a declaration of nonmonetary status is received, the District Court is simply tasked with determining the "validity of the objection," or, in other words, whether the Plaintiff's claims are based upon sufficient factual allegations of wrongful act or omission to support plaintiff's claim for relief. *See id; NRCP 12(b)(5)*.

In this matter, Sables filed its *Declaration of Non-Monetary Status* on December 24, 2018, three days after the District Court Clerk had entered its default. App. Vol. II, pp. 304-307, pp.300-301. In its *Declaration of Non-Monetary Status*, counsel for Sables stated:

. . . it is my reasonable belief that Sables, LLC was named solely in its capacity as trustee conducting non-judicial foreclosure, and not as a result of any wrongful act or omission made on the performance of Sables duties as trustee under the deed of trust.

App. Vol. II, p.305.

The Lincicomes filed their *Objection to Declaration of Non-Monetary Status* (hereinafter “Objection”) on January 9, 2019. App. Vol. II, pp. 326-329. In their Objection, the Lincicomes asserted that Sables is liable for violations of the Homeowner’s Bill of Rights by recording the notice of default with an affidavit that did not comply with NRS 107.510(1). App. Vol. II, p.327.

At the conclusion of their Objection, the Lincicomes pointed out that the District Court Clerk’s entry of Sables’ default had rendered Sables’ *Declaration of Non-Monetary Status* moot. App. Vol., p.328.

On January 28, 2019, even though not provided for under NRS 107.029, Sables filed a response to the Lincicomes’ Objection. *See* NRS 107.029; App. Vol. II, pp.334-338. In Sables’ response, it takes issue with Lincicomes’ assertion of liability and argues that the Lincicomes have not made any specific allegations which would constitute a “wrongful act or omission” under Nevada law.

Sables ignored a discussion of its duties that exist under NRS 107.028(6) once it was given notice of errors and inaccuracies. NRS 107.028(6) provides as follows in pertinent part:

6. . . . In performing acts required by NRS 107.080, the trustee incurs no liability for any good faith error resulting from reliance on information provided by the beneficiary regarding the nature and the amount of the default under the obligation secured by the deed of trust if the trustee corrects the good faith error not later than 20 days after discovering the error.

NRS 107.028(6).

In this matter, when Sables filed its response to the Lincicomes' Objection, it had already foreclosed on the Lincicomes' residence. App. Vol. II, p.430. As such, Sables' response should have disclosed to the District Court not only that the foreclosure had occurred, but also what steps it had taken as an "independent and impartial" trustee in good faith to verify that it had authority to foreclose upon the Lincicomes' home in light of the fact that it had been put on notice, as of November 7, 2018, of inaccuracies contained in the notice of default set forth in the Complaint and in the TRO Application. App. Vol. I, pp.1-125; App. Vol. I-II, pp.130-255.

However, of even greater consequence is the fact that Sables was put on notice that the Lincicomes had alleged that non-payment of the mortgage payment occurred not because of any act of the Lincicomes, but as a result of prior beneficiary's breach of the 2007 Deed of Trust, which breach occurred in October of 2009 when Bank of America rejected the Lincicomes' payment contrary to the terms of the July 2009 Loan Modification Agreement. App. Vol. I., pp.12-13.

In this regard, Bank of America's rejection of payment and breach of the 2009 Loan Modification Agreement terminated the Lincicomes' duty to perform until Bank of America cured its failure to perform, which has never occurred. *See Cain v. Price*, 134 Nev. Adv. Op. 26, 415 P.3d 25 (2018)(*holding* that at a material breach of one party's promise discharges the non-breaching party's duty to perform)(*citing* Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981)).

NRS 107.028(7) sets forth the damages that may be awarded upon a trustee's failure to comply with any portion of NRS 107.

7. If, in an action brought by a grantor, a person who holds title of record or a beneficiary in the district court in and for the county in which the real property is located, the court finds that the trustee did not comply with this section, any other provision of this chapter or any applicable provision of chapter 106 or 205 of NRS, the court must award to the grantor, the person who holds title of record or the beneficiary:

(a) Damages of \$5,000 or treble the amount of actual damages, whichever is greater;

(b) An injunction enjoining the exercise of the power of sale until the beneficiary, the successor in interest of the beneficiary or the trustee complies with the requirements of subsections 2, 3 and 4; and

(c) Reasonable attorney's fees and costs. . .

NRS 107.028(7).

Additionally, NRS 107.080(8) provides for damages where the trustee exercises the Power of Sale without authority. See NRS 107.080(8). NRS 107.080(8) provides as follows in pertinent part:

If, in an action brought by the grantor, . . . the district court . . . finds that the beneficiary, the successor in interest of the beneficiary or the trustee did not comply with any requirement of subsection 2, 3 or 4, the court must award to the grantor or the person who holds title of record:

(a) Damages of \$5,000 or treble the amount of actual damages, whichever is greater;

(b) An injunction enjoining the exercise of the power of sale until the beneficiary, the successor in interest of the beneficiary or the trustee complies with the requirements of subsections 2, 3 and 4; and

(c) Reasonable attorney's fees and costs, unless the court finds good cause for a different award. The remedy provided in this subsection is in addition to the remedy provided in subsection 5.

NRS 107.080(8).

Thus, as set forth above under NRS 107.028(6)-(7) and NRS 107.080(8), so long as the trial court finds Sables failed to correct a “good faith error relating to the nature and amount of the default” under NRS 107.080 within 20 days of being informed of the same, or otherwise failed to comply with subsections 2, 3 and 4, or otherwise failed to comply with “any other provision of this chapter” (NRS 107), the Lincicomes will be entitled to the greater of \$5,000 or treble the amount of actual damages.

NRS 107.080(1) and NRS 107.080(2) govern the trustee's power of sale. NRS 107.080(1) requires that the power of sale only be used by the Trustee upon a breach of the obligation for which the property serves as security. NRS 107.080(1); NRS 107.080(2).

NRS 107.080(2) provides that the "power of sale must not be exercised, however, until . . . (a) . . . (2) . . . the person who holds the title of record . . . has . . . failed to make good the deficiency in performance or payment." NRS 107.080(2).

The Lincicomes' Complaint in this matter put Sables on notice that the deficiency in performance resulting in nonpayment of the mortgage was caused by Bank of America and not the Lincicomes. App. Vol. I, pp.12-13. Additionally, the Complaint put Sables on notice of inaccuracies involving the "nature of the amount in default." App. Vol. I, pp.4-13

In paragraphs 18-19 of the Lincicomes' Complaint, it is alleged that Vicenta modified the 2007 Deed of Trust terms on July 31, 2009, by executing a Loan Modification Agreement. App. Vol. I, p.4.

In paragraph 21, it is alleged that Vicenta made her first payment to Bank of America on September 1, 2009. *Id.*

In paragraph 23, it is alleged that Bank of America refused to accept Vicenta's second payment on the modified loan on October 1, 2009, because Bank

of America could not find the existence of the LMA in its computer system. App. Vol. I, p.5.

In paragraphs 32-34, it is alleged that Bank of America found the 2009 Loan Modification Agreement and recorded the same with the office of the Lyon County Recorder on May 4, 2011, as Document No. 475808. App. Vol. I, p.6.

In paragraphs 57-59, it is alleged that on November 3, 2017, Sables recorded a *Notice of Breach and Default and of Election to Sell the Real Property under Deed of Trust* (hereinafter “NOD”) that was inaccurate. App. Vol. I, p.9.

In paragraph 70, the Lincicomes allege that Sables, among other defendants, violated the Homeowner’s Bill of Rights. App. Vol. I, p.10.

In paragraphs 73-77, the Lincicomes allege that the NOD was filed with an Affidavit of the Servicer that incorrectly reports the payment needed to cure the deficiency in payment, the amount in default, and the amount of accrued interest and late charges. App. Vol. I, p.11.

In paragraph 92, it is alleged that because Bank of America failed “to process the [2009 Loan Modification Agreement (referred to as “LMA”)], and [the Lincicomes’] payments according to the LMA’s terms, Bank of America materially breached the LMA.” App. Vol. I, p.13.

Additionally, Sables was put on notice by the allegations contained in the Lincicomes’ TRO Application, wherein the Lincicomes directly assert that “US

Bank and Sables have reported the incorrect balance, interest rate, and payment information in prior statements and in the recorded NOD.” App. Vol. I, p.141.

Furthermore, the District Court’s December 31, 2018 Order after the hearing upon the Lincicomes’ TRO Application also supports the conclusion that Sables has violated NRS 107.028, NRS 107.080(1) and NRS 107.080(2)(a)(2) as well as violated provision of the Homeowner’s Bill of Rights. App. Vol. II, pp.309-312.

In the December 31, 2018 Order, the District Court found:

...

2. That on or about July 11, 2009, Bank of America offered Vicenta a Loan Modification Agreement (hereinafter “LMA”) which modified and extended the maturity date of the [2007 Deed of Trust (referred to as “2007 DOT”)] from June 1, 2037, to August 1, 2049 and further modified the interest rate applicable to the 2007 DOT by reducing the same from 6.875% to 4.875%;
3. That the LMA provided that on September 1, 2014, the interest rate applicable to the 2007 DOT would increase from 4.875% to 5.375%;
4. That the LMA capitalized existing arrears of September 1, 2009, and modified the principal balance owed under the 2007 DOT from \$381,150 to \$417,196.58;
5. That on July 31, 2009, Vicenta accepted Bank of America’s offer to modify the 2007 DOT, and executed the LMA and sent the document to Bank of America;

6. That on September 1, 2009, the Lincicomes made a payment of \$2,272.62 to Bank of America upon the 2007 DOT as modified by the LMA;

7. That on September 1, 2009, Bank of America accepted payment, but was unable to find the modified loan in its system;

8. That on October 1, 2009, Bank of America refused payment from the Lincicomes, because it did not have a record that the 2007 DOT had been modified by the LMA;

9. That the Lincicomes' requests to make payment on the 2007 DOT as modified by the LMA between October 1, 2009 and December 2011, were refused by Bank of America;

...

12. That on May 4, 2011, Bank of America recorded a fully executed copy of the July 11, 2009 LMA with the office of the Lyon County Recorder, as Document No. 475808;

13. That the Lincicomes were not made aware of the execution and recording of the LMA until 2017;

...

21. That on November 3, 2017, Sables, LLC, as then acting Trustee under the 2007 DOT, recorded its Notice of Breach and Default and of Election to Sell the Real Property under Deed of Trust (hereinafter "NOD") with the Lyon County Recorder as Document No. 572258;

22. That the NOD provides that the "subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 . . . on 5/4/2011;"

23. That the NOD provides that all monthly installments from “9/1/2008” forward are due, instead of 9/1/2009 as required by the LMA;

24. That the NOD provides that the principal balance owed is \$381,150.00, instead of \$417,196.58 as provided in the LMA;

25. That on October 12, 2018, Defendant Sables, LLC, recorded its Notice of Trustee’s Sale with the Lyon County Recorder as Document No. 587470, providing that the Property would be sold by public auction on November 9, 2018, at 11:00 AM, at the Lyon County Court House on 31 S. Main Street, Yerington, Nevada 89447;

26. That under the circumstances the foreclosure of the Lincicomes’ residence would cause them irreparable injury;

27. The LMA appears to be a valid modification of the 2007 DOT;

28. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the total balance owed Vicenta Lincicome under the 2007 DOT as modified by the LMA;

29. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the principal obligation owed by Vicenta Lincicome under the 2007 DOT as modified under the LMA;

30. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the date through which 2007 DOT as modified under LMA is paid; and

31. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the current interest rate effective under the 2007 DOT as modified under the LMA.

App. Vol. II, pp.309-312.

The District Court also entered the following conclusions of law that also support the conclusion that Sables' and the other defendants' conduct violated Homeowner's Bill of Rights:

1. The Homeowners Bill of Rights codified under NRS 107.400 through NRS 107.560 is applicable to this foreclosure matter;
2. That Plaintiffs established that irreparable injury would result if Defendant Sables, LLC, was permitted to exercise the power of sale and foreclose on the Plaintiffs' real property located at 70 Riverside Drive, Dayton, Lyon County, Nevada, Assessor Parcel Number 29-401-17;
3. That Plaintiffs have established that they will succeed on their claim that Defendants have violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure; and
4. That Plaintiffs have established to the Court's satisfaction that they were likely to succeed on the merits of their claims pertaining to material violations of the Homeowner's Bill of Rights pursuant to NRS 107.400 through NRS 107.560.

App. Vol. II, pp.312-313.

While the District Court's findings and conclusions in its December 31, 2018 Order may not be final determinations, the findings were not reversed or contradicted by any of its findings made at the April 15, 2019 hearing or in the District Court's May 30, 2019 Order. *See* App. Vol. III, pp.713-717.

In addition to Sables' exercise of the power of sale, the Lincicomes' Complaint, *Objection to Declaration of Non-Monetary Status*, the District Court's findings and conclusions of law contained within its December 31, 2018 Order, and the record in this matter establish that sufficient allegations have been made to subject Sables to claims of wrongful conduct such as the claims made in the Lincicomes' proposed amended complaint attached to their Motion to Amend.

Accordingly, under the circumstances, the District Court committed reversible error in granting Sables' *Declaration of Non-Monetary Status*. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858 P.2d 1259 (1993)(*holding that dismissal upon NRCP 12(b)(5) is reversible error where sufficient facts are alleged to constitute a claim for relief*)).

3. The District Court's Prohibition Against Adding Additional Claims Against Sables was an Abuse of Discretion.

The District Court abused its discretion in prohibiting the Lincicomes from seeking to amend their Complaint to include additional claims for relief against Sables.

NRCP 15(d) permits a party to file an amended pleading to be filed upon leave of Court. NRCP 15(d). NRCP 15(d) provides that a court may permit a party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. *See id.*

Pursuant to NRCP 15(a), leave to amend pleadings "shall be freely given when justice so requires." *Id.*

"In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant - the leave sought should, as the rules require, be 'freely given.'" *Forman v. Davis*, 371 U.S. 178, 182 (1962).

A district court's denial of a motion to amend a complaint is reviewed by the Nevada Supreme Court for abuse of discretion. *Holcomb Condo Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013).

In this matter, the Lincicomes filed their *Motion for Leave to File Amended Complaint to Substitute Parties and Add Additional Claims for Relief* on March 24, 2019. In their Motion to Amend, the Lincicomes seek to substitute in additional parties and to assert additional claims of relief pertaining to Sables' January 4, 2019 foreclosure of the Lincicomes' residence. App. Vol. II-III, pp.425-506.

In the proposed First Amended Complaint attached as Exhibit 12 to the Motion to Amend, the Lincicomes assert additional claims for relief against Sables for Wrongful Foreclosure, Slander of Title and Declaratory Relief. App. Vol. II-III, pp.483-506.

No party filed an opposition to the Lincicomes' Motion to Amend.

In the District Court's May 30, 2019 Order it provides that "Plaintiffs are GRANTED leave to file another Motion for Leave to File an Amended Complaint, but is not granted leave to amend its claims as to Sables." App. Vol. III, p.715.

In so ordering, the District Court relied solely upon its determination to grant *Sables, LLC's Declaration of Non-Monetary Status* as the basis for prohibiting the Lincicomes from adding additional claims as to Sables, which runs afoul of the provisions of NRS 107.029(6) permitting amendments upon newly discovered evidence. *See* NRS 107.029(6).

NRS 107.029(6) provides as follows:

6. If, at any time during the proceedings under this section, the parties to the action acquire newly discovered evidence indicating the trustee should be made a participant in the action as a result of the trustee's performance of his or her duties as trustee, the parties may file a motion to amend the pleadings pursuant to Rule 15 of the Nevada Rules of Civil Procedure.

Id.

Accordingly, the statutory framework set forth in NRS 107.029 established to protect trustee from unnecessary litigation, will not serve to protect a trustee where it is discovered that the trustee should participate based upon the trustee's performance. Here, Sables' conduct in exercising the power of sale without investigating whether it has the right to exercise the power of sale in light of the Lincicomes' allegations of Bank of America's breach or not correcting the verifiable inaccuracies in its notice of default, have established actionable claims of relief under NRS 107.028(7) and NRS 107.080(8) for wrongful foreclosure.

Accordingly, under the circumstances, justice requires that the Lincicomes be given the opportunity not only to set forth allegations to make out claims of relief against Sables in their Complaint, but also to require Sables' participation in the matter and be subject to any judgment that may be rendered against it. NRS 107.029 was not established to shield trustees from all liability, especially where a trustee has acted with disregard to statements and notices given by the grantor of the deed of trust, as has occurred in his case.

The District Court provided no other basis for its determination and made no findings of fact or conclusions of law that support a determination that the Lincicomes should be prohibited from alleging additional claims against Sables.

Even if the District Court's grant of *Sables, LLC's Declaration of Non-Monetary Status* was appropriate the Court would have abused its discretion by

denying the Lincicomes leave to add additional actionable claims against Sables concerning its recent conduct, without some other basis for doing so. *See* NRS 107.029(6).

Therefore, because no basis for the denial of the Lincicomes request for leave to amend their complaint has been given other than the District Court's determination that *Sables, LLC's Declaration of Non-Monetary Status* be granted, it must be concluded under the circumstances that the District Court abused its discretion in denying Lincicomes leave to amend their Complaint to assert additional claims against Sables.

V. Conclusion

Sables' performance of its duties in this matter, after being put on notice that it may not have the right under Nevada law to exercise the power of sale, by way of the Lincicomes' Complaint, TRO Application, and the findings and conclusions set forth in the District Court's December 31, 2018 Order, should be found to warrant its continued participation in this matter.

Furthermore, the Lincicomes have alleged sufficient facts that, if presumed true, would entitle the Lincicomes to the recovery of damages from Sables in this matter pursuant to NRS 107.028(7) and NRS 107.080(8).

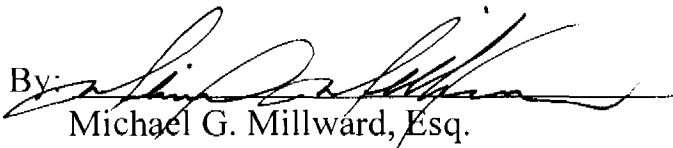
Under the circumstances, it should be concluded that the Third Judicial District Court committed reversible error in granting *Sales, LLC's Declaration of*

Non-Monetary Status. It should be further concluded that the Third Judicial District Court abused its discretion by denying the Lincicomes leave to amend their Complaint to assert additional claims against Sables.

Therefore, Petitioners respectfully request that a Writ of Mandamus be issued directing the Third Judicial District Court to vacate portions of its May 30, 2019 order granting *Sables, LLC's Declaration of Nonmonetary Status* and denying Petitioners leave to amend their Complaint as to claims pertaining to Sables.

Dated this 11th day of July, 2019.

MILLWARD LAW, LTD


By: 
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1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Petitioners

VERIFICATION OF ALBERT ELLIS LINCICOME, JR.


STATE OF NEVADA)
)ss.
COUNTY OF DOUGLAS)

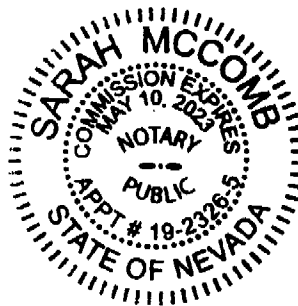
ALBERT ELLIS LINCICOME, JR., being first duly sworn under penalty of perjury, deposes and states:

That I am the Petitioner in the above-entitled action; that I have read the foregoing **PETITION FOR WRIT OF MANDAMUS** and know the contents thereof; that the same is true of my own knowledge, except as to those matters therein contained stated upon information and belief, and as to those matters, I believe them to be true.


Albert Ellis Lincicome, Jr.

SUBSCRIBED and SWORN to before
me this 11th day of July, 2019.


NOTARY PUBLIC in and for said
COUNTY AND STATE

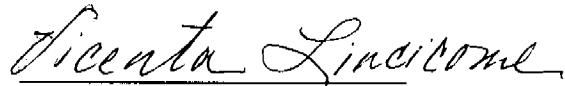


VERIFICATION OF VICENTA LINCICOME

STATE OF NEVADA)
)ss.
COUNTY OF DOUGLAS)


VICENTA LINCICOME, being first duly sworn under penalty of perjury,
deposes and states:

That I am the Petitioner in the above-entitled action; that I have read the foregoing **PETITION FOR WRIT OF MANDAMUS** and know the contents thereof; that the same is true of my own knowledge, except as to those matters therein contained stated upon information and belief, and as to those matters, I believe them to be true.

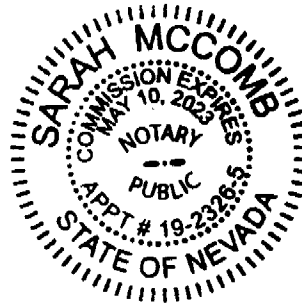


Vicenta Lincicome

SUBSCRIBED and SWORN to before
Me this 11th day of July, 2019.




NOTARY PUBLIC in and for said
COUNTY AND STATE



CERTIFICATE OF COMPLIANCE

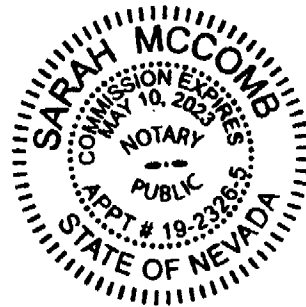
I, Michael G. Millward, Esq., hereby certify that this petition follows the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This petition has been prepared and proportionally spaced using Microsoft Word 2010 in Times New Roman, 14 point and with 1 inch margins.

I further hereby certify that I have read this petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed of any improper purpose. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.


Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before
Me this 11th day of July, 2019.


NOTARY PUBLIC in and for said
COUNTY AND STATE



NRAP 26.1 DISCLOSURE

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

Millward Law, LTD is not owned by any parent corporation nor does any publically held company own 10% or more of an interest in Millward Law, LTD. In addition, the undersigned is the only lawyer to have appeared in this matter for the Lincicomes.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 11th day of July, 2019.

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Sarah McComb, hereby certify that I am an employee of Millward Law Ltd., and that on the 11th day of July, 2019, I deposited for delivery a true and correct copy of the **PETITION FOR WRIT OF MANDAMUS** for service by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in Minden, Nevada, on said date, following ordinary business practices to the following:

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