

IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE
ASSOCIATION; AND GRANDBRIDGE
REAL ESTATE CAPITAL, LLC,

Appellants,

vs.

WESTLAND LIBERTY VILLAGE, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; AND WESTLAND
VILLAGE SQUARE, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Respondents.

Supreme Court No. 82174

Electronically Filed
Eighth Judicial District Court
Oct 13, 2021 04:22 p.m.
Case No. A-20-81941-1
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Kerry Earley, District Judge

APPELLANT'S REPLY BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in Nevada Rule of Appellate Procedure (“NRAP”) 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Appellant Grandbridge Real Estate Capital, LLC (“Grandbridge”) is a wholly owned subsidiary of Truist Bank.

Grandbridge had not yet made an appearance in the proceedings below at the time that the injunction order that is the subject of this appeal was entered. In the subsequent proceedings below, Grandbridge was represented by Joseph G. Went, Esq., Lars K. Evensen, Esq., and Sydney R. Gambee, Esq., and the law firm of Holland & Hart LLP.

DATED this 13th day of October 2021.

/s/ Joseph G. Went, Esq. _____
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I. STATEMENT OF THE CASE

Grandbridge relies upon its Statement of the Case in its Opening Brief. Grandbridge submits that the Statement of the Case offered by Respondents is imprecise, incomplete, and inaccurate, in that the record is mischaracterized, and the district court's ruling is rephrased.

II. STATEMENT OF FACTS

Grandbridge relies upon its Statement of Facts in its Opening Brief. As with the Statement of the Case, the version offered by Westland is not helpful to the examination of the case on its merits. In fact, Westland mischaracterizes the record and case law, which could have a distorting effect as this appeal is fact oriented.

In a desperate attempt to link Grandbridge to Fannie Mae, Westland's Answering Brief asserts that the district court made a "fact-sensitive inquiry" into whether Grandbridge was Fannie Mae's agent and whether Grandbridge and Fannie Mae were acting in concert. (AB¹ at 43.) This is untrue. Westland attempts to use the unsubstantiated statements of "fact" it unilaterally incorporated into its proposed preliminary injunction order as though the district court actually made such findings. It is unquestionable that Westland's proposed order, which was unfortunately entered by the district court, significantly expanded the scope of the district court's ruling announced at the October 13, 2020 hearing. In fact, the hearing transcript

¹ "AB" refers to Respondent's Answering Brief.

confirms that the district court limited its ruling to Fannie Mae. (Oct. 13, 2020 Hearing Trans., dated Oct. 19, 2020, at 51:11-13) (“I’m stopping Fannie Mae from going forward with anything based on that Notice of Default.”) There was no mention of Grandbridge whatsoever during this hearing. *Id.* The district court did not conduct the required “fact-sensitive inquiry.” (OB² at 23; AB at 43.)

There are several similar instances in which the “facts” set out in Westland’s Answering Brief are not supported by the record cited and the district court’s ruling. It is submitted that the Statement of Facts in the Opening Brief should be relied upon by this Court.

III. ARGUMENT

Westland’s four-page response to Grandbridge’s Opening Brief does not dispute that NRCP 65(a)(1) requires notice. Westland also evades the dispute that Grandbridge was deprived of its due process rights by arguing that Grandbridge is receiving due process in this Court. Instead, in seeking to circumvent the mandatory notice requirement, Westland argues that notice to Grandbridge was not required under the “significant exception” to NRCP 64(a)(1) because Grandbridge is Fannie Mae’s agent, or alternatively, because Grandbridge participated in the alleged misconduct in concert with Fannie Mae. Westland’s assertions are unsupported by the record. The “significant exception” set forth in NRCP 65(d)(2) does not apply to

² “OB” refers to Appellant’s Opening Brief.

Grandbridge as it is directed to nonparties, and Grandbridge is a named party to this litigation. There is no evidence that Grandbridge is Fannie Mae's agent or that it acted in concert with Fannie Mae.

The matter is simple, Westland did not provide Grandbridge with the required notice set forth in NRCP 65(a)(1). Grandbridge was effectively deprived of its due process rights, and this Court should therefore find that the injunction against Grandbridge was wrongfully entered.

Westland does not dispute that the preliminary injunction includes mandatory provisions directed to Grandbridge. Westland also does not dispute that these mandatory provisions exceed the scope of relief sought in the Countermotion. Therefore, as an alternative basis for not subjecting Grandbridge to the injunction due to lack of notice, this Court should find that the district court erred in entering the Order and should modify the Order to remove the mandatory provisions directed to Grandbridge.

A. The District Court Erred in Entering an Injunction Against Grandbridge Without Evidence of Service, Notice, or an Opportunity to be Heard.

Westland seeks to avoid the mandatory notice required under NRCP 65(a)(1) by contending that pursuant to NRCP 65(d)(2)(B), Grandbridge is bound by the injunction because it is Fannie Mae's agent with respect to the loans. Alternatively, Westland argues that pursuant to NRCP 65(d)(2)(C), Grandbridge is bound by the

injunction because it participated in the alleged misconduct in concert with Fannie Mae. However, neither NRCP 65(d)(2)(B) nor (C) is applicable to this case.

NRCP 65(a)(1) provides that “[t]he court may issue a preliminary injunction **only on notice to the adverse party.**” NRCP 65(a)(1) (emphasis added). To bypass the notice requirement, NRCP 65(d)(2) must apply. NRCP 65(d)(2) follows:

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties’ officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

NRCP 65(d)(2)(A)-(C).

NRCP 65(d)(2)(A) itself requires that the parties receive actual notice. Westland does not contest this, nor does Westland contest that NRCP 65(a)(1) requires notice to adverse parties, like Grandbridge. As it is undisputed that Grandbridge did not receive actual notice, Westland attempts to employ NRCP 65(d)(2)(B) and (C) in order to bind Grandbridge to the injunction. As discussed in further detail below, the exceptions in NRCP 65(d)(2)(B) and (C) do not apply to this case because they only apply to nonparties. Even if the applicability of these provisions is not limited to nonparties, Grandbridge is not an agent of Fannie Mae

and did not act in concert or participation with Fannie Mae. Thus, the lack of notice invalidates the injunction as to Grandbridge.

- 1. NRCP 65(d)(2)(B) and (C) only apply to nonparties, and therefore, do not excuse lack of notice to Grandbridge as it is a party to this litigation.**

Westland contends that Grandbridge's statement that it is not the agent of Fannie Mae "def[ies] reality" (AB 41) and "is simply not true" (AB 42). This is indeed the reality. Although Westland contends throughout its brief that Grandbridge is Fannie Mae's agent, Westland cites to no evidence from the record to support this assertion. This is in direct contravention of NRAP 28(e)(1), which requires that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found." It is no surprise that Westland cannot support its contention that Grandbridge is Fannie Mae's agent because not only was Grandbridge not once mentioned at the preliminary injunction hearing, but had Grandbridge been afforded its due process rights, Grandbridge would have offered evidence to the contrary.

Westland makes the nonsensical argument that Grandbridge was not deprived of its due process rights at the preliminary injunction hearing because Grandbridge is now given an opportunity to be heard before this Court. (AB 43.) Westland's unsupported assertions are based on an incomplete record as a result of Grandbridge

not receiving notice and the opportunity to be heard, which is where the due process violation lies. Westland attempts to reap the benefits of this incomplete record by now presenting unsupported arguments to this Court that Grandbridge is rightfully bound by the Order according to NRCP 65(d)(2).

This Court in *Hospitality Int’l Grp. v. Gratitude Grp., LLC* applied NRCP 65(d)(2) and focused on the interrelationship between the originally served defendants and later-served defendants in order to find that the later-served defendants had notice of the proceedings. 132 Nev. 980, 387 P.3d 208 (2016). By “interrelationship” this Court was referring to the relationships provided for in NRCP 65(d)(2)(B) and (C). Respectfully, Grandbridge contends that NRCP 65(d)(2)(B) and (C) are only applicable to non-parties. Westland’s own case law supports this. (AB at 44) (citing *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) (finding that NRCP 65(d)(2) makes it fair to bind a nonparty.) NRCP 65(d)(2) does not make it fair to bind a named party while ignoring the notice requirement in NRCP 65(a)(1).³

³ Westland argues that when Grandbridge made its appearance on October 19, 2020, Grandbridge had the opportunity to seek clarification or modification of the Order but never did, and therefore, it is fair to bind Grandbridge to the Order. (AB at 42 n.16.) In Westland’s own words, Grandbridge’s appearance was “more than a month before the district court entered the written preliminary injunction order.” *Id.* Hence, there was no order for which Grandbridge could seek clarification or modification. Further, Grandbridge would not have been aware of the scope of the Order as the (continued)

First, NRCP 65(d)(2)(A) explicitly carves out a provision for “the parties,” demonstrating that the parties are to be considered separate from non-parties.

Second, NRCP 65(d)(2)(B) is clear. It applies to the parties’ officers, agents, servants, employees, and attorneys. In other words, non-parties that have an agency or some other relationship to the parties.

Third, NRCP 65(d)(2)(C) operates as a catch-all provision by providing for “other persons.” Namely, persons who do not fall under NRCP 65(d)(2)(A) or (B), but who nonetheless should be bound by an injunction as a result of their participation with the parties or parties’ officers, agents, servants, employees, and attorneys.

This Court, quoting the *Federal Practice and Procedure: Civil* manual, found that “under the federal counterpart to NRCP 65(d), the ‘significant exception’ to the rule requiring in personam jurisdiction over the party enjoined ‘involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or the defendant’s privy in violating the injunction.” *Hospitality*, 132 Nev. at 209 (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil*, § 2956, at 386 (2013) (emphasis added)).

transcript for the October 13, 2020 hearing on the preliminary injunction does not once mention Grandbridge.

Based on the foregoing, an injunction cannot be entered against a nonparty to the action unless NRCP 65(d)(2)(B) or (C) applies. Thus, because Grandbridge is a named party to this matter, NRCP 65(d)(2)(B) and (C) are inapplicable, and Grandbridge should have received actual notice pursuant to NRCP 65(a)(1).

2. Even if NRCP 65(d)(2)(B) and (C) apply to parties, there is no evidence or case law showing that Grandbridge is the agent of or was in “active concert or participation” with Fannie Mae, rendering NRCP 65(d)(2)(B)-(C) inapplicable.

Even if this Court finds that NRCP 65(d)(2)(B) and (C) apply to parties, there is no such “interrelationship” between Fannie Mae and Grandbridge. For example, Westland unwaveringly argues that Grandbridge, as Fannie Mae’s agent, had actual notice pursuant to NRCP 65(d)(2)(B). Westland cites to *Nationstar Mortg. LLC v. SFR Inv. Pool 1, LLC* to support this argument. 133 Nev. 247, 396 P.3d 754 (2017). However, Westland mischaracterizes this case. (AB at 42.) While the loan servicer in *Nationstar* argued that it was a contractually authorized agent of Freddie Mac with standing to assert the Federal Foreclosure Bar, this Court did not determine that a loan servicer is always a contractually authorized agent of Freddie Mac. *Id.* at 249. This Court only determined that a loan servicer owned by a regulated entity has standing to assert the Federal Foreclosure Bar in a quiet title action. *Id.* 247. This Court confirmed that a loan servicer has such standing based on the loan servicer’s rights and obligations established in the servicing agreement. *Id.* at 250.

Westland also cites to *Berezovsky v. Moniz* to support its argument that Grandbridge is Fannie Mae's agent. 869 F.3d 923 (9th Cir. 2017). However, in *Berezovsky*, Freddie Mac's Single-Family Seller/Servicer Guide, which did establish an agency relationship with the loan servicer in *Berezovsky*, is not the same servicing guide Fannie Mae employs. *Id.* at 932.⁴ In fact, Fannie Mae's Servicing Guide provides that **"[t]he servicer services Fannie Mae mortgage loans as an independent contractor and not as an agent, assignee, or representative of Fannie Mae."**⁵ Thus, unlike the loan servicers in *Berezovsky* and *Nationstar*, which

⁴ Westland also cites to *Ditech Fin. LLC v. SFR Invs. Pool 1, LLV*, 793 Fed. Appx. 490, 492 (9th Cir. 2019), where the court found that the loan servicer is Fannie Mae's agent. (AB at 43.) However, without any analysis into the relationship between the loan servicer and Fannie Mae, the court reached this conclusion by citing to *Berezovsky*, indicating that the court relied on the contractual arrangement between Fannie Mae and the loan servicer. *Id.* at 492. Westland cites to this case law in an attempt to show that a loan servicer is always an agent of Fannie Mae. However, this is not a question of law, but rather, a question of fact. Namely, whether the servicing agreement between the parties provides that the loan servicer is Fannie Mae's agent.

⁵ See Fannie Mae, Servicing Guide (Sept. 8, 2021), available at <https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/Part-A-Doing-Business-with-Fannie-Mae/Subpart-A2-Getting-Started-with-Fannie-Mae/Chapter-A2-1-Servicer-Duties-and-Responsibilities/A2-1-01-General-Servicer-Duties-and-Responsibilities/1581707621/A2-1-01-General-Servicer-Duties-and-Responsibilities-09-08-2021.htm>. NRS 47.130 provides the mechanism by which this Court may take judicial notice of the servicing guide. In addition, Nevada courts commonly take judicial notice of website data generated by a governmental entity. See *Nev. Ass'n Servs. Chambers*, No. A-14-697287-C, 2018 Nev. Dist. LEXIS 1450, at *12 n. 3 (D. Nev. Dec. 24, 2018) ("The Guide is publicly available on Freddie Mac's website. The Court takes judicial notice of the Guide.") (citing *Berezovsky*, 869 F.3d at 932, n.9 (taking judicial notice of Freddie Mac's servicing guide)). Here, (continued)

were contractually authorized agents, Fannie Mae's Servicing Guide provides that Grandbridge has no such authority to act as an agent of Fannie Mae.

Unlike the loan servicer in *Berezovsky* that had contractual authorization to act as Freddie Mac's agent, Grandbridge's contract with Fannie Mae sets forth that Grandbridge has no such authority. The Multifamily Selling and Servicing Agreement ("MSSA") between Fannie Mae and Grandbridge explicitly provides that Grandbridge is not Fannie Mae's agent. Specifically, Section 1.5 of the MSSA states as follows:

1.5 Lender as Independent Contractor; Limitation on Delegation. **You function as an independent contractor when you sell and service Mortgage Loans for us, not as our agent or representative.** Although we delegate significant decision-making authority and responsibility to you, you will consult with us whenever matters arise that could materially affect our interests. Nevertheless, any consultations with us will not be a waiver of any requirement in the Program Documents. These requirements cannot be waived except in writing by us.

MSSA, Section 1.5 (emphasis added).⁶

Fannie Mae is a United States government enterprise and a publicly traded company, therefore, not only is Fannie Mae's Servicing Guide publicly available to all of the United States, including Nevada, but it's accuracy cannot be reasonably questioned. Accordingly, this Court may take judicial notice of Fannie Mae's Servicing Guide.

⁶ Westland cites to no evidence in the record that demonstrates that the servicing agreement between Fannie Mae and Grandbridge creates an agency relationship. No such evidence exists.

There is no evidence that Grandbridge acted as Fannie Mae's agent. NRCP 65(d)(2)(B) cannot be used as the "significant exception" to NRCP 65(a)(1), which requires notice.

Turning to NRCP 65(d)(2)(C), Westland contends that Grandbridge would be properly enjoined under this rule because Grandbridge, in concert with Fannie Mae, actively participated in the foreclosure proceedings and bad faith loan servicing against Westland that resulted in the preliminary injunction. (AB at 43.) NRCP 65(d)(2)(C) applies to "other persons" who act in concert or participation with the parties or the parties' officers, agents, servants, employees, and attorneys. Grandbridge is a party to this matter, and therefore does not fall into this catch-all "other persons" category.

Regardless, even if NRCP 65(d)(2)(C) was applicable, there is no evidence to support that Grandbridge aided or abetted Fannie Mae. As mentioned in Grandbridge's Opening Brief, the district court must conduct a "fact-sensitive inquiry" to determine whether Grandbridge can be bound by the injunction's terms because it was acting in concert with Fannie Mae. (OB at 23.) Westland states that "the district court correctly determined that Grandbridge – Fannie Mae's loan servicer and agent – actively participated in the wrongful conduct in concert with Fannie Mae." (AB at 43.) This is yet another unsupported assertion made by Westland as Westland does not cite to the record where the district court made this

determination. This is no surprise as it would be impossible for Westland to point to such district court's findings since the district court, Westland, and Fannie Mae did not mention Grandbridge at the preliminary injunction hearing. *See* Oct. 13, 2020 Hearing Trans., dated Oct. 19, 2020 (Grandbridge is not identified once at this hearing).

Westland further argues that it submitted substantial evidence that Grandbridge acted in concert with Fannie Mae and points to Section V.C – V.E of its Answering Brief. (AB at 7-11.) No such evidence exists. First, Westland asserts that “Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements.” (AB at 7.) Westland does not provide any evidence to support this assertion. Next, Westland cites to pages 9-10 of Grandbridge's Opening Brief to support the proposition that “Fannie Mae based its PCA demand on a temporarily reduced occupancy rate . . . when the loan agreements only allowed a PCA due to physical deterioration of the Properties.” Nowhere in the Opening Brief does Grandbridge state this. To the contrary, the Opening Brief provides that the inspection of the Properties is what made the PCAs necessary in order to determine the extent of the Properties' deterioration. (OB at 8.) Third, Westland states that “Fannie Mae (through Grandbridge) served a Notice of Demand.” (AB at 8.) This is not a finding the district court made during the October 13, 2020 hearing on the preliminary injunction, but rather, an unsubstantiated

statement that Westland put into its proposed order to the district court. It is unquestionable that this proposed order, which was unfortunately entered by the district court, significantly expanded the scope of the district court's ruling announced at the October 13, 2020 hearing. In fact, the hearing transcript confirms that the district court limited its ruling to Fannie Mae. (Oct. 13, 2020 Hearing Trans. dated Oct. 19, 2020 at 51:11-13) ("I'm stopping Fannie Mae from going forward with anything based on that Notice of Default."). There was no mention of Grandbridge whatsoever during this hearing. *Id.* Accordingly, the district court did not conduct the required "fact-sensitive inquiry" as to whether Grandbridge was acting in concert with Fannie Mae. (OB at 23; AB at 43.) Thus, NRCP 65(d)(2)(C) is inapplicable.

Leaning on its mistaken argument that NRCP 65(d)(2)(B) or (C) applies to Grandbridge, Westland does not contest that NRCP 65(a)(1) is mandatory.⁷ Because NRCP 65(d)(2)(B) or (C) does not apply to this case, NRCP 65(a)(1)'s notice

⁷ Westland also sidesteps the issue that entry of the Order against Grandbridge violated Grandbridge's due process rights. The analysis is simple. Because Grandbridge did not receive notice as required by NRCP 65(a)(1), Grandbridge was deprived of its right to notice and a hearing. To the degree that Westland has chosen not to address these points, they should be considered to be conceded, and treated as confessions of error. *See, e.g., Nev. Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984); *Orme v. District Court*, 105 Nev. 712, 782 P.2d 1325 (1989) (failure to respond can be treated as confession of error).

requirement does apply. NRCP 65(a)(1) requires that Westland provide notice to Grandbridge, an adverse party, prior to issuing a preliminary injunction. Because Westland does not contest, and, in fact, agreed, that Grandbridge did not receive proper notice pursuant to NRCP 65(a)(1), the Court can readily determine that the injunction does not bind Grandbridge.

Accordingly, this Court should find that the district court erred in entering an injunction against Grandbridge as Grandbridge did not receive notice or an opportunity to be heard as is required under NRCP 65(a)(1).

B. The District Court Erred by Entering an Injunction Which Contains Provisions That Are Mandatory in Nature and Exceed the Scope of the Relief Sought in Westland’s Countermotion.

1. The Order should be modified to remove the mandatory provisions directed to Grandbridge.

An alternative basis to relieve Grandbridge from the oppressive and mandatory provisions in the Order is that they exceed the scope of the district court’s oral ruling. The district court entered Westland’s proposed order, which includes provisions specifically enjoining Grandbridge. These provisions exceed the district court’s ruling announced at the October 13, 2020 hearing and include specific relief not sought in the Motion or Countermotion. Westland’s Answering Brief does not address the injunction’s provisions as it relates to Grandbridge. Instead, Westland focuses on the provisions directed to Fannie Mae and argues that those provisions are not mandatory, and rather, the injunction maintains the *status quo*.

First, like the other issues Westland failed to address, this issue should be considered as conceded, and treated as a confession of error. *See. e.g., Weber*, 100 Nev. at 123-24, 676 P.2d 1318; *Orme*, 105 Nev. 712, 782 P.2d 1325 (failure to respond can be treated as confession of error). *Second*, with respect to the provisions directed to Grandbridge, the *status quo* is not the focus of the Order. The terms of the Order require Grandbridge “to take action,” which is the crux of a mandatory injunction. (OB at 24.) These extensive mandatory injunction provisions directed to Grandbridge were never briefed, never argued, and were not included in the district court’s ruling. (OB at 13 ¶ 44 (providing several instances in which the Order imposes obligations on Grandbridge)).

Thus, an additional basis exists for this Court to relieve Grandbridge from the Order. This Court should determine that the district court erred by entering the Order which contains provisions that are mandatory in nature and exceed the scope of the relief sought in the Countermotion. Westland chose not to address this issue as it relates to Grandbridge because the provisions are, in fact, mandatory. Therefore, as an alternative basis for not subjecting Grandbridge to the injunction due to lack of notice, this Court should find that the district court erred in entering the Order and should modify the Order to remove the mandatory provisions directed to specific activity required from Grandbridge.

IV. CONCLUSION

Westland has not supported its assertions as is required by NRAP 28(e). Accordingly, the district court erred by entering the Order against Grandbridge without affording Grandbridge the protection of service and an opportunity to be heard. In addition, Grandbridge should be relieved of the mandatory provisions that require specific action by Grandbridge. The breadth of the language included in the Order exceeded the briefing and the scope of the district court's ruling announced at the hearing on October 13, 2020.

In accordance with the district court's ruling at the October 13, 2020 hearing, this Court should modify the Order to remove Grandbridge as an enjoined party and simply prohibit the continuation of foreclosure proceedings.

DATED this 13th day of October 2021.

/s/ Joseph G. Went, Esq.
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Grandbridge Real Estate Capital, LLC

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On October 13, 2021, I caused to be served a true and correct copy of the foregoing **APPELLANT’S REPLY BRIEF** upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court’s Service List for the above-referenced case.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court’s Service List for the above-referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Valerie Larsen

An Employee of HOLLAND & HART LLP