

IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL HOUSING FINANCE
AGENCY, in its capacity as
Conservator for the Federal National
Mortgage Association, and FEDERAL
NATIONAL MORTGAGE
ASSOCIATION,

Appellants,

vs.

WESTLAND LIBERTY VILLAGE,
LLC, a Nevada Limited Liability
Company; and WESTLAND
VILLAGE SQUARE, LLC a Nevada
Limited Liability Company,

Respondents.

Case No. 83695
Electronically Filed
Mar 09 2022 04:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

NOTICE OF SUPPLEMENTAL AUTHORITY

FHFA and Fannie Mae respectfully notify the Court of developments in the underlying case and a similar case. *See* NRAP 31(e).

In the underlying case, the district court recently declined to apply a provision of FHFA's organic statute to dismiss Westland's claims for punitive damages. *See* Minute Order (Dec. 22, 2021) (Ex. A).¹ That statutory provision

¹ The court tasked Westland's counsel with submitting a proposed final order, but counsel has yet to comply. After repeatedly inquiries from counsel for Fannie Mae, Westland's counsel first circulated a proposed final order on February 9.

Footnote continued on next page

mandates that as Conservator, FHFA “shall not be liable for *any amounts in the nature of penalties*” See 12 U.S.C. § 4617(j)(1), (4) (emphasis added) (the “Penalty Bar”). And while “under conservatorship ..., Fannie Mae is statutorily exempt from ... penalties ... to the same extent that the FHFA is” under the Penalty Bar. *Nevada ex rel. Hager v. Countrywide Home Loans Servicing*, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011). Thus, FHFA and Fannie Mae moved to dismiss Westland’s punitive damages claims, noting that under Nevada law “[p]unitive damages are designed not to compensate the plaintiff for harm suffered but, instead, to punish and deter the defendant’s culpable conduct.” *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). The district court denied the motion without explanation. See Ex. A.

More recently, a different district court hearing *Fannie Mae v. Sellers*, No. A-19-805418-C, took the opposite tack. Ex. B. ¶ 17. That court held that “[u]nder Nevada law and common sense, punitive damages are in the nature of penalties” and therefore off-limits under the Penalty Bar. Ex. B. ¶ 18. As that court explained, “[a]s a fundamental tenant of our federal system, this Court is ‘bound’ to apply ‘the laws of the United States,’ which the federal Constitution makes the ‘supreme law of the land.’” Ex. B ¶ 16 (quoting U.S. Const. art. VI, cl. 2).

Fannie Mae and FHFA provided comments on February 11, but have not received any response.

In this appeal, FHFA has argued that the district court disregarded one federal statutory provision—12 U.S.C. § 4617(f)—in contravention of the supremacy clause. Appellant Opening Br. at 46- 52; Appellant Reply Br. at 26. The district court has now disregarded a second—the Penalty Bar.

Dated this 9th day of March, 2022.

Respectfully submitted,

FENNEMORE CRAIG, P.C.

/s/ Leslie Bryan Hart
Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert, Esq. (SBN 11728)
7800 Rancharrah Parkway
Reno, NV 89511

ARNOLD & PORTER KAYE
SCHOLER, LLP

/s/ Michael A.F. Johnson
Michael A.F. Johnson, Esq.*
601 Massachusetts Ave. NW
Washington, DC 20001
*Admitted pro hac vice

*Attorneys for Appellant Federal
Housing Finance Agency in its
Capacity as Conservator of the Federal
National Mortgage Association*

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove
Kelly H. Dove, Esq. (SBN 10569)
Nathan G. Kanute, Esq. (SBN 12413)
3883 Howard Hughes Parkway,
Suite 1100
Las Vegas, NV 89169

*Attorneys for Appellant Federal
National Mortgage Association*

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 March 9, 2022, I caused to be served a true and correct copy of the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITY** 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/ Maricris Williams

An Employee of SNELL & WILMER L.L.P.

EXHIBIT A

EXHIBIT A

A-20-819412-B

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

December 22, 2021

A-20-819412-B Federal National Mortgage Association, Plaintiff(s)
vs.
Westland Liberty Village, LLC, Defendant(s)

December 22, 2021 7:00 AM Minute Order

HEARD BY: Denton, Mark R.

COURTROOM: Chambers

COURT CLERK: Madalyn Kearney

JOURNAL ENTRIES

HAVING further reviewed and considered the parties' filings and argument of counsel pertaining to "Plaintiff and FHFA's Motion to Dismiss in Part Defendants' First Amended Answer and Amended Counterclaim," heard and taken under advisement on December 16, 2021, and being fully advised in the premises, the Court makes the following determinations/rulings:

- The Court DENIES the Motion IN PART as a matter of law relative to Plaintiffs' venue contentions.
- The Court DENIES the Motion IN PART as a matter of law relative to Plaintiffs' punitive damages contentions and DENIES the same regarding the attorneys' fees aspect without prejudice to further development pursuant to NRCP 56 regarding Counterclaimants' special damages contentions, having determined that the complexities and nuances involved in this case render disposition under NRCP 12(b)(5) to be inappropriate.
- The Court DENIES the Motion IN PART regarding Plaintiffs' standing contentions without prejudice to further development pursuant to NRCP 56, having determined that the complexities, party affiliations/interrelationships, and nuances involved in this case render disposition under NRCP 12(b)(5) to be inappropriate.
- The Court GRANTS the Motion IN PART regarding Plaintiffs' consequential damages contentions, as what the Court can properly consider on Plaintiffs' NRCP 12(b)(5) Motion shows that such damages cannot be claimed.

Counsel for Defendants/Counterclaimants is directed to submit a proposed order consistent with the foregoing and with supportive briefing/argument following provision of the same to opposing counsel for signification of approval/disapproval.

PRINT DATE: 12/22/2021

Page 1 of 2

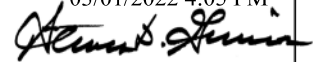
Minutes Date: December 22, 2021

IT IS SO ORDERED.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Madalyn Kearney, to all registered parties for Odyssey File & Serve. /mk 12/22/21

EXHIBIT B

EXHIBIT B


CLERK OF THE COURT

FFCO

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

SCOTT R. LACHMAN, ESQ.

Nevada Bar No. 12016

AKERMAN LLP

1635 Village Center Circle, Suite 200

Las Vegas, NV 89134

Telephone: (702) 634-5000

Facsimile: (702) 380-8572

Email: melanie.morgan@akerman.com

Email: scott.lachman@akerman.com

Kristin A. Schuler-Hintz, Esq., SBN 7171

McCarthy & Holthus, LLP

9510 West Sahara Avenue, Suite 200

Las Vegas, NV 89117

Telephone: (702) 685-0329

Facsimile: (866) 339-5961

Email: dcnv@mccarthyholthus.com

Attorneys for Federal National Mortgage Association

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE
ASSOCIATION

Plaintiff,

v.

CLARINDA R. SELLERS, an individual;
RICHARD E. SELLERS, an individual; DOES
1-50; and ROE CORPORATIONS 1-50
inclusive;

Defendants.

CLARINDA R. SELLERS, an individual;
RICHARD E. SELLERS, an individual; DOES
1-50; and ROE CORPORATIONS 1-50
inclusive;

Counterclaimants,

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Counterdefendant.

Case No.: A-19-805418-C

Dept. No.: V

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
FEDERAL NATIONAL MORTGAGE
ASSOCIATION'S MOTION FOR
SUMMARY JUDGMENT**

This matter came before Department V of the Eighth Judicial District Court, in and for Clark County, Nevada, on the 1st day of February 2022 for a hearing, with the Honorable Veronica Barisich presiding, upon the motion for summary judgment filed by plaintiff/counterdefendant Federal National Mortgage Association (**Fannie Mae**). Melanie D. Morgan, Esq. and Kristin Schuler-Hintz, Esq. appeared on behalf of Fannie Mae, and Corey B. Beck, Esq. appeared on behalf of defendants/counterclaimants Clarinda R. Sellers and Richard E. Sellers (**defendants**).

The Court, having reviewed the motion, the response in opposition, the reply in support, and the arguments of counsel, and good cause appearing, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about February 23, 2007, defendants obtained a loan in the original amount of \$232,500.00 from First Horizon Home Loan Corporation as the lender, secured by a deed of trust recorded on March 6, 2007 against the property at 578 Cervantes Drive, Henderson, Nevada 89014. The deed of trust listed Mortgage Electronic Registration Systems, Inc. (**MERS**) as nominee beneficiary for lender and lender's successors and assigns. The deed of trust and the promissory note it secures are referred to together as the "loan."

2. Defendants defaulted on their loan obligations by failing to make monthly payments beginning in January 2011. Defendants admit in verified interrogatory responses that, "[t]he last payment made on our mortgage was December 2010." The default has continued to the present.

3. On May 3, 2011, an assignment of deed of trust from MERS to Fannie Mae was recorded with the Office of the Clark County Recorder as Instrument 201105030001873. No additional assignments have been recorded, and Fannie Mae continues to be the record beneficiary of the deed of trust.

4. Fannie Mae's business records reflect that it acquired ownership of the loan in March 2007.

5. Fannie Mae is now, and at all times relevant to this action, owner of the loan, as further reflected in Fannie Mae's business records.

///

6. Since September 2008, Fannie Mae has been under the conservatorship of the Federal Housing Finance Agency ("FHFA").

7. Fannie Mae, through its counsel at McCarthy & Holthus, LLP, is in physical possession of the original wet-ink note, which is endorsed in blank.

8. Fannie Mae through its counsel at McCarthy & Holthus, LLP, is also in physical possession of the original deed of trust.

9. Nationstar Mortgage LLC began servicing the loan for Fannie Mae on February 29, 2019.

10. Nationstar Mortgage LLC, as the servicer of the loan for Fannie Mae, sent defendants a demand letter on March 21, 2019, which set forth the amount of the deficiency on the loan.

CONCLUSIONS OF LAW

Legal Standard

1. Summary judgment is appropriate and is authorized by NRCP 56 when no genuine issue remains for trial. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. To survive summary judgment, the nonmoving party must do more than simply show there is some metaphysical doubt as to the operative facts, relying upon more than general allegations and conclusions set forth in the pleadings, and must present specific facts demonstrating the existence of a genuine issue. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 439 (2019).

3. The nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Fannie Mae's Standing to Foreclose

4. In order to foreclose, a party must be entitled to enforce both the deed of trust and the promissory note. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 520, 286 P.3d 249, 259 (2012).

///

5. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed. NRS 104.3205 (2). Fannie Mae is entitled to enforce the note, which is endorsed in blank, because it is in possession of the original note.¹

6. Defendants' conjecture and speculation about "when, where and how" Fannie Mae became the holder of the note do not create a genuine issue of material fact. Because the note is endorsed in blank, Fannie Mae need only possess the note to be entitled to enforce it. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012) (finding that to be entitled to enforce the note, BNY Mellon would merely have to possess the note).

7. Fannie Mae is entitled to enforce the deed of trust because it is the record beneficiary of the deed of trust. *Id.* (finding that the party seeking to foreclose must demonstrate that it is both the beneficiary of the deed of trust and the current holder of the promissory note).

8. Fannie Mae need not possess the original assignment of the deed of trust from MERS to Fannie Mae in order to establish standing to foreclose. The copy of the assignment certified to be "a true and correct copy of the recorded document" by the Clark County Recorder sufficiently evidences Fannie Mae's status as the record beneficiary of the deed of trust. *Einhorn v. BAC Home Loans Servicing*, 128 Nev. 689, 290 P.3d 249 (2012).

9. The assignment from MERS to Fannie Mae contains a certificate of acknowledgement signed before a notary public, which carries a presumption of authenticity under NRS 52.165.

10. Also, the certified assignment from MERS to Fannie Mae was obtained from the county recorder's office, which "is sufficient to authenticate the writing." NRS 52.085.

11. Fannie Mae's possession of the original note and deed of trust, combined with the certified recorded assignment constitutes prima facie evidence of Fannie Mae's entitlement to enforce the note and to judicially foreclose on the property. *See Einhorn*, 128 Nev. at 694, citing

¹ Principles of agency apply in determining actual possession of the note. Where an agent of a secured party, here McCarthy & Holthus as agent for Fannie Mae, has physical possession of a note, the secured party has taken actual possession. *Edelstein*, 128 Nev. at 524 citing NRS 104.9313 and UCC § 9-313, cmt. 3).

1 *Edelstein*, 128 Nev. at 261. Fannie Mae's status as owner of the loan further supports the court's
2 conclusion that Fannie Mae is the party entitled to enforce the note and deed of trust.

3 12. The prior foreclosure mediations and the prior judicial foreclosure action dismissed
4 by Fannie Mae without prejudice have no relevance to this action, and particularly, Fannie Mae's
5 ability to establish its status as the party entitled to enforce the note and deed of trust in this action.

6 ***Defendants' Counterclaim***

7 13. Pursuant to NRCP 8(c), "[w]hen a party has mistakenly designated a defense as a
8 counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat
9 the pleading as if there had been a proper designation."

10 14. Defendants' allegations in their counterclaim are simply mirror images of the
11 arguments supporting judicial foreclosure; *i.e.* Fannie Mae is not the "real party in interest" and
12 failed to produce "required documentation." As such, that the counterclaim will be designated and
13 treated by the court as an affirmative defense. In addition, defendants' failure to respond to Fannie
14 Mae's NRCP 8(c) argument is deemed an admission that the argument is meritorious and a consent
15 to the granting of the same. *See* ECDR 2.20(e) ("Failure of the opposing party to serve and file
16 written opposition may be construed as an admission that the motion and/or joinder is meritorious
17 and a consent to granting the same.")

18 15. The court has considered the arguments presented in defendants' counterclaim as
19 affirmative defenses, and finds that they have no merit. As holder of the note and record
20 beneficiary of the deed of trust, Fannie Mae has standing to judicially foreclose. *See Edelstein*,
21 128 Nev. at 262.

22 ***Defendants' Claims for Punitive Damages and Attorneys' Fees***

23 16. Fannie Mae also seeks summary judgment on Counterclaimants' requests for
24 punitive damages and attorneys' fees, relying on a federal statute mandating that "in any case in
25 which the [Federal Housing Finance] Agency is acting as a conservator," it "shall not be liable for
26 any amounts in the nature of penalties or fines." 12 U.S.C. § 4617(j)(1), (4) (the "Penalty Bar").
27 As a fundamental tenet of our federal system, this Court is "bound" to apply "the laws of the
28

United States,” which the federal Constitution makes the “supreme law of the land.” U.S. Const. art. VI, cl. 2.

17. The Court holds that the Penalty Bar precludes Counterclaimants’ requests for punitive damages and attorneys’ fees. While Fannie Mae is in conservatorship, as it has been at all relevant times, the Penalty Bar protects it to the same extent as FHFA. *See Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011).

18. Under Nevada law and common sense, punitive damages are in the nature of penalties because they “are designed not to compensate the plaintiff ... but, instead, to punish and deter the defendant’s culpable conduct.” *Bongiovi v. Sullivan*, 122 Nev. 556, 580 (2006). Attorneys’ fees in civil cases are also in the nature of penalties because, by statute, Nevada awards them to “punish for and deter frivolous or vexatious claims and defenses.” NRS 18.010(2)(b), NRS 7.085.

19. As a matter of law, therefore, Counterclaimants’ requests for punitive damages and attorneys’ fees must fail under the Penalty Bar, and accordingly this Court grants Fannie Mae’s motion as to these requests for relief.

20. In addition, defendants’ failure to respond to Fannie Mae’s arguments in relation to punitive damages and attorneys’ fees is deemed an admission that the arguments are meritorious and a consent to the granting of the same. *See* ECDR 2.20(e).

21. There are no genuine issues of fact in dispute as (1) Fannie Mae is the owner of the loan, (2) Fannie Mae is the holder of the original promissory note, (3) there is a recorded assignment of the deed of trust to Fannie Mae, and (4) defendants are in default. Accordingly, Fannie Mae’s motion for summary judgment is **GRANTED** in its entirety.

22. Prior to entry of the final judgment for judicial foreclosure, Fannie Mae shall file a separate motion to establish the amount of its damages sought against the property, including attorneys’ fees.

Dated this 1st day of March, 2022



31A 535 DCCC 1327
Veronica M. Barisich
District Court Judge

Respectfully submitted by:

Dated this 15th day of February, 2022.

AKERMAN LLP

/s/ Melanie D. Morgan

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

SCOTT R. LACHMAN, ESQ.

Nevada Bar No. 12016

1635 Center Circle, Suite 200

Las Vegas, Nevada 89134

*Attorneys for Federal National Mortgage
Association*

MCCARTHY & HOLTHUS, LLP

/s/ Kristin A. Schuler-Hintz

Kristin A. Schuler-Hintz, Esq., SBN 7171

McCarthy & Holthus, LLP

9510 West Sahara Avenue, Suite 200

Las Vegas, NV 89117

Telephone: (702) 685-0329

Facsimile: (866) 339-5961

Email: dcnv@mccarthyholthus.com

Approved as to form and content by:

Dated this _____ day of February, 2022.

THE LAW OFFICE OF COREY B. BECK, P.C.

Refused to Sign

COREY BECK, ESQ.

Nevada Bar No. 5870

425 South Sixth Street

Las Vegas, NV 89101

Attorney for Richard and Clarinda Sellers

Llarena, Carla (LAA-Las)

From: Kristin Schuler-Hintz <khintz@McCarthyHolthus.com>
Sent: Wednesday, February 16, 2022 6:06 AM
To: Lachman, Scott (Ptnr-Las)
Cc: Morgan, Melanie (Ptnr-Las); Llarena, Carla (LAA-Las)
Subject: Re: Sellers - draft MSJ order
Attachments: Sellers Clarinda FOFCOL Judgment.2.8.22.DOC

[External to Akerman]

Approved

Sent from my iPhone

On Feb 15, 2022, at 6:00 PM, scott.lachman@akerman.com wrote:

Kristin – Please confirm we may use your e-signature on the attached draft order. Thanks.

Scott Lachman

Partner, Consumer Financial Services Practice Group
Akerman LLP | 1635 Village Center Circle, Suite 200 | Las Vegas, NV 89134
D: 702 634 5021 | C: 702 321 7282
Scott.Lachman@akerman.com

[vCard](#) | [Profile](#)



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Llarena, Carla (LAA-Las)

From: Morgan, Melanie (Ptnr-Las)
Sent: Tuesday, February 15, 2022 3:55 PM
To: 'corey beck'
Cc: Lachman, Scott (Ptnr-Las); khintz@McCarthyHolthus.com
Subject: RE: DUE TOMORROW: Sellers - MSJ order

Corey,

We do not agree that your modifications and additions should be included in the findings of fact and conclusions of law. We will submit our proposed version with a letter to the court, copying you of course, explaining that you reviewed the proposed order but do not agree to sign.

Thank you,

Melanie Morgan

Partner, Consumer Financial Services Practice Group
Akerman LLP | 1635 Village Center Circle, Suite 200 | Las Vegas, NV 89134
D: 702 634 5005
Admitted to Practice in Nevada and Texas
melanie.morgan@akerman.com

From: corey beck
Sent: Tuesday, February 15, 2022 12:45 PM
To: Morgan, Melanie (Ptnr-Las)
Subject: Re: DUE TOMORROW: Sellers - MSJ order

[External to Akerman]

This email is in response to your email below regarding the Order for Motion for Summary Judgment. I am providing the following changes;

Please insert standard for Summary Judgment.

Summary Judgment should only be granted in certain instances. Movant must meet the requirements of Rule 56. i.e. no issue of material fact must exist. Summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist. *Id.* "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. Adv. Op. 5, 318 P.3d 709, 710 (2014) (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)).

To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). Furthermore, the Court has the obligation to view the evidence in a light most favorable to the non-moving party and to draw favorable inferences therefrom for the non-moving party. See *Anderson*, 477 U.S. at 250; *Doud v. Las Vegas Hilton Corporation*, 109 Nev. 1096, 864 P.2d 796 (1993); see also *Van Cleave v. Kietz-Mill*

Minit Mart, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981). Similarly, the Court is not entitled to view the evidence in favor of the moving party. Charles v. J. Steven Lemons & Associates, 104 Nev. 388, 760, P.2d 118 (1988). The “reasonable” inferences drawn need not be the most likely, but merely rational or reasonable ones and the possibility that inferences other than those favorable to the nonmoving party could be drawn does not entitle the moving party to summary judgment. Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1293 (9th Cir. 1999). At the summary judgment stage, a court’s function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. See Anderson, 477 U.S. at 249. The evidence of the non-movant is “to be believed, and all justifiable inferences are to be drawn in his favor.” Anderson, 477 U.S. at 255.

Please insert that the Sellers argued that course of performance (conduct between parties) gave rise to material issue of fact. Court found course of performance did not create issue of material fact.

Sellers argument was that the servicer's statement gave rise to material issue of fact. Seterus's December 16, 2015 letter noted “Enclosed is a copy of the Recorded Instrument. Unfortunately, the collateral file does not contain the original Assignment, and therefore, we are unable to provide you with a Certified Copy of the Original Recorded Assignment. Please note that our records indicate there is only recorded Assignment.” Sellers argument was that the servicer's statement gave rise to material issue of fact. Court found that Seterus's letter did not create issue of material fact.

Sellers asserted that Fannie Mae's PMK's (Edward Hyme) testimony did not explain or justify inconsistencies with Seterus's December 16, 2015 letter. Sellers asserted that this testimony gave rise to an issue of material fact. Court found that expert testimony did not create issue of material fact.

Finally, Sellers argued that there was no direct evidence of transfer from First Horizon Home Mortgage to Fannie Mae. Sellers asserted this argument gave rise to issue of material fact. Court found that this argument did not create issue of material fact.

I await your response.

Corey B. Beck, Esq.
The Law Office of Corey B. Beck, P.C.
425 South Sixth Street
Las Vegas, Nevada 89101
Ph: (702) 678-1999
Fax: (702) 678-6788

Thank you for your business!!

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Federal National Mortgage
Association, Plaintiff(s)

CASE NO: A-19-805418-C

7 vs.

DEPT. NO. Department 5

8
9 Clarinda Sellers, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 3/1/2022

16 Kristin Schuler-Hintz

DCNV@mccarthyholthus.com

17 Melanie Morgan

melanie.morgan@akerman.com

18 Akerman LLP

AkermanLAS@akerman.com

19 Donna Wittig

donna.wittig@akerman.com

20 Scott Lachman

scott.lachman@akerman.com

21 Corey Beck

becksbk@yahoo.com