

**NO. 2022-80750**

**JONATHAN ANDERSON,  
Plaintiff**

§

**IN THE DISTRICT COURT OF**

**VS.**

**J DON BONEY JR and MIKAELA  
INVESTMENTS LLC and US BANK  
NATIONAL ASSOCIATION AS  
TRUSTEE FOR THE C BASS  
MORTGAGE LOAN ASSET BACKED  
CERTIFICATES SERIES 2005 CB5,  
Defendants**

§

**HARRIS COUNTY, TEXAS**

§

**80<sup>TH</sup> JUDICIAL DISTRICT**

**MIKAELA INVESTMENTS, LLC'S UNOPPOSED MOTION FOR  
LEAVE TO JOIN AVT TITLE SERVICES, LLC  
AS A THIRD-PARTY DEFENDANT**

**TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES Defendant, Mikaela Investments, LLC ("Mikaela"), who files this unopposed motion requesting leave to file a third-party petition against AVT Title Services, LLC ("AVT Title Services") and in support of such motion shows the Court as follows:

I.

This suit arises out of the December 6, 2022 foreclosure sale of a residential duplex property located at 2213/2215 Wheeler Street in Houston, Harris County, Texas. The Plaintiff, Jonathan Anderson, has sued J. Don Boney, Jr., the mortgagor of the property (who has not yet made an appearance and may not yet have been served), Mikaela Investments, LLC, the purchaser at the foreclosure sale, US Bank NA as Trustee for C Bass Mortgage Loan Assets Backed Certificate Series 2005 CB5 ("US Bank"), the nominal mortgagee, holder of the debt and mortgage servicer and Chicago Title Insurance Company which issued the mortgagee's title policy insuring the mortgagor's title to the property.

By his petition, the Plaintiff, Jonathan Anderson, asserts that he is the record owner of an undivided one-half interest in the property which was sold at foreclosure. He complains that despite the fact that he owns a one-half interest in the property, US Bank, through its substitute trustee, purportedly sold the whole property to Mikaela. Plaintiff has sued for a judgment declaring that he owns a one-half undivided interest in the property, ordering that the foreclosure sale be set aside, ordering that the deed of trust under which the sale was conducted be declared void and awarding him damages and attorneys fees.

## II.

Separate from Plaintiff's claim against US Bank, but related to the same foreclosure, Mikaela files this its motion for leave to join AVT Title Services as a Third-Party Defendant because AVT Title Services, which acted as US Bank's agent in the foreclosure sale has never delivered a deed to Mikaela. As the successful bidder at the December 6, 2022 foreclosure sale, Mikaela paid AVT Title Services the winning bid price of \$122,051.21, however, despite the clear directive of Tex. Bus. & Com. Code §22.005(2) (which requires the trustee to deliver a deed to the foreclosure purchaser within a "reasonable time"), to the date of the filing of this motion, AVT Title Services has failed to deliver or to record the foreclosure deed to Mikaela. If Plaintiff, Anderson, is correct in his allegation that he owns an undivided one-half interest in the property, then, at a minium, AVT Title Services sold Mikaela the remaining one-half. Mikaela is entitled to its deed. Because Mikaela's complaint against AVT Title Services arises out of the same transaction or occurrence that is the subject of the Plaintiff's claim, in the interest of judicial economy it should be joined with and considered in this proceeding. Additionally, if Plaintiff, Anderson, is successful in having the foreclosure sale set aside, AVT Title Services will be liable to Mikaela for the losses it will suffer as a result of such determination.

### III.

By this motion, Mikaela, the foreclosure purchaser, seeks to join AVT Title Services as a third-party Defendant. The petition which Mikaela intends to file is entitled “Defendant, Mikaela Investments, LLC’s Original Third-Party Petition.” A copy of that petition is attached hereto, marked as Exhibit “A,” and is incorporated herein for all purposes.

Rule 38(a) T.R.C.P. provides that a third-party plaintiff must obtain leave of court upon notice to all parties to make service upon a person not a party to the action if he files his third-party petition more than thirty (30) days after he files his original answer. Because Defendant filed its answer on January 9, 2023, leave of Court is required. Mikaela moves to join AVT Title Services as a third-party defendant under the authority of Rules 37, 39 and 40 T.R.C.P. In *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017) the court acknowledged that a defendant may join as a third-party defendant one who may be liable to the defendant or to the plaintiff for all or part of the plaintiff’s claims under Rule 38(a) T.R.C.P. However the court added that a defendant may also join an additional party under the authority of Rule 37 (necessary or proper parties), Rule 39 (where in the absence of such third-party complete relief cannot be accorded among those already parties) and Rule 40 (all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transactions or occurrences and if any question of law or fact common to all of them will arise in the action) (*Bennett*, a pp. 653-54).

Mikaela requests that it be permitted to join AVT Title Services, LLC as a third-party defendant because, in accordance with the foregoing rules, AVT Title Services is a necessary party in its suit to compel delivery of its deed. Further, without AVT Title’s joinder, Mikaela cannot be accorded complete relief. Further, Mikaela’s claim against AVT Title arises out of the same

transaction and occurrence that serves as the basis of Plaintiff's claim. (Rules 38(a) & 40 T.R.C.P.).

IV.

Finally, Mikaela would show that this request is timely in that the Court's Scheduling and Docket Control Order dated January 20, 2023 provides that all parties may join additional parties by November 3, 2023.

**WHEREFORE, PREMISES CONSIDERED**, Mikaela Investments, LLC requests that the Court grant this motion for leave to join AVT Title Services, LLC as a third-party defendant.

Respectfully submitted,

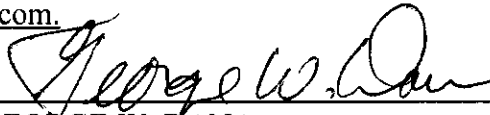


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Texas Bar No. 05351500  
Attorney for Defendant,  
Mikaela Investments LLC

**CERTIFICATE OF SERVICE**

I certify that on July 31, 2023 a true and correct copy of Defendant, Mikaela Investment LLC's Unopposed Motion for Leave to Join AVT Title Services, LLC as a Third-Party Defendant was served on Plaintiff, Jonathan Anderson, by and through his attorney of record, James H. Miller, electronically at [jitmiller@outlook.com](mailto:jitmiller@outlook.com), and on Defendant US Bank, by and through its attorneys, Alexis Del Rio, electronically at [adelrio@mcglinchey.com](mailto:adelrio@mcglinchey.com), Brian A. Piano, electronically at [bpaino@mcglinchey.com](mailto:bpaino@mcglinchey.com), Margaret J. Phe, electronically at [margaret.phe@fnf.com](mailto:margaret.phe@fnf.com) and Gregory Brewer electronically at [Gregory.Brewer@fnf.com](mailto:Gregory.Brewer@fnf.com).

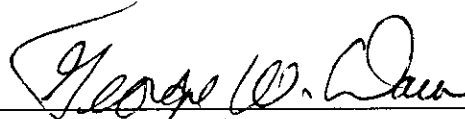


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GEORGE W. DANA

**CERTIFICATE OF CONFERENCE**

I certify that on July 12, 2023 I emailed a true and correct copy of Defendant, Mikaela Investment LLC's Motion for Leave to Join AVT Title Services, LLC as a Third-Party Defendant to Plaintiff, Jonathan Anderson's attorney, James H. Miller, electronically at [jitmiller@outlook.com](mailto:jitmiller@outlook.com), and I emailed a true and correct copy to Defendant US Bank's attorneys, Alexis Del Rio, electronically at [adelrio@mcglinchey.com](mailto:adelrio@mcglinchey.com), Brian A. Piano, electronically at [bpaino@mcglinchey.com](mailto:bpaino@mcglinchey.com), Margaret J. Phe, electronically at [margaret.phe@fnf.com](mailto:margaret.phe@fnf.com) and Gregory Brewer electronically at [Gregory.Brewer@fnf.com](mailto:Gregory.Brewer@fnf.com). Margaret, Phe, the Attorney for Defendant, US Bank, has advised that she does not oppose to this motion and James Miller, Attorney for Plaintiff, Jonathan Anderson, has advised that he does not oppose to this Motion.



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GEORGE W. DANA

NO. 2022-80750

**JONATHAN ANDERSON,**  
**Plaintiff**

§

**IN THE DISTRICT COURT OF**

**VS.**

**J DON BONEY JR and MIKAELA  
INVESTMENTS LLC and US BANK  
NATIONAL ASSOCIATION AS  
TRUSTEE FOR THE C BASS  
MORTGAGE LOAN ASSET BACKED  
CERTIFICATES SERIES 2005 CB5,**  
**Defendants**

§

**HARRIS COUNTY, TEXAS**

§

**80<sup>TH</sup> JUDICIAL DISTRICT**

**DEFENDANT, MIKAELA INVESTMENTS, LLC'S  
ORIGINAL THIRD PARTY PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES Defendant, Mikaela Investments, LLC (“Mikaela”), which files this its Original Third-Party Petition against AVT Title Services, LLC (“AVT Title Services”). In support of its Third-Party Petition Mikaela shows the Court as follows:

**PARTIES**

1. Mikaela may be contacted through the undersigned counsel of record.
2. AVT Title Services, LLC is a Texas limited liability company which may be served by serving its registered agent, Brandon B. Wolf, at 14160 N. Dallas Parkway, Suite 900, Dallas, Texas 75254.

**JURISDICTION AND VENUE**

3. This Court has jurisdiction over this lawsuit because the amount in controversy is within the jurisdictional limits of the Court. Further, Mikaela seeks an order of the Court compelling AVT Title Services to deliver a foreclosure deed as required by law. This Court is empowered to



grant such relief by Sections 24.007, 24.008 and 24.011 of the Tex. Gov't. Code and by Art. V, Section 8 of the Texas Constitution.

4. Venue is proper in Harris County, Texas because the property which is the subject of this suit is located in Harris County and the events giving rise to this cause of action occurred in Harris County.

5. As required by Rule 47(b) T.R.C.P., the damages sought are within the jurisdictional limits of this Court.

6. As required by Rule 47(c) T.R.C.P., Mikaela seeks nonmonetary relief and monetary relief of \$250,000.00 or less, plus any pre- and post-judgment interest at the highest statutory rate allowed.

#### **DISCOVERY**

7. Discovery is to be conducted under a Level Two Discovery Control Plan in accordance and with Rule 190.3 T.R.C.P.

#### **FACTS**

8. This litigation arises from a foreclosure sale which occurred in Harris County, Texas on December 6, 2022 in which US Bank, through AVT Title Services its substitute trustee, sold the property known as 2213/2215 Wheeler Street to Mikaela. At the time of the sale Mikaela offered the winning bid of \$122,051.21 whereupon AVT Title Services struck off the property to Mikaela. Immediately following the sale, Mikaela delivered its payment to AVT Title Services receiving a receipt confirming its payment of \$122,051.21. To the date of the filing of this complaint, however, Mikaela has never received its deed to the property.

9. The property which US Bank and AVT Title Services offered for sale was described in the Notice of [Substitute] Trustee Sale as:

Property Address: 2213/2215 Wheeler Avenue, Houston, Texas 77004.

The Notice also included the following:

“7. Property to be sold: The property to be sold is described as follows:  
West ½ of Lot Five (5) and the West ½ of Lot Six (6) in Block Five (5), of  
HOLMAN OUTLOT, a subdivision of a 10 acre outlot 65 according to the  
map or plat thereof recorded in Volume 40, Page 521A of the Deed Records  
of Harris County, Texas.”

A true and correct copy of the aforementioned Notice of [Substitute] Trustee Sale is attached hereto marked Exhibit “A” and is adopted and incorporated herein for all purposes.

10. Shortly after purchasing the property, Mikaela was served with a copy of Plaintiff’s Original Petition on Trespass to Try Title and Application for Temporary Restraining Order and Injunctive Relief filed by Jonathan Anderson (“Anderson”) in this proceeding. By such petition Anderson alleges that he owns an undivided one-half interest in the property which Mikaela purchased. Anderson’s petition requests a judgment declaring that he owns an undivided one-half (½) interest in the property, setting aside the foreclosure sale of December 6, 2022, declaring the deed of trust upon which the sale was based to be void and awarding him damages and attorney’s fees.

**FIRST CAUSE OF ACTION:**

**BREACH OF CONTRACT**

11. At the foreclosure sale, Mikaela submitted the winning bid and the property was struck off to it. Thereafter, Mikaela delivered its payment to AVT Title Services in the amount of \$122,051.21 which was accepted and for which payment AVT Title Services issued a receipt. The foregoing facts establish the fact that AVT Title Services and Mikaela entered into a contract for Mikaela’s purchase of the property. AVT Title Services’s acceptance of Mikaela’s payment removed the contract from the statute of fraud and transferred equitable title to Mikaela. *Kirkman*



*v. Amarillo Savings Ass'n*, 483 S.W.2d 302, 309 (Tex. Civ. App. - Amarillo 1972, writ ref'd n.r.e.).

AVT Title Services has breached its contract with Mikaela by failing to execute and deliver a trustee's deed to the property to Mikaela. Mikaela has performed every obligation and act required of it under the parties' agreement. AVT Title Services's refusal to deliver a deed is without legal justification and is, in fact a direct violation of §22.005(2) Tex. Bus. & Com. Code.

12. As a direct result of AVT Title Services's breach of contract, Mikaela has been harmed and by this action seeks to recover money damages against AVT Title Services.

13. In addition to the foregoing, Mikaela sues for specific performance of its contract with AVT Title Services. In addition to having been harmed by AVT Title Services's refusal to deliver its deed, Mikaela would show that the real property it purchased is unique. Mikaela has no adequate remedy at law. Although it is entitled to an award of damages for the delay it has suffered in obtaining the deed to its property, an award of additional damages in lieu of a deed to the property would be inadequate. Mikaela has already fully performed under the contract and did so in a timely manner. The contract between Mikaela and AVT Title Services is valid and enforceable and the contract terms are clear enough that AVT Title Services knows its obligations.

14. As a further direct result of AVT Title Services's refusal to deliver a deed, Mikaela has been forced to hire an attorney to sue to enforce its contractual rights. Mikaela therefore seeks the recovery of its attorney's fees to the greatest extent allowed under law.

## **SECOND CAUSE OF ACTION**

### **FRAUD IN A REAL ESTATE TRANSACTION**

15. If Plaintiff, Jonathan Anderson, is correct in his assertion that he owns an undivided one-half interest in the property which Mikaela purchased at foreclosure, then AVT Title Services and US Bank offered property for sale a portion of which they neither owned nor had the authority

to convey. Such conduct constitutes a violation of §27.01 Tex. Bus. & Com. Code. Specifically, it constitutes the commission of fraud in a real estate transaction because a foreclosure sale is a transaction involving real estate under §27.01 (*Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1985, writ ref'd n.r.e.)) Defendants made a representation of an existing material fact - i.e., that they were offering the entire property for sale - not merely an unadjudicated one-half interest in the property, the representation was false when made, it was made to Mikaela for the purposes of inducing it to enter into a contract and it was relied upon by Mikaela in entering into the contract. §27.01 imposes liability on the party making the misrepresentation without proof that it intended to deceive or knew that the representation was false. *Henning v. OneWest Bank FSB*, 405 S.W.3d 950, 963 (Tex. App. - Dallas 2015, no pet.).

16. As a direct result of AVT Title Services' fraud and false representations, Mikaela has been harmed and by this action seeks to recover money damages against AVT Title Services.

17. As a further direct result of AVT Title Services's fraud and false representations regarding the property, Mikaela seeks the recovery of its attorney's fees, expert fees, costs for copies of depositions and costs of court.

#### **CONDITIONS PRECEDENT**

18. All conditions precedent to Mikaela's claims for relief have been performed or have occurred.

#### **ATTORNEY'S FEES**

19. Mikaela has retained the undersigned attorney to prepare and present its cause of action and claims for relief. Mikaela asserts its right to recover its attorney's fees for each and all causes of action and claims for relief herein presented.

**PRAYER**

**WHEREFORE**, Mikaela prays that AVT Title Services, LLC be cited to appear and answer herein and that upon final trial hereof Mikaela be awarded the following relief of and against AVT Title Services, LLC:

- a) monetary damages for the delay in delivering Mikaela's deed;
- b) specific performance compelling the delivery of Mikaela's deed;
- c) monetary damages for fraud in a real estate transaction in the event that AVT Title Services cannot or will not deliver a deed to the whole property;
- d) attorney's fees;
- e) expert fees;
- f) costs of Court; and
- g) all such other and further relief, both general and special, legal and equitable, as to which Mikaela may show itself to be justly entitled.

Respectfully submitted,

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GEORGE W. DANA  
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Fax. (281) 484-9687  
Email: [gwdana@aol.com](mailto:gwdana@aol.com)  
Texas Bar No. 05351500  
Attorney for Defendant,  
Mikaela Investments LLC

**CERTIFICATE OF SERVICE**

I certify that on \_\_\_\_\_, 2023 a true and correct copy of Defendant, Mikaela Investment LLC's Original Third-Party Petition was served on Plaintiff, Jonathan Anderson, by and through his attorney of record, James H. Miller, electronically at [jitmiller@outlook.com](mailto:jitmiller@outlook.com), and on Defendant US Bank, by and through its attorneys, Alexis Del Rio, electronically at [adelrio@mcglinchey.com](mailto:adelrio@mcglinchey.com), Brian A. Piano, electronically at [bpaino@mcglinchey.com](mailto:bpaino@mcglinchey.com), Margaret J. Phe, electronically at [margaret.phe@fnf.com](mailto:margaret.phe@fnf.com) and Gregory Brewer electronically at [Gregory.Brewer@fnf.com](mailto:Gregory.Brewer@fnf.com).

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GEORGE W. DANA

Notice of [Substitute] Trustee Sale

Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

1. Date, Time and Place of Sale.

**Date:** 12/06/2022

**Time:** The sale will begin at 10:00 AM or not later than three hours after that time

**Place:** Harris County, Texas at the following location: 11,681 Square Feet area of covered concrete, being a 13,979 Square Feet area of covered concrete under the Bayou City Event Center Pavilion, save and except a 2,298 Square Feet Concession and Restroom area under said Pavilion, or if the preceding area is no longer the designated area, at the area most recently designated by the County Commissioner's Court PURSUANT TO SECTION 51.002 OF THE TEXAS PROPERTY CODE AS THE PLACE WHERE FORECLOSURE SALES ARE TO TAKE PLACE OR AS DESIGNATED BY THE COUNTY COMMISSIONERS

**Property Address:** 2213/2215 WHEAT AVENUE, HOUSTON, TX 77004

**2. Terms of Sale:** The sale will be conducted as a public auction to the highest bidder for cash. Pursuant to the deed of trust, the mortgagee has the right to direct the Trustee to sell the property in one or more parcels and/or to sell all or only part of the property. Pursuant to Section 51.009 of the Texas Property Code, the property will be sold in AS IS, WITH ALL CONDITIONS, without any express or implied warranties, except as to the warranties of title, if any, provided in the deed of trust. Any conveyance of the property is subject to all matters of record affecting the property.

**3. Instrument to be Foreclosed:** The instrument to be foreclosed is the Deed of Trust or Contract Lien dated 02/16/2005 and recorded 02/25/2005 in Book RP 002-01 Page 001 Document Y283264, real property records of Harris County, Texas, with J. DON BONEY, JR. grantor(s) and NEW CENTURY MORTGAGE CORPORATION as Lender, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2005-CB5 Beneficiary.

**4. Appointment of Substitute Trustee:** In accordance with Texas Property Code Sec. 51.0076, the undersigned authorized agent for the mortgage servicer has named and appointed, and by these presents does name and appoint AVT Title Services, LLC, located at 5177 Richmond Avenue Suite 1230, Houston, TX 77056, Substitute Trustee to act under and by virtue of said Deed of Trust.

**5. Obligation Secured:** Deed of Trust or Contract Lien executed by J. DON BONEY, JR., securing the payment of the indebtedness in the original principal amount of \$87,000.00, and obligations therein described including but not limited to the promissory note; and all modifications, renewals and extensions of the promissory note. U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2005-CB5 is the current mortgagee of the note and deed of trust or contract lien.

TENESHIA HUDSPETH, COUNTY CLERK, HARRIS COUNTY, TEXAS

FRCL-2022-5369

FILED 10/27/2022 10:25:41 AM

UNOFFICIAL COPY



TS No.: 2022-00864-TX  
22-000441-673

**Notice of [Substitute] Trustee Sale**

6. Default has occurred in the payment of indebtedness, and the same is now wholly due, and the lender and holder has requested to sell said property to satisfy said indebtedness.

7. Property to be sold. The property to be sold is described as follows:

West 1/2 of Lot Five (5) and the West 1/2 of Lot Six (6) in Block Five (5), of HOLMAN OUTLOT, a subdivision of a 10 acre tract 65 according to the map or plat thereof recorded in Volume 40, Page 521A of the Public Records of Harris County, Texas.

8. **Mortgage Servicer Information:** The Mortgage Servicer is authorized to represent the Mortgagee by virtue of a servicing agreement with the Mortgagee. Pursuant to the Servicing Agreement and Texas Property Code § 51.0025, the Mortgage Servicer is authorized to collect the debt and to administer any resulting foreclosure of the lien securing the property referenced above. PHH Mortgage Corporation, as Mortgage Servicer, is representing the current mortgagee, whose address is:

C/O PHH Mortgage Corporation  
1 Mortgage Way Mt. Laurel, NJ 08054  
Phone: 877-744-2506

TS No: 2022-00864-TX  
22-00041-673

**Notice of [Substitute] Trustee Sale**

9. **Limitation of Damages:** If the sale is set aside for any reason, the purchaser of the sale shall be entitled only to a return of the funds paid. The Purchaser shall have no further recourse against the Mortgagor, the Mortgagee, or the Mortgagee's attorney.

**THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE TRUSTEE OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.**

Date: October 25, 2022

Camisha Scott, Imán Walcott, Tahesha Humphrey, Claire Buxton, Glenda Hamilton – Attorney or Authorized Agent of The Mortgagee or Mortgage Servicer

C/O Power Default Services, Inc.  
2300 Lakeview Parkway, Suite 756  
Alpharetta, GA 30009  
Telephone: 855-427-2204  
Fax: 866-960-8298

**POWER DEFAULT SERVICES, INC. MAY BE ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED MAY BE USED FOR THAT PURPOSE.**

I am \_\_\_\_\_ of Posting  
whose address is c/o AVT Title Services, LLC, 5177 Richmond Avenue, Suite 1230,  
Houston, TX 77056. I declare under penalty of perjury that on \_\_\_\_\_ I filed this Notice of Foreclosure Sale at the office  
of the Harris County Clerk and caused it to be posted at the location directed by the Harris County Commissioners Court.

**UNOFFICIAL COPY**

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

George Dana on behalf of George Dana  
Bar No. 05351500  
gwdana@aol.com  
Envelope ID: 78036832  
Filing Code Description: Answer/ Response / Waiver  
Filing Description: Defendant, Mikaela Investments LLC's First Amended Original Answer  
Status as of 7/31/2023 12:38 PM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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