however, that the Nevada legislature meant to exempt these categories of persons or entities from complying with their *other* licensing obligations under Nevada law: specifically, as it relates to collection agencies, from the requirement that they be licensed or certified by the FID as collection agencies pursuant to NRS 649.

VI. DEFENDANTS SHOULD BE BOUND AT THIS 12(b)(5) STAGE TO THEIR ADMISSIONS THAT THEY WERE DEBT COLLECTORS SEEKING TO COLLECT ON A DEBT; THE "MINI-MIRANDA" ARGUMENT IS MERITLESS

As alleged in the SAC, Defendants represented to Plaintiffs in the notices of default Defendants publicly recorded in the course of the non-judicial foreclosure proceedings Defendants carried out that Defendants were "ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE" (or words substantially to that effect). *See, e.g.*, SAC, ¶¶ 1-4, 6-15, 23(f)-(g). At least some of the Defendants represented to at least some of the Plaintiffs that the Defendants were "DEBT COLLECTOR[S] ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *See, e.g.*, SAC, ¶¶ 6-9, 11-13. Defendants now, however, seek to avoid the consequences of these admissions and representations by contending that these unambiguous statements did not in fact mean Defendants were debt collectors attempting to collect a debt! The Court should reject Defendants' argument and bind Defendants at this stage of the case to their admissions that they were debt collectors seeking to collect on a debt in notices Defendants sent to Plaintiffs.

As discussed throughout this brief, the FDCPA and Nevada statutes on debt collection are not the same or even similar. The two have separate and distinct definitions or tests of the meaning of debt collector. *Cf.* 15 U.S.C. 1692a(6) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."), *with* NRS 649.020(1)("collection agency" means "all persons engaging, directly or indirectly, and as a

primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another.").

It has long been recognized that the same debt collection activity may violate state statutes and regulations on debt collection even while it does not violate the FDCPA. *See, e.g., Wade*, 87 F.3d at 1100-1101 (no violation of FDCPA but Idaho debt collection licensed statute likely violated). Moreover, the very cases relied on by Defendants show that Defendants are mistaken in asserting that Defendants' admissions and representations (so-called "mini-Miranda warnings") are immaterial to whether they are collection agencies under Nevada law. *See also Gburek*, 614 F.3d at 386 n. 3 (reversing dismissal in a class action and noting that mini-Miranda warning "does not *automatically* trigger the protections of the FDCPA, just as the absence of such language does not have *dispositive* significance.") (emphasis added); *Yeager v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 94149, at *25-27 n.19 (M.D. Ala. July 15, 2015) (denying motion to dismiss and adopting *Tocco v. Real Time Resolutions, Inc.*, 48 F. Supp. 3d 535 (S.D.N.Y. Aug. 13, 2014) approach and rejecting argument that mini-Miranda language was immaterial to whether defendant was a debt collector under the FDCPA as alleged); *Crippen v. Stites*, 346 B.R. 115 (E.D. Bkr. Pa. July 25, 2006) (denying motion to dismiss where allegations, including defendant's use of mini-Miranda warning, "sufficiently plead[]" defendant is a "'debt collector' as defined under the FDCPA"); *Estes v. Love, Beal & Nixon, P.C.*, 2015 U.S. Dist. LEXIS 96715 (N.D. Okl. July 24, 2015) (denying summary judgment on FDCPA claim in part because mini-Miranda warning in connection with other evidence supported inference that defendant was a debt collector under the FDCPA). In *Crippen*, the court noted that "[s]ignificantly for present purposes, this [mini-Miranda] warning is generally required *only* of 'debt collectors.'" *Crippen*, 346 B.R. at 120 (emphasis in original). The court concluded that it was "reasonable to infer [from the defendant's decision to use the warning] that [the defendant] is a 'debt collector'" under the FDCPA. *Id.* The *Crippen* court, denying the motion to dismiss, therefore ruled that the complaint adequately pled that the defendant was a debt collector. *Id.*

As a preliminary matter, Defendants' cases considered the significance of such admissions under the FDCPA; they neither address nor compel any conclusion as to whether those parties were debt collectors under state statutes such as Nevada has adopted. *See Boosahda v. Providence Dane LLC*, 462 Fed. Appx. 331, 334 (4th Cir. 2012); *Hightower-Henne v. Gelman*, 2012 U.S. Dist. LEXIS 4514, at *21-26 (D. Colo. Jan. 12, 2012); *New-Howard v. JPMorgan Chase Bank N.A.*, 2013 U.S. Dist. LEXIS 164882, at *25-26 (E.D. Pa. Nov. 20, 2013). Moreover, in *Boosahda*, on which Defendants rely, the court was "tasked solely with deciding whether the district court erred in concluding that Boosahda failed to show that the debt incurred on . . . credit cards was consumer debt—as opposed to commercial or business debt—for FDCPA purposes." *Boosahda*, 462 Fed. Appx. at 334. It was undisputed that the Defendant was a debt collector under the FDCPA. *Id.* at 333. The *Boosahda* court did not deem the use of mini-Miranda warnings irrelevant; rather, the court noted that their use did not, alone, establish an FDCPA claim. *Id.* at 334. More important to the actual issue in *Boosahda*, the court concluded that the warning did not establish that the debt was a *consumer* rather than a *commercial* debt. *Id.*

The decisions in *Hightower-Henne* and *New-Howard* are equally favorable to Plaintiffs here. Indeed, the court in *Hightower-Henne* recognized that the use of mini-Miranda warnings is not irrelevant, but rather is "'some' *evidence to be considered* in the debt collector determination, [even if] it is not particularly persuasive *standing alone*." *Hightower-Henne*, 2012 U.S. Dist. LEXIS 4514, at *21-23 (emphasis added). The fact that the court, taking into account all the circumstances presented, concluded that the defendant ultimately was not a debt collector under the FDCPA does not render the use of mini-Miranda warnings immaterial. *Id.* at 21-26. Similarly, in *New-Howard*, the court did not treat the use of mini-Miranda warnings as irrelevant to whether the defendant was a debt collector under the FDCPA. *New-Howard*, 2013 U.S. Dist. LEXIS 164882, at *21-26. Rather, the court concluded that the defendant was not a debt collector under the FDCPA because the fact that mini-Miranda warnings were used was *outweighed* by countervailing evidence that the defendant was not a debt collector under the FDCPA. *Id.* at *25-26. Moreover, even as the

court reached that determination, it declined to grant summary judgment in the defendant's favor on the plaintiffs' unfair trade practices claim under Pennsylvania state law. *Id.* at *21.

VII. NO GROUNDS OTHERWISE EXIST TO JUSTIFY DISMISSAL UNDER 12(b)(5)

A. Plaintiffs' Claims for Statutory Consumer "Fraud" Are Properly Pled According to Law

As an initial matter, Plaintiffs have not pled common law fraud in the SAC. The elements of common law fraud, including misrepresentation and reliance, are thus irrelevant. As a matter of law, by statutory definition, unlicensed collection activity is deemed a consumer "fraud" as it is a defined deceptive trade practice. *See* NRS 41.600 and NRS 598.0923(1).

Plaintiffs allege that Defendants violated Nevada's Deceptive Trade Practices Act ("DTPA") NRS 598.0923(1). NRS 598.0923(1) states that a defendant is guilty of a deceptive trade practice where he/she knowingly "conducts the business or occupation without all required state, county or city licenses." Plaintiffs' deceptive trade practice claim is based on the fact that Defendants conducted collection agency businesses without obtaining Nevada licenses[10] for debt collection agency activity. Consumer "fraud" is defined by NRS 41.600(2) and includes a deceptive trade practice as defined in NRS 598.0915 to 598.0925. The elements of such a claim include: 1) an act of consumer fraud by the defendant; 2) which caused; 3) damage to a plaintiff. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009). Accordingly, Plaintiffs must only allege an act of consumer fraud by Defendants which caused damage to Plaintiffs. This burden has been met.

Plaintiffs also allege that Defendants knowingly conducted business as a collection agency without first obtaining all required state, county or city licenses. In the SAC, Plaintiffs allege a pattern of conduct by Defendants that includes such items as sending debt-related notices, demands, collection communications, collecting money to apply to Plaintiffs' accounts, and/or foreclosing on Nevadans, all without obtaining a license as collection agencies from the Nevada FID. *See* SAC, ¶¶ 23, 34. Plaintiffs further allege that Defendants intentionally (i.e., with knowledge) committed these acts. *Id.* at ¶ 40. Plaintiffs also allege that, as a result of Defendants' actions, Plaintiffs suffered

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[10] There is nothing to suggest NRS 598.0923(1) would not apply equally to certificates of registration as foreign collection agencies, which are a form of license.

general and/or special damages. SAC, ¶¶ 34, 38. The requirements for alleging causation and damages are thus met. *See* SAC, ¶¶ 32-40 and Prayer for Relief.

B. Defendant "Knowingly" Committed an Act of Statutory Fraud, as a Matter of Law (Alternatively, Plaintiffs Can Add the Word "Knowingly" to the Second Amended Complaint)

Defendants mistakenly try to alter Plaintiffs' burden by claiming that it must be shown that Defendants conducted business knowing that their conduct amounted to a violation. This is not what NRS 598.0923 states. Plaintiffs must only allege that Defendants knowingly conducted business, which has been done.

Defendants "knowingly" argument is exceptionally weak for multiple reasons. First, Plaintiffs could easily add an allegation to the SAC that all Defendants acted "knowingly," but it should not be necessary. All Defendants clearly "knew" that they were conducting business as collection agencies, and surely they had service contracts with the lenders specifically for that purpose. If Defendants claim that such items were not done knowingly, then it must be that Defendants claim that they unknowingly sent an untold number of Notices of Default and Notices of Trustee's Sale to Nevadans and foreclosed on hundreds, if not thousands, of homeowners.

Defendants presumably are claiming that they were ignorant of the Nevada law which required that they hold a license. The classic rule is true and applies here as a matter of law: ignorance of the law is not a defense. *See* NRS 281A.115, *and* NRS 624.024.[11] Moreover, these Defendants were far from ignorant. For example, QLS received a cease and desist order for exactly the same misconduct described herein on October 15, 2010. RJN, ¶ 4, Ex. D. The order was issued by the State of Nevada, Department of Business and Industry, Financial Institutions Division. A high probability exists that discovery will reveal that all Defendants received notices from the State of Nevada to this effect years ago. Judge Williams' order in *Quality Loan* early 2013 was well after

[11] In order to construe the proper definition of the word "knowingly," as used in NRS 598.0923, we should look to the definition assigned to that term by the Nevada legislature in NRS 281A.115 and NRS 624.024, both of which provide the following definition: "'Knowingly'" imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinary prudent person upon inquiry."

the misconduct alleged in the SAC occurred and thus could not insulate Defendants as they suggest. Notice to the Defendants is also apparent, and beyond dispute, by simple reference to the record of lawsuits in this Court and the federal courts for a period of many years, many of which cases are cited in their moving papers. The federal circuit court decisions under the FDCPA date back to 1998!

C. Causation and Damages

Causation and damages have been pled in several respects, and these allegations must be taken as true for purposes of determining a 12(b)(5) motion. Defendants' assertions to the contrary are premised on a misreading of Plaintiffs' SAC and its allegations: Plaintiffs do not allege that they suffered damages only from Defendants' recordation of notices of default, notices of sale, and/or foreclosure on their homes. Plaintiffs properly allege that they suffered damages because of Defendants' failure to obtain licenses as required by Nevada law and illegal debt collection activities, including but not limited to periodically receiving payments from Plaintiffs prior to foreclosure. For example, paragraph 23 of the Second Amended Complaint makes clear that Plaintiff suffered damages by means of incurring the obligation for the amount of illicit payments received by Defendants, through the mechanism of increasing Plaintiffs' debts to the third-party lenders which engaged the services of the collection agencies. *See also* SAC, ¶ 44. Similarly, paragraph two of the Prayer for Relief in the SAC calls for the "disgorgement of any amounts paid to Defendants for their respective illegal and improper debt collection activities." These damages were caused—at least in part—by Defendants' failure to obtain licenses, especially as Plaintiffs would have had valid grounds for contesting any payment of such increased fees to unlicensed collection agencies violating Nevada law.

In contrast, in *Goldberg v. Central Credit Mgmt, Inc.*, 2012 U.S. Dist. LEXIS 171885, at *10-11 (D. Nev. 2012), dismissal of the plaintiff's Nevada DTPA claim was seemingly proper because the plaintiff, who only sought damages for emotional distress, had not adequately pled that any emotional distress suffered was caused by the defendant's failure to be licensed to collect debt in Nevada. Notably, the plaintiff there—unlike the Plaintiffs here—did not allege that he had paid

any money to the unlicensed defendant there. *Id.* In contrast, Plaintiffs' alleged damages go far beyond mere emotional distress and include the incurring of actual monetary damages through payments to Defendants that might not otherwise have been required given Defendants' failure to comply with Nevada law.

Accordingly, Plaintiffs sufficiently allege claims for violation of Nevada's DTPA. If Plaintiffs' allegations are insufficient, they should be given the opportunity to amend their pleading to bolster any seemingly deficient allegations.

D. Plaintiffs Have Adequately Pled Unjust Enrichment

Under Nevada law, unjust enrichment occurs whenever "a person has and retains a benefit which in equity and good conscience belongs to another." *Leasepartners Corp. v. The Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997) (internal quotation marks omitted). "An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Id.*

The SAC specifically alleges that Plaintiffs had no contracts with these Defendants, which acted against Plaintiffs as collection agents (and received compensation for their illegal acts). SAC, ¶ 41. Discovery will show definitively that collection agency service contracts exist between these Defendants and their client lenders and/or loan servicing entities. Defendants received payment for their unlicensed collection agency activities pursuant to those contracts, and were thus unjustly enriched by payment for illicit acts. *See* SAC, ¶ 44. The estimated amount is perhaps $80 million. Paragraph 2 of the Prayer for Relief in the SAC specifically prays "for disgorgement of any amounts paid to defendants for their respective illegal and improper debt collection activities," and paragraph 1 of the Prayer requests collective compensatory and consequential damages. Paragraph 44 of the SAC makes clear that Plaintiffs were damaged by means which include the fact that their debts were increased by the dollar amount of the illegal payments received by Defendants (from the lenders with whom they contracted to conduct illegal collection agency activities). In addition, paragraph 44 of the SAC provides as follows:

> Defendants received substantial payments for their respective illegal and improper

> collection agency activities. In each and every transaction wherein defendants engaged in their unlawful conduct, defendants gained an advantage to the detriment of plaintiffs. As a direct and proximate result of defendants' deceptive trade practices, each defendant was unjustly enriched by virtue of the fact that it received a fee which it was not legally entitled to receive and/or retain under Nevada State law. Acceptance and retention by the defendants of such benefits under the circumstances would be inequitable, and defendants should not be entitled to retain these illicit benefits to the detriment of plaintiffs. Each defendant should be disgorged of any and all benefits obtained by virtue of their deceptive trade practices.

E. The Deeds of Trust Are Irrelevant

Defendants' reliance on any deeds of trust between Plaintiffs and non-parties is misplaced. Defendants were unjustly enriched by their receipt of money, including from Plaintiffs, for conducting unlicensed collection agency activities which are illegal under Nevada law. *See* SAC, ¶ 23(b) ("When defendants received money from plaintiff class members . . ."), ¶¶ 41-47. Neither any deed of trust, nor any contract between private parties, can authorize or otherwise justify the commission of illegal acts, and receipt of illicit compensation therefore. The issue is not any remedy of non-judicial foreclosure that may be referenced in a deed of trust. The distinct, governing issue here concerns debt collection agency activities described in the SAC that are illegal acts under applicable Nevada law.

To the extent that Defendants suggest that some provision in deeds of trust allows them to conduct illegal, unlicensed debt collection agency activities in direct contravention of Nevada law, such provision is void as a matter of public policy. According to law, where the subject contract is unenforceable, the cause of action for unjust enrichment is valid. Under governing Nevada Supreme Court authority, the deed of trust cannot authorize Defendants to commit illegal acts, and any such contract stipulation is unenforceable such that Plaintiffs' unjust enrichment cause of action must be sustained. *See Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (1958); *Loomis v. Lange Financial Corp.*, 109 Nev. 1121, 865 P.2d 1161 (1993). As a matter of strong Nevada public policy, Defendants cannot be allowed to enrich themselves with perhaps as much as $80 million dollars in fees for conducting illegal acts against Plaintiffs, i.e., unlicensed collection agency activities. *See Loomis*, *supra*; *see also Webb v. Clark County School Dist.*, 125 Nev. 611, 218 P.3d 1239 (2009);

Vincent v. Santa Cruz, 98 Nev. 338, 647 P.2d 379 (1982).

Moreover, the deeds of trust do not insulate Defendants from liability here because any such deeds of trust were between Plaintiffs and non-parties. As alleged by Plaintiffs, Defendants were *not* parties to these agreements and their illegal activities were not authorized by them. *LeasePartners* is illuminating in this regard. There, many related contracts existed between and among the entities involved in the transactions at issue, but *no* written contract existed between LeasePartners and the Brooks Trust. *LeasePartners*, 113 Nev. at 756. Summary judgment was therefore reversed, as a claim for unjust enrichment was not barred. *Id.* Here, similarly, there is no contract between Plaintiffs and the Defendants, even if written contracts may have existed between Plaintiffs and non-parties and Defendants and non-parties. *See also Davis v. Citibank, N.A.*, 2015 U.S. Dist. LEXIS 26172, at *4-10 (applying Nevada law and concluding that unjust enrichment claim adequately pled even in light of written contract because claim "not based on terms contained within the parties' explicit written agreement").

The cases relied on by Defendants here do not show that Plaintiffs' unjust enrichment claims fail. In one, the plaintiff's wrongful foreclosure action and claim for unjust enrichment against his creditor failed because the "rights and obligations of the parties are dictated by express contracts [between them]—the first mortgage note and deed of trust." *Gurond v. JPMorgan Chase Bank*, 532 Fed. Appx. 693, 696 (2013). Notably, there was no allegation—as here—of fees paid to the trustee that foreclosed pursuant to the deed of trust, or of illegal debt collection activities by the trustee prior to foreclosure. *Id.* Whether a written contract existed between the plaintiff and the trustee were not at issue (as here). Similarly, in another case cited by Defendants, the plaintiffs' claims for unjust enrichment failed because those claims were predicated on a theory that the plaintiffs were "'targeted for and lured' into their mortgages" and those mortgages were express, written agreements between the mortgagors and the plaintiffs. *Goodwin v. Exec. Trustee Servs., LLC*, 680 F. Supp. 2d. 1244, 1255 (D. Nev. 2010). As noted in *Davis*, however, the *Goodwin* plaintiffs "pointed to no extrinsic agreement or arrangement outside their mortgages, and their claims failed because the mortgages themselves were express, written contracts." *Davis*, 2015 U.S.

Dist. LEXIS 26172, at *7 (footnote omitted). Here, however, Plaintiffs have alleged payment of fees that are not governed by any mortgages or deeds of trust and any such agreements do not govern their dealings with Defendants, which were not parties to those agreements. Similarly, in *Parker v. Greenpoint Mortg. Funding Inc.*, 2011 U.S. Dist. LEXIS 78037 (D. Nev. July 15, 2011), the court concluded that the plaintiff's unjust enrichment claim against alleged "predatory" lenders failed because there was an express, written contract between the plaintiff and the defendant lenders. The case is thus easily distinguishable from the case at hand, where no such written agreement exists between Plaintiffs and Defendants. Finally, in *Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981), there were insufficient facts to suggest that the defendant had been unjustly enriched. Here, in contrast, there are, as described above, ample allegations that Defendants were unjustly enriched at Plaintiffs' expense, including through payments by Plaintiffs to Defendants. *See* SAC, ¶¶ 41-47.

Accordingly, the Court should rule that Plaintiffs' unjust enrichment claim is adequately pled and deny Defendants' motion to dismiss.

F. Plaintiffs Kuhn, Gill, and Kallen Adequately Plead Elder Abuse

a. Defendants Rely on Wrong Pleading Standard

As an initial matter, Defendants' arguments regarding Plaintiffs' elder abuse claims are defective to the extent that they are premised on an improper pleading standard of plausibility. *See* Defs' Motion to Dismiss, at 23-25. Under Nevada law, Plaintiffs need not allege facts sufficient to make their claims of elder abuse *plausible*; rather, the test is whether it "appears *beyond a doubt* that [Plaintiffs] could prove no set of facts, which, if true, would entitle [them] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (emphasis added).

b. Elder Abuse Has Been Adequately Pled

To plead a cause of action for elder abuse under Nevada law, it must be alleged that a person over 60 either suffers personal injury or death caused by abuse or neglect, or suffers a loss of money or property caused by exploitation. NRS 41.1395. "Abuse" is defined as "willful and unjustified": (1) "[i]nfliction of pain, injury or mental anguish;" or (2) "[d]eprivation of food,

shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person." NRS 41.1395(4)(a).

In addition, NRS 598.0977 allows a private civil action by an "elderly person" who suffers damage or injury as a result of a deceptive trade practice to recover the actual damages suffered by the elderly person, punitive damages, if appropriate, and reasonable attorney's fees. An "elderly person" is a person who is 60 years of age or older. NRS 598.0933.

Here, Plaintiffs Kuhn, Gill, and Kallen allege the following in the SAC to support their cause of action for elder abuse:

1. They were each aged 60 or older. SAC, ¶ 50.
2. The unlicensed and illegal debt collection activities of Defendants Meridian and CRC constitute abuse against an elderly person as defined by NRS 41.1395 and NRS 200.5092, as such actions inflicted pain, injury or mental anguish on an older person as well as deprived an older person of shelter necessary to maintain their physical or mental health. SAC, ¶ 51. The unlawful debt collection activities included debt-related notices, demands, collection communications, and/or foreclosure sale and processes as well as illegal receipt of money to Defendants from Plaintiffs as payment on Plaintiffs' outstanding debt. SAC, ¶¶ 21, 23, 49.
3. The abuse committed by Defendants was willful, wanton, malicious and oppressive and done in conscious disregard of Plaintiffs Kuhn, Gill, and Kallen's interests and rights. SAC ¶ 54.
4. Defendants Meridian and CRC's actions were done while each did not either hold the requisite licenses to pursue collection agency activities or register as a foreign collection agent or agency with the Nevada FID. Because Defendants Meridian and CRC lacked the requisite license, their respective actions were not justified. SAC ¶ 49.
5. The abuses committed by Meridian and CRC caused Plaintiffs Kuhn, Gill, and Kallen damages. SAC, ¶ 52.

As such, despite Defendants' assertions to the contrary, Plaintiffs Kuhn, Gill and Kuhn have alleged the facts needed to support their cause of action for elder abuse. Plaintiffs have *not* alleged the recording of a notice of default or sale as the *only* misconduct by Defendants. *See* SAC, ¶¶ 21, 23, 49. Moreover, unlawful deprivation of money—which is alleged throughout the SAC—does establish that Plaintiffs Kuhn, Gill, and Kallen were willfully and unjustifiably deprived of food, shelter, or services necessary for the maintenance of their physical and mental health: after all, each time Defendants unlawfully deprived these Plaintiffs of money, they necessarily had less money to pay for food, shelter, and other services needed for maintenance of their physical and mental health.

See also Jung v. BAC Home Loans Servicing, LP, 2011 U.S. Dist. LEXIS 64802, at *11-12 (D. Nev. June 17, 2011) (denying motion to dismiss Nevada elder abuse claim on ground that claim adequately pled and sufficient notice given to defendant).

Defendants attempt to avoid the consequences of their misconduct as alleged by Plaintiffs by suggesting that the only thing complained of by Plaintiffs is the "act of initiating foreclosure pursuant to a deed of trust." Defs' Motion to Dismiss, at 25. As shown above and throughout this brief, however, Plaintiffs allege far more than that. Construing Plaintiffs' allegations liberally and accepting their factual allegations as true—as the Court must on a 12(b)(5) motion—the Court should deny Defendants' motion to dismiss on the ground that Plaintiffs Kuhn, Gill, and Kallen have adequately pled their claim for elder abuse. *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672; *see also Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) ("this court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted"). If the Court has *any* doubt as to the sufficiency of Plaintiffs' allegations of elder abuse, the Court should grant Plaintiffs leave to amend accordingly.

VIII. CONCLUSION

For the reasons stated above, the motion should be denied in its entirety.

Dated: January 18, 2016

LAW OFFICE OF NICHOLAS A. BOYLAN, A.P.C.

By: /s/ Nicholas A. Boylan
Nicholas A. Boylan, Esq.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, hereby certify that on January 18, 2016, I served a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**, on counsel by e-mail transmission to the persons listed below, pursuant to EDCR 8.05(a):

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Law Office of Nicholas A. Boylan, APC, and that on October 7, 2016, I served a true and correct copy of the foregoing:

- **NOTICE OF MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(b)(5) MOTIONS AND PLAINTIFFS' MOTION TO EXTEND LENGTH OF PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(b)(5) MOTIONS BY THIRTEEN (13) PAGES**
- **PLAINTIFFS' MOTION TO EXTEND LENGTH OF PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT DECLARATION OF NICHOLAS A. BOYLAN IN OPPOSITION TO DEFENDANTS' JOINT NRCP 12(b)(5) MOTIONS BY THIRTEEN (13) PAGES; EXHIBIT "A" [PROPOSED] ORDER**
- **PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANT' JOINT NRCP 12(b)(5) MOTIONS**
- **DECLARATION OF NICHOLAS A. BOYLAN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANT' JOINT NRCP 12(b)(5) MOTIONS; EXHIBITS 1-27**

via E-Service and/or by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail in San Diego, California addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY BENKO, a Nevada resident; CAMILO MARTINEZ, a Nevada resident; ANA MARTINEZ, a Nevada resident; FRANK SCINTA, a Nevada resident; JACQUELINE SCINTA, a Nevada resident; SUSAN HJORTH, a Nevada resident; RAYMOND SANSOTA, a Ohio resident; FRANCINE SANSOTA, a Ohio resident; SANDRA KUHN, a Nevada resident; JESUS GOMEZ, a Nevada resident; SILVIA GOMEZ, a Nevada resident; DONNA HERRERA, a Nevada resident; ANTOINETTE GILL, a Nevada resident; JESSE HENNIGAN, a Nevada resident; KIM MOORE, a Nevada resident; THOMAS MOORE, a Nevada resident; SUSAN KALLEN, a Nevada resident; ROBERT MANDARICH, a Nevada resident; JAMES NICO, a Nevada resident; and PATRICIA TAGLIAMONTE, a Nevada resident,

Plaintiffs,

vs.

QUALITY LOAN SERVICE CORPORATION, a California Corporation; MTC FINANCIAL, INC. dba TRUSTEE CORPS, a California Corporation; MERIDIAN FORECLOSURE SERVICE, a California and Nevada Corporation dba MTDS, Inc., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION; a Arizona Corporation, CALIFORNIA RECONVEYANCE COMPANY, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: A-11-649857-C
Dept. No.: XI

DEFENDANTS' JOINT MOTION TO STRIKE AND, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS

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Defendants Quality Loan Service Corporation ("QLS"), MTC Financial, Inc. dba Trustee Corps ("MTC"), National Default Servicing Corporation ("NDSC"), and California Reconveyance Company ("CRC") (collectively, "Defendants"), by and through undersigned counsel, hereby move this Court for the entry of an order striking or, in the alternative, denying Plaintiffs' Motion for Clarification and Entry of Order Re February 2016 Hearing on Defendants' Joint NRCP 12(b)(5) Motions (10/07/16) ("Motion").

The Court should deny the Motion as procedurally improper. First, there is no order on Defendants' joint motions to dismiss for the Court to clarify. Second, the Motion is a procedurally improper collateral attack on the Discovery Commissioner's Report and Recommendations (10/5/16) ("Report and Recommendations") to phase discovery in this case. Alternatively, Plaintiffs' Motion is without merit, and this Court should deny the Motion.

This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Counsel in Support of Defendants' Joint Motion to Strike and, in the Alternative, Opposition to Plaintiffs' Motion for Clarification and Entry of Order Re February 2016 Hearing on Defendants' Joint NRCP 12(b)(5) Motions ("Counsel Decl.") (attached hereto as Exhibit A), as well as the arguments of counsel.

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DATED this 24th day of October, 2016.

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MEMORANDUM

Introduction

Recognizing the weaknesses in the named Plaintiffs' claims against Defendants, Plaintiffs now ask this Court to allow them to litigate this class action backwards.[1] Rather than first establishing the validity of the named Plaintiffs' (and class representatives') claims in order to proceed to the class as a whole, Plaintiffs' counsel asks this Court to allow him to rifle through all class evidence, file by file and borrower by borrower, in hopes that he can identify a single class representative with a viable claim. This is the antithesis of class action litigation, as this type of strategy drives up expenses intentionally in the hope that Defendants will be forced to settle the claims against them due to cost alone. *See* David R. Singh & Gaspard Curioni, *Effective Discovery Strategies in Class-Action Litigation*, ABA (May 26, 2014), https://apps.americanbar.org/litigation/committees/corporate/articles/spring2014-0514-effective-discovery-strategies-class-action-litigation.html (explaining that defendants in class actions "are vulnerable to attempts by plaintiffs to propound extremely broad discovery requests, in the hopes that driving up the expense of the litigation will force the defendant to settle regardless of the merits of the case (or lack thereof)") (last visited Oct. 20, 2016). Both Judge Susan Scann and Commissioner Bonnie A. Bulla properly refused to entertain Plaintiffs' inefficient and unreasonable approach to class action litigation. Defendants ask this Court to do so as well.

Plaintiffs are fifteen individual borrowers who defaulted on their secured residential loans years ago and are facing non-judicial foreclosure or have had their properties foreclosed upon. Through this class action lawsuit, Plaintiffs seek to impose liability on Defendants, four otherwise independent foreclosure trustees (one of which has already been adjudicated by the Department of Financial Institutions NOT to require a collection agency license), based solely on the premise that engaging in non-judicial foreclosure activities—actions expressly contemplated by the deeds

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[1] Although there are a collection of twenty named Plaintiffs, this motion concerns those named Plaintiffs with claims against QLS, MTC, NDSC, or CRC. Those Plaintiffs include Jeffrey Benko, Camilo Martinez, Ana Martinez, Frank Scinta, Jacqueline Scinta, Susan Hjorth, Patricia Tagliamonte, Jesse Hennigan, Robert Mandarich, James Nico, Kim Moore, Thomas Moore, Susan Kallen, Raymond Sansota, and Francine Sansota (collectively, "Plaintiffs").

of trust governing Plaintiffs' real property loans—require the Defendants to be licensed or hold certificates as collection agencies from the state of Nevada pursuant to NRS 649.075.

On November 25, 2015, Plaintiffs filed their Second Amended Complaint which asserted causes of action for statutory consumer fraud, unjust enrichment, and elder abuse. [*See generally* Second Amended Complaint (11/25/15)] Thereafter, Defendants filed a joint motion to dismiss the complaint. [*See generally* Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint (12/18/15)] At the hearing on the joint motion to dismiss, Judge Scann dismissed the elder abuse cause of action but allowed the statutory fraud and unjust enrichment claims to proceed. [Defendants' Joint Motion to Bifurcate and Limit Discovery to Named Plaintiffs in Initial Phase of Discovery (6/15/16) ("Joint Motion to Bifurcate"), Ex. A-1 at 30:3, 30:10-22]

During the hearing, Judge Scann expressed skepticism that Plaintiffs had viable claims and indicated Defendants could and should file summary judgment motions with evidence supporting their arguments aimed at the individual, named plaintiffs. [*Id.* at 39:1-2, 41:14-16, 42:3-4, 43:21-44:6] Such skepticism is justified. NRS Chapter 107 governs Defendants, and in *Quality Loan Service Corp. v. State of Nevada, Department of Business & Industry, Financial Institutions Division*, No. 12A657580, 2013 WL 6911859 (Nev. Dist. Ct. Jan 3, 2013), a sister court of the Eighth Judicial District Court rejected the very collection agency licensing argument advanced by Plaintiffs in this lawsuit. Judge Timothy Williams entered detailed findings of fact and conclusions of law holding that foreclosure trustees engaging in non-judicial foreclosure activities are not collecting debts, are not collection agencies, and are not subject to Nevada licensing requirements for collection agencies. *Id.* at *1-2.

Quality Loan is consistent with the long line of Nevada federal district court decisions that have held that entities engaged in foreclosure activities are not engaging in debt collection activities and are not subject to Nevada licensing requirements for collection agencies. *See, e.g.*, *Padilla v. PNC Mortg.*, No. 3:11-cv-0326-LRH-VPC, 2011 WL 3585484, at *4 (D. Nev. Aug. 15, 2011) (dismissing deceptive trade practices claim and holding, two paragraphs after referencing NRS 649.020, that "GMAC did not have to be licensed to take part in the non judicial foreclosure proceedings because it is well established that non judicial foreclosures are not an attempt to

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collect a debt under the Fair Debt Collection Practice Act and similar state statutes"); *Smith v. Community Lending, Inc.*, 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (dismissing deceptive trade practices claim based on "the allegation that the foreclosing entities did not have a 'collector's license'" because foreclosure does not constitute debt collection); *Maves v. First Horizon Home Loans*, No. 3:10-cv-00396-LRH-VPC, 2010 WL 3724264, at *3 (D. Nev. Sept. 15, 2010) (dismissing deceptive trade practices claim under NRS 598.0923(1) against foreclosure trustee for alleged failure to have a collection agency license because "[a] foreclosure trustee does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt collector").

Adding to the weight of authority—albeit under a different statutory framework—the U.S. Court of Appeals for the Ninth Circuit unequivocally held recently that "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the [Fair Debt Collections Practices Act]." *Ho v. ReconTrust Co., NA*, No. 10-56884, 2016 WL 6091564, at *3 (9th Cir. Oct. 19, 2016) (holding that the "object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower" and concluding that trustees are not debt collectors). Individually and collectively, these authorities doom Plaintiffs' claims and support entry of judgment in favor of Defendants.

In addition to doubting the viability of the named Plaintiffs' claims, Judge Scann also called into question whether any class could be certified based on the individual issues alleged in the Second Amended Complaint. [Joint Motion to Bifurcate, Ex. A-1 at 41:14-16, 42:3-4] Importantly, Judge Scann opined that initial discovery should be limited to the named Plaintiffs. [*Id.* at 40:10-13, 40:20-21] She made it clear that discovery should be directed to the named Plaintiffs' files in this case and not directed toward the putative class.[2] [*Id.* at 40:20-21, 41:4-11, 41:17-21] Judge Scann did not enter an order on the motion to dismiss.

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[2] In their Motion, Plaintiffs (at 7) make much of the fact that Defendants did not refer to discovery phasing in their proposed order submitted to Judge Scann. As Commissioner Bulla recognized, however, the parties submitted competing orders, "but [Judge Scann] was going to *revise* the order and provide it, or you know, file it, and that was not done." (emphasis added). Defendants' cover letter to the Court stated that initial discovery was limited to the named Plaintiffs, suggesting Judge Scann's revised order would have reflected the same.

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Meanwhile, after the hearing before Judge Scann, Plaintiffs, in derogation of Judge Scann's admonitions, sought to bury Defendants with immediate classwide discovery. Plaintiffs served Defendants with requests for production, requests for admission, and interrogatories that focused on broad and voluminous amounts of information concerning the putative class. In addition to the written discovery, Plaintiffs served Defendants with NRCP 30(b)(6) deposition notices for information related to the putative class. [*Id.*, Exs. A31-A33] In response to the deluge of class-related discovery requests, on June 15, 2016, Defendants CRC, QLS, and NDSC filed two joint motions to be heard by Commissioner Bulla. [*See generally* Joint Motion to Bifurcate; Defendants' Joint Motion for Protective Order Vacating Plaintiffs' Notices of Depositions of Defendants' Person or Persons Most Knowledgeable (6/15/16)] The first motion sought to separate discovery into phases. The first phase of discovery would be limited to the claims of the named Plaintiffs. Defendants would then file dispositive motions related to those claims to test their viability, as suggested by Judge Scann. Assuming the case survived these initial motions, the second phase of discovery would focus on class discovery. In the event of certification, a third phase of discovery would focus on the merits of the classwide claims. The second motion sought to prevent Plaintiffs from conducting NRCP 30(b)(6) depositions that exceeded the scope of permissible initial discovery. MTC filed its own motions seeking the same remedies. [*See generally* Defendant, MTC Financial Inc. dba Trustee Corps' Motion to Bifurcate and Limit Discovery to Named Plaintiffs Raymond Sansota and Francine Sansota in Initial Phase of Discovery; and Joinder to Defendants' Joint Motion to Bifurcate and Limit Discovery to Named Plaintiffs in Initial Phase of Discovery (6/20/16); Defendant MTC Financial Inc. dba Trustee Corps' Motion for Protective Order Vacating and Limiting Plaintiffs' Notices of Deposition and Joinder to Defendants' Joint Motion for Protective Order Vacating Plaintiffs' Notices of Deposition of Defendants' Person or Persons Most Knowledgeable (6/21/16)]

At the discovery conference before Commissioner Bulla, on July 20, 2016, the parties briefed Commissioner Bulla on the ongoing discovery issues as well as the pending motions. After a three-hour hearing in which Commissioner Bulla thoughtfully considered the legal arguments presented to her and questioned counsel on both sides regarding their legal positions,

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Commissioner Bulla determined that discovery would be conducted in phases. She orally ruled that Phase I discovery would be limited to the viability of the named Plaintiffs' claims and the nature of Defendants' policies, practices, and procedures in Nevada. [Declaration of Nicholas A. Boylan in Support of Plaintiffs' Motion for Clarification and Entry of Order Re February 2016 Hearing on Defendant Joint NRCP 12(B)(5) Motions ("Motion Declaration") at 53:3-10] On August 22, 2016, Commissioner Bulla filed a Scheduling Order with dates and deadlines for the discovery phases. [Scheduling Order (8/22/16)]

On October 5, 2016, Commissioner Bulla served her Report and Recommendations on the parties. In her Report and Recommendations, and consistent with her prior oral ruling, Commissioner Bulla specified that "Phase I of discovery is limited to discovery in order to make the legal determination as to the viability of Plaintiffs' individual claims." [Report and Recommendations at 3] Further, "[i]n Phase I, Plaintiffs may propound written discovery to and take NRCP 30(b)(6) depositions of Defendants as they may relate to their credit collection services policies, practices, and procedures, including any protocol relating to telephone contact with debtors and the nature of correspondence sent to debtors." [*Id.*] The Report and Recommendations stated that "Plaintiffs are not entitled to seek discovery or question Defendants on class certification issues until Phase II of discovery." [*Id.*] Under the Report and Recommendations, Phase I of discovery is to close on November 1, 2016. [*Id.*]

After the Discovery Conference before Commissioner Bulla, Plaintiffs acted as though no limitations of any type had been placed on discovery. Plaintiffs served Defendants with two additional sets of discovery requests and deposition notices, all of which continued to seek information related to the putative class. [Counsel Decl., Ex. A-1; Ex. A-2] After Defendants invoked the discovery limitations imposed by Commissioner Bulla in response to the improper discovery requests, Plaintiffs filed multiple motions to compel class-related discovery against every Defendant. At a hearing on September 21, 2016 before Commissioner Bulla regarding Plaintiffs' motions to compel against Defendants MTC, NDSC, and QLS, Commissioner Bulla once again denied Plaintiffs' requests for expansive information regarding the putative class by emphasizing that, under her previous Report and Recommendations, discovery was limited to the

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viability of the named Plaintiffs' claims and generic information regarding Defendants' policies, practices, and procedures. [Motion Declaration, Ex. 25 at 69:3-6]

To date, discovery is proceeding apace. Plaintiffs have taken NRCP 30(b)(6) depositions of CRC and QLS and individual depositions of one current and one former employee of MTC. In the coming weeks, Plaintiffs will take the NRCP 30(b)(6) deposition of NDSC and depositions of the owner of MTC and two current employees of MTC. CRC and QLS have noticed the depositions of ten named Plaintiffs, and NDSC and MTC are in the process of scheduling dates to depose five other named Plaintiffs. The parties are working to schedule other depositions of Defendants' current and former employees. In addition, the parties have disclosed and produced documents and responded to various written discovery, including requests for production, requests for admission, and interrogatories. It is against this factual backdrop that Plaintiffs pursue their ill-conceived and meritless Motion before this Court.

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Argument

Plaintiffs' Motion, which reads like a veritable "greatest hits" compilation of Plaintiffs' past, largely unsuccessful motions, is a thinly veiled attempt to collaterally attack prior valid rulings by Judge Scann and Commissioner Bulla. Plaintiffs cast their Motion as a request for this Court to "clarify" that the parties did not bring a discovery motion before Judge Scann, and "that no order on discovery has been issued by the Court to date." [Motion at 1] Plaintiffs' request is some sort of straw man, as all parties in this matter are fully aware that no discovery motion was before Judge Scann, and Judge Scann did not issue an order on discovery. Plaintiffs do not seek or need clarification on that point. Indeed, there is no order entered that can be clarified.

Instead, Plaintiffs attempt to use their procedurally and substantively improper Motion to ask this Court to overrule Commissioner Bulla's valid rulings regarding the scope of discovery. Plaintiffs do so by asking this Court to "clarify . . . that discovery is according to the Nevada statutes, without 'phasing' or other limitations imposed by the Commissioner." [*Id.* at 2] Plaintiffs ultimately betray their motives when they ask this Court to enter a written order specifying that discovery be conducted "per NRCP" or "[a]lternatively, the Court should indicate that discovery to determine class certification should occur first." [*Id.* at 7] Commissioner Bulla

thoughtfully considered and dismissed both possibilities in favor of the discovery phasing currently in place. This Motion is either an improper motion for reconsideration of a non-existent district court order or an impermissible collateral attack on Commissioner Bulla's discovery order. Proof positive in this regard is Plaintiffs' separate objection to Commissioner Bulla's Report and Recommendations, which is the appropriate procedural vehicle by which to challenge her order. Consequently, Defendants ask this Court to strike Plaintiffs' Motion on this basis. In the alternative, Defendants ask this court to deny Plaintiffs' Motion on the merits. Additionally, because the instant is unnecessary, unwarranted, and "[s]o multiplies the proceedings in a case as to increase costs unreasonably and vexatiously," Defendants ask this Court to award fees and costs to Defendants for needlessly having to prepare this response.

I. PLAINTIFFS' MOTION FOR CLARIFICATION IS PROCEDURALLY IMPROPER AND SHOULD BE STRICKEN IN ITS ENTIRETY.

As a threshold issue, Plaintiffs' Motion is procedurally improper. Plaintiffs do not seek clarity regarding a prior order. Instead, Plaintiffs seek reconsideration of Judge Scann's prior comments in February 2016, and Commissioner Bulla's rulings on July 20, 2016. It is a procedurally improper motion on both counts and should be stricken. *See Thomason v. Myers*, No. 66291, 2015 WL 5475296, at *2 (Nev. Ct. App. Sept. 14, 2015) ("A party may respond to a motion . . . by moving to strike it on the grounds that the original motion was procedurally improper").

First, Plaintiffs' Motion is procedurally improper as it relates to Judge Scann's instructions in February 2016. Eighth Judicial District Court Rule 2.24(b) states that the "party seeking reconsideration of a ruling of the court . . . must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order." As Plaintiffs acknowledge in their Motion (at 2), no written order from Judge Scann exists. Plaintiffs fail to cite any authority authorizing them to come before the Court for clarification or reconsideration of an order that does not exist.

Second, Plaintiffs improperly spend pages and pages of their Motion attacking Commissioner Bulla's rulings at the July 20, 2016 hearing. NRCP 16.1(d)(2) and (3) state that:

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> [w]ithin 5 days after being served a copy [of the report and recommendations], any party may serve and file written objections to the recommendations . . . . Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

Under NRCP 16.1(d), the proper way to challenge Commissioner Bulla's Report and Recommendations is to file an objection to the Report and Recommendations, which Plaintiffs did on October 12, 2016. Accordingly, the instant Motion serves no legitimate purpose and instead acts as either an improper reconsideration move or an impermissible collateral attack on the Commissioner's Report and Recommendations. Because Plaintiffs' Motion is not procedurally proper, Defendants ask this Court to strike Plaintiffs' Motion in its entirety.

II. EVEN IF PLAINTIFFS' MOTION WERE PROCEDURALLY PROPER, THE MOTION SHOULD BE DENIED.

NRCP 60(b) provides that a court may relieve a party from a final order due to, in relevant part: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; [or] (3) fraud . . . misrepresentation or other misconduct of an adverse party."

Plaintiffs do not present any grounds for relief from Commissioner Bulla's rulings. Instead, Plaintiffs use their Motion to repeat the same legal arguments, usually verbatim, which Plaintiffs previously made and lost before both Judge Scann and Commissioner Bulla. This kind of recycling defeats the purpose of motions for reconsideration. *See, e.g., United States v. De Rong Shang*, No. 2:11-cr-110-RLH-VCF, 2012 WL 234646, at *1 (D. Nev. Jan. 25, 2012) ("Motions for reconsideration are not 'the proper vehicles for rehashing old arguments' . . . and are not 'intended to give an unhappy litigant one additional chance to sway the judge'") (citations omitted). Plaintiffs raise no new issues of law and do not make reference to additional facts entitling them to reconsideration. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("We note particularly that the second motion . . . raised no new issues or law and made reference to no new or additional facts. Under such circumstances the motion was superfluous and, in our view, *it was an abuse of discretion for the district court to entertain it*") (emphasis added); *see also Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (holding that a district court properly denied a motion for reconsideration in which the plaintiff presented

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nothing that was not already raised in his original motion). "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached" should a motion for reconsideration be granted. *Moore*, 92 Nev. at 405, 551 P.2d at 246. Because Plaintiffs fail to raise any new legal arguments or new issues of fact, this Court should deny the Motion on the merits.

III. COMMISSIONER BULLA'S RULING PHASING DISCOVERY WAS MADE WITH EXTENSIVE DELIBERATION AND ANALYSIS, IS SUPPORTED BY AMPLE AND PERTINENT AUTHORITIES, AND SHOULD NOT BE DISTURBED.

Plaintiffs insist throughout their Motion that Commissioner Bulla ruled in favor of phasing discovery solely because she felt bound by a "phantom order" from Judge Scann. In doing so, Plaintiffs fail to acknowledge that Defendants affirmatively moved to phase discovery and that Commissioner Bulla fashioned her own ruling after extensive proceedings involving the parties. Her ultimate decision to phase discovery is supported by well-reasoned authority. For these reasons, this Court should deny Plaintiffs' Motion on the merits.

A. Commissioner Bulla Was Well-Reasoned In Her Analysis And Within Her Discretion To Phase Discovery.

In their Motion, Plaintiffs misstate or misinterpret Commissioner Bulla's thoughtful and deliberative process in arriving at her decision to phase discovery. The parties submitted extensive briefing and authorities on the issue and subsequently participated in a hearing before Commissioner Bulla that spanned nearly three hours. During the hearing, Commissioner Bulla gave due consideration to Judge Scann's comments as well as the parties' arguments, as was her right and obligation. Commissioner Bulla understood there is a threshold legal issue—whether Defendants are collection agencies requiring licensing under Nevada law, or whether they are not. [Motion Declaration, Ex. 24 at 13:10-12]

Moreover, Commissioner Bulla considered multiple discovery scenarios—including the two possibilities that Plaintiffs request from this Court—before ultimately arriving at her decision. [*See id.* at 24:1-11; 27:22-30:15] She weighed factors such as litigation costs [*id.* at

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15:1-3, 17:17-21, 18:13-16] and fairness to the named Plaintiffs [*id.* at 36:22-24].[3] Had Commissioner Bulla felt obligated to adhere to Judge Scann's comments, she would have said so and stopped, instead of engaging both sides in a purposeful dialogue for hours before ultimately arriving at her decision. Commissioner Bulla utilized her discretion to determine the course of proceedings and to enter appropriate recommendations to this Court which appropriately regulate or supervise the conduct and sequence of discovery. NRCP 26(b)(2) (stating, "[b]y order, the court may alter the limits in these rules" pertaining to discovery); *MGM Grand, Inc. v. Eighth Judicial Dist. Court of the State of Nev.*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (holding "there is wide discretion in the trial court to control the conduct of pretrial discovery" and limiting scope of discovery concerning dispositive jurisdictional issue) (citation omitted). Commissioner Bulla's ruling should not be disturbed, as her ultimate decision fell soundly within her discretion.

B. Commissioner Bulla's Ruling Is Supported By Ample Authority.

Class action case law supports Commissioner Bulla's decision to phase discovery with an initial focus on the viability of the named Plaintiffs' claims. *E.g.*, *Ardrey v. UPS*, 798 F.2d 679, 680, 684 (4th Cir. 1986) (affirming order of district court limiting discovery to plaintiffs' individual claims and delaying class-wide discovery until after viability of individual claims established), *cert. denied*, 480 U.S. 934 (1987); *Loreaux v. ACB Receivables Mgmt., Inc.*, Civil Action No. 14-710 (MAS), 2015 WL 5032052, at *4 (D.N.J. Aug. 25, 2015) (phasing discovery and limiting the first phase to the named plaintiffs in a class action for deceptive trade practices under the FDCPA where the court found that a narrow, dispositive issue existed regarding whether the defendant's correspondence violated the FDCPA, the issue did not implicate the

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[3] Commissioner Bulla recognized that litigating the narrow legal issue would keep litigation costs down for all parties. She repeatedly questioned why Plaintiffs' counsel would want to drive up costs when his clients may not have viable claims. [*Id.* at 15:1-3 ("Why do you want to spend a lot of money doing research or discovery on class certification when you may not have a viable claim? That does not make a lot of sense to me."); *id.* at 17:17-21 ("Why would we increase litigation costs and expenses if the defendants – and I know you disagree with this, but if they are correct on the law . . . that they are not collection agencies?"); *id.* at 18:13-16 ("And why would you spend a lot of money doing class certification merit discovery without knowing the initial answer to the question of whether or not you have a legally valid claim under Nevada law?")]

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class, and bifurcation would save the parties and the court from the substantial costs of class-wide discovery and best serve the interest of judicial economy and efficiency); *Degutis v. Financial Freedom, LLC*, No. 2:12-cv-319-FM-38DNF, 2013 WL 10207621, at *2 (M.D. Fla. Oct. 18, 2013) (limiting discovery to the named plaintiff in the context of a state law deceptive trade practices claim, where defendants allege there are no damages, so that defendants may file for summary judgment against the named plaintiff prior to addressing class issues); *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 12-60798-CIV, 2012 WL 7856269, at *2 (S.D. Fla. Nov. 27, 2012) (granting motion to phase discovery in class action lawsuit and limiting initial discovery to named plaintiffs only); *Stavroff v. Midland Credit Mgmt. Inc.*, Cause No. 3:05-CV-127 AS, 2005 WL 6329149, at *4 (N.D. Ind. June 8, 2005) (granting defendants' motion to phase discovery and allowing parties to proceed with phased discovery regarding the named plaintiffs); *see also Manual for Complex Litigation* § 11.422 (4th ed. 2004) ("Initial discovery may also be targeted at information that might . . . provide the foundation for a dispositive motion"). There is ample basis supporting Commissioner Bulla's decision to phase and limit discovery at this time to the named Plaintiffs during the initial phase of discovery.

Indeed, phasing initial discovery to the named Plaintiffs only promotes efficiency and judicial economy and prevents waste of potentially unnecessary time and expense on class and merits issues. *E.g.*, *Starvoff*, 2005 WL 6329149, at *2-3 (bifurcating and limiting discovery to named plaintiffs to prevent unnecessary expense and promote efficiency in accordance with Federal Rule of Civil Procedure 1); *Anda, Inc.*, 2012 WL 7856269, at *2 (holding "the Court agrees that in the interests of efficiency, Defendant should be allowed to conduct discovery on and submit a dispositive motion as to Plaintiff's individual claims").

Contrary to Plaintiffs' arguments (at 29-32), limiting discovery to the named Plaintiffs will not result in duplication. The scope of discovery on the named Plaintiffs and generic information is narrow, and it may be that only a single NRCP 30(b)(6) deposition from each Defendant on the named Plaintiffs' files and the Defendants' policies, practices, and procedures relevant to Nevada is necessary. If the parties proceed to Phase II discovery, Plaintiffs will be entitled to no more than four additional NRCP 30(b)(6) depositions (one per Defendant), and

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these depositions will cover new material related to the class. The Report and Recommendations limit Defendants to one deposition per named Plaintiff. [Report and Recommendations at 3:13-14] Plaintiffs' position that "as many as 20 to 30 people will have to be deposed at least twice" due to discovery phasing is nothing more than unsubstantiated conjecture and speculation. Moreover, Plaintiffs have been the source of delay in this case, as Plaintiffs' counsel recently asked to postpone the end of Phase I discovery until March 2017. [Counsel Decl., Ex. A-3 (e-mail from N. Boylan)] Plaintiffs cannot seriously contend that they are prejudiced by delaying class discovery while at the same time requesting delay themselves.

Much of Plaintiffs' Motion focuses (at 26-27) on phasing between class discovery and merits discovery. Plaintiffs' cited cases are not helpful as they do not concern limiting initial discovery to the named Plaintiffs and to policies, practices and procedures. In addition, Defendants are not seeking to preclude class discovery. Instead, Defendants' position is simply that, consistent with Judge Scann's directive and Commissioner Bulla's ruling, class discovery is not appropriate *at this stage of discovery*. Plaintiffs' counsel selected the class representatives, not Defendants. If Plaintiffs' counsel cannot defeat summary judgment using the claims of the individuals he selected, then there is no reason to provide Plaintiffs' counsel with class information.[4] If Plaintiffs can somehow defeat Defendants' dispositive motions for summary judgment (which will be difficult to do), then discovery will proceed to class issues.

IV. PLAINTIFFS NARROWLY AVOIDED COMPLETE DISMISSAL BEFORE JUDGE SCANN.

Plaintiffs' Motion seeks to mislead the Court into believing Plaintiffs have an ironclad case. Not so. *Every Nevada state and federal court to consider the licensure issue has concluded that non-judicial foreclosure activities by trustees under a deed of trust do not constitute collection agency activities under NRS 649.* Should Plaintiffs succeed here, it would be the very first such case of its kind. To assure that Defendants' activities fit within those numerous

[4] Additionally, Plaintiffs' proposed borrower-by-borrower inquiry dooms counsel's contention that a class will ever be certified.

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authorities notwithstanding the Court's grave misgivings concerning the viability of the named Plaintiffs' claims, Judge Scann indicated that initial discovery should take place, confined to the named Plaintiffs' claims.

A. Nevada Case Law Uniformly Favors Defendants.

Plaintiffs do not and cannot point to any Nevada federal or state court decision finding that non-judicial foreclosure activities constitute collection agency activities under NRS Chapter 649.[5]

In contrast to Plaintiffs' lack of Nevada authority, in *Quality Loan*, Judge Timothy Williams considered and rejected the very collection agency licensure argument that underlies Plaintiffs' claims in this case. There, the state court scrutinized the various Nevada statutes

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[5] Instead of addressing the relevant Nevada case law, Plaintiffs in their Motion present the Court with the glaring misstatement that "the states are uniform" in their treatment of debt collection licensing. [Motion at 15] Plaintiffs' cited cases support the unremarkable premise—irrelevant to the instant case—that a business that *purchases* or *acquires* the right to consumer debt from another for the purpose of collecting on that debt should be licensed as a debt collector under state law. *See Smith v. LVNV Funding, LLC*, 894 F. Supp. 2d 1045, 1048-49 (E.D. Tenn. 2012) (concerning defendant that purchased unpaid credit card debt from the original creditor for subsequent collection); *Veras v. LVNV Funding, LLC*, Civil No. 13-1745 (RBK/JS), 2014 WL 1050512, at *3-6 (D.N.J. Mar. 17, 2014) (concerning defendant that purchased credit card debt and then attempted to collect that debt); *Simpson v. Cavalry SPV I, LLC*, 440 S.W.3d 335, 336-40 (Ark. 2014) (concerning entity that purchased delinquent credit card debt and then retained a lawyer to collect on the delinquent accounts and file lawsuits); *Gray v. Suttell & Assocs.*, 334 P.3d 14, 15-16 (Wash. 2014) (concerning company that purchased consumers' unpaid financial commitments to credit originators and took steps to collect the debts); *Finch v. LVNV Funding LLC*, 71 A.3d 193, 195 (Md. Ct. Spec. App. 2013) (concerning defendant that acquired unpaid credit card debts by assignment and subsequently filed debt collection suits against plaintiffs), *cert. denied sub nom.* 435 Md. 266 (2013); *Commercial Serv. of Perry, Inc. v. Fitzgerald*, 856 P.2d 58, 59-60, 62 (Colo. App. 1993) (concerning plaintiff's business that consisted of purchasing groups of loans from the FDIC and then collecting the debts on its own behalf). To state the obvious, Plaintiffs' case law is irrelevant here because not a single Defendant in this case owned consumer debt, purchased it or otherwise acquired it.

Other cases cited by Plaintiffs do not even address state law or debt collection licenses. *See JHass Group L.L.C. v. Arizona Dep't of Fin. Insts.*, 360 P.3d 1029, 1035-40 (Ariz. Ct. App. 2015) (deciding that a business which negotiated debt settlements needed to be licensed as a debt management company); *Centurion Capital Corp. v. Druce*, 828 N.Y.S. 2d 851, 852-53, 855 (N.Y. Civ. Ct. 2006) (finding that plaintiff that purchased credit card debt and attempted to collect against defendant could not do so as an unlicensed debt collection agency under the New York City Administrative Code). Still other cases cited by Plaintiffs concern businesses that were clearly operating in the debt collection market, also irrelevant here. *Badeen v. PAR, Inc.*, 853 N.W.2d 303, 305, 308-09 (Mich. 2014) (holding that "forwarding companies" which act as intermediaries between a company needing collections and a collection agent should be licensed as debt collectors under Michigan law); *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1099-1101 (9th Cir. 1996) (finding that, while an out-of-state collection agency should have been licensed under Idaho law, its collection efforts were "innocuous" and did not violate the FDCPA).

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implicated in this determination, and held squarely that "a Trustee's exercise of the power of sale under NRS Chapter 107 is *not* the collection of a debt or claim under NRS Chapter 649, and therefore a Trustee who is only exercising the power of sale under NRS Chapter 107 is not required to obtain a license from the FID as a collection agency." *Quality Loan*, 2013 WL 6911859 at *3 (emphasis added). The Nevada Financial Institutions Division ("FID")—the governmental body charged with collection agency licensure—did not appeal this decision, and counsel has been unable to find any evidence that the FID has pursued licensing claims against any other foreclosure trustee.

As the Court explained: "Because of the unique nature of real property, the use of a Deed of Trust to hold such real property as security for a real estate loan (which includes the Trustee's power of sale by the contractual consent of the borrower), a Deed of Trust is not a 'claim' or 'debt' as defined by NRS chapter 649." *Id.* Similarly, "[t]he notices required by NRS Chapter 107 in the event of default by the borrower are *not* the solicitation of payment of a debt or claim." *Id.* (emphasis added). The Court concluded: "NRS chapter 649 does not apply to the exercise of the power of sale under a Deed of Trust. Rather, only NRS Chapter 107 regulates the exercise of the power of sale pursuant to a Deed of Trust." *Id.*

The *Quality Loan* decision squarely demonstrates that foreclosure trustees engaging in non-judicial foreclosure activities, like QLS and the other Defendants in this action, are not collecting claims and are not collection agencies under Nevada law. Defendants do not need to be licensed or hold certificates as collection agencies to engage in non-judicial foreclosure activities.

As held in *Quality Loan*:

- "[A] Deed of Trust is not a 'claim' or 'debt' as defined by NRS Chapter 649." *Id.*
- "[T]he exercise of the power of sale by a Trustee under NRS Chapter 107, including giving the required notices and conducting sale of the real property held as security, is not the collection of debt or claim or the solicitation of payment of a debt or claim under NRS Chapter 649." *Id.* at *2.
- "[A] Trustee exercising the power of sale pursuant to the procedures set forth in NRS chapter 107 is not required to obtain a license as a 'collection

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agency' from the FID prior to exercising the power of sale under a Deed of Trust." *Id.*

- "The FID has no regulatory, licensing or enforcement authority over a Trustee's exercise of the power of sale pursuant to NRS chapter 107." *Id.* at *3.

Consistent with *Quality Loan*, a near avalanche of decisions by Nevada federal district courts uniformly hold that engaging in non-judicial foreclosure activities is not debt collection and does not require licensure as a collection agency under NRS 649. *See, e.g., Padilla*, 2011 WL 3585484, at *4 (dismissing deceptive trade practice claim against foreclosure entity for alleged failure to have a state license because "it is well established that non judicial foreclosures are not an attempt to collect a debt under the Fair Debt Collection Practice Act and similar state statutes"); *Erickson v. PNC Mortg.*, No. 3:10-cv-0678-LRH-VPC, 2011 WL 1626582, at *3 (D. Nev. Apr. 27, 2011) (dismissing deceptive trade practices claim and holding that "[a] foreclosure trustee does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt collector"); *Smith*, 773 F. Supp. 2d 941 at 944 (dismissing deceptive trade practices claim based on "the allegation that the foreclosing entities did not have a 'collector's license'" because foreclosure does not constitute a debt collection activity); *Camacho-Villa v. Great W. Home Loans*, 3:10-cv-210-ECR-VPC, 2011 WL 1103681, at *5 (D. Nev. Mar. 23, 2011) (concluding that servicing a mortgage and initiating foreclosure pursuant to a deed of trust do not constitute debt collection under NRS 649); *Karl v. Quality Loan Serv. Corp.*, 759 F. Supp. 2d 1240, 1248 (D. Nev. 2010) (rejecting deceptive trade practices claim against QLS for allegedly conducting debt collection activities in Nevada without the requisite license by recording a notice of default because QLS "was not acting as a debt collector [and] did not need to be licensed as one"), *aff'd*, 553 F. App'x 733 (9th Cir. 2014); *Maves*, 2010 WL 3724264, at *3 (dismissing deceptive trade practices claim under NRS 598.0923(1) against foreclosure trustee for alleged failure to have a collection agency license because "[a] foreclosure trustee does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt collector"), *aff'd*, 461 F. App'x 636 (9th Cir. 2011).

These Nevada district court decisions, many of which were affirmed by the Ninth Circuit, analyzed NRS 598.0923(1), which provides that it is a deceptive trade practice for a company to

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knowingly conduct business without all required state, county or city licenses. NRS 649.075 is the *only* statute that requires licensure for operation of a collection agency; there is no companion licensure provision in the Fair Debt Collection Practices Act ("FDCPA"). Consequently, all these courts examined the applicability of NRS 649.075 when they determined that the defendants in those cases were not subject to the licensure requirements.

In addition, while the FDCPA is a different statutory scheme than NRS 649, the Ninth Circuit's recent decision in *Ho* is persuasive. In *Ho*, the Ninth Circuit expressly rejected authorities relied upon by Plaintiffs here from other Circuits and held that trustee "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the [Fair Debt Collections Practices Act]." *Ho*, 2016 WL6091564, at *3.[6] In reaching this conclusion, the Ninth Circuit "view[ed] all of ReconTrust's activities as falling under the umbrella of 'enforcement of a security interest" and affirmed the leading federal district court decision in the Ninth Circuit that held "'foreclosing on a trust deed is an entirely different path' than 'collecting funds from a debtor.'" *Id.* at *3-4 (quoting *Hulse v. Ocwen Fed. Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)).[7]

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[6] Such rejected decisions include specifically *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), relied on by Plaintiffs' Motion (at 14, 16, 20, 30).

[7] The Ninth Circuit's decision in *Ho* also rejects Plaintiffs' contention that mini-Miranda warnings transform Defendants into debt collectors. *Ho*, at *5 n.7 (holding that the disclaimer stating "ReconTrust 'is a debt collector attempting to collect a debt' . . . isn't sufficient to show that ReconTrust is a debt collector").

None of the federal circuit court authorities from beyond the Ninth Circuit cited by Plaintiffs (at 14) is or can be controlling. *See, e.g., Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (concerning letter from law firm to homeowner that exceeded statutory provisions on foreclosure); *Rowe v. Educational Credit Mgmt. Corp.*, 559 F.3d 1028, 1035 (9th Cir. 2009) (concerning collection of defaulted student loans); *Wilson*, 443 F.3d at 376-77 (concerning various mortgage collection letters sent to plaintiff that allegedly failed to verify the debt, continued after the debt was disputed, and were sent to represented party); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 230 (3d Cir. 2005) (concerning collection of municipal water obligations); *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 113 (2d Cir. 1998) (concerning collection of rent from tenant); *see also Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386-87 (7th Cir. 2010) (holding that "it was a mistake to dismiss the complaint on the sole ground that none of these communications explicitly demanded payment from Gburek" because letters to plaintiff were sent to induce settlement); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (remanding for court to consider whether lawyer conducting foreclosure fit general definition of debt collector).

Thus, in evaluating Plaintiffs' request for expensive, wide-ranging discovery, Defendants urge the Court to take into account the absence of authority to support Plaintiffs' claims and the wealth of authorities that have rejected these claims on numerous occasions. It is entirely appropriate for the Court to view the discovery phasing with that contextual background in mind.

B. Judge Scann Expressed Serious Doubts Regarding The Viability Of Plaintiffs' Remaining Claims.

Plaintiffs' characterization of their case also fails to acknowledge the numerous misgivings Judge Scann expressed concerning the merits of their causes of action. Judge Scann dismissed Plaintiffs' elder abuse claim without needing to hear any argument by Defendants. [Joint Motion to Bifurcate, Ex. A-1 at 11:6 (stating to defense counsel on the elder abuse claim that "[y]ou don't even need to address that"); *id.* at 30:3 ("I'm dismissing the elder abuse claim")] During the February 22, 2016 hearing on Defendants' joint motion to dismiss, Judge Scann also expressed her inclination to grant Defendants' motion to dismiss the Second Amended Complaint as it pertained to the remaining statutory fraud and unjust enrichment claims. Among other things, Judge Scann asked Plaintiffs' counsel: "What are you trying to accomplish here, counsel, because *I don't see any damages whatsoever*." [*Id.* at 13:8-9 (emphasis added)] Judge Scann observed: "But you haven't paid that. It's for the benefit of the plaintiff—or the defendants, the lenders. So how is that your damages? How would you ever get that money back, or how would you ever get that money?" [*Id.* at 17:5-7] Further expressing skepticism as to damages, Judge Scann stated: "So your clients, who haven't paid – haven't satisfied their mortgage notes, get money for not satisfying their mortgage notes?" [*Id.* at 17:15-16] Judge Scann also grappled with the complaint's lack of factual allegations, stating "there aren't very many in this complaint." [*Id.* at 14:10]

In addition, Judge Scann repeatedly suggested that counsel may have failed to satisfy Rule 11 when he filed the complaint. For example, Judge Scann stated:

> THE COURT: You need to have enough to satisfy Rule 11 before you can file it.
>
> MR. BOYLAN: Well, I mean –
>
> THE COURT: I mean, you've got to have some facts. What you don't have in here is facts.

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[*Id.* at 16:12-16; *see also id.* at 44:3-6 (stating "[w]ell, you need to know some information before you even file, if that's the case. . . . Rule 11)]

Plaintiffs could not articulate to Judge Scann precisely what constitutes collection agency activity that would take this case out of the litany of cases decided against similar plaintiffs in similar circumstances. The following exchange occurred:

> THE COURT: How else do you act as a non-judicial foreclosure trustee? So you're trying to say that every activity that they did makes them a debt collector.
>
> MR. BOYLAN: No, that's just false. That's a mischaracterization of our complaint. They make that argument, Your Honor, but that not true. It's real simple.
>
> . . .
>
> MR. BOYLAN: What they did is they packaged it. They packaged it and said, oh, I will do this for you. We'll collect the debt, we'll do this, we'll make the phone calls, we'll send the letters, we'll collect the money, we'll pass the money on to you.

[*Id.* at 19:4-18] At most, Plaintiffs' counsel described his claims as something more than statutory foreclosure activities. He said, "[a]gain, the problem is they did so much more than simply record a notice of default." [*Id.* at 25:7-8][8]

Although Judge Scann was inclined to dismiss all of Plaintiffs' claims, ultimately she elected to permit Plaintiffs to develop the alleged "so much more" with respect to the numerous named Plaintiffs themselves. Judge Scann said: "I really feel like more information is needed as a part of the record in order for me to make a ruling on that, because the supreme court likes to see a record." [*Id.* at 34:20-22] In declining to dismiss the statutory fraud and unjust enrichment claims at the pleading stage, Judge Scann contemplated that Defendants would file early summary judgment motions based on the documents relating to the named Plaintiffs. [*Id.* at 39:1-2] "All right. And this of course is without prejudice to a summary judgment if there's some – just a collection of documents is what it sounds like to me." [*Id.* at 39:1-3]

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[8] In Plaintiffs' Counsel's Declaration, Plaintiffs' counsel points to the mini-Miranda warnings in Defendants' documents as somehow establishing Plaintiffs' entire case. Judge Scann dismissed the same arguments advanced by Plaintiffs' counsel at the motion to dismiss stage because "in my experience that's what everybody does is to insure that they don't get sued for some violation of the Fair Debt Collection Act." [*Id.* at 21:11-12] The Ninth Circuit's recent decision in *Ho* confirms the correctness of Judge Scann's view. See note 7 *supra*.

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Ignoring that admonition entirely, Plaintiffs' counsel began to recite a laundry list of discovery he intended to seek. [*Id.* at 39:8-14] In response, Defendants expressed concern that Plaintiffs sounded like they were going to seek an enormous amount of discovery designed to drastically increase costs and force Defendants to settle claims having no merit.

As Defendants' counsel explained, "in fairness I wanted to advertise to the Court that in an attempt to try to curtail the expenditure that you hear coming, *the fusillade of discovery that is clearly coming from my good friend on the other side, we may w[ant] to try to shorten this and decrease the expense to try to bring it to a position where you have what you think you need to decide these issues on the record.*" [*Id.* at 40:8-13 (emphasis added)] Counsel specifically expressed concern that Plaintiffs would bury Defendants in one-sided discovery to force the case to settle due to the exorbitant cost:

> *You just heard what's coming at us.* And this is the real disappointment in a sense that, as Your Honor pointed out, what are the damages here? He's talking about practices, procedures, all encompassing this, encompassing that. *He's going through millions of documents, not because he wants to read any of the documents, but he wants us to cut a check.* And the more he speaks, the more I'm disinclined on this side of the aisle to want to do any of that. But of course we're not spending our own money, either, we're spending our client's money. And my position, taking Your Honor's directive, will be to focus on the individual issues first. And like I say, you may see additional motion practice stemming from this.

[*Id.* at 42:10-19 (emphasis added)]

Judge Scann, in response, instructed the parties that discovery would be limited to the named Plaintiffs. [*Id.* at 40:20-21 (stating "right now we don't have a class that's certified, so it's limited to the parties as far as the discovery goes")] Judge Scann unequivocally stated: "*I want to see like the files for these particular individuals that you've named.*" [*Id.* at 43:17-18 (emphasis added)] Judge Scann refuted Plaintiffs' attempt to expand discovery beyond the named Plaintiffs. When counsel suggested he needed documents "for thousands of people," Judge Scann made it clear discovery would be limited to the named Plaintiffs. [*Id.* at 41:17-21] Judge Scann stated "*[n]ot for thousands of people, for the people who are the named plaintiffs.*" [*Id.* at 41:20-21 (emphasis added)]

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V. PLAINTIFFS MAY NOT ENGAGE IN CLASS DISCOVERY TO FIND NEW CLASS REPRESENTATIVES AND SUMMARY JUDGMENT AGAINST NAMED PLAINTIFF REPRESENTATIVES IS COMMONPLACE IN CLASS ACTION PRACTICE.

Plaintiffs incorrectly contend (at 11-12, 40-43) that members of the alleged class are percipient witnesses to the named Plaintiffs' claims. Purported members of the alleged class do not and cannot have knowledge of the facts or claims of the named Plaintiffs, as such claims concern each named Plaintiff's default on his or her mortgage obligations and the related non-judicial foreclosure process concerning the home secured by his or her deed of trust. The facts concerning the named Plaintiffs' claims are in the files of the named Plaintiffs or reside with the named Plaintiffs themselves. There is no dispute that these files have been produced.

Plaintiffs' insistence that they must immediately engage in class discovery is nothing more than tacit acknowledgement of the weakness of the named Plaintiffs' claims and a lengthy fishing expedition to increase Defendants' expenses and rummage through Defendants' records to try to find new class representatives with viable claims. This is impermissible. *E.g.*, *Annunziato v. Collecto, Inc.*, 296 F.R.D. 112, 120 (E.D.N.Y. 2013) (explaining that, in a class action, "[t]he party seeking discovery must make a *prima facie* showing that the discovery sought is more than merely a fishing expedition") (citations omitted); *Arango v. Work & Well, Inc.*, No. 11 C 1525, 2012 WL 3023338, at *3 (N.D. Ill. July 24, 2012) (commenting that "the plaintiff was going about discovering facts in the wrong order" to support his class action claims, and finding that the plaintiff sought to use discovery as an impermissible "fishing expedition"); *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI) (MDG), 2006 WL 1455464, at *1 (E.D.N.Y. May 23, 2006) ("Courts have ordinarily refused to allow discovery of class members' identities at the pre-certification stage out of concern that plaintiffs' attorneys may be seeking such information to identify potential new clients, rather than to establish the appropriateness of the certification"); *In re Mortgagors of Temple-Inland Mortg. Corp.*, No. CIV. A. 99-CV-4633, 2001 WL 177181, at *2-3 (E.D. Pa. Jan. 24, 2001) (refusing to permit plaintiffs' counsel to obtain the identities and addresses of prospective class members from the defendant before class certification for the purpose of identifying a class representative in a FDCPA case); *see also Bird Hotel Corp. v.*

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Super 8 Motels, Inc., No. CIV 06-4073, 2007 WL 404703, at *4 (D.S.D. Feb. 1, 2007) (refusing to compel defendant to provide class member identities and information prior to class certification).[9]

In addition, Defendants are entitled to seek early summary judgment as to the named Plaintiffs. *E.g.*, *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (finding that the "proper approach" is to allow a defendant to waive the protection afforded by an early ruling on class certification and instead seek summary judgment as to the claims of the named plaintiffs before considering class certification); *see also Thornton v. Mercantile Stores Co.*, 13 F. Supp. 2d 1282, 1290 (M.D. Ala. 1998) ("Where the defendant seeks summary judgment [on the named plaintiffs' claims in a class action] knowing of the possibility that other plaintiffs will enter the case and not be bound thereby, it is not for the plaintiffs or the court to deter them from assuming that risk") (citing *Wright*).

VI. AN AWARD OF DEFENDANTS' FEES AND COSTS IS APPROPRIATE BECAUSE PLAINTIFFS' MOTION IS UNNECESSARY, UNWARRANTED, AND UNREASONABLY INCREASED COSTS.

An award of Defendants' fees and costs against Plaintiffs or their counsel is warranted here. NRCP 11(b)(1) requires counsel to certify that a motion "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Eighth Judicial District Court Rule 7.60(b) allows this Court to impose reasonable award of fees and costs upon an attorney or a party when an attorney or a party "without just cause: (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary, or unwarranted . . . [or] (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously." Plaintiffs' Motion is frivolous, unnecessary, and unreasonably drives up the costs of defending the instant suit because it is procedurally and

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[9] To support their position, Plaintiffs largely rely (at 11-12, 40-43) on California cases—which are not controlling in Nevada. These cases are distinguishable—even if California law were controlling—because the leading California authority on disclosure of the identity of class members requires that class members receive an opt-out notice before the defendant discloses the identities of members of the proposed class. *Pioneer Elecs. (USA), Inc. v. Superior Court*, 53 Cal. Rptr. 3d 513, 514-15 (2007). Plaintiffs do not request such a procedure here, but rather ask this Court to force the Defendants to turn the information over without regard for the proposed class members' privacy rights.

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substantively improper. Moreover, Plaintiffs filed two versions of the same motion—this Motion and Plaintiffs' Objections to the Report and Recommendations. Defendants now have to respond to two separate motions from the same party seeking essentially the same relief.

Defendants respectfully ask the Court to consider their request for an award of costs and fees in the context of Plaintiffs' preferred litigation tactics thus far. These tactics are the source of the "hugely wasteful and expensive duplication" that Plaintiffs themselves argue against in their Motion. Since Phase I of discovery commenced in July, Plaintiffs' counsel has not produced a single named Plaintiff for a deposition and has failed to provide substantive responses to Defendants' affirmative discovery. Instead of litigating this case by providing Phase I discovery related to his own clients' claims against Defendants, Plaintiffs' counsel has seen fit to drive up the costs for the defense by sending Defendants—by our latest count—no fewer than 119 letters and filing no fewer than ten motions to compel class-related discovery in direct contravention of Commissioner Bulla's rulings. Now, the parties are forced into litigating this Motion—one that exceeds the page limits, is not procedurally proper, and needlessly repeats arguments that Plaintiffs have already lost. Instead of litigating the case on the merits, Defendants must respond to motion after motion at a huge cost to each Defendant. Accordingly, an award of Defendants' fees and costs against Plaintiffs or their counsel is warranted here.

Relief Requested

For the reasons set forth above, Defendants respectfully ask this Court to grant Defendants' Joint Motion to Strike Plaintiffs' Motion for Clarification or, in the alternative, deny Plaintiffs' Motion for Clarification on the merits. Defendants also ask this Court for an award of their fees and costs incurred in responding to this Motion.

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DATED this 24th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016 I served a true and correct copy of the foregoing **DEFENDANTS' JOINT MOTION TO STRIKE AND, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS,** on counsel by e-mail transmission to the persons listed below, pursuant to EDCR 8.05(a):

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EXHIBIT A

DECL
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DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY BENKO, a Nevada resident; CAMILO MARTINEZ, a Nevada resident; ANA MARTINEZ, a Nevada resident; FRANK SCINTA, a Nevada resident; JACQUELINE SCINTA, a Nevada resident; SUSAN HJORTH, a Nevada resident; RAYMOND SANSOTA, a Ohio resident; FRANCINE SANSOTA, a Ohio resident; SANDRA KUHN, a Nevada resident; JESUS GOMEZ, a Nevada resident; SILVIA GOMEZ, a Nevada resident; DONNA HERRERA, a Nevada resident; ANTOINETTE GILL, a Nevada resident; JESSE HENNIGAN, a Nevada resident; KIM MOORE, a Nevada resident; THOMAS MOORE, a Nevada resident; SUSAN KALLEN, a Nevada resident; ROBERT MANDARICH, a Nevada resident; JAMES NICO, a Nevada resident; and PATRICIA TAGLIAMONTE, a Nevada resident,

Plaintiffs,

vs.

QUALITY LOAN SERVICE CORPORATION, a California Corporation; MTC FINANCIAL, INC. dba TRUSTEE CORPS, a California Corporation; MERIDIAN FORECLOSURE SERVICE, a California and Nevada Corporation dba MTDS, Inc., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION; a Arizona Corporation, CALIFORNIA RECONVEYANCE COMPANY, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: A-11-649857-C
Dept. No.: XXIX
(ELECTRONIC FILING CASE)

DECLARATION OF COUNSEL IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STRIKE AND, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS

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Katie M. Weber, a resident of the state of Nevada, declares as follows:

1. I am a licensed attorney currently in good standing to practice law in the state of Nevada and before this Court.

2. I am an associate at the law firm of Smith Larsen & Wixom, 1935 Village Center Circle, Las Vegas, Nevada 89134, and I am one of the counsel representing defendant California Reconveyance Company in this action.

3. I have personal knowledge of the matters contained in this declaration or am relying upon statements by co-counsel in this case whom I believe to be reliable and capable of determining the authenticity of the materials. I am competent to testify regarding them.

4. Attached as Exhibit A-1 is a true and correct copy of the Plaintiff, Susan Kallen's Requests for Production, Set Three, served September 30, 2016.

5. Attached as Exhibit A-2 is a true and correct copy of Interrogatories, Set Two from Propounding Party, Plaintiff Susan E. Kallen to Responding Party, Defendant California Reconveyance Company, dated October 5, 2016.

6. Attached as Exhibit A-3 is a true and correct copy of an email exchange between Jessica Maziarz and Nicholas Boylan, dated October 10, 2016.

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

EXECUTED this 24th day of October, 2016 at Las Vegas, Nevada.

Katie M. Weber

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B. The Prior QLS Order Is Distinguishable on the Critical Facts

As reiterated throughout this brief, according to the text of the order from Dept. 16 in the QLS matter, the Court limited its determination to the simple fact that QLS did nothing other than record a notice of default (and possibly conduct the sale). The facts at issue here, as pled in the SAC, depict a very different scenario, which itemizes a variety of debt collection activities, including demanding payments, receiving payments, forwarding payments, soliciting from the banks the opportunity to act on their behalf to collect the debts, seeking payment by cashier's checks and/or wire transfers made payable to Defendants, all as collection agents for the lenders, etc.

C. The Prior QLS Order Is Incorrect on Its Face

For example, it seems that there is a glaring legal error on the face of the QLS order from Department 16 that is relied upon by Defendants here. In the "Conclusions of Law," paragraph numbers 2 and 3 thereof, it appears that Judge Williams based his order in substantial part on a determination that the California company, QLS, was not doing business in the State of Nevada pursuant to NRS 80.015. It is inexplicable that the order did not cite or discuss the contrary, dispositive portion of that same statute, with respect to the issue. Specifically, NRS 80.015(4)(b) provides specifically that: "The fact that a person is not doing business in this state within the meaning of this section . . . [d]oes not affect the applicability of any other provision of law with respect to the person and may not be offered as a defense or introduced in evidence in any civil action, . . . involving an alleged violation of chapter 597, 598,[7] or 598A of NRS." The issue of whether QLS was doing business in the State as set forth in NRS 80.015 is not even allowed to be an issue on this matter, yet it was the basis of Judge Williams' order

D. There Are Numerous and Critical Defects in the Federal Trial Court Orders Relied Upon by Defendants

According to all the federal appellate courts, which issue the binding decisions that set the

[7] NRS 598.0923(1) defines a deceptive trade practice in the course of a person's business or occupation when he or she knowingly conducts the business or occupation without all required state, county, or city licenses.

legal precedents which must be followed, under the less stringent federal law (the FDCPA, not at issue here, but relevant in the trial court orders relied upon by Defendants), trustees conducting foreclosure activities of the kind at issue in this case are debt collectors. *See Wilson v. Draper & Goldberg PLLC*, 443 F.3d 373 (4th Cir. 2006); *Piper v. Portnoff Law Assocs.*, 396 F.3d 227 (3rd Cir. 2005); *Reese*, 678 F.3d 1211; *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 117 (2nd Cir. 1998); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386 (7th Cir. 2010); *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013); *see also Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028 (9th Cir. 2009); *Carter v. Deutsche Bank Nat'l Trust Co.*, 2010 U.S. Dist. LEXIS 44984 (N.D. Cal. May 7, 2010) (declining to dismiss FDCPA claim at pleading stage). The *Wilson* and *Piper* holdings have also been recognized as sources of authority by a trial court in the 1st Circuit. *Moore v. Mortgage Elec. Registration Sys.*, 848 F. Supp. 2d 107 (D.N.H. Jan. 27, 2012) (holding claims could not be dismissed on basis of activities not falling within FDCPA).

The decision in *Wilson* is on all fours. Like the Defendants here, the defendants in *Wilson* relied on various unreported district court decisions. *Wilson*, 443 F.3d at 374. The Fourth Circuit unambiguously rejected the defense contention that they could not be "debt collectors" under the FDCPA because they were substitute trustees foreclosing on a deed of trust. *Id.* As here, Defendant had engaged in a variety of debt collection activities, including sending letters and/or notices expressly admitting that they were attempting to collect a debt. *Id.* at 374-375.

The Ninth Circuit has cited the *Wilson* decision without reservation or restriction. *Rowe*, 559 F.3d 1028. Another trial court in the Ninth Circuit refused to dismiss a FDCPA case at the pleading stage, recognizing the authority for finding the FDCPA applies. *Carter*, 2010 U.S. Dist. LEXIS 44984. Given the consensus among numerous federal circuit courts, any trial court orders to the contrary are without force. They are simply wrong.

Accordingly, given the contrary federal circuit decisions, Defendants cannot properly rely on the erroneous federal trial court decisions from Nevada. Several of those trial court decisions have additional glaring errors. For example, several of Defendants' cases concluded that the

foreclosure companies were not required to obtain a license because their foreclosure activities were not "doing business" in the state. *See, e.g., Karl v. Quality Loan Serv. Corp.*, 759 F. Supp. 2d 1240, 1248 (D. Nev. 2010). Under NRS 80.015(1), activities such as creating or acquiring indebtedness, mortgages and security interest in real or personal property, and securing or collecting debts or enforcing mortgages and security interests in property securing the debts do not technically constitute doing business in the State of Nevada for the sole purpose of determining whether a foreign corporation is required to register with the Nevada Secretary of State under NRS chapter 80. However, "the fact that a person is not doing business in this state within the meaning of this section . . . does not affect the applicability of any other provision of law with respect to the person and may not be offered as a defense or introduced in evidence in any civil action . . . involving an alleged violation of chapter 597, 598, or 598A of NRS." NRS 80.015(4)(b) (emphasis added).

Defendants' reliance on the federal trial court cases is therefore erroneous because these cases generally failed to consider NRS 80.015(4)(b). *See, e.g., Karl*, 759 F. Supp. 2d at 1248 (D. Nev. 2010) (finding that "[s]ecuring or collecting debts or enforcing mortgages and security interest in property securing the debts" does not constitute "doing business" in Nevada under NRS 80.015(b)). None of these cases attempted to consider or examine NRS 80.015(4), which clearly requires Defendants to comply with Nevada's deceptive trade practice statutes regardless of whether their foreclosure and collection activities technically constitute "doing business" in the State for other purposes. Therefore, Defendants were required to comply with the license requirement of NRS 649.075, pursuant to NRS 80.015(4) and NRS 598.0923(1).

Defendants' reliance on unpublished federal district court cases is also misplaced because they are distinguishable and/or unpersuasive. For example, one decision relied on by Defendants is *Padilla v. PNC Mortg.*, 2011 WL 3583484 (D. Nev. Aug. 15, 2011). In *Padilla*, the plaintiff brought, in addition to other claims, a wrongful foreclosure claim under NRS 649.020, and the court determined that "there is no private right of action under NRS Chapter 649." *Id.* at *1, 4.

Padilla did not involve the question of private right of action with respect to the deceptive trade practice statute.

Furthermore, the above district court decisions do not instruct this Court because they do not carry any binding precedential effect. *See, e.g., NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F. 3d 1065, 1069 (9th Cir. 2007) ("[A] district court opinion does not have binding precedential effect.").

III. UNDER NEVADA LAW AND THE SAC, DEFENDANTS ENGAGED IN DEBT COLLECTION ACTIVITIES AND WERE REQUIRED TO BE LICENSED AS COLLECTION AGENCIES AS THEY ENGAGED IN MUCH MORE THAN THE MINISTERIAL ACT OF RECORDING NOTICES OF DEFAULT

Defendants' contentions disregard well-established principles under Rule 12(b)(5) and ignore the allegations stated by Plaintiffs in the SAC. As previously noted, the SAC clearly establishes that Defendants engaged in more than ministerial activities of recording notices of default. For instance, Plaintiffs allege that Defendants were involved only when debt was past due and needed to be collected; that they solicited information from their clients (lenders) to find out the payoff amounts; that they sent notices that state "it is an attempt to collect a debt"; that they asked debtors to send cashier's checks to their accounting office to pay off debt; that they periodically provided wire instructions to debtors, so that they would be able to make payments; that they sent debt validation notices to debtors; and that they forwarded the payment amounts, or the amounts they obtained from selling properties at auctions, to the lender. *See, e.g.*, SAC, ¶¶ 23. These allegations demonstrate that Defendants engaged in more than default recordation activities, such as by actually collecting and handling money on behalf of their client lenders and, therefore, were subject to the license requirement under NRS 649.075. *See e.g., Reese*, 678 F.3d 1211; *Ottovich v. Washington Mutual*, 2010 U.S. Dist. LEXIS 99161 (N.D. Cal. Sept. 22, 2010) (Alsup, J.).

Furthermore, even if federal law applied under the FDCPA, which it does not, based on Plaintiffs' allegations that Defendants' activities went far beyond merely mailing and recording a notice of default, on the specific facts alleged here, Defendants' actions constitute debt collection. *See e.g., Reese*, 678 F.3d 1211, *Ottovich*, 2010 U.S. Dist. Lexis 99161; *see also Natividad v. Wells*

Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 74067 (C.D. Cal. May 24, 2013); *Pfeifer v. Countrywide Home Loans Inc.*, 211 Cal.App.4th 1250, 150 Cal.Rptr.3d 673 (Ct. App. 2012).

IV. THE PRIOR *QUALITY LOAN* DECISION DOES NOT HAVE PRECLUSIVE EFFECT IN THIS CASE

A. The Four Requirements For Issue Preclusion Have Not Been Established

Issue and claim preclusion do not apply unless specific requirements are met. *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. Adv. Rep. 38, 254 P.3d 641, 646 (2011). The "following factors are necessary for application of issue preclusion: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (internal quotation marks and citation omitted; second alteration in original). The fourth requirement means that the issue in the prior case was "'actually litigated and determined by a valid and final judgment, and the determination [was] essential to the judgment.'" *In re Sandoval*, 126 Nev. Adv. Rep. 15, 232 P.3d 422, 424 (quoting *Restatement (Second) of Judgments* ("*Restatement*"), section 27 (1982)).

"Additionally, claim and issue preclusion cannot *enlarge* an order that the rendering judge *expressly limited*." *Holt v. Reg'l Tr. Servs. Corp.* 127 Nev. Adv. Rep. 80, 266 P.3d 602, 605 (2011). "The availability of issue preclusion is a mixed question of law and fact, in which legal issues predominate"; moreover, even "[o]nce it is determined [to be] available, the actual decision to apply it is left to the discretion of the tribunal in which it is invoked." *Redrock Valley Ranch*, 127 Nev. Adv. Rep. 38, 254 P.3d at 647 (internal quotation marks omitted; alterations in original). "The party seeking to assert a judgment against another has the burden of proving the preclusive effect of the judgment." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009).

1. It Is Improper for Defendants to Raise Issue Preclusion by Motion to Dismiss

As a preliminary matter, it is generally procedurally improper under Nevada law for Defendants to raise issue preclusion by way of a motion to dismiss because issue preclusion is an *affirmative* defense that must be both pled and proven by the party asserting it. *See* N.R.C.P. 8(c) ("In pleading to a preceding pleading, a party shall set forth *affirmatively* . . . estoppel, . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense."); *Bower*, 125 Nev. at 481 ("The party seeking to assert a judgment against another has the *burden of proving* the preclusive effect of the judgment."); *Schwartz v. Schwartz*, 95 Nev. 202, 204, 591 P.2d 1137, 1139 (1979) ("Res judicata is an affirmative defense that must be specifically pleaded."). Accordingly, it would be improper for the Court to adjudicate in a motion to dismiss Defendants' affirmative defense of issue preclusion. The Court should expressly decline to do so, especially in order to avoid unfairly prejudicing Plaintiffs by considering matters outside the pleadings, thereby converting Defendants' motion to dismiss into a motion for summary judgment while failing to give Plaintiffs discovery and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" of the Nevada Rules of Civil Procedure. *See* N.R.C.P. 12(b) ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *see also Redrock Valley Ranch*, 254 P.3d at 647.

i. The Issue Decided in Prior QLS Litigation Is Not Identical to Issue Presented Here

For issue preclusion to be available, the issue decided in the prior litigation must be identical to the issue or issues presented in the current action. *See Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713. Defendants mistakenly contend that the "precise issue" presented in *Quality Loan* is the same as the issue before the Court in this action. *See, e .g.*, Defs' Motion to Dismiss, p. 6. According to Defendants, this first requirement for issue preclusion is "easily met" because, Defendants assert, the "issue decided in *Quality Loan* is identical to the collection agency issue underlying this lawsuit." *Id.* at p. 17. Not so.

According to his written order in *Quality Loan*, the pertinent issue decided by Judge Williams was whether a foreclosure trustee who is *only* exercising the power of sale under a deed of

According to his written order in *Quality Loan*, the pertinent issue decided by Judge Williams was whether a foreclosure trustee who is *only* exercising the power of sale under a deed of trust and NRS 107 is collecting a debt or claim, or soliciting the payment of a debt as defined in NRS 649 such that the trustee is required to be licensed as a collection agency by the FID. *See, e.g.*, *Quality Loan*, at 2-3. Defendants do not appear to dispute this. *See, e.g.*, Defs' Motion to Dismiss, p. 10.

As discussed throughout this brief, Plaintiffs here, despite Defendants' assertions to the contrary, do not allege that Defendants were required to be licensed by the FID as collection agencies solely because they recorded a notice of default as trustees. Rather, Plaintiffs have alleged in the SAC that *these* Defendants were required to be licensed by the FID because they were in fact collection agencies and simultaneously engaged in collection activity under Nevada law when they performed the non-judicial foreclosures that are alleged in the SAC. Defendants' activities as collection agencies are evidenced by—but certainly not limited to—the various actions they took in carrying out these non-judicial foreclosures. These actions included but were not limited to soliciting the work from the banks, demanding payment on past due debts, and collecting and forwarding payments. These issues are not identical to the content of Judge Williams' order in *Quality Loan*: whether a trustee of a deed of trust "who is *only* exercising the power of sale under NRS chapter 107 . . . is required to obtain a license from the FID as a collection agency" when "*merely* exercising the power of sale specifically granted" under a deed of trust and NRS 107.[8] .

To the extent that Defendants may attempt to argue that Judge Williams decided more than his written order in *Quality Loan* expresses, Nevada law is clear: issue preclusion cannot "enlarge an order that the rendering judge expressly limited." *Holt v. Reg'l Tr. Servs. Corp.* 127 Nev. Adv. Rep. 80, 266 P.3d 602, 605 (2011). This Court should not entertain any arguments as to what issues Judge Williams decided that would exceed or enlarge the text of his written order.

ii. Defendants Fail to Establish Privity

[8] As discussed below, Plaintiffs do not allege that *all* trustees of deeds of trust are also collection agencies by virtue of their being trustees. *See* NRS 107.028. It is clear, however, that *some* trustees are collection agencies—and must obtain licenses from the FID accordingly—as well as trustees.

(a) Privity under *Restatement* Section 41 Is Lacking

"'Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation.'" *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Rep. 28, 321 P.3d 912, 917 (2014) (quoting *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009)). For this privity requirement, the Nevada Supreme Court has adopted the *Restatement* section 41's "examples of privity that arises when a plaintiff's interests are being represented by someone else." *Id.* at 917-918 (citing *Restatement* § 41(1982)).

Defendants mistakenly contend that privity is established here under the *Restatement*'s examples of a person who was represented by an "official or agency invested by law with authority to represent the person's interests." *See Restatement* § 41(1)(d). Defendants fail to take into account the important guidance found in the comments to section 41(1)(d), however. Comment *d* to section 41 states that:

> As an aspect of the powers and responsibilities of his office, a public official may have authority to maintain or defend litigation on behalf of individuals or of a collective public interest. That authority may be construed as *exclusive*, in that maintaining an action to protect the interest, or defending the interest when an action concerning it is brought by another, is treated as solely within the authority of the official or agency involved. When the authority of the official or agency is so construed, other persons correlatively are denied judicially enforceable interest in the matter, or as it may be called 'standing to sue,' and are thus unable to become parties to litigation concerning the interest. *In such circumstances, the question of their being precluded in subsequent litigation by hypothesis cannot arise.*
>
> In other circumstances, the authority of the public official or agency is coexistent with that of individuals or members of the public, such as citizens or taxpayers, in that the latter are recognized as having a legally enforceable right permitting them to bring or defend an action concerning an interest which the official or agency may also seek to protect through litigation. Where this is so, a further question presented is whether the exercise of the official or agency's authority . . . should be construed as preempting the otherwise available opportunity of the individual or members of the public to prosecute or defend litigation in the matter. Where the exercise of that authority is regarding as preemptive, the public official or agency represents such other persons for the purposes of litigation concerning the interests in question and the judgment is binding on them. *On the other hand, the remedies that a public official is empowered to pursue may be interpreted as being supplemental to those which private persons may pursue themselves. In that circumstance, the official's maintenance of an action does not preclude other litigation by the persons affected. The*

> *opposing party, however, may be precluded from relitigating issues determined in the first action . . . .*
> (emphasis added).

Here, Defendants have failed to even address—let alone establish—whether the authority of the FID is exclusive, or, if not exclusive, preemptive such that the prior litigation would be binding on Plaintiffs here.[9] That omission is fatal to Defendants' preclusion argument, especially as the statutes cited by Defendants show that the FID's authority is exclusive. For instance, the authority of the FID to suspend or revoke the license of a collection agency, found in NRS 649.395(2)(a), and to revoke management of multiple collection agencies, found in NRS 649.220(4)(a)-(b), is exclusive, insofar as it is solely within the power of the FID rather than coexistent with the powers of individuals or members of the public (such as Plaintiffs here). Similarly, the power of the FID to issue cease and desist orders as part of its disciplinary powers—the very power, indeed, whose exercise led to the *Quality Loan* decision—is vested by the Nevada legislature *exclusively* in the FID Commissioner. *See* NRS 649.390(2) ("If the Commissioner determines that an unlicensed person is engaging in an activity for which a license is required pursuant to this chapter, the Commissioner shall issue and serve on the person an order to cease and desist from engaging in the activity until such time as the person obtains a license from the Commissioner."). Because members of the general public—such as Plaintiffs here—thus were and are unable to become parties to such litigation, the question of their being precluded in subsequent litigation cannot arise as a matter of law. *See Restatement* § 41, cmt. *d*; *see also Democratic Cent. Comm. v. Washington Met. Area Transit Comm'n*, 842 F.2d 402, 409-410 n.52 (D.C. Cir. 1988) ("The American Law Institute distinguishes between agencies granted *exclusive* authority to litigate on behalf of the public and agencies whose legal authority *coexists* with that of private citizens. As to the former, no question of preclusion can arise because individuals have no standing to sue. As to the latter, one must determine whether the agency's action *preempts* individual action. Non-preemptive agency action does *not* prevent a later suit by an individual.") (emphasis added; citations to *Restatement* § 41

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[9] It would be unfair to allow Defendants to attempt to rectify this failure through their reply brief, since Plaintiffs would be deprived of the opportunity to respond insofar as Defendants failed to raise these points in their moving papers.

omitted). Defendants have also failed to show that the FID has been invested by law with authority to represent individuals such as Plaintiffs in civil actions such as the one before Court here and recover damages on their behalf. *Cf. Mohammed v. May Dep't Stores, Inc.*, 273 F.Supp. 2d 531, 535 (U.S. Dist. Ct. D. Del. 2003) ("The EEOC is invested by law with the power to represent aggrieved individuals in civil actions against employers to recover damages for discrimination.").

To the extent that the FID's authority might not be exclusive, Defendants have failed to establish that exercise of that authority preempts subsequent individual action (such as by Plaintiffs here) rather than being supplemental to the remedies that private parties may pursue themselves. *See Restatement* § 41, Comment *d*. Here, for instance, an action for remedies such as damages by Plaintiffs would properly be supplemental to the remedies available to the FID in the prior proceeding, which was prospectively concerned with enforcing compliance with Nevada law rather than seeking damages for past harm suffered by failure to comply with such law.

The two cases cited by Defendants are not to the contrary. In the first, the question of privity concerned an estate and its beneficiary, which does not implicate the same exclusivity and preemption considerations that representation by public officials and agencies does. *See Alcantara*, 130 Nev. Adv. Rep. 28, 321 P.3d at 917-918. The second, a California case that predates by decades Nevada's substantial revisions to its law of issue and claim preclusion, applied the doctrine of *claim* rather than *issue* preclusion, which have distinct purposes. *Cf. Rynsburger v. Dairymen's Fertilizer Cooperative, Inc.*, 266 Cal.App.2d 269, 275-276 (Cal. Ct. App. 1968), *with Five Star*, 124 Nev. at 1054, 194 P.3d at 721-713 ("As a result of this lack of clarity in our case law regarding the factors relevant to determining whether claim or issue preclusion apply, we take this opportunity to establish clear tests for making such determinations. We now specifically adopt the terms of claim preclusion and issue preclusion as the proper terminology in referring to these doctrines. This will help avoid confusion and interchanging use of the two separate doctrines . . . .").

In *Rynsburger*, moreover, the California appellate court concluded that privity between three cities and private individuals existed because the private individuals were "so identified in interest" with the public parties from the first proceeding that those individuals "although not

before the court in person, [had been] so far represented by others that [their] interest received actual and efficient protection." *Rynsburger*, 266 Cal.App.2d at 277-278. It was also significant that the private individuals had previously requested the public parties to initiate the prior public nuisance action on their behalf, the prior lawsuit had been "filed for the purpose of benefiting all property owners" (including the private individuals) affected by the public nuisance, and many of the allegations in the complaints in the two cases were "substantially the same." *Id.* at 276. Here, in contrast, the *Quality Loan* action was not carried out at Plaintiffs' request, was not expressly initiated on Plaintiffs' behalf, did not contain substantially the same allegations as those found in Plaintiffs' SAC here, and did not seek damages for Plaintiffs.

B. The Exceptions to Privity Found in Section 42 Apply

Equally troubling is Defendants' failure to acknowledge or address the exceptions found in section 42 of the *Restatement* to the privity rule found in section 41. These exceptions are expressly referred to in and thus incorporated by section 41 itself. Defendants' failure to address these exceptions is especially surprising as at least two of the exceptions apply here: the exceptions for divergence of interest and lack of diligence. *See Restatement* §42(1)(d)-(e), Comments *e* and *f*.

C. The FID's Interests Substantially Diverged From Those of Plaintiffs Here

Here, there are ample grounds for this Court to find that the FID's interests in beginning and then defending the *Quality Loan* proceeding substantially diverged from the interests of Plaintiffs here, such that the FID could not and did not fairly represent Plaintiffs as to the matters for which the prior proceeding is invoked now by Defendants. *See Restatement* § 42(d). The FID simply wanted QLS to get its license in Nevada, and QLS did so. The FID's interest in bringing the prior proceeding was to insure compliance by Defendant QLS with Nevada law and the FID's regulations. *See* Defs' Ex. B and Plaintiffs' Exhibit D (showing FID sought to make QLS comply with Nevada licensing requirements). The FID in the prior proceeding had no interest—and the prior proceeding could not have led to—obtaining damages or other relief for Plaintiffs' here, for the injuries they have alleged in the SAC. There was no deceptive trade practices claim for damages. During the course of the prior proceeding, QLS obtained a certificate as a foreign collection agency from the FID. *See* Plaintiffs' Exs. A & B. Once that happened, the FID's interests

in defending the prior proceeding vastly diverged from those of Plaintiffs here, as the FID had achieved its goals in initiating the prior action, whereas Plaintiffs, who had not and still have yet to receive relief for the harm they suffered, had achieved nothing. Similarly, as discussed throughout this brief, once the Nevada legislature amended the relevant statutes to satisfy the FID's interests, the FID presumably had no reason to continue to defend the prior action by appeal. These statutory revisions, however, did not meet Plaintiffs' interests here, since they did nothing to provide Plaintiffs relief for the damages they incurred. Accordingly, the substantial divergence of interests between the FID and Plaintiffs here establishes that privity does not exist between them as the FID could not fairly represent Plaintiffs in the prior proceeding. *See S.O.V. v. People ex rel. M.C.*, 914 P.2d 355, 359-361 (Colo. 1996) (State and non-party child deemed not to be in privity in prior paternity suit because "child's interests in a paternity proceeding are of a different and broader nature than those of the State"); *see also Democratic Cent. Comm.*, 842 F.2d at 409-410 (No privity because "Commission's representation . . . was clearly less than the advocacy of private parties" and the "interests of PUC and Transit's farepayers differed markedly").

D. QLS Was on Notice that the FID Failed to Prosecute or Defend in *Quality Loan* with Due Diligence and Reasonable Prudence

There are also good grounds here for this Court to conclude that the FID failed to prosecute the *Quality Loan* proceeding with due diligence and reasonable prudence, and that QLS was on notice of the facts making that failure apparent. *See Restatement* § 42(e). Despite serious errors of law in Judge Williams' *Quality Loan* decision, the FID failed to appeal it, thereby demonstrating a lack of due diligence and reasonable prudence on the FID's part in representing Plaintiffs' interests. As the opposing party to the prior proceeding, QLS naturally was on notice of the FID's failure to appeal—and thus on notice of the FID's failure to defend the prior action adequately. Given QLS had by then obtained the certificate that the FID insisted it required, and the Nevada legislature had amended relevant statutes in ways favorable to the FID, the FID's failure to appeal may have been sensible *as to the FID's interests* but, as noted above, certainly was *not* due diligence and reasonable prudence as to *Plaintiffs' different and broader interests*. Thus, the FID's failure to appeal was such "grossly deficient" management of the litigation as far as Plaintiffs' interests were

f; *see also Arduini v. Hart*, 774 F.3d 622, 636 (9th Cir. 2014) (applying Nevada law on issue preclusion and concluding that insufficient showing of inadequate representation where plaintiffs in prior case "fully litigated the case through its dismissal . . . and then fully briefed and argued their appeal . . . .").

E. Questions of Fact Bar Dismissal

Accordingly, for these reasons, the Court should conclude that privity does not exist between the FID and Plaintiffs here. If the Court is inclined otherwise, however, the Court should not resolve this matter on a motion to dismiss because whether prior "representation has been inadequate is a *question of fact.*" *Restatement* § 42, Comment *f*; *see also Falcon v. Beverly Hills Mortgage Corp.*, 168 Ariz. 527, 531, 815 P.2d 896, 899-900 (Ariz. 1991) ("[D]ue diligence is a question of fact.") Due process thus requires that the Court give Plaintiffs an opportunity to conduct discovery and present evidence on this factual issue before the Court concludes that the prior representation, if any, was adequate.

F. Even If Issue Preclusion Were Available Here, the Court Should Exercise Its Discretion and Decline to Apply Issue Preclusion

1. The FID Had Reasons Not to Appeal the Prior Erroneous *Quality Loan* Decision Because QLS Had By Then Capitulated and Obtained a Certificate from the FID, and the Nevada Legislature Had Amended the Statutes Favorably to the FID

In their motion papers, Defendants suggest that the FID "acquiesced in [the] result" in *Quality Loan* because FID chose not to appeal the decision and "has not pursued its licensing theory against any other foreclosure trustees." Defs' Motion to Dismiss, p. 5. As an initial matter, Defendants' speculations as to the FID's reasons for not appealing the *Quality Loan* decision are not properly before the Court at this stage (if any) and are *not* evidence. Similarly, Defendants' assertion that the FID has not gone after any other foreclosure trustees is improper because it is outside the pleadings, is not evidence, and is not supported by any evidence or allegations properly before the Court.

Moreover, as discussed above, the FID had its own good reasons not to appeal the *Quality Loan* decision in January 2013: QLS had by that time obtained a certificate as a foreign collection

Moreover, as discussed above, the FID had its own good reasons not to appeal the *Quality Loan* decision in January 2013: QLS had by that time obtained a certificate as a foreign collection agency from the FID! (*See* Plaintiffs' Ex. A.) Moreover, by that point, the Nevada legislature had amended the relevant statutes in ways that confirmed the position of the FID. *See, e.g.*, NRS 107.028 (making clear that collection agencies licensed under Nevada law can serve as trustees of deeds of trust). Thus, the FID's failure to appeal, under the circumstances, does not in any way suggest that the FID agreed with the decision or believed it lacked solid grounds for appealing it. Rather, the FID's decision is explicable given that by point in time the FID had achieved its objectives (even if the FID had *not* satisfied the interests of Plaintiffs here by obtaining redress for past wrongdoing by QLS). Under such circumstances, the Court should, in an exercise of the discretion entrusted to it, decline to apply issue preclusion here.

2. The Factual Record Here Is Inadequate Because Plaintiffs Have Not Yet Had the Opportunity to Conduct Discovery

As explained above, Defendants have the burden of pleading and proving their affirmative defense of issue preclusion where, as here, the record itself does not show it applies. *Bower*, 125 Nev. at 481, 215 P.3d at 718. Moreover, whether issue preclusion applies is a mixed question of law and fact. *Redrock Valley Ranch*, 254 P.3d at 647; *see also Falcon*, 168 Ariz. at 531, 815 P.2d at 899-900 ("[D]ue diligence is a question of fact."). Defendants have not properly pled, let alone proven, issue preclusion as an affirmative defense. Moreover, Plaintiffs have not yet had the opportunity to conduct any discovery and present evidence on these questions of law and fact, especially as to the factual question of whether the prior representation, if any, by the FID was constitutionally adequate. Accordingly, if the Court is inclined at this time to consider issue preclusion in this case, the Court should decline to do so until after the issue has been properly presented to the Court and Plaintiffs have had an opportunity to discover and litigate the issue fully and fairly. Due process of law requires no less.

V. COLLECTION AGENCIES ACTING AS TRUSTEES ARE REQUIRED TO OBTAIN NEVADA LICENSES OR CERTIFICATES ESTABLISHING THEM AS

COLLECTION AGENCIES BEFORE ENGAGING IN NON-JUDICIAL FORECLOSURE ACTIVITIES

A. The Nevada foreclosure scheme is different from the federal debt collection statutes, and is not intended to occupy the entire field of Nevada regulation for all conduct that is in any way related to the foreclosure process

Defendants contend that under Nevada law the enforcement of a security interest does not make a non-judicial foreclosure trustee a collection agency, and they seek to justify the dismissal here based on cases interpreting the Federal Debt Collection Practices Act ("FDCPA"). Defendants' contentions fail for the following three reasons: (a) the Nevada debt collection scheme is distinct and quite different from the FDCPA; (b) according to the Nevada legislative history, conducting these various foreclosure activities constitutes debt collection in Nevada; and (c) the Nevada FID has already held that conducting foreclosure activities as specifically performed here by defendants constitutes debt collection on these facts.

B. The Nevada debt collections scheme is distinct from the FDCPA

Defendants rely on federal trial court decisions which have held that non-judicial foreclosures are not debt collection under the FDCPA, and similar state statutes. However, such reliance is erroneous because the Nevada scheme is materially different from the FDCPA.

The critical differences between the FDCPA and NRS chapter 649 are ascertainable from the stated purpose and scope of each statute. In enacting the FDCPA, Congress' limited purpose was only to eliminate abusive debt collection practices by debt collectors. *See* 15 U.S.C § 1692(e) ("It is the purpose of [the FDCPA] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not . . . disadvantaged, and . . . to protect consumers against debt collection abuses."). Quite differently, the Nevada legislature intended more stringent and comprehensive regulatory control over collection agencies through NRS chapter 649. In addition to addressing abusive debt collection activities, Nevada regulates who engages in debt collection activities and who may be qualified to engage in such activities, and imposes additional regulations on those who engage in such activities. *See* NRS 649.045(2) ("It is the purpose of this chapter to: (a) [b]ring licensed collection agencies and their personnel under more stringent public supervision; (b) [e]stablish a system of regulation to ensure that persons using the services of a collection agency are properly represented;

collection agencies to be licensed); NRS 649.085 (listing the qualifications to obtain a license); NRS 649.095 (listing the application requirements for a license); NRS 649.167 (requiring branch offices to obtain a permit from the Commissioner); NRS 649.295 (requiring the payment of a fee for a license).

The definitions of "debt collector" or "collection agency" stated in the FDCPA and NRS chapter 649 further indicate the differences in their schemes. In a limited fashion, Congress defined "debt collector" under the FDCPA as, "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempt to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). In other words, the FDCPA only regulates any person who performs debt collection activities as the primary purpose of the business.

The Nevada statute defines collection agency much more broadly than the federal statute—— "all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another." NRS 649.020(1) (emphasis added). NRS chapter 649 is not limited to the collection of debts being the primary purpose, and includes the soliciting of payments and obtaining in any manner the payment of a claim, even as a secondary object of their activity, and even if indirectly! Here, according to Plaintiffs' allegations, Defendants' own documents, and also Commissioner Burns' decision, it is shown that, at an absolute minimum, debt collection was a secondary object of Defendants' business activities. They can do both. *Reese*, 678 F.3d 1211. The Plaintiffs' allegations and Defendants' own documents show that Defendants were soliciting and collecting payments owed to the lenders, etc. SAC, ¶ 23.

1. The Language of the Statutes Is Clear and Unambiguous

Defendants contend that NRS 649 and NRS 107 show that Defendants are not collection agencies and are not required to obtain licenses or certificates from the FID. Defendants are mistaken: proper interpretation of these statutes proves that Defendants violated Nevada law as

alleged in the SAC. As a preliminary matter, it is axiomatic that, in construing statutes, the "intent of the legislature is the controlling factor and that, if the statutes under consideration are clear on their face, we cannot go beyond them in determining legislative intent." *White v. Warden, Nev. State Prison*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980). Thus, only if some ambiguity in NRS 649 and NRS 107 existed—which Defendants have wholly failed to demonstrate—would the Court properly consider Defendants' arguments regarding the legislative history of these statutes.

2. The Plain Language of NRS 649 Supports Plaintiffs Here

Proper review of the statutory scheme found in the plain language of NRS 649, however, supports Plaintiffs here. In pertinent part, NRS 649 broadly defines "collection agency" as meaning "all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another." NRS 649.020(1). The statute then expressly provides for several *limited* exceptions to this broad definition: for instance, banks, nonprofit cooperative associations, and "[a]ttorneys and counselors at law licensed to practice in this State, so long as they are retained by their clients to collect or to solicit or obtain payment of such clients' claims in the usual course of the practice of their profession" are *not* deemed to collection agencies for purposes of NRS 649 *unless* "they are conducting collection agencies." NRS 649.020(2). Thus, the Nevada legislature in crafting NRS 649.020 sought to *broadly* define "collection agency" while expressly carving out several limited exceptions to that definition. Notably, Defendants have *not* sought to avail themselves of any of these exceptions, suggesting that even Defendants concede they do not apply to them.

Given this clear statutory scheme, Defendants' reading of NRS 649.020 is misleading at best. Despite Defendants' illogical suggestions to the contrary, the Nevada legislature would *not* have "explicitly identified" or stated that a trustee's enforcement of a security interest through non-judicial foreclosure was a collection agency because doing so would undermine the broadly inclusive statutory scheme; rather, the Nevada legislature surely would have expressly *excepted* such activity from the definition of collection agency only *if* the Nevada legislature did not intend

for such conduct to fall within the statute. The Nevada legislature, however, did no such thing. Indeed, the statute's treatment of community managers, relied on by Defendants, supports Plaintiffs' reading of the statute: the *limited* exception for certain types of community managers found in NRS 649.020 makes clear that a community manager who does *not* "perform[] or offer[] to perform any act associated with the foreclosure of a lien" is *not* deemed to be a collection agency under Nevada law while a community manager who does so qualifies as a collection agency. *See* NRS 649.020(3)(a)-(b).

As Defendants rightly point out, it is a maxim of statutory construction that generally the "expression of one thing [in a statute] is the exclusion of another." *See* Def.'s MTD, p. 11 (citing *Cramer v. State Dep't of Motor Vehicles*, 126 Nev. Adv. Rep. 38, 240 P.3d 8, 12 (2010); *O'Callaghan v. Eighth Judicial Dist. Court of the State of Nevada*, 89 Nev. 33, 35, 505 P.2d 1215, 1216 (1973); *State v. Boerlin*, 38 Nev. 39, 45, 144 P. 738 740 (1914)). Defendants wrongly believe this maxim assists them here. However, the expression by the Nevada legislature in NRS 649.020(2) of certain enumerated exceptions to the definition of collection agency necessarily excludes any other unenumerated exceptions—such as the very exception Defendants seek to carve out here for collection agencies carrying out non-judicial foreclosures in order to collect debts.

C. <u>The Relevant Legislative History of NRS 649 Also Supports Plaintiffs</u>

Defendants' contentions also disregard the applicable legislative history of NRS Chapter 649, which shows Nevada's intent in 2005 to consider the non-judicial foreclosure services and activities undertaken by Defendants as debt collection activities. *See* Minutes of the Subcommittee of the Senate Committee on Commerce and Labor, 73rd Session, April 12, 2005, p. 3 ("[I]f you have a full-service management company, and some of the large ones are full-service, and you are offering to file liens, record notices of default and go through the foreclosure process, . . . *you have to meet the same licensing and the same qualifications as the actual foreclosure service that are out there.*") (emphasis added); Minutes of the Subcommittee of the Senate Committee on Commerce and Labor, 73rd Session, April 12, 2005, p. 4 ("[I]f you are a management company or . . . community manager who is going to be collecting . . . then you are going to be governed under

language of NRS 649 is plain, the legislative history helps to show that Nevada never intended to exempt collection agencies from otherwise applicable licensing requirements when carrying out non-judicial foreclosures as part of their debt collection activities.

D. The Plain Language and Relevant Legislative History of NRS 107 Support Plaintiffs

Defendants' reading of the plain language of NRS 107.028 is equally mistaken. As an initial matter, although Defendants make much of the language and legislative history of NRS 107.028, they fail to make clear that this provision was added to NRS 107 in May and June 2011 and only went into effect on October 1, 2011—thus, NRS 107.028 only was enacted and took effect *after* most of the misconduct by Defendants that is alleged by Plaintiffs in their SAC.

Defendants, whether intentionally or inadvertently, also misdirect the Court in their characterization of Plaintiffs' allegations in the SAC. Plaintiffs do *not* contend that *all* trustees under a deed of trust necessarily qualify as collection agencies pursuant to NRS 649.020. Rather, Plaintiffs allege that *these* Defendants by their alleged, specific activities were in fact collection agencies under Nevada law, and carried out the misconduct complained of in the SAC without the licenses or certificates from the FID required by Nevada law. *See* SAC, ¶¶ 1-20, 23, 34-38, 42-45, 49. These Defendants are not insulated from liability for their misconduct as unlicensed collection agencies by the fact that they may have carried out a tiny portion of those activities acting as trustees under deeds of trust.

1. The Plain Language of NRS 107.028 Favors Plaintiffs Here

The plain language of NRS 107.028, relied on by Defendants, supports Plaintiffs here. The Nevada legislature, by expressly identifying the ten persons (including entities) that may serve as trustees under a deed of trust, clarified and made clear that persons qualifying as licensed collection agencies under NRS 649 could be such trustees. NRS 107.028(1)(i). (It seems significant that Defendants, while contending they are *not* collection agencies, fail to state which entity among the ten express categories listed in NRS 107.028 they are, if *not* the collection agency category!) Under NRS 107.028, collection agencies as defined by NRS 649 can serve as trustees of deeds of trust; thus, while not all trustees under deeds of trust are licensed collection agencies, some of them—such as Defendants here—will be. There is absolutely nothing, however, to suggest that the Nevada

legislature intended thereby to insulate collection agencies from the licensing requirements found in NRS 649 (as Defendants seemingly would have it).

2. The Legislative History of NRS 107.028 Is Consistent with Plaintiffs' Interpretation Here

Although Defendants have not identified *any* ambiguity in the plain language of NRS 107.028, they seek to bolster their arguments by turning to what they take to be its legislative history. NRS 107.028 was originally enacted in May 2011 as part of Assembly Bill No. 284, which, in pertinent part, stated that the "trustee under a deed of trust must be:"

> (a) An attorney licensed to practice law in this State;
> (b) A title insurer or title agent authorized to do business in this State pursuant to chapter 692A of NRS; or
> (c) A person licensed pursuant to chapter 669 of NRS [governing trust companies] or a person exempt from the provisions of chapter 669 of NRS pursuant to paragraph (a) or (b) of subsection 1 of NRS 669.080.

(emphasis added.)

Thus, as originally drafted, NRS 107.028 would have limited those who could serve as trustees under deeds of trust to (1) Nevada attorneys, (2) title insurers or title agents, or (3) trust companies licensed by Nevada or otherwise exempt from licensing by Nevada law. In June 2011, the Nevada legislature amended NRS 107.028 through Assembly Bill No. 273, which, in pertinent part, added seven other categories, including collection agencies under NRS 649, to NRS 107.028(1)'s list of those who could serve as trustees under deeds of trust in Nevada. (Assembly Bill No. 273 also made NRS 107.028 effective October 1, 2011, rather than July 1, 2011 as originally drafted.)

Although Defendants quote from a portion of the Nevada legislature's Journal of the Senate, the remarks by Senator Wiener on A.B. No. 273 are worth quoting more fully. On May 30, 2011, Senator Wiener explained that the pertinent portions of A.B. No. 273 "revises Section 6 of Assembly Bill No. 284 that requires the trustee under a deed of trust to be an attorney licensed in Nevada, a title insurer or title agent authorized to do business in Nevada, or person licensed as a trust company or otherwise exempt from the requirements to be a licensed trust company in this State." Nevada State Legislature, *Journal of the Senate* (5/30/11) at 4284. Thus, in Senator Wiener's view:

State." Nevada State Legislature, *Journal of the Senate* (5/30/11) at 4284. Thus, in Senator Wiener's view:

> Amendment No. 824 [of Assembly Bill No. 273] expands those provisions in Assembly Bill No. 284 so that a trustee under a deed of trust may be a domestic or foreign entity which holds a current state business license or certain persons who are *exempt from having to obtain a license as a trust company but are authorized to be a trustee under a deed of trust.* They include a person who does business relating to banks, savings and loan associations, or thrift companies, a person appointed as a fiduciary, a trustee of a trust that is holding real property for the purpose of facilitation real estate transaction [*sic*] or a registered agent, *collection agency* or escrow agency.
>
> *Id.*

Senator Roberson then clarified that "the purpose of this amendment is to clean up some things that were missed on Assembly Bill No. 284" by "clarify[ing] who can act as a trustee under a deed of trust for a residential property." *Id.* He went on:

> There was a concern that there were certain small, family owned businesses in this State that would have been put out of business by Assembly Bill No. 284. We want to make certain this does not happen. This clarifies Assembly Bill No. 284 so we do not put businesses out of business.
>
> *Id.*

Taken in their proper context and in light of the full legislative history of NRS 107.028, Senators Wiener and Roberson's remarks make clear that the Nevada legislature was concerned that certain companies might be put out of business because they were not licensed as attorneys, title insurers or title agents, or licensed as trust companies or otherwise exempt from licensing in Nevada as trust companies. The Nevada legislature therefore expressly exempted several additional categories, including licensed collection agencies. Senators Wiener and Roberson's remarks make clear that they were concerned about the requirement that certain businesses might be harmed by too strict a requirement that they be licensed *as trust companies*. There is nothing to suggest,

MR. BOYLAN: Yeah, but remember he mentioned, Your Honor, they went out of business five years ago.

THE DISCOVERY COMMISSIONER: So?

MR. BOYLAN: I don't know why it would be confidential, a five-year-old contract for a company that's out of business, but I --

THE DISCOVERY COMMISSIONER: Well, I don't know that it wouldn't be. That's the problem.

MR. BOYLAN: That's why they're supposed to submit it to you and explain it in a declaration.

THE DISCOVERY COMMISSIONER: I'm not going to do it.

MR. SCARBOROUGH: Thank you.

THE DISCOVERY COMMISSIONER: If I had to do that in every single case for every single document, I could not physically do it. I'm not going to do it.

Now, what does this protective order mean, Defense Counsel? It means that they -- the plaintiffs can share the inner information within their office with their clients, with their experts without having them sign off on anything once I put the protective order in place.

Number two, if we are filing a motion that has a manual -- a piece of a manual attached, then this is typically what I would do. I would probably call up plaintiffs' counsel, I'd call defense counsel and say, I've got our motion on our, you know, dispositive motion on Phase 1. I want to attach this

part of the manual. I'd rather not have to file it under seal. Are you okay with it? I'm not attaching the whole manual. I'm attaching this page or this paragraph. Have that conversation. Get it in writing if it's okay. Otherwise, put it in an envelope, attach it under seal, make sure a Judge gets a copy of it.

And how you do it is you just take the, either, you know, electronically -- and I do apologize to you because I'm not exactly sure how it works, but I know that if you take the 26 -- in this case it'll be the motion granting the confidentiality order. It'll be signed by the Judge. It'll be an order saying it can be filed under seal. He'll take that to the clerk's office, or send it in with the motion -- I hope that's how it works -- and they'll put it under seal.

MS. SCHULER-HINTZ: I think there's a box on Wiznet, Your Honor.

THE DISCOVERY COMMISSIONER: A box on Wiznet.

MS. SCHULER-HINTZ: That you actually check that says it's being filed. I know in federal court it says --

THE DISCOVERY COMMISSIONER: Filed under seal and then you reference the order. I don't think it's a significant burden on plaintiffs' counsel, but I think you can have that discussion. If it's one page of a manual, maybe you live with that and be Exhibit A, but you do have to talk about things. If you're in a deposition, have a dialogue.

If there's a group of documents that you're concerned about being part of the public record because the depositions are public record, then you put that line of questioning and those documents -- just ask the court reporter to put it under seal, and the seal or the protection remains in place until otherwise ordered by the District Court Judge.

And the confidentiality may lose its -- the documents may lose their confidentiality if they are attached to a dispositive motion and/or entered into exhibits, into evidence at the time of trial. They likely will, but that can all go into the parameters of the protective order.

Other than financial information or proprietary manuals, operating procedures of the different defendants, that's it; I'm not going to protect anything else. So stock letters that you send to people, e-mails, I'm just not going to protect it, but your operating manuals, your procedures to the extent that they are -- they do involve proprietary information, I would protect, but anything that's basically an industry standard, people do it a little bit differently. I'm not going to worry about it.

If there's a dispute over a document, have your 2.34 conference. If you want me -- if it's one or two documents you need me to look at, I'll be happy to do that. I say one or two. I had a law firm deliver 15 boxes of documents. So I can review. I'm a quick reader, but I would want you to really

narrow the issues on the document production. So I'm going to grant that motion within those parameters.

Now, I would like to get one report and recommendations done off of this hearing with all motions. I'm not confident it is going to happen, and I am going to appoint a person on each side to work with each other. Can I do that?

MR. SCARBOROUGH: Absolutely.

THE DISCOVERY COMMISSIONER: Mr. Boylan, you're it on the plaintiffs' side.

MR. BOYLAN: Thank you.

THE DISCOVERY COMMISSIONER: Counsel for the defendant, can I ask you to select someone that will work with Mr. Boylan on the report and recommendations, because by my account there are eight motions.

MR. BOYLAN: Mr. Scarborough is typically my liaison contact, but he has no motions today I don't believe other than the confidentiality one. So maybe myself and Mr. Ceran.

MR. CERAN: That's fine, Your Honor.

MR. SCARBOROUGH: Sounds like I got fired, but I'll accept that for purposes of --

THE DISCOVERY COMMISSIONER: You know what --

MS. SCHULER-HINTZ: Mr. Scarborough is --

THE DISCOVERY COMMISSIONER: -- I think in this case that's a good thing. I would be okay with that.

All right. But you might want to look over the

protective order.

MR. SCARBOROUGH: Yes. Absolutely.

MR. CERAN: I'm sorry. Who's taking the laboring on the report?

MS. SCHULER-HINTZ: I think Mr. Scarborough volunteered.

THE DISCOVERY COMMISSIONER: You both.

MR. CERAN: (Unintelligible).

MR. SCARBOROUGH: Yeah, I did volunteer.

MR. CERAN: Well, if Mr. Scarborough has volunteered, I'll cede to him. That's fine, Your Honor.

MR. SCARBOROUGH: I'm back in business, Your Honor, unless that's a problem for you.

THE DISCOVERY COMMISSIONER: It's not a problem for me. I just need one person on the defense side, and when I say that, don't delegate this issue.

MR. SCARBOROUGH: I got it.

THE DISCOVERY COMMISSIONER: Work with Mr. Boylan. It'll be a nice experience for both of you.

MR. SCARBOROUGH: We dialogue perfectly well. Do you want one of us to be assigned the task of first draft?

THE DISCOVERY COMMISSIONER: Yes, that would be nice, and then you can share it, or you both can draft one and exchange it, whatever you want to do.

MR. SCARBOROUGH: Most of the motions were -- I'll

just turn to Mr. Boylan and ask if he'd like to do that, or if he'd like me to. I'm happy to serve at his pleasure.

MR. BOYLAN: I failed the last time. So I would rather Mr. Scarborough take the opening shot.

THE DISCOVERY COMMISSIONER: Okay. That's fine. I wouldn't say a complete failure at all. I just think that the defense reflects what I want it to, and you'll be able to object to it then. Once I get it done, if you want to object, you can. Just make sure you do it timely.

All right. Is there anything else I have not covered?

MR. SODERSTROM: Your Honor, just very briefly for my own clarification in my notes.

THE DISCOVERY COMMISSIONER: Yes.

MR. SODERSTROM: Interrogatory No. 18, I just want to confirm that that was limited to the named --

THE DISCOVERY COMMISSIONER: I'm sorry. I can't hear you.

MR. SODERSTROM: I'm sorry. Interrogatory No. 18 --

THE DISCOVERY COMMISSIONER: Yes.

MR. SODERSTROM: -- I have in my notes that that is confined to the named plaintiffs. I just want to confirm it.

THE DISCOVERY COMMISSIONER: Can you just read it for me.

MR. SODERSTROM: Interrogatory No. 18 states: Your

best estimate of the total amount of dollars received by you as payment of fees and/or costs related to foreclosure-related and/or collection-agency services provided by you as to the entirety of the putative class as stated against you in the operative complaint in this matter.

THE DISCOVERY COMMISSIONER: Okay. No, I didn't intend it just to be the plaintiffs. I intended it to be the amount of money that your client received from the services it performed in Nevada for whatever the years were.

MR. SODERSTROM: Thank you.

THE DISCOVERY COMMISSIONER: You're welcome.

Anything further?

MR. SCARBOROUGH: Not from us, Your Honor.

MR. CERAN: Not from us, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. Well, good luck.

MR. BOYLAN: Thank you, Your Honor.

MR. CHRISTOPHER: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: I'm going to give counsel 20 days to get the report and recommendation to me, and I will set it for status check at the same time we're meeting in October.

MR. SCARBOROUGH: October 12th.

THE DISCOVERY COMMISSIONER: No, that's not -- when is the next time? Didn't I set another hearing?

THE CLERK: It is October --

MR. SCARBOROUGH: In this case, Your Honor, no. Our next time to meet is October 12th.

MR. CERAN: We have a motion for a protective order that we filed recently. I don't think we've received a hearing date back to the best of my knowledge.

THE DISCOVERY COMMISSIONER: I thought I set something.

THE CLERK: There's October 7th.

THE DISCOVERY COMMISSIONER: I made that one motion.

THE CLERK: Motion to quash.

THE DISCOVERY COMMISSIONER: Maybe I'm confused.

MR. CERAN: It had to do with a subpoena for financial records.

THE DISCOVERY COMMISSIONER: Right. That's the motion to quash, but I don't think we have a date on that yet.

MR. CERAN: Right.

THE DISCOVERY COMMISSIONER: Is that right?

MR. CERAN: Right. That's what I was saying.

MR. BOYLAN: I think MTC has two motions to quash pending, one with respect to those witnesses, but I'm not sure now if counsel --

Allan, if you're going to withdraw that one.

The one for financial records we should probably talk about that again in light of the Court's ruling.

THE CLERK: They also have October 19th.

MR. BOYLAN: The other one relates to witnesses.

MR. CERAN: Right. And I mean I --

THE DISCOVERY COMMISSIONER: I think it was October 19th that I continued something to.

MR. CERAN: Well, we'll talk and see if we can resolve that, Your Honor.

THE CLERK: It's the motion to quash.

MR. SCARBOROUGH: I actually think that's --

THE DISCOVERY COMMISSIONER: Is that the motion to quash?

MR. SCARBOROUGH: I think that's Mr. Ceran's motion to quash on the 19th.

THE DISCOVERY COMMISSIONER: Okay. So I'll put the status check on the report and recommendations hearing to October 19th, and I know we have one on October 12th --

MR. SCARBOROUGH: Correct.

THE DISCOVERY COMMISSIONER: -- to status on the Phase 1 discovery. I still would like you to be here for that. I could move the status check to the 19th if that would be easier. Would it be easier for everyone?

MR. BOYLAN: I think so, Your Honor.

MR. CERAN: Probably easier for less travel.

THE DISCOVERY COMMISSIONER: All right. So let's move the October 12th status on Phase 1 discovery to the October 19th hearing date.

THE CLERK: And then the October 7th, there's also something. Do you want that --

THE DISCOVERY COMMISSIONER: October 7th, what is on October 7th?

THE CLERK: That's also motion to quash, quash motion for a protective order regarding depositions, subpoenas to nonparties.

MR. BOYLAN: Former employees of MTC, yeah, that's a big deal.

THE DISCOVERY COMMISSIONER: Okay. Do you want to just leave that on the 7th then?

MR. BOYLAN: I think your rulings today effectively indicate those depositions should go forward. So --

MR. CERAN: Yeah, let's leave those on calendar, and I would need to talk to my colleague who actually prepared --

THE DISCOVERY COMMISSIONER: But you think that you'll be able to work that out maybe?

MR. CERAN: I'm hopeful, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. If it's former employees, if you're going to be representing them at their deposition, you need to work on producing them.

MR. CERAN: I'm sorry. We need to what?

THE DISCOVERY COMMISSIONER: If they're former employees that you're representing at a deposition, then you will need to coordinate a deposition time for them with

counsel.

MR. CERAN: Right.

MR. BOYLAN: And so far ——

THE DISCOVERY COMMISSIONER: If you're not representing them, they need to be subpoenaed, in which case you're going to have to give the contact information.

MR. CERAN: Right.

MR. BOYLAN: And so far both the witness and Mr. Ceran's partner have said they're not representing them.

MR. CERAN: That's not true. We're representing Ms. Diaz, Maria Diaz.

THE DISCOVERY COMMISSIONER: Okay. Listen.

MR. CERAN: Okay.

THE DISCOVERY COMMISSIONER: Let's work together on it. If you are not representing them, you need to give the contact information ——

MR. CERAN: Yes.

THE DISCOVERY COMMISSIONER: —— so they can be subpoenaed.

Don't forget to subpoena.

MR. CERAN: And not only that ——

MR. BOYLAN: We already did subpoena her.

MR. CERAN: They have the contact information.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: We already subpoenaed her.

THE DISCOVERY COMMISSIONER: Oh.

MR. BOYLAN: And they filed a motion.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: One other thing, final note, Your Honor, and I think this applies to NDSC's counsel as well who mentioned to me they've got a trial in October, I've got to set in October.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And so I may have to call counsel and your department as well if I'm completely jammed. In fact, another reason why I was going to mention that perhaps we should talk about Phase 1 is I do have two trials in October.

THE DISCOVERY COMMISSIONER: I promise you --

MR. BOYLAN: It's going to be ugly.

THE DISCOVERY COMMISSIONER: -- we will talk about it. I promise you I will make sure if we need to extend it we will so that everybody can get the discovery done, and the proper motion work will go to the Court, and I'm going to see what I can do on that.

All right. In terms of that one deposition on the motion to quash, if it's a nonparty, you can still take the deposition if they have information. So if that was the purpose of the motion to quash, it's probably moot.

MR. CERAN: Right.

THE DISCOVERY COMMISSIONER: But why don't you take a

look at it.

MR. CERAN: I just need to look at it. I don't want to --

THE DISCOVERY COMMISSIONER: And I'll leave it on the 7th, and it can always -- you can just send a letter asking it to be taken off.

MR. CERAN: Okay.

THE DISCOVERY COMMISSIONER: But the person who files the motion has to do that.

MR. CERAN: Okay.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And, Allan, if I may, we need to know real soon because I think our opposition is due Friday.

MR. CERAN: Okay.

MR. BOYLAN: Thank you.

THE DISCOVERY COMMISSIONER: Thank you all very much. Safe travels.

MR. SCARBOROUGH: Thank you, Your Honor.

MR. CERAN: Thank you. Thank you for your time, Your Honor.

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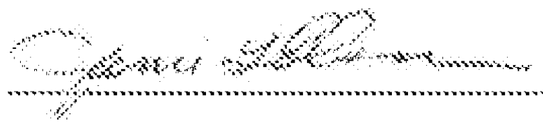
MS. SCHULER-HINTZ: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: You're welcome.

(Proceedings concluded 1:06 p.m.)

--oOo--

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.



Janie L. Olsen
Transcriber

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CLARK COUNTY, NEVADA

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CASE NO: A-11-649857-C

Honorable Susan W. Scann
Dept. 29

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date of Hearing: February 22, 2016
Time of Hearing: 10:00 a.m.

and PATRICIA TAGLIAMONTE, a Nevada resident

Plaintiffs,

v.

QUALITY LOAN SERVICE CORPORATION, a California Corporation; APPLETON PROPERTIES, LLC, a Nevada Limited Liability Company; MTC FINANCIAL, INC. dba TRUSTEE CORPS, a California Corporation; MERIDIAN FORECLOSURE SERVICE, a California and Nevada Corporation dba MTDS, Inc., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION, a Arizona Corporation; CALIFORNIA RECONVEYANCE COMPANY, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

The hearing on the Joint Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Defendants Quality Loan Service Corporation, MTC Financial (Joinder), Inc., Meridian Foreclosure Service, National Default Servicing Corporation and California Reconveyance Company was conducted on the 22nd day of February, 2016, and the Court reviewed the pleadings and filings submitted in this matter, and heard oral arguments by the respective counsel of record for the parties.

IT IS THEREFORE ORDERED AND DETERMINED BY THE COURT that:

1. The Court takes judicial notice of the all documents submitted by Defendants and Plaintiffs.

2. The allegations included in Plaintiffs' Second Amended Complaint (e.g. ¶¶ 1-15, 23, and 32-40), constitute a claim for Statutory Consumer Fraud under NRS 41.600, including:

a. During the relevant period, each of the respective Defendants failed to obtain the requisite license to operate as a collection agency or registration as a foreign collection agent/agency, as defined and required by NRS Chapter 649;

b. The failure to obtain the requisite license as a collection agency or registration as a foreign collection agent/agency is a Statutory Deceptive Trade Practice pursuant to NRS 598.0923; and

c. Plaintiffs have adequately alleged that they sustained damages and/or seek statutory remedies, as a result of the alleged Statutory Consumer Fraud committed by the respective Defendants.

3. The allegations included in Plaintiffs' Second Amended Complaint (e.g. ¶¶ 1-15, 23, and 41-47), constitute a claim for Unjust Enrichment, including:

a. During the relevant period, each of the respective Defendants failed to obtain the requisite license to operate as a collection agency or registration as a foreign collection agent/agency, as defined and required by NRS Chapter 649;

b. Despite failing to obtain the requisite license as a collection agency or registration as a foreign collection agent/agency, each of the Defendants illegally and improperly operated as a collection agency and received substantial payments for their respective illegal and improper collection agency activities;

c. In each and every transaction wherein Defendants engaged in their unlawful conduct, Defendants gained an advantage to the detriment of Plaintiffs;

d. As a direct and proximate result of Defendants' deceptive trade practices, each Defendant was unjustly enriched by virtue of the fact that it received a fee which it was not legally entitled to receive and/or retain, and acceptance and retention by the Defendants of such benefits under the circumstances would be inequitable;

e. Defendants should not be entitled to retain these illicit benefits to the detriment of Plaintiffs and each Defendant should be disgorged of any and all benefits obtained by virtue of their deceptive trade practices.

4. Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint is accordingly denied as to the first cause of action for Statutory Consumer Fraud, and the second cause of action for Unjust Enrichment.

5. Defendant's Joint Motion to Dismiss Plaintiffs' Second Amended Complaint is granted in part as the third cause of action for Elder Abuse is ordered dismissed from Plaintiffs' Second Amended Complaint. Plaintiffs' request to amend to cure any deficiency in the Elder Abuse cause of action is denied.

6. The court makes no further findings, rulings or conclusions on this matter at this time.

DATED this _____ day of February 2016.

DISTRICT COURT JUDGE

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SERVICE, a California and Nevada Corporation) dba MTDS, Inc., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION, a Arizona Corporation; CALIFORNIA RECONVEYANCE COMPANY, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

On February 22, 2016, at 10:00 a.m. in Department XXIX, before the Honorable Susan Scann, Plaintiffs, by and through their counsel, and Defendants California Reconveyance Company, Quality Loan Service Corporation, Meridian Foreclosure Service, National Default Servicing Corporation, and MTC Financial Inc. dba Trustee Corps., by and through their counsel, appeared before the Court on: (1) Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint; (2) Defendant MTC Financial Inc. dba Trustee Corps' Joinder in Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint; Supplemental Memorandum of Point and Authorities in Support Thereof; (3) Defendant MTC Financial Inc. dba Trustee Corps' Request for Judicial Notice in Support of Joinder in and to the Following: Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint; (4) Plaintiffs' Request for Judicial Notice in Support of Their Opposition to Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint; and (5) Plaintiffs' Objections to Defendants' Requests for Judicial Notice in Support of and in Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint.

The Court, having reviewed the pleadings and papers on file herein, having heard the arguments of counsel at the time of hearing, and for good cause appearing, hereby rules as follows:

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint as to the First and Second Causes of Action (Statutory Consumer Fraud and Unjust Enrichment) is DENIED without prejudice and as to the Third Cause of Action (Elder Abuse) is GRANTED. The Third Cause of Action (Elder Abuse) in Plaintiffs' Second Amended Complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant MTC Financial Inc. dba Trustee Corps' Joinder in Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint; Supplemental Memorandum of Point and Authorities in Support Thereof is DENIED without prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant MTC Financial Inc. dba Trustee Corps' Request for Judicial Notice in Support of Joinder in and to the Following: Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint is GRANTED, Plaintiffs' Request for Judicial Notice in Support of Their Opposition to Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint is GRANTED, and Plaintiffs' Objections to Defendants' Requests for Judicial Notice in Support of and in Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint is DENIED. The Court takes judicial notice of all documents submitted by Defendants and Plaintiffs in the various pleadings including, but not limited to, all exhibits attached to Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint.

Dated this ____ day of _____, 2016.

_____
DISTRICT JUDGE

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MERIDIAN FORECLOSURE SERVICE, a California and Nevada Corporation dba MTDS, Inc., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION, a Arizona Corporation; CALIFORNIA RECONVEYANCE COMPANY, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

Hearing Date: February 22, 2016
Time: 10:00 a.m.

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I. INTRODUCTION

Years ago, in 2010, Quality Loan Service Corporation ("QLS") was caught by the Financial Institution Division (hereinafter "FID") conducting various debt collection activities, far beyond the simple recording of a notice of default pursuant to a deed of trust. The FID issued a cease and desist order, stopping the wrongful activities of QLS, unless and until QLS became licensed by the FID as a collection agency in Nevada. The San Diego-based company, knowing it was caught committing a major violation of Nevada law, and impliedly admitting its liability here, quickly obtained its collection agency license from the FID, no later than February 6, 2011, for its first location[1] in San Diego and, for its second San Diego office, on September 28, 2012. Plaintiffs' Request for Judicial Notice ("RJN"), ¶¶ 1-2; Exs. A & B. The QLS license remains active today. RJN, ¶ 2; Ex. B. Defendant MTC Financial, Inc. ("MTC") obtained its collection agency license from the FID no later than April 19, 2012. RJN, ¶ 3; Ex. C.

Accordingly, Defendants' speculative comments about why the FID may have chosen not to appeal Judge Williams' erroneous reversal of Commissioner Burns' decision[2] is unpersuasive. (QLS had complied with the FID's demand.) This is particularly true given that, after the FID began its proceedings against QLS in 2010, the FID was apparently successful in pursuing a clear path with the Nevada Legislature, such that, in 2011, the Legislature added NRS107.028 to Chapter 107. Thus, the Nevada legislature specifically clarified and made crystal clear the pre-existing intent of both the legislative and administrative branches of Nevada government that only licensed collection agencies (NRS 649) are among those entities allowed by law to serve as trustees of deeds of trust, i.e., to conduct foreclosure proceedings.

In addition to numerous other compelling facts alleged here and taken as true by law, Defendants are also upended by their own words, admitting they were engaged in debt collection (requesting and collecting payments on past due debts) as agents of the lenders, stated by

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[1] According to the FID, each and every out of state collection agency office/location that is soliciting payments from Nevada consumers must be separately licensed. See e.g., NRS 649.167.

[2] A copy of Commissioner Burns' decision is attached. RJN, ¶ 4, Ex. D.

Defendants in contemporaneous documents that Defendants themselves wrote and sent to Plaintiffs. The cases do not support Defendants' "mini-Miranda" excuse, and these written admissions point directly to a 12(b)(5) adjudication in favor of Plaintiffs here. So too does the detailed and well-reasoned decision of Commissioner Burns, of the Nevada Financial Institutions Division. RJN, ¶ 4, Ex. D; *see also* SAC, ¶¶ 23, 34 (very specific allegations of Defendants' various debt collection activities).

Defendants are bound by both the facts of specific collection agency activities alleged in the SAC (e.g., demanding and collecting payments on past due debts) and their own written words, for the purpose of a motion to dismiss under NRCP 12(b)(5). For example, Meridian's notice sent to the Nevada consumers who are Plaintiffs here flatly admits that Meridian "is assisting the beneficiary to collect a debt and any information obtained will be used for that purpose." SAC, Ex. "D". The same is true for QLS, which admitted in its writing that: "This office is attempting to collect a debt and any information obtained will be used for that purpose." SAC, Exs. "A", "B", "C", and "E", and "F". In a separate writing, Quality Loan Service admitted its collection agency actions, saying: "This notice is sent for the purpose of collecting a debt. This firm is attempting to collect a debt on behalf of the holder and owner of the Note. Any information obtained by or provided to this firm or the Creditor will be used for that purpose." SAC, Ex. "F". Defendant National Default Servicing Corporation ("NDSC") also admitted in its writing: "This is an attempt to collect a debt and any information will be used for that purpose." SAC, Exs. "S" and "T". *See, e.g., Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098 (9th Cir. 1996) (defendant violated Idaho's version of the Nevada licensing law pled here, but not federal law).

The allegations of the SAC are dispositive of the instant motion. The allegations of paragraphs 23 and 34 of the SAC, for example, make clear that Defendants' activities went far beyond merely recording a statutory notice of default. *See Reese v. Ellis, Painter, Ratterree, & Adams, LLP*, 678 F.3d 1211, 1216-1217 (11th Cir. 2012).

Contrary to the express and specific allegations of the SAC (e.g., SAC, ¶¶ 23, 34), Defendants nevertheless state to this Court the bold untruth that they did nothing other than the

public recordation of a notice of default.[3] However, the allegations of the SAC,[4] which all agree must be taken as true, include the following:[5]

1. Plaintiffs were directly the subject of collection activities and communications from Defendants, including demands for payment on the underlying debt. SAC, ¶¶ 1-15.
2. Plaintiffs were told by Defendants that unless they could either remit the payoff amount on the loan or the past due payments owed to cure the delinquency on the loan account, their properties would be sold to satisfy the debt. SAC, ¶23(e).
3. Defendants issued directly to the Plaintiffs notices and demands for payment, including the payoff amount on the loan, and requested that plaintiffs send a cashier's check payable to Defendants and submitted directly to Defendants' accounting offices. SAC, ¶23(f).
4. While expressly demanding payment of the underlying debt, Defendants issued notices and communications directly to Plaintiffs that periodically provided wire instructions to Plaintiffs so that they could make the loan payments demand by Defendants directly to Defendants via wire transfer. SAC, ¶ 23(g).

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[3] After discovery occurs in this case, Defendants' credibility with this Court may be destroyed, as it is expected that overwhelming evidence will show that Plaintiffs' allegations of debt collection activities are true.

[4] According to law, for purpose of the Rule 12(b)(5) adjudication, the allegations of the complaint must be liberally construed in favor of the plaintiffs. *See, e.g.*, NRCP 8("All pleadings shall be so construed as to do substantial justice."); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (Nevada "courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party.").

[5] Although it is believed unnecessary, by amendment, plaintiff can add additional allegations to the effect that from their various locations and call centers, both in writing and telephonically, while acting on behalf of the lenders to collect the past due debts and solicit payments, defendants made direct contact with plaintiffs, demanding payment of the debts. And, after necessary discovery, it is highly probable that the information and documentation will show thousands and thousands of debt collection communications and demands for payment from the defendants to the plaintiffs, and also receipt of payments on the debt, as part of their processes.

5. Defendants actually collected money on behalf of lenders, pursuant to their agency relationship with the lenders, and, upon receipt, Defendants would forward the amounts received to the lenders for payment on the outstanding debt. SAC, ¶ 23(h).

6. When Defendants sold property, Defendants would collect and then forward the full amount of the net cash proceeds of money received to the lenders for whom they were acting as collection agent, for crediting against the outstanding loan. SAC, ¶ 23(i).

Furthermore, the SAC does sufficiently plead causation and damages under applicable law.[6] Paragraph 21 of the SAC alleges that Plaintiffs' debts were increased by the dollar amount of illegal payments received by Defendants for their illegal, unlicensed debt collection services. This constitutes thousands of dollars of damages for each and every Plaintiff. Paragraph 44 of the SAC makes plain that Defendants in fact received substantial illegal payments for their respective illegal and improper collection agency activities and, through their illegal activity, "Defendants gained an advantage, to the detriment" of Plaintiffs. Paragraph 44 of the SAC further alleges that as a "direct and proximate result of [D]efendants' deceptive trade practices, each [D]efendant was unjustly enriched by virtue of the fact that it received a fee [added to Plaintiffs' debt] which it was not legally entitled to receive and/or retain" under Nevada law. "Acceptance and retention by the [D]efendants of such benefits under the circumstances would be inequitable, and [D]efendants should not be entitled to retain these illicit benefits to the detriment of [P]laintiffs. Each [D]efendant should be disgorged of any and all benefits obtained by virtue of their deceptive trade practices." SAC, ¶ 44. Paragraphs 45-47 of the SAC also expressly allege proximate cause and damages. In the SAC, paragraphs 1 and 2 of the Prayer for Relief seek recovery of all such damages. Consistent with applicable law, paragraphs 3-5 of the Prayer for Relief request recoverable damages, equitable relief and the attorneys' fees which are a recoverable item of damage under Nevada's deceptive trade practices statute, NRS 41.600.

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[6] If deemed necessary by the Court, amendment could surely enhance and augment the allegations of causation and damages, and Plaintiffs respectfully reserve and request the right to do so if needed.

A. The Reasoning of Commissioner Burns, on behalf of the Nevada Department of Business and Industry, Financial Institutions Division, is Compelling (RJN, ¶ 4, Ex. D)

With respect to the substantive issues of Nevada law presented here, including proper interpretation and application of most of the Nevada statutes at issue, the legal reasoning and analysis stated in Commissioner Burns' decision is truly compelling. Commissioner Burns is the highest authority at the FID, and the single most experienced and knowledgeable Nevadan on the issues at hand. Commissioner Burns' fourteen-page decision persuasively dismantles most every argument asserted here by Defendants. Defendants' only response of note is that Commissioner Burns' decision was overturned by a trial court, and not appealed.

The Department 16 order, ostensibly signed by Judge Williams, appears to be an advocacy piece, every word of which was crafted by QLS's attorneys at the firm of Lionel, Sawyer & Collins. The order contains no indication of any independent review, analysis, or contribution by the Judge. In fact, the order is not signed by the Judge, but says instead, "Jessie Walsh for Timothy C. Williams." Below that signature, the order indicates that it was "prepared and submitted" by Attorney Paul Larson, of the firm Lionel, Sawyer & Collins representing QLS. In paragraph 9 of the order, there is a significant mischaracterization of Commissioner Burns' fact-finding and his determinations, which mischaracterization and various related omissions illustrate the inaccuracies spread throughout the entire order. Specifically, the order misstated that Commissioner Burns determined that merely exercising the power of sale in a deed of trust constitutes the action of a collection agency. The trial court order omits any reference to the pervasive evidence discussed and the critical findings of Commissioner Burns' decision, which show a variety of debt collection activities (including demanding and collecting payments on past due amounts), different from and well beyond the mere recordation of a default notice or the mere statutory exercise of the power of sale. *Cf. Reese*, *supra*. Plaintiffs respectfully suggest that the order is without persuasive force.

Pursuant to NRS Chapter 649, the FID has the authority to interpret the statute and is the most knowledgeable about the statutory scheme. *See* NRS 649.051 ("The Commissioner shall administer and enforce the provisions of this chapter"); NRS 649.053 ("The Commissioner shall adopt such regulations as may be necessary to carry out the provisions of this chapter."); NRS

649.440 ("Commissioner may impose an administrative fine of not more than $10,000 upon a person who . . .[w]ithout a license or certificate, conducts any business or activity for which a license or certificate is required pursuant to the provisions of this chapter; or . . . [v]iolates any provision of this chapter or any regulation adopted pursuant thereto."); NRS 649.135 ("Commissioner shall enter an order approving the application for a license, . . . if the Commissioner finds that the applicant has met all the other requirements of this chapter pertaining to the applicant's qualifications and application."). In the prior case against QLS, the FID's then Commissioner personally acted as the hearing officer, and determined exactly the opposite of what Defendants contend. RJN, ¶ 4, Ex. D. That is, conducting various foreclosure activities in the manner performed here, by demanding and collecting money on past due amounts, constitutes debt collection in Nevada. Accordingly, the Commissioner correctly determined that QLS was not exempt from the licensing requirement under NRS 649.020. *Id.*

This Court should defer to the FID, as the applicable Nevada administrative agency. *See, e.g., Holliday Ret. Corp. v. State Div. of Indus. Rels.*, 128 Nev. Adv. Rep. 13, 274 P.3d 759, 761 (2012); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). Nothing in Judge Williams' order reflects any consideration whatsoever of the law indicating that it is the Court's duty to give primary deference to the administrative agency in charge.

II. THE PRIOR QLS DECISION IN DEPT. 16 IS NOT CONTROLLING HERE

A. The Decision in Dept. 16 Is Neither Binding Nor Persuasive

In their Brief, at pg. 9, Defendants claim that the sister court "scrutinized the legislative history of the various Nevada statutes implicated" in its determination. Although drafted by the QLS lawyers at Lionel Sawyer, the text of the order does not expressly show or recite any scrutiny, analysis, review, or consideration of any legislative history. There is no citation to legislative history in the order. Nor is there any quotation of the legislative record in the order. Moreover, the text of the order reflects no consideration of the 2011 amendment of NRS Chapter 107 and its express inclusion of NRS 649 licensed collection agencies. NRS 107.028.

B. The Prior QLS Order Is Distinguishable on the Critical Facts

As reiterated throughout this brief, according to the text of the order from Dept. 16 in the QLS matter, the Court limited its determination to the simple fact that QLS did nothing other than record a notice of default (and possibly conduct the sale). The facts at issue here, as pled in the SAC, depict a very different scenario, which itemizes a variety of debt collection activities, including demanding payments, receiving payments, forwarding payments, soliciting from the banks the opportunity to act on their behalf to collect the debts, seeking payment by cashier's checks and/or wire transfers made payable to Defendants, all as collection agents for the lenders, etc.

C. The Prior QLS Order Is Incorrect on Its Face

For example, it seems that there is a glaring legal error on the face of the QLS order from Department 16 that is relied upon by Defendants here. In the "Conclusions of Law," paragraph numbers 2 and 3 thereof, it appears that Judge Williams based his order in substantial part on a determination that the California company, QLS, was not doing business in the State of Nevada pursuant to NRS 80.015. It is inexplicable that the order did not cite or discuss the contrary, dispositive portion of that same statute, with respect to the issue. Specifically, NRS 80.015(4)(b) provides specifically that: "The fact that a person is not doing business in this state within the meaning of this section . . . [d]oes not affect the applicability of any other provision of law with respect to the person and may not be offered as a defense or introduced in evidence in any civil action, . . . involving an alleged violation of chapter 597, 598,[7] or 598A of NRS." The issue of whether QLS was doing business in the State as set forth in NRS 80.015 is not even allowed to be an issue on this matter, yet it was the basis of Judge Williams' order

D. There Are Numerous and Critical Defects in the Federal Trial Court Orders Relied Upon by Defendants

According to all the federal appellate courts, which issue the binding decisions that set the

[7] NRS 598.0923(1) defines a deceptive trade practice in the course of a person's business or occupation when he or she knowingly conducts the business or occupation without all required state, county, or city licenses.

location of documents constituting phone bills from telephone providers with respect to the itemization of all calls the defendant made to or received from Nevada debtors. First of all, we have to know what phone numbers they used. Then we have to know who their provider was. I think you have to subpoena the phone company for the records using their numbers, to and from.

If you -- when I step away for a few minutes, you can have that discussion, and if they have an ability to give you those records without the subpoena, you can work on it.

And I believe that covers everything as it relates to the defendant Nevada -- I'm sorry -- National Default Servicing Corporation.

Now, how I approached this should work in the other motions to compel.

We really need to take a break, which we are going to do. You are welcome to take a break as well. I'm going to give you a few minutes, though, to talk to each other to see what we can -- if we can resolve the other motions to compel that are out there, not the one dealing with the 30(b)(6) deposition that's been taken. We have to talk about that one.

And we will be back. We'll reconvene in 10 to 15 minutes.

(Proceedings recessed 11:32 a.m. to 11:48 a.m.)

THE DISCOVERY COMMISSIONER: Did we have a productive

conversation?

MR. SCARBOROUGH: I think we made some progress, Your Honor.

THE DISCOVERY COMMISSIONER: Oh, I'm sorry. Are we not on?

THE COURT RECORDER: It was pausing.

THE DISCOVERY COMMISSIONER: Okay. Sorry.

THE COURT RECORDER: It's fine now.

THE DISCOVERY COMMISSIONER: We have to wait for our technology to catch up.

MS. SCHULER-HINTZ: Pardon me, Your Honor. What I have written down is that we are required under No. 7 to ID employees in position of making and receiving calls?

THE DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: Well, the request -- I think you said -- the request was for the contact information, names and contact information, and you illustrated that as an example is what I understood.

THE DISCOVERY COMMISSIONER: Okay. So under 16.1 you are required to list the employee addresses and telephone numbers. If you represent them and they are a current employee, you may list them in -- you know, in care of your firm, but if you do that, I expect them to be produced without a problem. When we get closer to trial, if they need to be subpoenaed for trial, then obviously if they haven't already

disclosed their address in deposition, you will need to do that.

MR. BOYLAN: That's important, Your Honor, and I'll just flag this because it's not before you today, and it's with our experience, and we have a disagreement -- Mr. Scarborough and I -- about this, but for example, CRC, which has been out of business for five years, is claiming that all the former employees, including clerical-level people, low-level managers, they're all represented by two of the biggest law firms in the United States, and they refuse to give us their contact information. They've said that we can't interview them because they're represented by Kirkland & Ellis, thousand dollar lawyers an hour out of LA.

THE DISCOVERY COMMISSIONER: I don't even know who they are.

MR. BOYLAN: And then when we were asking questions about that with Ms. Briggnack, there were multiple instructions not to answer where we attempted to expose that there was in fact no real attorney-client relationship, but they are -- they're imposing these lawyers on former employees.

THE DISCOVERY COMMISSIONER: Okay. So --

MR. BOYLAN: It's a very difficult problem.

THE DISCOVERY COMMISSIONER: Then we'll deal with it when it's properly before me, which I'm assuming won't be very far into the future.

So I believe that I have dealt with all the issues, I hope, that concern a Nevada -- I'm sorry. I keep saying Nevada -- National Default Servicing Corporation. Am I correct? We've gone through all of those issues?

MR. SODERSTROM: I believe so.

THE DISCOVERY COMMISSIONER: So the attorneys that are before me now are on which matter?

MS. SCHULER-HINTZ: Quality Loan Service, Your Honor, Kristin Schuler-Hintz. And Mr. Boylan and I did have a semi-productive conversation. What I proposed to Mr. Boylan was that we follow the instructions that the Court laid out with regard to NDSC because I believe all the interrogatories, all the 16.1, all the discovery was formatted the same. I took very good notes, and I have the ability to get a transcript. I requested 30 days to supplement everything to the extent it needs to be supplemented by that and then push the hearings out for 45 days if there was any further dispute.

THE DISCOVERY COMMISSIONER: And I should've mentioned before, Counsel, I was going to give the attorneys 30 days from today to be able to supplement the answers to discovery.

MS. SCHULER-HINTZ: And then the last point that I suggested was that as to Quality Loan Service, our discovery would be for the period of 2007 until the date we obtained our debt collection license in 2012, and we have semi-agreement on

that. Mr. Boylan has some different time frames. So I'll let him -- I think we're in agreement as to I can respond as the Court laid out with regard to NDSC. The disagreement stems to time periods.

THE DISCOVERY COMMISSIONER: Let me just make sure I have the right motion before me. I have plenty of MTC.

Am I not doing this right? I'm sorry.

Okay. Here we go. So this was plaintiffs' motion to compel and for sanctions against defendant QLS, which is Quality Loan Servicing -- servicing or services -- Servicing.

MS. SCHULER-HINTZ: Quality Loan Servicing.

THE DISCOVERY COMMISSIONER: Okay. And apparently there is still a dispute regarding the time frame?

MS. SCHULER-HINTZ: I asked for 30 days to respond, and then if the Court felt that we should have a continued hearing on this to see if we had complied, that that would be set out 45 days. Counsel did not feel that 45 days setting the hearing out was sufficient.

MR. BOYLAN: Well, there's a number of issues, Your Honor. First, if -- if there's issues about compliance, we're going to have to brief those, and once we get the stuff in 30 days, it'll be at least 10 days before we can figure out, you know, where our disagreements are about whether they've complied with your intent. That has to be briefed so you don't have to look at all the old briefs, and then Phase 1 is over,

and this is just the beginning of discovery.

Here's the problem from the plaintiffs' perspective. If we start getting this information in 30 days, that information's going to lead to additional discovery. That's the way the world works, and Phase 1 is going to be over, and that's what we've said in our briefs. Part of our whole objection here in our request for sanctions is they're trying to run out the clock, and we're not going to be able to get the information we need.

So I would -- I suggested to counsel that we -- that we'd like to work with her, but we're not comfortable with just passing on the sanctions, first, but second, we would ask that Phase 1 be continued to March 31st because --

THE DISCOVERY COMMISSIONER: I will deal with that when you return to see me. I'm hoping I have a better idea of what will be happening with the department at that point as well. I was probably overly optimistic when I gave the initial scheduling order, but it is done. It is out. I believe that we're probably going to have to modify that. I am not going to let this case go to trial until both sides have the information they need, period. So understand that I'm aware of that.

I think I had a little bit different view on this perhaps than what the discovery is or the extent of the discovery that is necessary, but I will deal with that issue. I don't want to deal with it today because I want to see what

you get first and what we're looking at.

MR. CERAN: And, Your Honor --

THE DISCOVERY COMMISSIONER: Yes, sir.

MR. CERAN: -- and for MTC Financial, I tried to follow along as best I can, and to the extent that I could, we're fine with the Court's order. The problem is that our numbering may differ slightly then some of the things that were before the Court, and I don't want the Court to have to go through all of that. So taking in mind what the Court has said and having a transcript of what's happened, I would propose that we simply go along with, you know, taking the guidance from the Court, supplement our responses within 30 days, and then if there's a question or a problem, I'm sure Mr. Boylan and I will bring it to the Court's attention.

THE DISCOVERY COMMISSIONER: I have prepared everything, but I really used the first case as my test case. So I've shortened, I think, a little bit of the rulings, and I will handle each motion at a time so we make sure that we address everything, and I appreciate what you're saying.

Okay. So on the motion to compel against Quality Loan Servicing, I am going to give them an additional 30 days from today or thereabouts, which would be what -- let me give you a date so you can put that into the report and recommendations.

THE CLERK: October 19th.

THE DISCOVERY COMMISSIONER: So that'll be your date, and that goes for the National Default as well. All right.

Again, I just did a little bit of summary. Only produce documents related to these plaintiffs or documents related to stock, letters or generic information that was sent to Nevada residents from the defendant. No class list, no putative class discovery, no bank account information at this time except as it pertains to these plaintiffs. Now, if that's sufficient guidance for you, then I will not go through every single request.

MS. SCHULER-HINTZ: I'm fine with that guidance, Your Honor.

THE DISCOVERY COMMISSIONER: The same is true then for the admissions, for the initial disclosures, and I do not recall if this had a 30(b)(6) issue or not.

MS. SCHULER-HINTZ: It did, Your Honor, and I have the exact -- I have the guidance that you wrote on this, and we will produce -- we offered Mr. Boylan his choice of three dates, and we would accommodate three dates of his choosing. So he just needs to provide them and --

THE DISCOVERY COMMISSIONER: And move forward.

Okay. Are there any specific requests that are different of this particular defendant that you are specifically concerned about, Mr. Boylan?

(No response.)

THE DISCOVERY COMMISSIONER: I'm just going to take a look at 18, Interrogatory 18, which appears ironically enough on page 18 of the motion at the bottom, and I want to tell you how I rewrote this one. It says, State your best estimate of the total amount of dollars received by you as payment of fees and/or costs related to foreclosure related and/or collection-agency activities provided by you. This is not an admission. It's an interrogatory.

And then it says, As to the entire putative class as stated by you in the operative complaint, I took out the last part of the sentence, but I do believe it is acceptable for you to identify the total amount of fees that you incurred in the state of Nevada by rendering whatever services you rendered.

And I think you can clarify that we only did X-type of services. You know, see our letters. See the, you know, documents regarding our incorporation, whatever you want to say, and from that we earned approximately 1.5 million -- and I'm making all of this up -- during the years of 2007 to 2012.

Now, you are the one that received your license in what year?

MS. SCHULER-HINTZ: 2012, Your Honor.

THE DISCOVERY COMMISSIONER: So that would be your deadline date because you're not going to have anyone in the class after they received their license.

MR. BOYLAN: Well, yeah. The only thing is is that,

as I mentioned to counsel -- it's in our papers as well -- if their business activities and services were the same before and after --

THE DISCOVERY COMMISSIONER: Well, that's a good point, but the total -- that's a good point.

MS. SCHULER-HINTZ: But, Your Honor, we were -- and you know this as well as I do at this point. You've heard it.

THE DISCOVERY COMMISSIONER: So ask, did anything change. Can we ask that question?

MR. BOYLAN: I've asked it.

THE DISCOVERY COMMISSIONER: Even of the 30(b)(6) witness or in an interrogatory? What if any procedures did you change once you received your license in 2012?

MS. SCHULER-HINTZ: And we'd be happy to answer that, Your Honor.

MR. BOYLAN: Well, we asked it from witnesses under oath. I asked that, for example, of Ms. Briggnack on --

MS. SCHULER-HINTZ: But you didn't ask my witness, and we're talking about my case now. So --

MR. BOYLAN: Well, I understand that, but --

THE DISCOVERY COMMISSIONER: We're on this case.

MR. BOYLAN: -- let me give you -- well, I understand that, but the way they've interpreted your directions before -- and that's coming up in the MTC motion -- is, one, we can't take any individual deposition. MTC's position is that you

ruled ——

THE DISCOVERY COMMISSIONER: Okay. We're not on MTC right now. Let's focus on what we need to focus on right now with this lawyer on this case, and then we'll move forward.

MR. BOYLAN: All right. So then I take it QLS does not take the position that we can only take 30(b)(6) depositions?

THE DISCOVERY COMMISSIONER: Well, if I implied that that was all the plaintiff was entitled to take, let me correct that misperception. That is not what I intended. We talked about the 30(b)(6) witnesses as a way to obtain information. If there is another witness that is critical to Phase 1, I expect you to take that witness's deposition.

MR. BOYLAN: One of the comments you also made that they disagreed with, Your Honor, and I think QLS disagrees with too, is you made it very clear, and we quoted you directly, is it's very important that we depose their management staff. That was your exact phrase, and we're trying to do that. So far they haven't given us —— you know, they won't give us those witnesses, but we'll work on that.

THE DISCOVERY COMMISSIONER: Okay. So ——

MS. SCHULER-HINTZ: I haven't received a depo for management staff, Your Honor.

THE DISCOVERY COMMISSIONER: You can't just say in a notice of deposition, you know, we want your PMK of your

management staff. You can't do that.

MR. BOYLAN: No, we'll use names.

THE DISCOVERY COMMISSIONER: The 30(b)(6) deposition, and you use names. Now, I do follow the Apex Rule. So I would probably want you to take that 30(b)(6) deposition first before we started deposing high-level people in this company.

MR. BOYLAN: We're not interested in the high-level people, frankly. My experience says you get the truth out of the lowest-level people. So we're going to be focusing on the people making the phone calls, sending the letters and that kind of stuff.

THE DISCOVERY COMMISSIONER: I don't really think there's an issue before me today on this. If one arises, I will be available to address it.

MS. SCHULER-HINTZ: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: Anything further with respect to this particular defendant? I'm going to grant the motion to compel within the same parameters that I granted the motion for default servicing, and I will give the defendant -- I just want to make sure I say it right -- Quality Loan Service Corporation 30 days from today, or October 19th, to supplement their answers to discovery.

MS. SCHULER-HINTZ: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: Is there any ambiguity in anything I have said on this?

MS. SCHULER-HINTZ: Not in my mind, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. Great. Moving right along.

MR. BOYLAN: As you know, Your Honor -- and you haven't commented on it yet -- from our perspective at least, and as we've said in our papers, notwithstanding disagreements about your prior ruling, we've been struggling for months to get this information and to get depositions. There's always excuses. You deal with these excuses all day, but we've been struggling for months, and we've spent many thousands of dollars to make these motions. Otherwise, none of this would be happening. We would be getting zero. So we would ask the Court to rule on our sanctions request.

THE DISCOVERY COMMISSIONER: We're not through. We have three more motions to go. My plan on, quote, sanctions or attorneys' fees for having to bring the motions was actually going to be deferred until I see what the compliance is, and I have to make the decision then.

I understand you've spent a lot of money preparing and filing these motions. I've spent a lot of time reading them. So I understand this is important, but I am probably not going to award you fees today because I want to see what the defendants do in terms of compliance, and not all of your discovery was perfect. Okay. That's not the test for awarding fees by the way under Rule 37, but I just want you to know that

there were issues on both sides.

So who has QLS?

MS. SCHULER-HINTZ: That's me, Your Honor.

THE DISCOVERY COMMISSIONER: That's you, and that's the one I just dealt with, and there was a motion to compel sanctions against defendant QLS, and that was the 30(b)(6) motion.

MS. SCHULER-HINTZ: Yes, Your Honor, there was a 30(b)(6) motion, a written discovery motion, an interrogatory motion.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And a 16.1.

THE DISCOVERY COMMISSIONER: Right. That was the other one, okay. So there were three separate motions against QLS as well.

So the motion to compel the 30(b)(6) deposition is granted within the parameters that we've discussed.

The motion to compel the written initial discovery responses against QLS is also granted within the parameters that we discussed with respect to National Default.

If I say National Default to shorten it, is that understandable?

MS. SCHULER-HINTZ: That's fine, Your Honor.

MR. BOYLAN: Your Honor, one point of order that I'd appreciate if you could comment on, or maybe you'll want to do

it in specific context pursuant to a phone call, but there is a reasonable probability that there's in connection with specific questions -- for example during depositions -- there's still going to be some remaining and perhaps substantial dispute between counsel about whether the question is in or out based on the scope of your order.

And as you confirmed when we discussed it on the record last time, as you have had the same experience I have over these years, there's sometimes overlap. Factual matters sometimes overlap between phases. We're not going to push the envelope, but we're going to have disagreements.

What I would ask -- and I think is consistent with the law, but I'm asking clarity because I don't want problems -- if counsel believes, defense counsel believes that questions at a deposition are beyond your intended scope of Phase 1, that they simply make the objection rather than instruct the witness not to answer.

THE DISCOVERY COMMISSIONER: We're going to deal with that issue.

MR. BOYLAN: That way we can present to you a true record.

THE DISCOVERY COMMISSIONER: Under Nevada law, which you all have the privilege of practicing under for this case, you can instruct a witness not to answer based on privilege, number one, or number two, a Court order; that's it. Now, you

will have a discovery scheduling order in this case with phased discovery. Today you will have more direction and hopefully report and recommendations that will reflect what has occurred here properly. So if the Judge approves it, you will have a court order.

So if you use that court order to instruct a witness not to answer a question that is more properly in the class-certification discovery, i.e., give me all the names of all the people you contacted in Nevada -- object. We have a court order. We're only dealing with discovery on these plaintiffs. That would be sufficient to instruct a witness not to answer. It would because there's going to be a court order.

MR. BOYLAN: But my point goes to when there's differences about the application of that order.

THE DISCOVERY COMMISSIONER: Well then you'll have to bring a motion.

MR. BOYLAN: Well, and what I'm suggesting is if there are differences -- and we're obviously not going to ask that question because it's a clear -- you've ruled on that clearly, but if there is a --

THE DISCOVERY COMMISSIONER: Have a discussion and call me. If I'm not available, you're going to need to call the department. If that Judge is not available, you make the best record you can. You continue the deposition pending resolution of that question, and whoever prevails will probably

get an award of fees and costs. That's the best I can tell you, but I do make myself available, and I take deposition calls.

Moving right along. The remainder of the motions, other than the motion for confidentiality that was brought by the defendants or for a protective order, I guess, the joint motion for confidentiality order, that's the last motion I have. The next set of motions I have all pertain to MTC.

I'm trying to think of where to start.

So again there's a motion to compel and for sanctions against MTC related to the 16.1 disclosures. I'm going to grant the motion to compel. Again, I guess, these motions actually are granted in part and denied in part because I'm not granting everything. So I hope somebody's been paying attention to all of this.

MS. SCHULER-HINTZ: I have very detailed notes, Your Honor.

THE DISCOVERY COMMISSIONER: All right. So on all the 16.1 motions that are identified, they're going to be granted in part and denied in part. I might have said granted before, but they are granted in part and denied in part because not all the information requested needs to be turned over, but the information needs to be provided in accordance with the scope that I previously identified with National Default, same parameters.

Now, in this case, it's a little bit different because, for example, Item 7 deals with documents related to applications and communications with the FID when MTC applied and obtained its collection agency license for the first time in 2012. I expect those documents to be produced.

MR. CERAN: Right.

THE DISCOVERY COMMISSIONER: But that's different than National Default.

MR. CERAN: Correct. Now, that's where I got confused. The numbering diverged at that point.

THE DISCOVERY COMMISSIONER: Do not go on the numbering. Go on the substance.

MR. CERAN: Right.

THE DISCOVERY COMMISSIONER: So, for example, No. 1, all names and contact information of Nevada debtors to whom you had conversations, no, you don't need to produce that. I do expect you to have produced the information though as it relates to the plaintiffs in the case, but not to all debtors.

MR. BOYLAN: We have the plaintiffs' names and contact information, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. So there's nothing further for you to produce in Phase 1. I'm not going to spend any more time on this. If I need to, I will, but I'm hopeful that you all know what the situation is.

And then the next motion I have is the motion to

compel the written discovery, and again this is granted in part and denied in part. All the motions to compel, the written discovery are granted in part and denied in part.

And again, to the extent that the admissions are there, they need to be rewritten and re-served to take out the and/or. So either go with -- you can do two sets, you know, one of collection activities and one foreclosure activities, but you just can't put them in the same request to produce, and again the parameters are as set forth in the discussions we had with respect to National Default.

Are there any --

MR. BOYLAN: You meant RFAs, Your Honor, I believe.

THE DISCOVERY COMMISSIONER: I'm sorry. What now?

MR. BOYLAN: You meant RFAs.

THE DISCOVERY COMMISSIONER: The RFA's, but it's a motion to compel written discoveries. So it covers more than just the RFAs.

MR. BOYLAN: Yes, okay.

THE DISCOVERY COMMISSIONER: So I'm saying that MTC will have to supplement its written discovery request in line with the parameters that I set forth in the National Default discussion.

MR. CERAN: Your Honor, the only question that I had based on my notes had to do with the request for admissions, and it was No. 25, I believe, and the Court had previously said

that there were problems with the use of the disjunctive and the conjunctive, but then said that 25 needs to be answered.

THE DISCOVERY COMMISSIONER: Right. Because it doesn't have the conjunctive in there.

MR. CERAN: Right. But the other problem in that request for admission is did you --

THE DISCOVERY COMMISSIONER: It goes to the putative class, and I said substitute plaintiff for it.

MR. CERAN: The other problem then is -- not to criticize the drafting -- but the other problem is, You, and then parentheses, or the lender asked them to make payments. So that's asking two questions, one of which we would actually have, you know, very little reason to know, you know, independently what the lender had done.

THE DISCOVERY COMMISSIONER: So how do you answer that? You answer the admission as it relates to you, and then you say we can neither admit nor deny as it relates to the collection services agency or however you want to do it. That's how you do that. Remember, I started by saying you admit, deny --

MR. CERAN: Yeah.

THE DISCOVERY COMMISSIONER: -- admit in part, deny in part or explain why you can neither admit nor deny. That would be a perfect example of why you can neither admit nor deny.

MR. CERAN: Okay.

MR. BOYLAN: But the logs do indicate that they are aware of what the lender is doing. In fact, they shared with respect to one of the defendants, I'm not sure, frankly, about Mr. Ceran's client, but at least as to one of the defendants they shared the databases. So they were constantly keeping track of who was doing what vis-à-vis these debtors.

THE DISCOVERY COMMISSIONER: Okay. So if you have the information, you need to respond. I'm not going to go through that motion to compel any further than what I've already done with the others unless there's a specific request, interrogatory, admission that is different for this particular party. If there is, we'll talk about it.

If not, the motion is granted in part and denied in part as in accordance with what we discussed regarding -- with regard to National Default.

The next motion I have is plaintiffs' motion to compel and for sanctions against MTC, and this actually is different because it is a deposition that has been taken. And is there a video recording of this deposition?

MR. BOYLAN: Terry [phonetic] Johnsen's, no, there's not, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. All right. So I don't know. It's so funny. Sometimes we don't know how we come off. Some people say to me, Oh, you, you know, come off a

certain way, and I'm thinking, gosh, that's not what I intended to do at all, but that's the problem with being a human being is that sometimes we don't know how people react to us, even if it's not our intent. So it's hard for me to tell, Mr. Boylan, if at times somebody may have been not as responsive to you because they felt like they were backed up against a wall, and that's what I can't tell from the written discovery.

Now, as lawyers, we want to make sure that we pin the witness down, but you've got to be careful in how you do it. I could be critical of conduct on both sides, but I don't have a motion against the plaintiffs. I only have a motion against defense counsel or the defendant, but let me just say --

MR. CERAN: But --

THE DISCOVERY COMMISSIONER: Just a minute.

-- let me just say this. Mr. Boylan, this was one of your responses: Are you instructing her not to answer? Because I will seek sanctions, Counsel. You're really off the rails. You cannot comment about another attorney's or your perception of another attorney's demeanor, state of mind or comment in any way that is demeaning to counsel.

I'll tell you what the problem is. If you do it, then the deponent will necessarily believe that the lawyer is not -- maybe not professional enough, or I don't have to listen to the lawyer, or there's a real problem here, and I don't have -- and then the deponent does not give their best

testimony. We don't do this in Nevada. Magistrate Leen wrote a wonderful -- in the federal court -- wrote a wonderful decision on it. If you cannot find it, I will see if I can find it for you.

And I guess it's Mr. Reynolds that took --

MR. CERAN: Yes, Your Honor.

THE DISCOVERY COMMISSIONER: Yes. Okay. So you can answer the question if you know is not appropriate. That's coaching. You can't say it because then what it does is exactly what it did in this case, saying -- the witness says, I can't answer the question.

You then start answering the questions for the deponent, which again you cannot do. It causes a problem. I know things are done differently in California, but they are done differently in Nevada, and you cannot do it.

You can object to the form of the questions succinctly. You have to state a reason. Don't just say object to the form because that's not helpful in the Judge figuring out whether or not the question is proper or not at the time of a proper motion in limine. Objection, lacks foundation. Objection, asked and answered.

There are different appropriate objections, but you cannot start commenting on what the witness knows. You can't coach the witness, and unfortunately I understand the frustration that the plaintiff had because of the situation.

You can object, but you were doing far more than that. You were coaching, and it's not appropriate under the Nevada Rules of Civil Procedure. So I understand the problem.

The question is: What do we do about it?

MR. BOYLAN: As you know, Your Honor, there are also many instructions not to answer, and they're also the witness herself simply refused to answer.

THE DISCOVERY COMMISSIONER: Yeah, I found that very interesting. I haven't really seen that before.

MR. CERAN: Well, Your Honor, there were three instructions not to answer. They're all about trivial matters.

THE DISCOVERY COMMISSIONER: Yeah, you can't do it in Nevada. In Nevada you cannot object on the grounds of relevancy or trivial matters. You cannot do it. You will get yourself sanctioned. I'm just telling you right now it will happen.

MR. BOYLAN: There was one occasion --

MR. CERAN: I understand, Your Honor, and the other thing -- but I just wanted to say that earlier the Court said that we haven't asked for any relief, and actually we filed a -- we made a countermotion where we would like a discovery master.

THE DISCOVERY COMMISSIONER: Right. I'm sorry. You did. That motion needs to go to the Judge. I cannot appoint a referee for you.

MR. CERAN: Oh, okay.

THE DISCOVERY COMMISSIONER: So the countermotion actually has to be taken off calendar. You need to refile it with the District Court Judge.

I understand. I wasn't there. So I don't know what the tenor of the questions were. I don't know what the tenor of the deposition was, and I don't have a videotape unfortunately. I'm almost thinking of requiring you to videotape all your depositions from here on out. Sometimes that is a deterrent, and then that way I can better understand what happens during the deposition process.

MR. BOYLAN: One thing we do have though, Your Honor, we've got a number of clear examples where the witness simply refused to answer.

THE DISCOVERY COMMISSIONER: Yeah. I just don't understand that. That's what I'm concerned about.

MR. BOYLAN: I can explain it to you.

THE DISCOVERY COMMISSIONER: Oh, please do. Can you get inside her head? Because I couldn't.

MR. BOYLAN: Yeah, I was there, and I know exactly what happened. She was told before that she was only going to talk about one piece of paper that she had signed, nothing else, and that didn't go as expected. So when she started getting these other questions, she said, I'm not here for that. I'm not here for that. I'm not here to answer that. I'm not

going to answer that. There was even an occasion where Mr. Reynolds, at my request -- although most of the time he didn't -- there was even occasion at my request where I asked him to instruct her to answer.

THE DISCOVERY COMMISSIONER: Yeah, I saw that.

MR. BOYLAN: He did so, and she still didn't answer.

THE DISCOVERY COMMISSIONER: Right. So here's the problem, and this is what makes it so difficult for a Magistrate, Judge or a Discovery Commissioner or somebody who's looking at this and trying to be as objective as possible, I don't know what the dynamics were in that room. I will tell you this.

I think, Defense Counsel, your objections were -- there were many that were improper. You cannot instruct a witness not to answer on grounds of relevancy under Nevada law. Your local counsel should have been there with you on that. I don't understand why there was not more assistance provided to you.

Who is local counsel for your --

MR. CERAN: Phil Silvestri.

THE DISCOVERY COMMISSIONER: Well, Mr. Silvestri knows better.

MR. CERAN: Your Honor --

THE DISCOVERY COMMISSIONER: So I am concerned that you were not given proper instruction by local counsel, but

having said all that, what I really think that I want to do today is to grant a motion to compel a second deposition at the cost of the defendant for all the questions that Ms. -- is it Johnsen, J-o-h-n-s-e-n -- Johnsen did not answer so that we can get to the truth of the matter.

And I am going to caution the defendant, Defense Counsel, that you cannot conduct yourself the way that you did in this deposition. I know that's going to be difficult. I suspect California law things are done differently there, but in this jurisdiction, if you read the case law out of our federal court -- Magistrate Leen is in the District Court of Nevada -- you will find that this is not appropriate deposition conduct in terms of objections.

Now, you're very pleasant. You're very professional. I'm confident it was not done in a way that was offensive, although I don't know because I don't have a video recording, but I'm going to give you the benefit of the doubt on that.

But we have to have this deposition retaken. The areas that were not answered need to be answered, and it will be at the cost of the defendant.

MR. CERAN: Your Honor, if I could just be heard. I hear the Court. I wasn't at the deposition either, but there are some mitigating circumstances, Your Honor. One is that we at the time had a motion for protective order pending before the Court where we were seeking a limitation in questioning to

the plaintiffs --

THE DISCOVERY COMMISSIONER: Okay. That doesn't work.

MR. CERAN: Well --

THE DISCOVERY COMMISSIONER: You can't have something pending --

MR. CERAN: I --

THE DISCOVERY COMMISSIONER: -- you have to do it before the deposition. That's where the -- I don't know if you were here --

MR. CERAN: Well, that was our mistake.

THE DISCOVERY COMMISSIONER: Yeah.

MR. CERAN: But that's what I'm trying to say is a mitigating factor. We filed the motion, and then we agreed to produce Mrs. Johnsen. What we should've done is we just should've said, notwithstanding Mr. Boylan's constant requests, we would've said, no, we really need to get this issue about what you can ask straightened away before we have the deposition. So there was that dynamic, and you were asking about the dynamic, and I think that's a mitigating factor, Your Honor.

We just disagreed with Mr. Boylan as to what the proper scope of the deposition was. We had taken steps to have that resolved before the Court, and our mistake was producing the witness as opposed to waiting until the Court ruled on our

motion, which it ended up granting. So I think that's a mitigating factor.

And if Mr. Boylan, who by the way has not indicated anything in his papers about what he didn't find out that he still needs to find out, if Mr. Boylan, he's ——

THE DISCOVERY COMMISSIONER: I'm really confused, and I apologize, and I don't mean to interrupt.

MR. CERAN: No, I apologize.

THE DISCOVERY COMMISSIONER: You said you were not at this deposition?

MR. CERAN: No, Mr. Reynolds was.

THE DISCOVERY COMMISSIONER: I'm sorry. I thought you were Mr. Reynolds. I apologize to you, sir.

MR. CERAN: I picked up on that, Your Honor. That's why I mentioned it.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: I don't think it would have happened if Mr. Ceran were there, but ——

THE DISCOVERY COMMISSIONER: Okay. Because I'm, like, Mr. Ceran does not sound like he would've done something.

MR. CERAN: I'm a lot meaner then I sound, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. So where's Mr. Reynolds?

MR. CERAN: Mr. Reynolds is back in ——

THE DISCOVERY COMMISSIONER: Mr. Reynolds has a Nevada bar number.

MR. CERAN: Yes.

THE DISCOVERY COMMISSIONER: Mr. Reynolds is going to be in trouble with this Court. This is not acceptable.

MR. CERAN: Well, again I was trying to explain the mitigating factors.

THE DISCOVERY COMMISSIONER: It's not a mitigating factor, Counsel. Here's the problem. That doesn't mean you throw deposition conduct out the window. Number one, you did not have a protective order. Number two, the proper way to handle it is under Rule 30(d), and number three, that doesn't excuse the coaching and speaking objections.

MR. BOYLAN: And there's another --

MR. CERAN: I understand, Your Honor.

THE DISCOVERY COMMISSIONER: So I apologize to you, sir.

MR. CERAN: And that's not going to happen again.

THE DISCOVERY COMMISSIONER: I thought you were Mr. Reynolds.

MR. BOYLAN: There is another factor, if I may respond.

MR. CERAN: And I'm still talking, Your Honor, and if I can continue.

THE DISCOVERY COMMISSIONER: You may finish.

MR. CERAN: And in his moving papers, Mr. Boylan does not list one single area that he still needs to ask questions of this witness about. So he has a 147-page deposition transcript. The deposition lasted all day. He got the answers to his questions except for the three admittedly improper instructions not to answer, which were about completely -- well, let's just say minimally important questions, if important at all. So I'm not quite sure.

I understand the Court's chagrin with Mr. Reynolds and with us in the first deposition, but at the same time there is nothing in the record that indicates there is any more information that needs to be gotten. So it seems a little bit unfair that we would have to pay for a deposition that's unnecessary.

THE DISCOVERY COMMISSIONER: Okay. Well, I was going to make you make a nice contribution to Barbara Buckley's group at the Legal Aid. So I might stop while I was ahead because you do not want me to go through this and make a record. I'll be happy to.

MR. CERAN: I'm not --

THE DISCOVERY COMMISSIONER: There are multiple questions.

What does trustee work include, ma'am?

Answer, Foreclosure.

What else?

Whatever goes with it.

Question, You tell me. It's your business over 20 years. Can you tell me, please, what goes with it.

Answer, We do eviction work.

And then there's a report of clarification, and the witness says, I don't remember. I don't recall, which I'm assuming goes with, What work did you do.

I'm not answering that because you're asking me, and you're putting words in my mouth.

Can you answer the question, yes or no?

Answer, I won't answer the question.

Okay. Can you answer it?

I won't answer it.

Where's the lawyer? And that's the problem. Somehow this deponent got the message that it was okay not to answer plaintiff counsel's questions.

Have you erased or deleted any of your e-mails recently?

That has nothing to do with why I'm here at all.

Can you answer, yes or no?

No, I won't answer. No, I won't answer.

Okay. I've might have asked the question a little bit differently, like, do you have e-mail retention policies. I might have had the foundation first, but having said that, you know, again this is not helpful.

Okay. I'm going to ask you again. As an owner of the company and as one of only two signatories on the trust account, on an annual basis, in or about 2011, 2010, what's your best estimate in the amount of money your company collected on behalf of clients and deposited into its trust account?

Objection. Form.

Witness, That's to me. That's private information, and I'm not answering it.

By plaintiffs' counsel, Is it more ---

Objection. It's also irrelevant to this case and beyond the scope of admissible evidence.

Well, that's not exactly correct.

Is it more or less than 50 million?

Not answering.

Same objection.

Witness, Sorry.

Where are your banking records located?

Answer, I believe at the office.

Question, In a file cabinet?

Oh, no.

Where?

It's irrelevant to why I'm here.

Well, it's not irrelevant. I'm going to go after those records, ma'am, and I'm entitled to know. So I'm going

to ask you again.

Mr. Reynolds, Actually or probably not, but if you can, you can still do whatever you need to do, and she's not going to answer the question.

Mr. Boylan, Where are those records held, please, ma'am, the banking records?

In a safe.

Are those paper records for the trust account?

Maybe.

And what else, whatever else?

Do you want me to go on?

MR. CERAN: No, Your Honor.

THE DISCOVERY COMMISSIONER: I'm ordering a second 30(b)(6) deposition of your witnesses. You have an obligation under Nevada law to educate your witnesses. I better not see any more deposition conduct like this --

MR. CERAN: Understood.

THE DISCOVERY COMMISSIONER: -- in terms of objections, instructing witnesses not to answer improperly because if I do it will be a hefty sanction that will be paid to the Clark County Legal Aid.

MR. CERAN: Understood.

THE DISCOVERY COMMISSIONER: All right. The cost will be -- the cost will -- it will be borne by the defendant. What does that mean? It means all the court reporter's fees

and all the deposition transcript costs.

I don't know where -- where is the witness located or witnesses?

MR. CERAN: In Orange County, Your Honor, in Los Angeles.

THE DISCOVERY COMMISSIONER: Okay. So you'll pay for the plaintiffs' travel costs. Alternatively, you can bring the witness to the jurisdiction if you prefer, but the plaintiff will not have to pay travel costs.

Do not go on high-expense airline first class. Do a reasonable -- if you live there, that's perfectly fine.

MR. BOYLAN: I drive. I'd just drive my car to Mr. Ceran's office. It's not a problem, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. I'm so happy to hear that. Maybe you can have a cup --

MR. CERAN: I see we're getting along better already.

THE DISCOVERY COMMISSIONER: I know. Maybe you can have a cup of coffee for him when he gets there.

MR. BOYLAN: Mr. Ceran and I get along fine. Mr. Reynolds was a different question.

THE DISCOVERY COMMISSIONER: Okay. Well, Mr. Reynolds --

MR. CERAN: I'll talk to Mr. Reynolds, Your Honor. I'll share.

THE DISCOVERY COMMISSIONER: Okay. Mr. Ceran, I

would like you to be at this deposition.

MR. CERAN: Yes, Your Honor.

MR. BOYLAN: So then, Your Honor, we have the three other depositions of the managers, none of which they would produce after they repeatedly promised to do so.

THE DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: And, Mr. Ceran, he was not involved at all. So I don't fault him, but some of the things he said to the Court are just not accurate because I was dealing with an associate who had to go to speak to Mr. Reynolds every time, like he had to go -- but they promised us multiple depositions, and then they canceled them. We had an agreement in writing. There's lots of e-mails.

THE DISCOVERY COMMISSIONER: So set the depositions. It's Mr. Johnson, Ms. Sherburne [phonetic], who I guess -- you know, I'm not really sure exactly --

MR. BOYLAN: Overall Operations Manager according to Terry Johnsen.

THE DISCOVERY COMMISSIONER: Ms. Juarez [phonetic]?

MR. BOYLAN: Juarez involved money, collections, and I can't remember what else. I think it's in our papers.

THE DISCOVERY COMMISSIONER: As long as these depositions are set and taken in the parameter of Phase 1 discovery, no problem with it. Get them set.

MR. CERAN: Understood, Your Honor.

THE DISCOVERY COMMISSIONER: All right. So that motion to compel is granted.

In terms of the sanctions, I'm going to require the 30(b)(6) deposition to be retaken at the cost of the defendant. I want those questions answered. I want somebody who is educated to be able to respond to them, and I better not see any attitude by the next witness.

MR. CERAN: Your Honor, just to be clear, Mrs. Johnsen's deposition was not a 30(b)(6) deposition. It was an individual deposition, I believe.

Isn't that right, Counsel?

THE DISCOVERY COMMISSIONER: I thought I saw 30(b)(6), but I could've been wrong on that.

MR. BOYLAN: Well, it started out that way, and then with all the e-mail and stuff, we went back and forth, and we just --

THE DISCOVERY COMMISSIONER: You just took an individual?

MR. BOYLAN: Well, we put her name on it. The notice may have originally said 30(b)(6) and then it changed to --

MR. CERAN: It was an individual.

THE DISCOVERY COMMISSIONER: All right.

MR. BOYLAN: It changed to Terry Johnsen at some point.

THE DISCOVERY COMMISSIONER: So if that was my

mistake, I apologize.

MR. CERAN: It's fine.

THE DISCOVERY COMMISSIONER: What you need to do then is to decide how you're going to proceed.

If I were you, Plaintiffs' Counsel, I would do the 30(b)(6) deposition with the different topic areas. If you want to take -- I'm not sure it's worth taking Ms. Johnsen again.

MR. BOYLAN: Well, with this -- with this defendant, unlike the others, we actually know who the key players are. So I'm not sure we need any 30(b)(6) at this point because Sherburne, Johnson --

THE DISCOVERY COMMISSIONER: They were all like -- they owned the company?

MR. BOYLAN: They're the key players now.

THE DISCOVERY COMMISSIONER: They're -- okay.

MR. BOYLAN: The only other thing we need is to get to -- and I interviewed one on the phone. It's in my declaration. We need to get to the line people. That's where all the truth is, the phone calls, the correspondence. For example, Maria --

THE DISCOVERY COMMISSIONER: Well, I think those should be answered in the discovery that we've already discussed.

MR. CERAN: We've already been provided -- that's how

he knows who the people are.

THE DISCOVERY COMMISSIONER: Do you want to take Ms. Johnsen's deposition again?

MR. BOYLAN: I think I'm going to need to to clean up some things, yes.

THE DISCOVERY COMMISSIONER: So that — and again, here's my concern. I'm not real excited about having people deposed two or three or four times. So I like — I follow the Ninth Circuit to the extent that I can; I look to the Ninth Circuit. So if you want to do her in her individual capacity and representative capacity, do that in one deposition. There's different ways to do it. I don't know if there's one way that's more effective than the other. If you want to start, you know — I don't even know if she would be your 30(b)(6) witness on any topic area.

MR. BOYLAN: We'll just do her individually and finish it up that way, Your Honor.

THE DISCOVERY COMMISSIONER: If it turns out she is, we can always — you can always reach an agreement that she'll bind the corporation on certain questions.

MR. CERAN: My biggest concern is that we try to be efficient in terms of scheduling. Maybe we can have her in a half a day and use the other half day for somebody else.

THE DISCOVERY COMMISSIONER: Well, I'll tell you how we could really be efficient, but you don't want to hear it.

So you don't want to hear it. All right. Which would be -- just so I said that and it sounds a little ominous, let me say. We just don't phase discovery. That's how we be efficient.

MR. BOYLAN: I heard you mention this in the prior -- on a prior matter, and I just -- I'm curious, Your Honor. When you say Ninth Circuit, do you mean the Ninth Circuit Court of Appeal, or do you mean Washington, Oregon, California?

THE DISCOVERY COMMISSIONER: I mean all the states that are in the Ninth Circuit. I know it's federal court. I know it's not binding on state court.

MR. BOYLAN: Okay.

THE DISCOVERY COMMISSIONER: But understand, without a lot of the persuasive opinions I received from my colleagues in federal court on discovery issues, I have some limitations.

MR. BOYLAN: Okay.

THE DISCOVERY COMMISSIONER: They do not bind -- well, although -- okay. So the Ninth Circuit recently ruled that part of our HOA collection law may be unconstitutional. Now, we are in a debate on whether or not that binds the Nevada Supreme Court or our state. So, listen --

MR. BOYLAN: I read that.

THE DISCOVERY COMMISSIONER: -- it's all very interesting. Let me just say, it's all very interesting. We'll see how it all plays out. I don't have an answer for you today, but that's what I mean. I don't look at the Tenth

Circuit. Utah's in the Tenth Circuit. Sometimes I read the Utah decisions, but I just tell you that for the most part I'm looking at some of the analysis out of the federal court here and out of the Ninth Circuit. I do look at the federal court decisions. Obviously the states are ——

MR. BOYLAN: Did you read the ones I left for you —— gave you last time, Your Honor?

THE DISCOVERY COMMISSIONER: You know what, I have not, but I still have them. I do understand though that I'm bound by Nevada law, and I do do my best to follow it. So you all do your best to follow it when you're in depositions.

All right. That's all I'm going to do on the sanctions today. So the motion to compel and for sanctions against MTC is granted within the parameters that we've discussed.

MR. CERAN: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: You'll pay for all the transcripts. If there's any other costs associated with the deposition, just make sure, Plaintiffs' Counsel, you so advised, but if I see the conduct again, I just want you to know that ——

MR. CERAN: I hear you, Your Honor.

THE DISCOVERY COMMISSIONER: —— it will be a different scenario.

MR. CERAN: Understood.

THE DISCOVERY COMMISSIONER: The last motion I have is defendants' joint motion for a confidentiality order. I was somewhat —— one of my questions was: Do we have a confidentiality order in place in this case just generically? Do we have one in place?

MR. SCARBOROUGH: No. We're contending for one, and that's what's in front of Your Honor.

THE DISCOVERY COMMISSIONER: Okay.

MR. SCARBOROUGH: Some of us have taken the risk to try to meet Phase 1 parameters of getting information out and in the hands of plaintiffs even though we don't have such an order. I heard Your Honor earlier who said quite clearly to two other lawyers —— I wasn't in the room. I don't know if there was an agreement or not. We've attached some documents, but suffice it to say we thought we were proceeding down a path to an agreed order toward the end, meaning the end before productions were being made, and we were about to produce our 30(b)(6) witness who is on videotape.

Mr. Boylan told us he wouldn't stipulate to anything being confidential. We had —— and I'll say this lovingly —— a bit of a stare down in the deposition on, well, are you at least going to promise not to publish anything in the deposition until we can get the motion up or down? The answer to that, thankfully, by Mr. Boylan was, yes, and then we —— and I will use this word intentionally —— rushed this motion in

front of Your Honor. I know it was returned because we didn't do enough to show the emergent nature of it.

But I will cut to the quick because I know it's been a long morning for Your Honor, and we appreciate everything that's been done here. This is about practicality. All we want to do is be able to produce information without defense costs soaring by having to sit down and deal with the fine points of whether something is or isn't confidential.

Mr. Boylan in what was filed last night -- I don't even know if Your Honor's read it -- talks about blank pages --

THE DISCOVERY COMMISSIONER: Yeah, I did --

MR. SCARBOROUGH: -- and about other pages. Well, I can answer that. I mean, clearly everything that looks like it may also have been a public record came out of a borrower's file. That's Graham-Leach-Bliley material. The blank pages, that's what happens when somebody hits a double-sided copy on a document that's only printed on one side and you employ a system where if one page has confidential information in a document all the pages get labeled.

We urge the Court to go to practicality rather than cause the defense -- we're in asymmetric discovery. We all know that in this room. We've got all the information -- Mr. Boylan's clients have little -- where we can simply designate, get the information in plaintiffs' hands, and if there's a legitimate fight about something later on or we're --

we're going to be amenable to releasing, but I just don't want us to have to go hire the squadron of document reviewers to do this page by page. By definition it slows down the very access to information that Mr. Boylan vehemently tells this Court we're fighting to withhold from him.

THE DISCOVERY COMMISSIONER: Well, and part ——

MR. SCARBOROUGH: That's all I have to say.

THE DISCOVERY COMMISSIONER: Yeah. Part of the problem in Nevada is we don't have a clawback provision. They do in federal court, but not in state court. So once something's inadvertently disclosed, it's out there.

MR. SCARBOROUGH: Well, I appreciate that very much. I've been litigating up here for a decade, and I did not know that.

THE DISCOVERY COMMISSIONER: No, we don't. We do not have a clawback provision.

MR. SCARBOROUGH: Okay.

THE DISCOVERY COMMISSIONER: When I have some more spare time, I'm going to be working on that.

What I am concerned about in this case are all the financial information and not just on the defense side. I'm concerned about it on the plaintiffs' side as well. We have a law in Nevada that you can't disclose Social Security numbers.

Everybody familiar with that?

So that type of information probably, except for the

last four digits which are not confidential, would need to be redacted. I think it makes a lot of sense to have a protective order in this case.

Now, what does that really mean? It certainly means you can share it with your clients, with your experts, with the lawyers in your firm, with your paralegals, paraprofessionals. You should be able to do all that without a problem. Can you post it on your favorite Facebook page? No. Can you post it on YouTube? No. I don't even know how you post things on YouTube. You can't do it.

If you file documents to a dispositive motion, they lose their confidentiality or until otherwise ordered by the District Court Judge. You enter them into evidence at trial; they lose their confidentiality, but for purposes of discovery, ensuring that the documents are exchanged timely, I have no problem granting this motion.

And, honestly, Plaintiffs' Counsel, I don't think you should have a problem with it either.

If you have to file a document to a motion, you just take your motion for protective order -- it's under NRCP 26(c) -- because otherwise we have to have a full-blown hearing on sealing of records, which we're not doing. I'm not sealing the record. I am simply putting it under a protective order until otherwise ordered by the District Court Judge. This does not require any one party to do anything special. So you don't

have to do anything special.

If you get into a dispute -- and I would certainly say you should be able to show witnesses documents as well during deposition. If there is some critical document you are worried about, put it under seal in the deposition. That's easy enough and the questions. I'm assuming the court reporters still know how to do that, but having said that, I just don't think that this as a practical matter does anything, but make sure that all the information is disclosed right away.

If a document turns out to be one that's already in the public eye or public record, then it's technically lost its confidentiality, although there may be rules that still protect.

And I guess the best example I can give you is something totally off, outside of your case, but when we are looking at medical records of other experts, and they identify other plaintiffs who are not plaintiffs in the case at issue, those plaintiffs don't expect their medical treatment and care to be discussed in this nonrelated case. HIPPA applies. So you have to think through the problem.

There is no reason in my mind we can't grant a protective order in this case as long as it doesn't require additional work of the plaintiff. If it is a situation where you start arguing about we really have to have this out in the open, then the party who wants it to remain confidential has

the burden of proof of bringing the motion to continue the protective order, but other than that I don't think it's a problem.

MR. BOYLAN: Let me comment on that if I may. First of all, I don't see -- I haven't seen any reason or basis that we'd want to post information on a website or anything like that. That's so -- I mean, that's not even an issue here.

THE DISCOVERY COMMISSIONER: I'm just trying to preempt everything I've seen.

MR. BOYLAN: Well, yes. But what I'm saying is, here's the way it is. We don't want the confidential stamp placed on documents that are not sensitive or trade secrets because it burdens us with respect to our use of those documents, unless you're saying there's no burdens whatsoever, except publication on YouTube or Facebook --

THE DISCOVERY COMMISSIONER: Well --

MR. BOYLAN: -- because we don't --

THE DISCOVERY COMMISSIONER: -- and attaching them to a motion, you have to --

MR. BOYLAN: We have to be able to do that. That's --

THE DISCOVERY COMMISSIONER: Yes, but you just --

MR. BOYLAN: -- that's why I'm opposing this.

THE DISCOVERY COMMISSIONER: -- do it under seal. You seal it.

MR. BOYLAN: That is a significant burden, and they want to ——

THE DISCOVERY COMMISSIONER: Do you even know how you do it in Nevada?

MR. BOYLAN: May I finish, please? They wanted, for example, to designate ——

THE DISCOVERY COMMISSIONER: I want you to answer my question. Do you know how to do it?

MR. BOYLAN: Not exactly, I don't, Your Honor.

THE DISCOVERY COMMISSIONER: Okay. Then don't say ——

MR. BOYLAN: —— but I've been —— I've been around a while.

THE DISCOVERY COMMISSIONER: —— it's a burden until you know.

MR. BOYLAN: Well, because I know my staff, and I know we're operating remotely, and I know we're already struggling to get everything hand-delivered to you, and now we're going to be dealing with stuff under seal that's not —— it's no trade secret here. Let me give you ——

THE DISCOVERY COMMISSIONER: Financial information.

MR. BOYLAN: What, for example? There's none here.

THE DISCOVERY COMMISSIONER: Personal financial information, the earnings of the defendant, which you have asked for. How much money they make, you've asked for that. If you asked for supporting documentation of that, that's going

to be under seal. Bank records, personal financial records of your client, which I would think you would want to be very careful about.

MR. BOYLAN: My clients don't have any that are even asked for I don't think in this case, but in any event, they submitted a highly restrictive order with all kinds of layers of burdens, and they want to designate entire deposition transcripts confidential. They want to designate public records, blank records, blank forms. That is going to be a cumbersome burden that is not justified under the law.

My understanding of the law is if you want a confidentiality order, which are disfavored generally in the law because this is a public forum, if you want that, you've got to submit evidence in the form of declarations identifying the trade secret or sensitive information. Typically defendants will submit in camera.

For example, if there is a financial record -- they haven't given us any, by the way -- but if there were such a thing, they would submit that in camera, and they would prove to you that, yes, there is sensitive information here, and they haven't done that.

THE DISCOVERY COMMISSIONER: I'm not doing that. I'm going to require that all financial information be maintained confidentially within the confines of this litigation. Any information that is protected under public law and not to be

disseminated will remain confidentially under the -- in the confines of this litigation until otherwise ordered by the District Court Judge. That's it, financial information.

Now, I don't know what trade secret information would even be part of this case. So --

MR. SCARBOROUGH: Nor do we.

THE DISCOVERY COMMISSIONER: I'm not even sure --

MR. BOYLAN: Nor do I.

MR. SCARBOROUGH: And that's why we --

THE DISCOVERY COMMISSIONER: I'm not even sure that's an issue here.

MR. SCARBOROUGH: No. The kinds of other documents that have been produced that we've stamped confidential, just to continue the conversation, are the manuals that our clients cause us to operate under. They wouldn't want that disclosed.

THE DISCOVERY COMMISSIONER: That's proprietary information. I typically protect that.

MR. SCARBOROUGH: Second, the contracts that we've already produced with confidentiality stamps between ourselves, CRC, and our clients, those are confidential business records. There's no trade secret here, Your Honor. That's a red herring.

THE DISCOVERY COMMISSIONER: It's a confidential proprietary record under 26(c).

MR. SCARBOROUGH: Exactly.

would've come in just before we started to change things. So you're going to have to bear with me a little bit.

We are also going electronic. Let me tell you what that means for you all. That means that I only need the original with the signatures. I don't need copies anymore. You will receive them via e-serve, and that will start your notice time for objection.

So instead of us mailing these out or putting them in your box downstairs -- which I like to call the antiquated notice system -- we will be e-serving then, and that will be your notice to start the time running for objection. Under e-serve you have to add three days. It's just like mailing, but be aware of that. So I'm just going to need one report and recommendations with everybody's signature on it.

Now, Plaintiff's Counsel.

MR. BOYLAN: Thank you, Your Honor.

THE DISCOVERY COMMISSIONER: I have read yours as well. I like the defense counsel's better. If you don't want to sign off on it, that's fine. I would like you to reconsider signing off on it because I think it captures what happened at the hearing without discussing ad nauseam some of the particulars.

I want to say this because you indicated a list of items that you thought were discoverable without limitation. I understand why there was some confusion because I read the

transcript, but it was not my intent that the defendants had to disclose every document or every communication they made to every Nevada person. That was not my intent, or identification of the last known names and contact information of every Nevada debtor, not in Phase 1. That was not my intent.

I made an offhanded comment that, you know, it might be that we end up getting the list in Phase 1, but that did not -- I should probably have not made that comment because I was forward thinking, and I think it confused things because I had no intent for any discovery to go beyond the current plaintiffs' discovery with the following exceptions in that I said you should be able to discover what their business policies, practices were, what they were doing generally.

I don't even necessarily have a problem with you sending a request to produce saying, you know, please provide all the forms that you would have used at or near the time of the plaintiff -- making contact with the plaintiff, not a specific form to a specific person, but the generic form that you may have sent out during that time. Give us a sample of it. I don't have a problem with that.

But I think the different topic areas that you identified in the report and recommendations, many of them were not what I intended. So I think the defendants' report and recommendations more effectively captures what I intended, and it has the references to the transcript, which I'm fine with as

long as the transcript itself is not attached.

MR. BOYLAN: Can I speak to that for a moment, please, Your Honor?

THE DISCOVERY COMMISSIONER: Yes, you may.

MR. BOYLAN: I thought that you made some very appropriate comments last time about what we need to prove in Phase 1 and what it takes to determine the validity of plaintiffs' claims, and that takes us I believe right directly to NRS 649.020(1), which defines a collection agency because that's what you said very clearly. We have to determine if they were acting and in the business of being a collection agency in Nevada without a license. All persons engaging directly or indirectly as a primary or secondary object business or pursuit in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another.

At the beginning of the hearing I said we have to prove that they were conducting business within this statute, and we can't do that just based on the information from the named plaintiffs, an anecdotal group of people. You said, I agree with you.

THE DISCOVERY COMMISSIONER: I -- but the Court has already ruled on the issue from the February 22nd hearing, and the Court has said that we are only doing discovery on the named plaintiffs. I extended that to include the legal

validity of the plaintiffs' claims, but I included the plaintiffs' claims. So I fully intended for you to get what I will call the generic letters that were sent out to people in Nevada or to the people who owned the property who may not have resided in Nevada, but I clearly intended you to be able to obtain generic information but not specifics of the various debtors.

And to the extent that I said something that would've led you to believe that that was what I intended, then I am going to correct myself on the record. That is not what I intended. That is Phase 2 of the class discovery after it has been determined that you have and may pursue a legally valid claim in Nevada, and that is what Judge Scann said. I might have said, I might have done this differently, which we talked about, but that is not what happened here.

But imagine my surprise when I looked at your competing orders from the Judge's hearing, and it didn't even discuss the discovery issue.

MR. BOYLAN: I'm not surprised by that. I'm sorry, but I told you at the very first hearing that that was not a ruling. That was not an order. It was a random discussion at the end of a 12(b) hearing. I'm not surprised it's not in the order. I don't believe it was the order of the Court. I don't believe it is the order of the Court, but I understand you're interpreting her intent from the transcript. I respectfully

disagree, but I understand what you're doing, but --

THE DISCOVERY COMMISSIONER: But then you --

MR. BOYLAN: -- there was no motion pending. We hadn't submitted declarations or evidence. So I'm not surprised it's not in the order. I would respectfully -- I know you disagree, but I have to make my record. I would respectfully ask that you not treat that as an order. It is not an order, was not an order, and according to the drafts you've seen will not be an order, and respectfully, I disagree with it.

Now, if I may, I understand I'm indulging -- you know, I'm asking for your patience, but pages 42 and 43 of the transcript, when we were here last time, they stood up and said, We don't have any phone communications with debtors. You said, Hey, buddy, if you don't, okay, fine, but if you do, you better disclose it.

THE DISCOVERY COMMISSIONER: If you know, if you know the --

MR. BOYLAN: Well, of course they know.

THE DISCOVERY COMMISSIONER: -- the witnessee. You can't hide behind -- what I made very clear is you can't -- if you have knowledge, you can't hide behind the order of the Court and not produce it as you are required to under 16.1, which predates my involvement.

MR. BOYLAN: And you said that if -- you've got to go

get that information. You can't just not look for it.

THE DISCOVERY COMMISSIONER: No, I didn't say that. I said I don't expect the defendant to go back into the computer and search for all people unless we have a legal cause of action --

MR. BOYLAN: But the computer --

THE DISCOVERY COMMISSIONER: Listen, I just read my transcript.

MR. BOYLAN: The computer indicates who they spoke to, Your Honor. For example --

THE DISCOVERY COMMISSIONER: But I said that was going to be part of Class 2, the class certification. You have to determine if there's a legally valid claim first --

MR. BOYLAN: And what I'm suggesting to you --

THE DISCOVERY COMMISSIONER: -- and if you disagree with that, and if you disagree with what the Court or my interpretation of what Judge Scann decided to do and how she decided to do it, then you need to file the appropriate motion with the department. An order has not yet been signed. And so why not file your motion to reconsider or for clarification with the District Court Judge?

MR. BOYLAN: Thank, Your Honor.

THE DISCOVERY COMMISSIONER: Because I can't overrule the District Court Judge.

MR. BOYLAN: And I don't think there's an order. So

you're not overruling anyone, but we can --

THE DISCOVERY COMMISSIONER: Well, I disagree with you on that in principle because the Court has spoken.

MR. BOYLAN: Well, where we do have agreement, I thought, is that based on this statute, which I just quoted, we're entitled to prove -- in fact, I think we must prove that they were engaged in this business, and what that business is about is communicating with debtors regarding the defaulted debt in the state of Nevada, communicating orally, communicating in writing.

It's about conducting reinstatement work with respect to the defaulted debt, pay-off work with respect to the defaulted debt, debt validation, notices and responses. All of these things I thought you understood and declared that we were entitled to discovery of all of that.

THE DISCOVERY COMMISSIONER: With regard to these particular plaintiffs, yes. With regard to all debtors, no.

MR. BOYLAN: Well, then we can't prove they were in the business just based on two or three people. How does that -- I'm sorry, Your Honor. It's not -- it doesn't make any sense.

THE DISCOVERY COMMISSIONER: Well, then you'll have to talk to -- well, you'll have to talk to the Judge about it because I think it does make sense. If these individuals -- and there are a number of them. There are a number of

plaintiffs here. If you are sending out a credit letter -- and you've even cited the case law -- if it's one letter that they're -- they're acting like a credit collection agency. So you don't need all the debtor potential members of the class right now.

MR. BOYLAN: I just need the evidence. I prefer overwhelming evidence, and I think I'm entitled to get it, but if --

THE DISCOVERY COMMISSIONER: Why don't --

MR. BOYLAN: I understand you disagree.

THE DISCOVERY COMMISSIONER: Why don't you do what I have requested that you do initially. Get the information regarding these plaintiffs. Get the generic information that I've said that you were entitled to, and then you can bring another motion asking to conduct class discovery based on these findings, but you have to give me something to look at beyond what I have right now.

MR. BOYLAN: Understood. But just for point of clarification, it is absolutely not class discovery. That's where you've been misled. If you read the statute, it's discovery related that they were engaged directly or indirectly as a primary or secondary object business or pursuit in the state of Nevada in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another. That's what it proves.

Now --

THE DISCOVERY COMMISSIONER: And the plaintiffs are your group that you are focused on initially.

MR. BOYLAN: Okay. We --

THE DISCOVERY COMMISSIONER: And that's my -- I do not want to -- we have so much to get through today. That's my ruling.

MR. BOYLAN: I understand. One final point on it though just for the record. I think this is what persuaded you last time to take a much, I think, more constructive approach, and that is these people are, Your Honor, witnesses too. Remember, they won't give us -- we can't -- they won't give us it. So when those summary judgment motions come, I'm going to say respectfully, the Discovery Commissioner would not allow me to find these witnesses which would have probably maybe, what, 50 declarations --

THE DISCOVERY COMMISSIONER: If you make that representation to the Court, you're going to have a problem, sir.

MR. BOYLAN: No, I'm --

THE DISCOVERY COMMISSIONER: You may not be able to practice in the state of Nevada because that is not what I said.

MR. BOYLAN: I'm sorry. I don't mean it that way. It's not meant to be pejorative.

THE DISCOVERY COMMISSIONER: Well, then you need to be careful how you say things because, frankly, I'm on the front lines all the day, day in and day out. I know you don't always agree with me, and I'm not asking you to, and maybe you're right on this issue, but I have a transcript from a District Court Judge that would suggest otherwise, and her plan in allowing the certain claims to go forward was to determine whether or not the plaintiffs had legally viable claims in Nevada, and that is the first area that needs to be addressed.

Now, I am inviting you to file an appropriate motion with the Court if you feel that that was an inappropriate decision, but you need to do that because I am not going to overrule Judge Scann in her thought process.

MR. BOYLAN: Understood, Your Honor. I just have also just a little different view of what Judge Scann intended.

THE DISCOVERY COMMISSIONER: I understand that. That's fine. Seek clarification. But what I am not going to do is going to require the defendants at this point to turn over all the names, addresses, financial information, et cetera, of all the people that they dealt with on the various foreclosure cases, all of the debtors, not going to do it, not right now, not today, not in Phase 1.

MR. BOYLAN: I think we'll probably need your order in order to qualify to make a reconsideration motion. I'm not sure otherwise we can under the rules. I interpret what you

just said as permission to do that. I'm not sure if it will require a written order.

THE DISCOVERY COMMISSIONER: I don't think it's me that you have to worry about. I don't think I'm telling you -- I mean, you can object to anything I've done obviously, but that is not the issue. You need someone to clarify the scope of the case for you, which is the District Court Judge handling the case.

MR. BOYLAN: Do we know if it's going to have a permanent assignment yet, Your Honor?

THE DISCOVERY COMMISSIONER: They've opened the position. I don't know what the status is. The last time I checked no one had applied.

MR. BOYLAN: Okay.

THE DISCOVERY COMMISSIONER: So I don't know if the Court is going to have to extend the time for applications. I just don't know what the status is. It's not something that I have knowledge of. So they are staffing the department with senior judges. I am considering talking with someone with more authority than I have to suggest that we find a permanent home for this case sooner rather than later, but right now you're in Department 29.

So here's -- and again, it's really important, and let me stress this to my defense counsel. Let me just ask this question.

Do you have any of these other types of lawsuits going, not from these two attorneys, but in other cases? Do you have other lawsuits?

MR. SCARBOROUGH: Class actions here in Nevada --

THE DISCOVERY COMMISSIONER: Yes.

MR. SCARBOROUGH: -- against us on us, no.

THE DISCOVERY COMMISSIONER: Okay.

MR. SCARBOROUGH: This is it.

THE DISCOVERY COMMISSIONER: Have you had class actions anywhere else?

MR. SCARBOROUGH: No, not to my knowledge.

THE DISCOVERY COMMISSIONER: On this particular issue of acting like a credit agency?

MR. SCARBOROUGH: No, I wouldn't --

THE DISCOVERY COMMISSIONER: A debt collection agency. I'm sorry.

MR. SCARBOROUGH: I wouldn't want to speak for the laws of all 50 states, but I will say this Nevada statue is somewhat unique, and that's obviously the genesis of all this.

THE DISCOVERY COMMISSIONER: This is the only case you have against your clients. Do you have any other complaints by anyone?

MR. SCARBOROUGH: Not to my --

THE DISCOVERY COMMISSIONER: Do you have a complaint log that you -- you know, have you had any other letters

received, any other calls from any other counsel, any other complaints by any individuals that you've serviced? If you have a complaint file, I would highly recommend that you go through that file to make sure that there have been no complaints from anyone saying, hey, you're acting like a collection agency. Leave me alone. Don't call me anymore. If you have any of those types of complaints with the names attached to them, that information needs to be provided.

But I am not -- what I am not doing at this point is asking the defendants to go into their databases and pull all the names and identities of all the individuals that you have had contact with in the state of Nevada and all the financial information. I'm not going to do it right now.

MR. BOYLAN: What I would suggest on that, Your Honor -- I think you intended it at least at the last hearing. You did intend, I believe, that we could conduct depositions to determine -- correct me if I'm wrong -- to determine the facts about that database. What is in there? What's searchable? How easily it is to retrieve the information? I believe that you intended that.

THE DISCOVERY COMMISSIONER: I don't have a problem with you finding out about their policies and procedures, and to the extent that that would go to a policy and procedure -- do you maintain a database? You know, what's in that database. I don't particularly have a great deal of problem with that.

What I have a problem with is getting the specific names, identifications, financial information. That, we're not doing until Phase 2.

And when I say Phase 2, we've done everything we can to have the legal issues resolved, and then we're moving forward. I suspect at some point we'll be in Phase 2, but I don't know that for certain because you'll have to make your motions after Phase 1.

MR. BOYLAN: When you say financial information, you meant financial information of other ——

THE DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: —— Nevada debtors?

THE DISCOVERY COMMISSIONER: Not on the plaintiffs.

MR. BOYLAN: Nevada debtors?

THE DISCOVERY COMMISSIONER: The plaintiffs you're entitled to all their information, and I think you've gotten it. I think they've turned over the files, the letters, the e-mails. I think everything has been turned over with regard to the named plaintiffs. If it hasn't, you need to let me know.

MR. BOYLAN: No, that's not a problem. The distinction though I wanted to make clear is one of the things we have done in discovery in some depositions, we've asked questions, and we've gotten some very good answers. Although there was a lot of obstruction and the like, we got some

information about -- given that, you know, we have to prove that they were in the business of being a collection agent to show the validity of our claims, we've gotten some information that they collected millions of dollars from Nevada debtors, now, not the names, not a particular debtor.

THE DISCOVERY COMMISSIONER: I think I said that you could find out, and if I didn't, we'll address it today. I don't have a great deal of problem asking the basic question. What were you paid? What services did you perform? How were you paid for those services. Do you have an estimate of how much you were paid for those services in the state of Nevada? I have no problem with that.

MR. BOYLAN: And how much -- how many millions they collected from Nevada debtors, which they've given us some answers, but here's the problem, Your Honor. The witnesses typically say I don't know or I don't remember. So we've subpoenaed the bank records because what they did -- and we've got testimony that shows this --

THE DISCOVERY COMMISSIONER: Okay. Well, did you serve those subpoenas on the defendant? Because I'm going to quash those bank records. I mean, that was not the intent, number one. Number two, you have to ask or you should be asking it as a request to produce, which I think you may have.

MR. BOYLAN: We did.

THE DISCOVERY COMMISSIONER: So we'll address that,

but --

MR. BOYLAN: We're only asking for the -- from the banks and from the defendants. We're only asking for the trust records for the dollars they collected from Nevada debtors; that's all we're asking for. So that proves --

THE DISCOVERY COMMISSIONER: Well, I'm sure the bank will get right on that.

MR. BOYLAN: Well, they've made a motion to quash.

THE DISCOVERY COMMISSIONER: They'll probably -- yeah.

MR. BOYLAN: There is a motion to quash that's been filed.

THE DISCOVERY COMMISSIONER: All right. Well, I'll have to look at it when it's properly before me.

Okay. So again, I have no problem with you asking the generic-type questions. Now, the specifics in terms of how much money, you know, did you collect on behalf of -- you know, I mean, I don't know if collect is even the right word. You know, how much money were you paid for your services in the state of Nevada approximately? You could ask that in an interrogatory, and they would have time to research it and give you a number, but asking it in a deposition of a 30(b)(6) witness is somewhat difficult.

MR. BOYLAN: Well, for us, what we have found so far, Your Honor, is that unless we get documents we can't get any

reliable information. Just we can't.

THE DISCOVERY COMMISSIONER: Well, I disagree with that.

But let me just finish on the report and recommendations first before we move forward. I'm going to sign the defendants' version.

Plaintiff's Counsel, if you want to approve as to form and content, you're more than welcome to do that. That does not mean you don't -- you waive any right to object to anything in there. You can obviously object, but I think that the defendants' is an accurate reflection of what I intended.

For some reason, I don't have it, Ms. Weber. So I need you to resubmit an original. You don't need to submit copies. Just submit the original. Let plaintiffs' counsel have some time to think about it. Try to approach them again to see if they'll sign off on it. If not, then just submit it directly to me with a cover letter explaining that they wouldn't sign off on it, and then I'll review it, and the chances are I'm going to sign it, and you can leave the references to the transcript in. I think that will be helpful to the District Court Judge.

Okay. And again that report and recommendations is from the July 20th hearing.

THE CLERK: Did we set a status check?

THE DISCOVERY COMMISSIONER: I thought we had, but I

don't know ——

MR. SCARBOROUGH: There's one on October 12th. I'm not sure what all the Court contemplated, but I do believe we're on the calendar for ——

THE DISCOVERY COMMISSIONER: Was it for the report?

MR. SCARBOROUGH: —— for Phase —— no, not for the report. I think it was for just the general status of Phase 1.

THE DISCOVERY COMMISSIONER: Oh, okay.

THE CLERK: I can have it at 10 on October 12th.

THE DISCOVERY COMMISSIONER: Why don't we go ahead and put the report and recommendations from July 20th on that date. Hopefully it won't be an issue. Thank you.

Okay. Before we get started on the motions, does anyone have anything else that they want to discuss?

(No response.)

THE DISCOVERY COMMISSIONER: I tried to do this grouped by defendants. I did the best I could to put all of the information together in what I thought was a workable format.

The first motion I have is plaintiffs' motion to compel and for sanctions against defendant NDSC, and it includes depositions, written discovery, 16.1 disclosures. So this may apply to other defendants as well, but the first set of discovery, the request to produce the interrogatories that were served before the filing of the case conference report are

invalid. Typically what I suggest is that the parties agree that they will answer them 30 days after the case conference report has been filed. If not, they'll have to re-serve them, but they are invalid, and I agree with the defense counsel's analysis on that point.

MR. BOYLAN: Can I speak to that, Your Honor, or should I wait until you're done?

THE DISCOVERY COMMISSIONER: You can speak to that. I am going to require them in part to be answered, but I'm going to give them 30 days to do it.

MR. BOYLAN: On that subject, Your Honor, the rule indicated that the discovery could issue 10 days after the filing of the case conference report by any party. We did -- we served it 10 days after the case conference report was filed by the defendants; that's undisputed. Now --

THE DISCOVERY COMMISSIONER: No, wait a minute. It's your filing. Did you file -- when did you file your joint case conference report? Maybe I was --

MR. BOYLAN: Yeah. The rule says any party though, not us. So we complied with the rule, but here's what happened.

THE DISCOVERY COMMISSIONER: Are you kidding me?

MR. BOYLAN: No.

THE DISCOVERY COMMISSIONER: Okay. Well, let's -- let's --

MR. BOYLAN: That's our interpretation. If we're wrong, we're wrong.

THE DISCOVERY COMMISSIONER: No, I'm not moving on. We're going to look at the rule.

MR. BOYLAN: No, I said, if we're wrong, we're wrong. I apologize, but that's my understanding, but here's what happened. On May 6th, we served our case conference report on everyone, ours, but just there was an inadvertent error. It wasn't filed electronically with the Court, but it was served, including on NDSC. That's not denied. Now, we figured it out. There was an inadvertent error, and we filed it thereafter, but here's the thing. The defendants also filed a case conference report. So our discovery didn't go out until 10 days after theirs. So either way under the rule, despite the error, we complied with the rule.

Plus, when we met and conferred with NDSC, we said, Hey, if you want an extension of time, no problem. They simply refused to answer and absolutely insisted that they be re-served. We wrote two more letters with all the details, the dates, the rule, the date that they filed theirs, the date that we served ours. It's all in black and white, and I don't believe those dates are disputed.

THE DISCOVERY COMMISSIONER: Rule 26, you have to read both clauses. It says, Any party who has complied with 16.1(a)(1), which means you're the one who has to serve the

case conference report.

MR. BOYLAN: And we did on May 6th.

THE DISCOVERY COMMISSIONER: Right. On May 6th you served ——

MR. BOYLAN: Yes, ma'am.

THE DISCOVERY COMMISSIONER: —— the case conference report?

MR. BOYLAN: Yes, ma'am, absolutely, undisputed, and we served it on NDSC, and our discovery didn't go out until the 19th. That's 13 days later.

THE DISCOVERY COMMISSIONER: Defense Counsel, why did I think that that was an argument?

MR. SODERSTROM: Your Honor, again, I haven't stipulated that we did receive plaintiffs' individual case conference report on May 6. That's what they're claiming after the fact, but again I don't believe that we did receive any copy of it. In any event, the rule requires that they file a case conference report. That didn't happen for a few more weeks.

THE DISCOVERY COMMISSIONER: Was the discovery to the defendants in this case served by the plaintiff served 10 days after the individual case conference report was filed, yes, or no?

MR. SODERSTROM: To me, no, it was —— they filed their report after they served their written discovery request.

We sent them a letter citing Rule 26, said it's premature. Re-serve it once you've complied with the rule, and rather than doing that they -- they simply took the position that --

THE DISCOVERY COMMISSIONER: Is everybody in that position, or did the rest of you receive your discovery timely?

And, sir, tell me -- I'm struggling with everybody. Tell me the name of the defendant again that you represent.

MR. SODERSTROM: My defendant is National Default Servicing Corporation, Your Honor. Kevin Soderstrom for National Default Servicing Corporation, and --

THE DISCOVERY COMMISSIONER: Okay. So you are the one we're talking about right now with this first motion?

MR. SODERSTROM: Correct. We asserted that objection that the request went out prematurely. I believe the request -- the first set of requests to all defendants went out at the same time or within -- actually within a few days around -- what was it -- May 19th through --

MR. BOYLAN: No one else took this position, Your Honor.

THE DISCOVERY COMMISSIONER: No one else took the position?

MR. BOYLAN: No. And just for clarity, Wiznet shows -- and this is all in our papers. Wiznet shows that we did serve them with our case conference report on May 6th. It's on Wiznet, and if we, you know -- if we need to take

testimony or whatever, we're happy to do it, but we did serve them with our case conference report on May 6th via Wiznet.

THE DISCOVERY COMMISSIONER: On the e-serve?

MR. BOYLAN: Yes, ma'am.

THE DISCOVERY COMMISSIONER: You wait three days to effect service. It's just like mailing. So you have to add three days for that.

MR. BOYLAN: All right. So then it's still 10 days, Your Honor, because the discovery went out on the 19th.

THE DISCOVERY COMMISSIONER: Okay. So I don't understand, Defense Counsel, why you made the argument.

MR. SODERSTROM: Again, Your Honor, the plaintiffs' case conference report was filed May 31st, 2016. The discovery request was served approximately 10 days prior to that time. Rule 26 says, At the time the joint ---

THE DISCOVERY COMMISSIONER: So you're saying -- excuse me.

Jennifer, can you just look for the date that the plaintiffs' individual case conference report was filed.

MR. BOYLAN: He is correct on the filing date. What I said is we served them by Wiznet on May 6th, and that's not disputed I don't believe. If he does dispute it, it's shown by Wiznet, Your Honor.

THE DISCOVERY COMMISSIONER: Is it the 31st?

MS. SCHULER-HINTZ: Your Honor, 5/6/16 says that

there was service of a case conference report, and then there was an errata served on 5/10/16, I believe -- no, I'm sorry. That's --

THE DISCOVERY COMMISSIONER: But the report itself was filed when, the 31st?

MS. SCHULER-HINTZ: I believe that is correct, Your Honor.

THE CLERK: Yes, it's in Odyssey. Plaintiffs' case conference report and exhibits.

THE DISCOVERY COMMISSIONER: Okay. And that is filed?

THE CLERK: May 31st, 2016.

THE DISCOVERY COMMISSIONER: Okay. So the way the rule reads is as follows: At any time after the filing of a joint case conference report or not sooner than 10 days after a party has filed a separate case conference report. So I'll go back to my original statement. It appeared to me based on the filing date of the report, which is what controls, not the service date, that the first set of discovery was untimely.

So there are two options when that happens. Either the defense counsel in the spirit of cooperation says, I will answer your discovery or respond to it if you have objections 30 days after I receive a filed-stamped copy of your joint case conference report, or you need to re-serve your discovery. Either one is appropriate. It is not service that controls.

And, Mr. Christopher, you should know this.

MR. BOYLAN: We offered them an extension of time, Your Honor; we weren't being ridiculous about it. We said, Do you need an extension of time, fine. They said, No.

THE DISCOVERY COMMISSIONER: But you just took a position to the Court that's not supported by the statute.

MR. BOYLAN: Well, here's the way I looked at it.

THE DISCOVERY COMMISSIONER: Well, it's not about how you look at it. It's about what the law says, and that's where I'm having a little bit of difficulty with you, sir --

MR. BOYLAN: Well, it's --

THE DISCOVERY COMMISSIONER: -- because you don't get to interpret things the way you want them to sound.

MR. BOYLAN: Absolutely.

THE DISCOVERY COMMISSIONER: You have to read what the rule says, and the rule says filed.

MR. BOYLAN: No, I agree, but what I explained was it was just inadvertent. Apparently when you go on Wiznet there's certain boxes you click --

THE DISCOVERY COMMISSIONER: Right. Service is one --

MR. BOYLAN: -- and she clicked --

THE DISCOVERY COMMISSIONER: -- and file is the other.

MR. BOYLAN: -- and then she clicked the wrong box.

I mean, I'm sorry. I don't think, you know --

THE DISCOVERY COMMISSIONER: Well, then don't take a position that's not supported by the statute.

MR. BOYLAN: All right.

THE DISCOVERY COMMISSIONER: All right. So we're going to work our way through that. So now we're going to look at the merits of the discovery, but I am -- and the reason this was an important exercise is I'm not awarding fees and costs.

All right. So the discovery is worded on the request to produce, A Demand for Inspection. I am assuming that is how it is done in California. We call it a request to produce. I'm assuming it was the same thing, and then I get to the merits. I'm trying to think of which one is best to use.

Okay. So the first one I have -- and I'm just going to use -- I guess I was going to use the reply. Does that work for everyone? Is that the reply? It's the declaration actually in support of the plaintiffs' motion. I thought I had an easier set to use.

MR. BOYLAN: Are you beginning, Your Honor, with depositions or written discovery or 16.1?

THE DISCOVERY COMMISSIONER: I was looking at your written -- the written discovery was what I was starting with, and I just don't know exactly how -- if I use the reply, the first one I have is the inspection, No. 34, but for some reason my numbers don't match what's here.

MR. BOYLAN: I believe the numbers, Your Honor, are 2 through 8, 10 through 22 ——

THE DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: —— 26 through 29 ——

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: —— 31 and 32.

THE DISCOVERY COMMISSIONER: That's what I have written down, and then I can't find them on my —— I apologize.

Okay. The first one I have is plaintiffs' request to produce No. 3.

Am I right that by inspection you meant request to produce?

MR. BOYLAN: Yes, Your Honor. And the first grouping is 2 through 8.

THE DISCOVERY COMMISSIONER: Okay. Well, I have plaintiffs' inspection demand No. 3 first up on page 6. Is that something that you are still concerned about or not?

MR. BOYLAN: Yes, Your Honor, we haven't withdrawn any aspects of the motion.

THE DISCOVERY COMMISSIONER: I'm sorry. No. 3 you're not concerned about?

MR. BOYLAN: No, we aren't moving to compel as to No. 3.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: Perhaps I'm not understanding. I

apologize.

THE DISCOVERY COMMISSIONER: No, I might not be understanding. You said it dealt with request No. 2, but No. 3 is first. I'll just take No. 3.

So with respect to No. 3, Defense Counsel -- I can kind of see you here -- you need to answer No. 3. Now, I believe one of your clients, one of the defendants did finally get their license, correct?

MR. BOYLAN: Two defendants did, Your Honor, eventually.

THE DISCOVERY COMMISSIONER: Sorry. Two defendants, but not your client?

MR. SODERSTROM: Not my client, Your Honor.

MR. CERAN: MTC Financial got a license.

THE DISCOVERY COMMISSIONER: I'm sorry. What now?

MR. CERAN: MTC Financial has a paper license.

THE DISCOVERY COMMISSIONER: Okay. Thank you.

Well, we're still on the first group, which is NDSC. So this is the first motion to compel I have. So No. 3 needs to be answered.

No. 2 needs to be answered.

No. 8 needs to be answered with the following clarification: I just take out putative class because we're focusing on the plaintiffs' information and/or generic information, but it doesn't have to be specific to any other

person, understood?

MR. SODERSTROM: Yes. Your Honor, I apologize for interrupting. Would the same not also apply to No. 2, which references communications with any members of the putative class from 2007 to present?

THE DISCOVERY COMMISSIONER: So, okay. I don't --

MR. BOYLAN: And, Your Honor, I'm sure you're aware --

THE DISCOVERY COMMISSIONER: -- yes.

MR. BOYLAN: I'm sure you're aware that after the hearing with you we wrote letters and explained that these were to be construed consistent with your order. So we weren't seeking class --

THE DISCOVERY COMMISSIONER: Okay. Wonderful. That helps.

So where it says putative class -- am I saying that right? I can't even talk anymore -- you focus on generic information or the plaintiffs' information.

No. 16, I think I understand what the plaintiffs want. That's all the phone numbers you used in the state of Nevada to contact people as part of your business. So if it's an 800 number, if it's an 877 number, I don't know what you used, but you do need to identify those numbers.

Is that what you're looking for?

MR. BOYLAN: Inbound and outbound, yes. The

defendants -- most of the defendants are actually -- their offices, most of them were in California. MIC, there's testimony indicating they did have one here. I don't really know about NDSC, but I don't think they have much of a presence here, but I could be wrong. They haven't given us that information, but, yes, we need all of the phone numbers that they used, and they didn't just use 800 numbers. They used regular numbers too.

THE DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And one of the things we're going to get to is phone bills, which is critical, but --

THE DISCOVERY COMMISSIONER: We'll talk about that in a minute.

All right. So No. 16 needs to be answered.

No. 22 needs to be answered.

Then I get to --

Sir, do you need some water? Are you okay?

MR. CHRISTOPHER: I came prepared.

THE DISCOVERY COMMISSIONER: It sounds like everybody is coming down with something out there.

MR. CHRISTOPHER: I'm trying to not cough over the hearing transcript.

THE DISCOVERY COMMISSIONER: So the next thing I have is plaintiffs' requests for production of documents, set 2. Now, that's not right because they weren't due at the time of

the filing of this motion; is that correct?

MR. SODERSTROM: That's correct. Set 2 is not due until August 10th. We started August 10th. The motion to compel was filed August 9th.

THE DISCOVERY COMMISSIONER: Okay. So I'm not going to address set 2 today. You're going to have to have another 2.34 conference and file a separate motion on that.

Plaintiffs' interrogatories --

MR. SODERSTROM: Your Honor, if I may just go to No. 22. This -- one of the issues we had is just how broad this request is. Essentially, all documents, everything relating to business activities from 2007 to the present is, I think, extremely broad. So that's one of the issues that we had is this is not tailored or focused on Phase 1 discovery.

THE DISCOVERY COMMISSIONER: When were the plaintiffs -- what was the time range of the plaintiffs -- what years were involved with these particular plaintiffs? Do you know?

MR. BOYLAN: I think it goes 2007 to 2012 approximately.

THE DISCOVERY COMMISSIONER: So can we modify No. 22 to be from 2007 to 2012?

MR. BOYLAN: Yes, Your Honor.

MR. SODERSTROM: Your Honor, I think that the years are -- I think the time period is a little bit narrower than

that. I don't have the dates in front of me, but if we could tailor it to whatever those time periods are for my particular named plaintiffs.

THE DISCOVERY COMMISSIONER: I know why they went to the present time, because of the statute-of-limitations issues, and I understand that, but we still have to determine the time frame of the Class 2.

MR. SODERSTROM: Okay.

THE DISCOVERY COMMISSIONER: I mean, it's going to be a very difficult issue.

MR. SODERSTROM: Again, Your Honor, just to put it another way maybe. As long as the earlier comments apply that what we're looking at in Phase 1 is the named plaintiffs and the generic information, then --

THE DISCOVERY COMMISSIONER: Then you can --

MR. SODERSTROM: -- I think that makes a little more --

THE DISCOVERY COMMISSIONER: -- go to the present.

MR. SODERSTROM: I think it makes it a lot easier to deal with than a request that just says all records for all business activities.

THE DISCOVERY COMMISSIONER: Let's go ahead then and go from 2007 to the present with the understanding that it's going to deal with the plaintiffs and the generic information.

MR. BOYLAN: I --

THE DISCOVERY COMMISSIONER: Yes, sir.

MR. BOYLAN: I think as crazy as it sounds we're going to have unending disputes about what's generic and what's not, and we're going to get virtually nothing. That's based on past performance and what I've seen in this case, but I'm not sure --

THE DISCOVERY COMMISSIONER: So if there's a letter, if there is a business statement, if there is a license, if there is an introductory letter that is sent out to vendors or to people in Nevada that your company was directly dealing with, if there's a document that defines the scope of what you were doing, including how you were registered with the Secretary of State, presumably as a foreign business -- all of that information needs to be produced. I mean, I don't know how else to say it.

MR. BOYLAN: Well, one thing is, for example, without any individual named, how many loan modifications did they perform in Nevada?

THE DISCOVERY COMMISSIONER: Well, that's a good interrogatory question and a good question to ask a 30(b)(6) witness. It's not a request to produce.

MR. BOYLAN: Okay. The 30(b)(6) witnesses that we have asked those questions to, they say, I don't know.

THE DISCOVERY COMMISSIONER: Okay. So --

MR. BOYLAN: No one's going to know that in their

head, Your Honor.

THE DISCOVERY COMMISSIONER: Well, right. So let's ask an interrogatory. It's not a request to produce. A request to produce is for documents.

MR. BOYLAN: Well, I understand, Your Honor.

THE DISCOVERY COMMISSIONER: If you're asking a specific question, ask it in an interrogatory and get them to swear it, you know, file their verification -- or not file it, but --

MR. BOYLAN: I understand what you're saying --

THE DISCOVERY COMMISSIONER: -- but to provide you with the verification.

MR. BOYLAN: I understand what you're saying completely, but in my three decades, interrogatories are very ineffective, and in this case, we have a little bit of an unusual case.

THE DISCOVERY COMMISSIONER: Well, maybe you can talk to Justice Hardesty about that, but for today these are our Nevada Rules of Civil Procedure. Interrogatories are going to be effective, and if you send that interrogatory to the defendant, and they don't answer it, and you move to compel it, and after I hear arguments, the winner will be awarded fees and costs, but it is not a request to produce documents.

It is a specific question. How many loan modifications did you do within the state of Nevada between

2007? And if you want to break it down into years, you can do that.

MR. BOYLAN: Okay. Well, I can tell you their response is going to be the Discovery Commissioner said we don't have to look at our electronic records. We don't have to go back. So they're going to say we can't answer.

THE DISCOVERY COMMISSIONER: I didn't say you didn't look at your -- did I say -- does anybody have the impression that I have said don't look at your electronic records?

MR. BOYLAN: They've written that to me, and they've put it in their responses, Your Honor. They've said that that was your order.

THE DISCOVERY COMMISSIONER: Is there -- I need to ask. Defense counsel, did you interpret what I said to mean that you don't look at your electronic records to provide information?

MR. SCARBOROUGH: Your Honor, you don't want to hear Mr. Boylan's and my competing views of what happened during a daylong deposition of CRCs 30(b)(6) deposition.

THE DISCOVERY COMMISSIONER: I'm afraid I'm going to listen to it.

MR. SCARBOROUGH: But I'm going to say one thing.

MR. BOYLAN: I'll give you the transcript.

MR. SCARBOROUGH: There is a -- we bet -- I want the video to go to the Court as well,

Mr. Boylan.

The Fans [phonetic] database is the database that we've disclosed, and CRC has no motion to compel against it today, but I'm listening very intently because I gather from some of the Court's comments -- so I want to be sure that we're aligned in terms of what we've done --- but I can tell you that the Fans database, which is a database that CRC used when it was actually doing business in Nevada --- it isn't anymore --- was the subject of numerous, numerous questions to our witness Debra Briggnack, (phonetic) and she answered every single one of them. So that is, I believe, a direct response to Your Honor's question.

THE DISCOVERY COMMISSIONER: So in other words, whatever I said, you did not take it to mean that you were not required to look at electronic discovery if it was responsive?

MR. SCARBOROUGH: Indeed there were --- that is correct, and indeed --

THE DISCOVERY COMMISSIONER: That's all I want to know. I want to make sure that I didn't misspeak or that somehow what I said was misinterpreted as the plaintiffs' counsel has apparently thought it was. I just want to make sure.

If you need to look at your electronic databases to answer a question, if you have to go on your computer to pull out generic forms to provide answers to discovery requests, I

expect you to do that. I do not expect you to identify all the individuals that you dealt with in the state of Nevada or provide any of their information that may be on your computers.

MR. BOYLAN: I thank you for that, Your Honor, and what we're going to do on that is we're going to take the depositions to confirm that they in fact did do that review.

THE DISCOVERY COMMISSIONER: Well --

MR. BOYLAN: That's my experience the only way you know.

THE DISCOVERY COMMISSIONER: Well, I'm just not going to comment.

Moving right along, I'm not going to deal with set 2. Let's go to the interrogatories.

Interrogatory No. 7 --

MR. BOYLAN: Your Honor, I don't -- forgive me if I'm wrong -- okay. I see. Set 2 was on --

THE DISCOVERY COMMISSIONER: Set 2 I am not responding to. You filed this motion one day before they were due. Look at what you have. I'm not listening to it today. I'll make it very clear. I'm not hearing it.

MR. BOYLAN: Understood, Your Honor.

THE DISCOVERY COMMISSIONER: Interrogatory -- the next group I have is the Interrogatories No. 7 -- 7, 8, 9, 10 and 18 will be limited to the plaintiffs in this case. So you can answer those interrogatories as it relates to the

plaintiffs in this case.

Interrogatory No. 24 probably puts you over the top of your 40 because each one of the interrogatories -- each one of the requests for admissions -- I'm sorry -- counts as one interrogatory. That's how I do it. So if there are five, you're fine. If there are 25, you're over the top.

So what I would recommend on Interrogatory No. 24 is that you go back and determine exactly which admissions you need responses to, and I think the best approach based on the admissions is that I'm going to have you re-serve 24 as separate interrogatories per admission that you think is important for you to get that information for, not as this catchall admission.

So, Defense Counsel, you do not have to answer 24 at the present time. It's not that it's an improper interrogatory; it's just I'm going to have them redo it because they're going to have to redo the admissions.

MR. BOYLAN: Can we go back briefly, Your Honor, to, I guess, it's 7 through 10?

THE DISCOVERY COMMISSIONER: Yes.

MR. BOYLAN: And 18.

THE DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: My first comment is to 18 -- well, no, actually not 18. With respect to 8, 9 and 10, it may well be -- and as you know, we still haven't taken the depositions.

Although you've said that we can, we haven't been able to get depositions yet regarding the databases and the ease and access of this information -- but 8, 9 and 10 don't ask for any specific names or addresses of any Nevadans. It really is just asking them to use their databases to accumulate totals for these events that constitute their business practices in Nevada under NRS 649.020(1). There's no specific individuals requested in those.

THE DISCOVERY COMMISSIONER: Well, I think from my initial hearing though what I told the defendants is I don't expect you to have to go into your databases and figure all of this out at the present time. So my concern is -- and this is one of those very difficult areas in this case, balancing the concern about looking at the validity of the plaintiffs' claims versus getting into or back-dooring what I would consider to be class discovery. I doubt they have their phone records on how many phone calls they made.

MR. BOYLAN: What we've seen so far that they've produced -- and we're going to get more into the software and speak with some other experts in the field because they're -- we're starting to find out what software they used, but what we've seen from what they've produced so far is they actually do have electronic histories that document, and they've admitted that there is --

THE DISCOVERY COMMISSIONER: But then they'll have to

go on their database and pull it up for every individual Nevada citizen, and we're not doing that today. So you're going to live with -- you're welcome to object to my report and recommendations. I understand what your position is, but it sounds good, except as a practical matter it forces them to do exactly what I told them they would not have to do in the first phase.

MR. BOYLAN: Unless --

THE DISCOVERY COMMISSIONER: But they will have to do it for all the named plaintiffs.

MR. BOYLAN: But unless there's search criteria, that's what I'm saying. It's really a software question, Your Honor. A lot of these databases, they have search criteria. So you can just search Nevada only, just search Nevada only, and so I think actually it's much easier and much simpler than the Court is assuming because this software is pretty sophisticated.

THE DISCOVERY COMMISSIONER: Right. It's just that I told the defendants they would not have to do that in Phase 1. So I don't necessarily have a problem if you want to ask them software questions to determine how easy it is or how they, you know, store their information, for lack of a better phrase.

But with respect to these interrogatories, it's going to be limited to the plaintiffs at the present time. I want to see what you come up with.

All right. Then we go to the admissions. Requests for Admission No. 8, I do expect an answer. Now, on an admission, you admit it, or you deny it, or you explain why you can neither admit or deny, or you admit in part, deny in part, and you explain why you cannot admit it. There are many variations of this.

But let me just say this. I do expect the lawyers when they are answering admissions to answer them truthfully, and I say that because -- and I speak to my California-based lawyers -- I was recently advised that, hey, if they want the admission, we'll admit it. It doesn't matter if it's true or not or something to that effect. If you answer an admission, you have to answer it truthfully. That's all I'm going to say. So you can't admit something you know to be false. Everybody understand that?

Moving right along. Request for Admission No. 8 is okay.

Now, here's my problem with the rest of the admissions, and they will need to be rewritten and re-served, and I don't know which defense counsel did the analysis, and please bear with me because I still have to get all your names with your clients correct, and I apologize to you, but one of the defense attorneys talked about conjunctive problem with the admissions. It's an and/or. You're right. You can't do it logically.

And if they did admit it, it wouldn't give the plaintiff anything because you don't know if they're admitting it because they're admitting it because it was performing foreclosure activities or collection-agency activities. It gives the Court no information. If they deny it, we don't know if they're denying it because of foreclosure issues or because of collection-agency issues. I don't know. It gives me no information.

So the reason 8 is okay -- although I would have said it differently. I would've said in the course of communications, including written and oral. I would've done it a little bit differently. I let the and/or on the communication stand because I think we know what that means, I hope, but with respect to foreclosure and/or collection-agency activities, I mean that is the crux of this case. So you need to separate it.

MR. BOYLAN: And it is a struggle. We just know if the word collection is in anything they will deny it. So --

THE DISCOVERY COMMISSIONER: Fine. That's fine. That's exactly what's supposed to happen. No, it is, and then if you find out otherwise, that's going to be a problem for them at trial, isn't it?

MR. BOYLAN: We already have.

THE DISCOVERY COMMISSIONER: Well, all I'm saying is you need to re-serve and rewrite, choose. You only have 40

admissions. So you could technically break it up into foreclosure activities versus collection-agency activities. I don't care how you do it. It can't be in the same request. So Nos. 9, 20, 21, 22, 23, 24 you have to rewrite and re-serve. And I'm protecting the defendant from having to answer them as currently written.

Now, No. 25 is going to be -- again, I think you've agreed to this, but it only pertains to the plaintiffs. So with that clarification, it needs to be answered.

And then we go to the 30(b)(6) issues. Have you taken a 30(b)(6) witness of this defendant yet?

MR. BOYLAN: No, Your Honor, they have refused to produce any of the witnesses.

THE DISCOVERY COMMISSIONER: Okay.

MR. SODERSTROM: That's not correct.

THE DISCOVERY COMMISSIONER: That wasn't exactly true, but I can't remember what the problem was.

MR. SODERSTROM: The problem was the initial deposition notice for a 30(b)(6) witness for my client came out early June. Shortly thereafter the parties stipulated to stay the person most knowledgeable depositions pending the ruling on the Court's -- or from the Court on the July 20th motions.

July 8th, I believe it was, a second PMK deposition notice was sent out to us setting the deposition for the 29th of July. Again, we wanted to come to the hearing on the

20th, get the parameters for discovery. We got that. We spoke with Mr. Boylan on July 22nd -- in fact, I believe that's the only time I've actually spoken with Mr. Boylan outside the Court -- at which time we advised him of some concerns that we had, one being that the date for the deposition, that we had a conflict. We suggested that we look at some dates in August. He flat out refused to cooperate. He said it has to be the 29th, only the 29th of July, and so that was a real sticking point.

THE DISCOVERY COMMISSIONER: Are you going to produce a 30(b)(6) witness?

MR. SODERSTROM: Yes.

THE DISCOVERY COMMISSIONER: When is your witness available, or witnesses? When are they available? And where are they located?

MR. SODERSTROM: The witness is located in Phoenix. We'll produce him. We'll bring him here to Las Vegas, but again we suggested that we talk about alternative dates. He said, No. We also wanted to address the issue that we had two different lists for PMK notices. We wanted to have a single list and have it in accordance with Phase 1, and iron that out and bring our -- make our witness available for a deposition. So certainly we'll make them available.

THE DISCOVERY COMMISSIONER: I'm going to grant the motion to compel the 30(b)(6) deposition notice with the

following provisions:

Number one, Plaintiffs' Counsel, you are to provide a reasonable number of dates to defense counsel as to when you are able to take a 30(b)(6) witness deposition.

Defense Counsel, you need to talk to your witnesses and get dates from them as well, and then you need to meet and confer and find out what dates work.

Number two, if you're going to bring the witnesses to the forum, that's perfectly fine. Just confirm that. Confirm where the deposition will be taken. You know, we traditionally take the opposing party's deposition. In this case it would be in Mr. Davis — Mr. Christopher's office, okay. That's what we typically do, but you need to confirm the date and the time and work together on that, okay.

I am not going to address that further, but I will grant your motion to compel the 30(b)(6) depositions.

MR. BOYLAN: Yeah. And I wasn't unreasonable. They knew of my vacation in August. So effectively they were offering me dates in September, and they wanted to have to approve the contents of the notice.

THE DISCOVERY COMMISSIONER: Okay. Well, they don't get to do that.

MR. BOYLAN: That's what they asked for in writing.

THE DISCOVERY COMMISSIONER: Well, I think what they asked for as I understand it is one 30(b)(6) notice. Let's get

rid of the PMK use. Let's try to do that, so 30(b)(6) notice. They changed the rules. Knowledge is not required. You are required to educate a witness and produce them. That's what the rule says. In order to do that, you have to have the listed -- list of topics. So I'll make it really clear one more time. It will be limited to the plaintiffs or the generic information, which would include letters, policies, procedures, et cetera.

But redo your list, one notice. They get to choose who they're going to produce. It may be more than one person. They've agreed to bring them to the forum. Get the deposition done. When you come back and see me in October, I want an update.

MR. BOYLAN: And my understanding is under the notice, if you want one notice, it may end up being two or three people. I mean, because --

THE DISCOVERY COMMISSIONER: Right. That's right. That's how we do it in Nevada.

MR. BOYLAN: Okay.

THE DISCOVERY COMMISSIONER: One notice.

Okay. The last area I have are the 16.1 requests, the initial disclosures. We're going to talk about that. I can see and I appreciate all my other defense counsel are taking notes because once I get through this we're going to take a break, and I am going to have all the other lawyers who

have similar motions -- because I have eight of them today, not the deposition motion, not that one -- but if you have other similar motions on discovery, the motions to compel, I'm going to give you all a few minutes to see if you can based on the guidance I've given you work it out.

Let's start on the initial disclosures. I'm looking at page 21 of your motion. Okay. No. 1, the names and all contact information for Nevada debtors with whom the defendant had telephone communications made or received from 2007 to 2012. Okay. Now we have a time frame, but it is limited to the plaintiffs. The names and contact information would be class discovery, which we are not doing.

No. 2, again it refers to all Nevada debtors. It's going to be limited to the plaintiffs.

No. 3, again limited to the plaintiffs, but I have to give my caveat because I've learned the hard way on this. So listen up. If your company is aware of a complaint from another debtor, if you know there is a problem lurking out there, and you are familiar with the identity of that person, you need to disclose that person pursuant to 16.1. You cannot hide behind the phases of discovery to fail to disclose information you know about, including witnesses because otherwise you're going to be subject to a long evidentiary hearing.

No. 4, limited to the plaintiffs.

Now, I suspect as a practical matter you're going to get the information you want, Plaintiffs' Counsel, on where they hold their bank — no, their bank account, not the number, just what bank do you bank with, but I am limiting it to the plaintiffs in this case, but I think as a practical matter, unless they had a different bank for every single person, which is unlikely, you're going to get that information.

No. 5 —

MR. BOYLAN: Well, just so you know, Your Honor — and I'm sure you do — each of the defendants, there's only, you know, one, two or three plaintiffs as to each of the defendants, and so this here, if all these are limited to the plaintiffs, it won't — it won't in any way give us —

THE DISCOVERY COMMISSIONER: That's all we have right now because we have no class certified.

MR. BOYLAN: Understood.

THE DISCOVERY COMMISSIONER: And I understand the circular problem, but that's what we're going to do for now.

No. 5, we have to discuss this one because I think I'm okay with the defendants being required to disclose what moneys they collected as part of their — or, you know, whether or not — and you may get a none here; I don't know — but I think for example, what I think you are really asking is, you know, how did they get compensated, and what was the total amount of compensation based on —

MR. BOYLAN: Huh-uh. No.

THE DISCOVERY COMMISSIONER: -- their services in Nevada.

MR. BOYLAN: No, Your Honor. No, that's not it at all. You know, what we believe is nothing -- there's a lot of different facts under the law, but nothing shows you're a collection agent more than collecting money from the debtors and giving it to the lenders, and --

THE DISCOVERY COMMISSIONER: Okay. Well, you can do that with respect to the plaintiffs in this case, but not all -- not all the people that they dealt with. Listen --

MR. BOYLAN: We don't want --

THE DISCOVERY COMMISSIONER: -- if they are -- if they've engaged in this, and you get the letters pertaining to the specific plaintiffs in this case and you can show the Court that and you can show the validity of your lawsuit based on the subset that you have, then we can go into Class 2 discovery.

MR. BOYLAN: Yes. But my point is when you only have one or two people and there were thousands and thousands of files, these one or two might not have gotten a phone call, might not have done a restatement.

THE DISCOVERY COMMISSIONER: Well, that's not my problem. That's your choice on the plaintiffs that you've taken.

MR. BOYLAN: Well, what my point is, there are other

witnesses that we need to access to prove it because when you have a class action --

THE DISCOVERY COMMISSIONER: I understand that --

MR. BOYLAN: -- you have a diverse group --

THE DISCOVERY COMMISSIONER: -- and we are rehashing the same arguments, and I'm not going to hear it. I've already made that decision.

No. 6, I'm okay with that if it's standard letters and not -- or letters that were sent to the plaintiff -- plaintiffs.

No. 7, I'm okay with this. You have to identify your employees that would've been in the position of making or receiving calls from that time frame that's requested.

No. 8, the only way I see No. 8 remotely working is to subpoena the telephone company for those records. What I'm going to require the defendants to do is to identify their providers.

MR. BOYLAN: If they have the documents though, if they have the documents, don't they have to give them to us, Your Honor, so that we don't have to do the subpoena?

THE DISCOVERY COMMISSIONER: So I doubt they have the documents.

MR. BOYLAN: We'll ask them under oath, but if they do, we've asked for them.

THE DISCOVERY COMMISSIONER: The existence and

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY BENKO, A NEVADA RESIDENT; ET Al., Appellants, v. QUALITY LOAN SERVICE CORPORATION, A CALIFORNIA CORPORATION; ET AL., Respondents	Supreme Court No. 73484 District Court Case No. A-11-649857

Electronically Filed
Mar 01 2018 10:09 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANTS' APPENDIX

VOLUME 7

Appeal from Eighth Judicial District Court
Clark County, Nevada

The Honorable William Kephart

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them back twenty times on their, quote, unquote "debt," that person needs to be identified. So if I were you, defense counsel, I would go back and see what my phone protocol is, you know, how many people called in, did we call them back, how did we approach that, because that would probably be relevant. And that would be a good topic for your 30(b)(6) deposition.

MR. BOYLAN: Precisely. Thank you, Your Honor. And just -- you know, under the statute it doesn't matter who called who. If they're acting as a collection agent, it doesn't matter who initiated the phone call.

DISCOVERY COMMISSIONER: I understand that. I'm just trying to be descriptive so there's no misunderstanding. But I don't expect the defendants to go back and comb their records right now and identify every single person that they made a phone call to or every person -- I don't expect that. But I think you have to do your 30(b)(6) deposition specifically enough that you get that information. But if there is some knowledge of some individuals that, you know, fall within that category, then, you know, that's why written discovery may be important, too.

MR. BOYLAN: And we've done that. They've refused to respond to any of it. That's the other thing in terms of your time table, Your Honor. Can we have --

MR. SCARBOROUGH: That's just completely untrue.

MR. REYNOLDS: Again false, Your Honor.

MR. BOYLAN: They --

DISCOVERY COMMISSIONER: Well, then that's your fault for not bringing a motion to compel.

MR. BOYLAN: No, we will, but we were waiting for --

DISCOVERY COMMISSIONER: Oh, boy, I can't wait. All right. So, go

ahead. I'm sorry.

MR. BOYLAN: We were waiting for the ruling today --

DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: -- because it may have dispensed with the need, frankly.

DISCOVERY COMMISSIONER: Okay. And please don't think I'm not giving you class discovery, because I'm going to. And please don't represent to the court that I denied you class discovery. You can say that I didn't give it to you in Phase 1.

MR. BOYLAN: No, all I'm mentioning is witnesses we need to oppose summary judgment. That's my only comment.

DISCOVERY COMMISSIONER: Right. I understand. I get it.

So here's my plan for Phase 1. And again, this is discovery in order to make a legal determination of the viability of plaintiffs' claims. And to that end, the focus will be on the plaintiffs' individual claims. I would recommend that this phase close November 1st of 2016, with any dispositive motions needing to be filed by November 30th of 2016.

Phase 2 will be class discovery. And if the Court then finds validity to plaintiffs' claims, we move to Phase 2. And then at that point, defense counsel, you'll have to provide your list of all the people who you serviced, probably, within that certain time frame.

MR. REYNOLDS: Can I -- Is the Court saying that it wants a list of every single person that was foreclosed in the state of Nevada? Because there's no other way of finding out any of that information.

DISCOVERY COMMISSIONER: Well, I would hope that you would have record of that -- that you dealt with.

MR. REYNOLDS: Well --

DISCOVERY COMMISSIONER: No?

MR. REYNOLDS: I doubt that anybody would have a record individually of somebody making a phone call because those calls never happened.

DISCOVERY COMMISSIONER: Well, would you have a list of the homeowners that you had any contact with in this process?

MR. REYNOLDS: I am assuming the only list that anybody would have in this room would be a list of those people, if they could find it, of every person that's been foreclosed in the state of Nevada and for a period of time, and the statutes vary as to different parties.

DISCOVERY COMMISSIONER: Right.

MR. REYNOLDS: And this is out of school, but our office will probably be filing a motion to sever ourselves from the rest of this class.

DISCOVERY COMMISSIONER: Okay.

MR. REYNOLDS: I'm not saying it to argue the case, I'm saying that that is something --

DISCOVERY COMMISSIONER: Right.

MR. REYNOLDS: I didn't want to bring it up after the Court's ruling.

DISCOVERY COMMISSIONER: Well, again, this ruling is your scheduling order.

MR. REYNOLDS: Right.

MR. SCARBOROUGH: So we're moving to Phase 2 --

MR. REYNOLDS: Class discovery.

MR. SCARBOROUGH: -- which is class discovery?

DISCOVERY COMMISSIONER: Correct.

MR. SCARBOROUGH: Okay.

DISCOVERY COMMISSIONER: And this would be my recommendation. Usually what I do is I give like 60 days between Phase 1 and 2 after the dispositive motion deadline. So what I would anticipate, that the class discovery would close -- I'm not going to put you on the 1st -- maybe April 7th of 2016. Now, in this case --

MR. BOYLAN: 17?

MR. SCARBOROUGH: 2017?

DISCOVERY COMMISSIONER: 17. I'm sorry. I don't want to re-live this year. April 7th of 2017. Now, what I don't know is if you need experts in this phase. Can you -- do you know if you would need an expert?

MR. SCARBOROUGH: I don't know as I sit here today. I just can't answer the question.

DISCOVERY COMMISSIONER: Plaintiffs' counsel?

MR. BOYLAN: Possibly as to ESI, if we get into disputes about what they're giving us and whatnot and how it's stored, but I'm not sure. I doubt that. Based on our knowledge of the software and the like, the stuff is readily available. Second, you asked a question today about how would the industry work.

DISCOVERY COMMISSIONER: Yeah.

MR. BOYLAN: We're going to have, hopefully, access to a lot of documents and testimony that tells us how these businesses worked, but it is conceivable that we will also need an expert on how this industry works, including in the state of Nevada.

DISCOVERY COMMISSIONER: I think so. Okay, so let me do this. I'm

going to adjust my deadlines a little bit. I'm going to close your class discovery June 1st of 2017, with your last day to amend pleadings, add parties, and your initial expert disclosure date will be March 1st of 2017. Your rebuttal deadline will be March 31st of 2017 and your dispositive motions will be due -- I'll make it July 3rd of 2017.

MR. SCARBOROUGH: And when Your Honor said dispositive motions in this phase --

DISCOVERY COMMISSIONER: Summary judgment.

MR. SCARBOROUGH: You're contemplating summary judgment or motion for class certification?

DISCOVERY COMMISSIONER: You know what, that's an excellent point. It would be the motion for class certification.

MR. SCARBOROUGH: Okay.

DISCOVERY COMMISSIONER: And I will reflect that on my scheduling order. Thank you. So the dispositive motion for the Phase 2 would be the motion for class certification.

Then Phase 3, we'll call it merit discovery, I am assuming at this point -- this actually may be the point, plaintiffs' counsel, where you want your industry standard expert. I don't know if you'll want them in the class certification phase or not. I'm going to give you the deadlines and you can make your decision on when you want to call them or retain them. So then what I would contemplate is -- if I do -- I'm wondering if we can -- if I have your class certification motions filed July 3rd and I give you 60 days before you have to disclose experts, will that be sufficient, do you think?

MR. BOYLAN: Yes, Your Honor.

DISCOVERY COMMISSIONER: So your close of discovery will be December 8th of 2017. Last day to amend pleadings, add parties, initial expert disclosure date will be September 8th of 2017. Your rebuttal deadline will be October 9th of 2017. And your dispositive motion deadline will be January 8th of 2018.

MR. SCARBOROUGH: I'm sorry, did you say 8 or 18?

DISCOVERY COMMISSIONER: 18. January 8th --

MR. SCARBOROUGH: Of '18.

DISCOVERY COMMISSIONER: -- of '18.

MR. SCARBOROUGH: Got it. Thank you.

DISCOVERY COMMISSIONER: And I know I wrote it down. And you believe that the first date, the earliest date to try the case would be -- didn't I write that down?

MR. SCARBOROUGH: I believe we agreed on the five year rule, March 1st, 2019, so there's a year.

DISCOVERY COMMISSIONER: That's fine.

MR. SCARBOROUGH: Yeah, there's a year more.

DISCOVERY COMMISSIONER: Okay. And that will comply or be in accordance with the five year rule.

Now, let me just make sure I have all the other information I need for the scheduling order. I'm kind of afraid to ask the next question. I'm going to say -- I'm going to characterize the case as fraud and unjust enrichment. That's just a label so the Court somewhat knows what the case is about. I would say two to three

weeks for trial. That was my estimate. Is that sufficient? Can you --

MR. SCARBOROUGH: My guess -- obviously it depends how many experts there are going to be, but I would think that might be a tad on the low side. So I'd look at --

DISCOVERY COMMISSIONER: Three to four weeks?

MR. SCARBOROUGH: Something like that.

DISCOVERY COMMISSIONER: Okay, three to four weeks for trial. No settlement conference was requested, although I'm going to send you to a mandatory settlement conference. Do not think that I will not do that once you've had a little opportunity to engage in some discovery.

MR. SCARBOROUGH: Thank you, Your Honor.

DISCOVERY COMMISSIONER: All right. So now I have the motions. And I have my other counsel back.

MR. SCARBOROUGH: I will say I think that goes -- if I can, that that goes a long way toward answering the motions because the first motion was bifurcation. The second motion dealt with database discovery, and really what that means is how much class discovery are we doing in Phase 1, were Your Honor to grant the -- I'm sorry, I won't call it bifurcation anymore, I'll call it phasing.

DISCOVERY COMMISSIONER: Phasing. Let's call it phasing.

MR. SCARBOROUGH: Because Your Honor just ordered phasing, I think we can go back and review our discovery responses as they sit and also deal with whatever plaintiffs ask us and we ask them, applying the template that you just put around your discussion and timeline of phasing in this case.

DISCOVERY COMMISSIONER: It's really important to me, though, that the

plaintiff have the opportunity to take your 30(b)(6) depositions.

MR. SCARBOROUGH: I understood Your Honor to be ruling that.

DISCOVERY COMMISSIONER: I understand that some of that was on class discovery, but what I really think the plaintiff needs to find out is how the business operated, what type of phone calls were made, if any, how the contacts were made, how the letters that you have from your clients were developed. All of those issues need to be discussed. The only part I really don't want to get into or have you all have to disclose, you know, your list of, you know, all the homeowners that you dealt with.

MR. SCARBOROUGH: Your Honor was very clear on that.

DISCOVERY COMMISSIONER: So just briefly, there's four motions. I actually think I can do them fairly quickly.

MR. BOYLAN: May I comment briefly, Your Honor?

DISCOVERY COMMISSIONER: Yes.

MR. BOYLAN: I think your comments about 16.1 disclosure and sanctions are extremely important and I think that under 16.1 and under the applicable law I think particularly where they can do so through computer searches that are easy, I think they do have an obligation to disclose as witnesses those individuals in Nevada who received either collection letters or collection phone calls. And whether they characterize it as --

DISCOVERY COMMISSIONER: Okay. Actually, defense counsel, I think that might be a fair -- if sending a collection letter is one of the indicia for supporting that the company is a collection agency. But I don't see why we don't ask that in an interrogatory.

MR. BOYLAN: I did. They refused to answer it. We're going to bring that motion.

DISCOVERY COMMISSIONER: Okay. Well, that's one that I want answered. How many people did you send -- Did you send out collection letters? Yes or no. If you did, how many did you send out in the state of Nevada? I am hoping you have a database that will allow you to answer that question. If you do not, then you need to explain what you did to try to answer it. If it's really problematic and too burdensome, then you need to bring a motion for a protective order. But that is honestly, I think, one of the areas that I would expect some responses on.

MR. BOYLAN: And the way we test that, Your Honor, as a plaintiff is we take the deposition of the Person Most Knowledgeable about their database. We noticed those weeks and weeks ago and we --

DISCOVERY COMMISSIONER: It's actually a 30(b)(6) deposition.

MR. BOYLAN: Yes.

DISCOVERY COMMISSIONER: They eliminated the notice requirement.

MR. BOYLAN: We did that, exactly as you say.

DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And you know why we did it? Because when we arrived here today we wanted to be able to tell you the fruits of that. They refused to produce any of those people. So you don't know --

DISCOVERY COMMISSIONER: So let's get the foundational information first. Whether or not they actually -- now, obviously they did because your clients have these, right, collection letters.

MR. BOYLAN: We've submitted a bunch to the Court with our papers.

DISCOVERY COMMISSIONER: Okay, well -- okay, I'm not commenting on the validity of them, who sent them, what the significance is. I'm just saying that that's the representation that has been made to me.

MR. REYNOLDS: Your Honor, there is some very distinct issues here. Two of the defendants have collection agency licenses for many years. So to that extent all of that discovery is irrelevant. One of those is my client. And so --

DISCOVERY COMMISSIONER: Okay. So then you shouldn't have to answer it.

MR. REYNOLDS: That is correct.

DISCOVERY COMMISSIONER: Just say we have a collection agency license. Here it is.

MR. BOYLAN: No, Your Honor. They got it in 2012. Our discovery --

MR. REYNOLDS: That's right.

MR. BOYLAN: No. They didn't get it until 2012.

MR. REYNOLDS: The discovery is going to last year.

MR. BOYLAN: It goes from --

DISCOVERY COMMISSIONER: I'm confident that the judge is going to limit it based on the statute of limitations, so you will need to calculate or figure out your statute of limitations. And I'm only saying that because that's been my experience in other class action cases like the one that was here, but you probably didn't see them.

All right. So, defendants' joint motion for protective order on 30(b)(6) notices is granted in part and denied in part in that the plaintiff will be able to take a 30(b)(6) deposition focused on, again, the viability of its claims and specifically

on whether or not the defendants qualify as a collection agency under Nevada law. However, class certification discovery is protected.

Number two, the second motion. Defendants' joint motion to bifurcate and limit discovery to named plaintiffs in initial phase of discovery. It's granted within parameters we've discussed, with a caveat that I do expect that 16.1 is complied with, that witnesses who may have knowledge, including from the plaintiffs' perspective are disclosed, who have knowledge about this issue. And I do expect the defense counsel to answer questions regarding, you know, their policies and procedures and practices regarding if they were involved in collection activities or how they contacted people who used their services.

And then the next motion is defendants' motion to bifurcate or limit discovery to named plaintiffs, and this was Raymond and Francine Sansota, I believe, and then there was a joinder and a joint motion to bifurcate. The motion is granted in accordance with the scheduling order that I issued in phases.

And the fourth motion is defendants' motion to compel -- gosh, I think I said it wrong. Financial information for protective order?

MR. BOYLAN: No, Your Honor. It was the other one about the depositions. It was parallel to what you've already ruled on, the PMK depositions.

DISCOVERY COMMISSIONER: Okay. So can I just say granted in accordance with the scheduling order?

MR. BOYLAN: Granted in part and denied in part with the parameters you described as to the other motion. It's exactly the same.

DISCOVERY COMMISSIONER: Okay, I like that. And I like it so much, you get to prepare my Report and Recommendations on these motions.

MR. BOYLAN: Who, Your Honor?

DISCOVERY COMMISSIONER: Do you have local counsel? You do, right?

MR. BOYLAN: Mr. Christopher.

DISCOVERY COMMISSIONER: Mr. Christopher.

MR. BOYLAN: I've been admitted here since '96, so I'm not a complete stranger.

DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: I had an office here for many years.

DISCOVERY COMMISSIONER: Okay, good, so you can handle this, right? But see the forms on the table, the green --

MR. BOYLAN: Yes.

DISCOVERY COMMISSIONER: Perfect. I want you --

MR. BOYLAN: May I make one final request?

DISCOVERY COMMISSIONER: I want you to prepare that Report and Recommendations. Yes, sir?

MR. BOYLAN: This case has some levels of complexity to it.

DISCOVERY COMMISSIONER: Right.

MR. BOYLAN: Once you cut through it, I think it doesn't seem complex at all. But until you make that first cut, it's kind of tough to get your arms around. I would like to make a request that -- I would like to suggest that the Court take a look at four items before we see you again that I think will at least give you the plaintiffs' perspective on what this is about. I mean, there's a lot of briefing. There was a ton of briefing on the 12(b)(5) motion.

DISCOVERY COMMISSIONER: What would you like me to look at?

MR. BOYLAN: Two decisions by federal appellate courts. Glazer v. Chase Home Financial, that's the Sixth Circuit, 704 F. 3d 453.

DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: The Fourth Circuit decision in Wilson v. Draper & Goldberg. That's 443 F. 3rd 373.

DISCOVERY COMMISSIONER: Okay.

MR. BOYLAN: And then the recent decision by the Alaska Supreme Court on this debt collection issue, which I have a copy I can share with your bailiff. And also, although we submitted it to you -- defendants have all this, Your Honor -- a copy of Commissioner Burns' decision in the QLS matter. Those four things will give you a huge perspective on how the plaintiff views the case.

DISCOVERY COMMISSIONER: Does anyone have Judge Williams' decision?

MS. SCHULER-HINTZ: I do, Your Honor. I'll supply it.

DISCOVERY COMMISSIONER: Can you submit it to me?

MS. SCHULER-HINTZ: Certainly.

DISCOVERY COMMISSIONER: Make sure you send plaintiffs' counsel a copy, too.

MS. SCHULER-HINTZ: He has it.

MR. SCARBOROUGH: It's been in all the briefing, but we're happy to do that.

DISCOVERY COMMISSIONER: If it's in the briefing, I'll find it. I just couldn't find it.

MR. SCARBOROUGH: On the 12(b)(5) motion it's --

DISCOVERY COMMISSIONER: On the 12(b)(5) motion it is?

MR. SCARBOROUGH: Yeah.

DISCOVERY COMMISSIONER: All right, then I can pull it off the Internet.

MR. SCARBOROUGH: So the Court obviously can decide what it wants to spend its time reading what. I'll just make -- if I can have two sentences of commentary on that?

DISCOVERY COMMISSIONER: Absolutely.

MR. SCARBOROUGH: So the firs thing is Commissioner Burns' decision is worth reading because that's the decision that Judge Williams reversed. And upon reversal, the financial institutions division appealed it no further, meaning to the Nevada Supreme Court.

DISCOVERY COMMISSIONER: I know it didn't go all the way up. Okay.

MR. SCARBOROUGH: And two, my second point is on the two cases that you were given, the out-of-state cases, none of those dealt with the statutory scheme that is before the Court that provides the exclusive basis for the relief that the plaintiffs seek in these cases. So I would never tell you what not to read, but those cases do not involve the Nevada statutory scheme, 107, or the Deceptive Practices Act or the licensure requirement.

DISCOVERY COMMISSIONER: Isn't there an equity remedy of unjust enrichment, too? Although I'm not sure how that plays out here.

MR. SCARBOROUGH: There is --

MR. BOYLAN: There's a bunch of statutory remedies. You were right before. There's injunctive relief. It's a DTPA claim. It's statutory consumer fraud. So there's all those remedies.

A final comment on Judge Williams. QLS capitulated and got its

collection agency license. There was no need to appeal.

MS. SCHULER-HINTZ: Your Honor --

MR. SCARBOROUGH: Well, as the winner, QLS would not be the one appealing, and there's counsel right there.

DISCOVERY COMMISSIONER: Okay.

MS. SCHULER-HINTZ: As QLS's counsel, he wasn't in the case. He doesn't know what went on. He doesn't know the decisions.

DISCOVERY COMMISSIONER: Well, just in case those of you don't know, Judge Williams and I worked together for a number of years, so I'm just going to disclose that.

MS. SCHULER-HINTZ: I just wish he would stop making comments regarding what happened in a case that he wasn't a party to.

DISCOVERY COMMISSIONER: Okay. So now you know, I worked with Judge Williams and Neil Galatz for a number of years. I just want you to know that, okay.

MS. SCHULER-HINTZ: And, Your Honor, I'm sorry. I handed your bailiff that decision that you asked for.

DISCOVERY COMMISSIONER: I got it. Thank you very much.

Okay, so last thing, I've got to set you for a status check. And I'm doing that because -- and I will look at those cases. I will. I'm always interested in reading. I'm kind of a nerd that way. I'll be happy to look at them. But I do want to set you for a status check, so does everyone have their calendars available? Can you -- if I give you a time and a date, if something doesn't work out you can call me and I will move it. But I want to check in with you to see how this Phase 1 discovery is doing. I'd like

to see you back here maybe -- I don't know if Wednesdays or Fridays are better for travel; you tell me.

MR. BOYLAN: Probably Wednesdays, Your Honor.

DISCOVERY COMMISSIONER: Okay. How about October 12th at 10:00 a.m.?

MR. BOYLAN: Yes, Your Honor.

DISCOVERY COMMISSIONER: It will be a status check on Phase 1 discovery. And then at that time, depending on what you find out, we can talk about moving into the next phase, if necessary.

MR. BOYLAN: Years ago -- just a point of order going forward, years ago -- and I haven't worked with Your Honor, but a long time ago I think it was Commissioner Biggar, he would take calls. I mean, sometimes --

DISCOVERY COMMISSIONER: Oh, I take calls.

MR. BOYLAN: -- I run into a lot of problems at depos. I just had one where there were multiple instructions not to answer. I've read your pet peeves in your writings. I know the rules.

DISCOVERY COMMISSIONER: I think I have to update them. Everybody read the Coyote Springs case?

MR. BOYLAN: Is that -- I just read Commissioner Opinion No. 11. That's very helpful to this case.

DISCOVERY COMMISSIONER: Yeah. Those were my --

MR. BOYLAN: That's Oliveras v. Rebel (phonetic).

DISCOVERY COMMISSIONER: Right. My predecessor's opinions. But there have been some updates in the case law. The state court no longer follows

the In re Stratosphere case in federal court. It's Coyote Springs. If you haven't read that case, please read it. I don't have the citation off the top of my head. I believe it came down late last year, 2015. Your local counsel should be able to find it for you. It's a supreme court decision.

MR. BOYLAN: We can find it, Your Honor, for sure, Your Honor.

DISCOVERY COMMISSIONER: All right. Read that case. Make sure you read it. It's important. I take deposition calls all the time. I think some of the lawyers in the room know that. So I'll be happy to take your call. If you need a conference call with me on some issue that arises, call me. I'll take a conference call with you.

MR. BOYLAN: Another thing that you may or may not embrace, Your Honor, that I've seen in cases, a couple of the depositions like these PMK depositions that we're going to take now with your permission, if we did the first couple of depositions here close to you, in physical proximity to you --

DISCOVERY COMMISSIONER: No, I won't do that. Everybody has read the Okada case, though. You need to read that one, too, in terms of the location of depositions. I generally typically do follow the federal court rule on that. But the Okada case changed the landscape a little bit, so just please read that rule as well or that case as well. And that one is relatively recent. I think it's A-k-a-d-a.

MR. BOYLAN: We've seen that.

DISCOVERY COMMISSIONER: Okada. Yeah, read that one. But usually I do it at the convenience of the deponent. But I'm available by phone and if you are two or three hours away and you are taking a deposition, if you let me know in advance I've actually shared my cell phone number so that you can call me during

the deposition if need be, and I'm happy to do that. So those are the things that I will tell counsel that we do -- I do to try to make myself accessible.

I'm hoping also that we will have some instruction for you on the location of this case. Right now it will remain in Department 29, but we'll let you know. You will definitely be advised, okay.

All right. Good luck with everything. I will issue the scheduling order. You'll receive a copy of it. I need my Report and Recommendations -- I'm going to give you 20 days. I know you're going on vacation as well. Try to get the Report and Recommendations to me as soon as possible. I'd like all counsel to approve as to form and content. I know that hasn't gone very well for you all in the past, but I am counting on some effort here. I will fix the Report and Recommendations if need be. They are not an order in the case until they are signed by the district court judge, but if you don't obey them and they are subsequently signed, you're in trouble because the order is retroactive. And I believe that is the Bahena case. You might want to read that. There's Bahena I and Bahena II.

All right. Anything further today? I'll issue the scheduling order. I hope everybody -- I hope we're all on the same page, but have a conference call with me if anything arises or call me during the deposition if you have a problem.

MR. SCARBOROUGH: Thank you, Your Honor.

MR. REYNOLDS: Thank you, Your Honor.

MR. BOYLAN: Thank you, Your Honor.

MR. CHRISTOPHER: Thank you.

THE CLERK: Status check is August 26th at 11:00.

DISCOVERY COMMISSIONER: This is only for plaintiffs' counsel to be here

in case the Report and Recommendations is not done. But plaintiffs' counsel is not going to be here for this. They're going to get their homework done. Okay?

MR. SCARBOROUGH: Thank you, Your Honor.

MR. BOYLAN: Thank you, Your Honor.

MS. SCHULER-HINTZ: Thank you, Your Honor.

DISCOVERY COMMISSIONER: All right, thank you all. Have a good rest of the week.

(PROCEEDINGS CONCLUDED AT 11:44 A.M.)

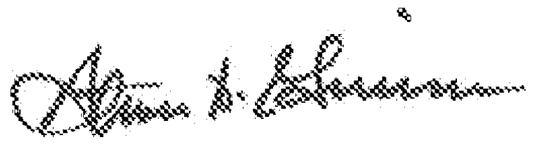
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DISTRICT COURT
CLARK COUNTY, NEVADA
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JEFFREY BENKO, Plaintiff, vs. QUALITY LOAN SERVICE CORPORATION, Defendant. AND RELATED PARTIES	)	CASE NO. A-11-649857-C DEPT NO. XXIX **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER

RE: NOTICE OF PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANT NDSC (DEPOSITIONS WRITTEN DISCOVERY, NRCP 16.1 DISCLOSURES)

(SEE ADDITIONAL MATTERS ON NEXT PAGE)

WEDNESDAY, SEPTEMBER 21, 2016

APPEARANCES:

FOR THE PLAINTIFFS:	NICHOLAS A. BOYLAN, ESQ. SHAWN CHRISTOPHER, ESQ.
FOR DEFENDANT QLSC:	KRISTIN A. SCHULER-HINTZ, ESQ.
FOR DEFENDANT CRV:	LAWRENCE SCARBOROUGH, ESQ. KATIE M. WEBER, ESQ.
FOR DEFENDANT NDSC:	KEVIN SODERSTROM, ESQ.
FOR DEFENDANT MTC:	ALLAN E. CERAN, ESQ.
ALSO PRESENT:	PAUL LARSON JESSICA MAZZYARS

RECORDED BY: FRANCESCA HAAK, COURT RECORDER
TRANSCRIBED BY: JD Reporting, Inc.

A D D I T I O N A L M A T T E R S

RE: NOTICE OF PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANT MTC (WRITTEN DISCOVERY)

RE: NOTICE OF PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANT MTC (DEPOSITIONS)

RE: NOTICE OF PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANT MTC (NRCP 16.1 DISCLOSURES)

RE: PLAINTIFFS' MOTION TO COMPEL AND SANCTIONS AGAINST DEFENDANT QLS (DEPOSITIONS)

RE: PLAINTIFFS' MOTION TO COMPEL AND SANCTIONS AGAINST DEFENDANT QLS (WRITTEN DISCOVERY)

RE: PLAINTIFFS' NOTICE OF MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANTS QLS (NRCP 16.1 DISCLOSURES)

RE: DEFENDANTS' JOINT MOTION FOR ENTRY OF CONFIDENTIALITY ORDER AND MOTION FOR ORDER SHORTENING TIME

LAS VEGAS, CLARK COUNTY, NEVADA, SEPTEMBER 21, 2016, 10:02 A.M.

* * * * *

THE DISCOVERY COMMISSIONER: I need everyone to state their appearances and who they represent, please.

MS. SCHULER-HINTZ: I guess I'm first. Good morning, Your Honor. Kristin Schuler-Hintz on behalf of Quality Loan Service. With me today in the courtroom is my soon-to-be associated in counsel Paul Larson. He's hiding back there. He's been sick.

Mr. Larson: Right here, Your Honor.

THE DISCOVERY COMMISSIONER: Good morning.

MR. SCARBOROUGH: You have Larry Scarborough, Jessica Mazzyars [phonetic] and Katie Weber for CRC.

THE DISCOVERY COMMISSIONER: Good morning.

MR. CERAN: Good morning, Your Honor, Allan Ceran representing MTC Financial doing business as Trustee Corp.

THE DISCOVERY COMMISSIONER: Good morning.

MR. CERAN: Good morning, Your Honor.

MR. SODERSTROM: Good morning, Your Honor, Kevin Soderstron for National Default Servicing Corporation.

THE DISCOVERY COMMISSIONER: Good morning.

MR. BOYLAN: Good morning, Your Honor. Nicholas Boylan and Shawn Christopher representing the plaintiffs.

THE DISCOVERY COMMISSIONER: Good morning. Please have a seat.

So the first thing I would like to deal with is the report and recommendation from the last hearing, and I need to advise you all of something.

I did ask the Court for the draft orders from the February 22nd hearing. I know that there is no order yet from that hearing, but I asked to look at the draft proposed orders that were submitted, and to my surprise neither order mentions anything about the discovery parameters. So I was concerned about that issue and what the Court allowed, but apparently you all were not concerned about it because it's not in either of your proposed orders.

All I have is the Judge's transcript. So in any event that gave me some concern. So then I looked again at Judge Scann's hearing transcript. I looked at my hearing transcript from the hearing on July 20th. Now, the purpose of that hearing, it's called a discovery conference, and the purpose of that was to get a scheduling order, and I did try to articulate what I thought the Judge intended.

I am concerned because I want to be able to process this report and recommendations, but evidently there is some dispute with it. The only report and recommendations I believe that I have -- the original that I have although I've got a lot of letter writing back and forth -- what I do have is the one submitted by Mr. Boylan.

And I need to understand from defense counsel -- I

did not receive one from defense counsel. If we did receive it, it probably was sent back for changes because I do not have it. All I have is the plaintiffs' version. So I am concerned as to -- I would like to get this sorted out first because I also think it will help us with the motion, but I would like to know what the problems are with the plaintiffs' report and recommendations that was submitted from the July 20th hearing.

So, Defense Counsel, if you could assist me, I would appreciate it.

MR. SCARBOROUGH: Sure. I have no explanation for why you don't have what we submitted to the Court or thought we submitted to the Court in terms of our view of what occurred on July 20. I hold it in my hand, my copy from my notebook, and I can hand it to Your Honor if you'd like it.

THE DISCOVERY COMMISSIONER: Okay. Do you believe it may have gone back?

MR. SCARBOROUGH: It -- we -- well, we know -- no, is my -- and looking around at everyone, we have no indication on the defense side that it ever came back to us for any changes. We are aware that there was outreach from chambers to Mr. Boylan to make some changes to what he submitted.

THE DISCOVERY COMMISSIONER: Right. Well, what we do, just so you know, is if we get a report and recommendation that's improper we will send it back to the lawyer submitting

it saying please fix this. Please fix that. This is something that we do as the department to assist you.

MR. SCARBOROUGH: Now, one of the things that we understand chambers asked Mr. Boylan to do was to pull out transcript references.

THE DISCOVERY COMMISSIONER: Right.

MR. SCARBOROUGH: So what I'm going to hand you we were not asked to pull out transcript references. Ours has them in it too. We could easily pull them out, but this is what we submitted.

THE DISCOVERY COMMISSIONER: I'm really concerned. I don't know if we received it or if we received it and sent it back.

MR. SCARBOROUGH: You're not the only one who's concerned.

THE DISCOVERY COMMISSIONER: I am happy to find out.

MR. SCARBOROUGH: I'm panic stricken because this is a very important order.

THE DISCOVERY COMMISSIONER: Well, don't be. I haven't signed anything. I haven't -- I was going to have a conference call with you because I was concerned about it, but the --

MR. BOYLAN: Your Honor, I have some information on that.

THE DISCOVERY COMMISSIONER: -- since you were coming

in to see me, I just felt this would be an appropriate time to talk about it.

MR. BOYLAN: The defense --

MR. SCARBOROUGH: So how did I --

And I'm sorry. If I can continue my dialogue free of interruption.

THE DISCOVERY COMMISSIONER: Yes.

MR. SCARBOROUGH: Thank you, Your Honor. I just would look to the Court for guidance as to what you would like us to do with what we thought we submitted quite some time ago.

THE DISCOVERY COMMISSIONER: All right. May I have -- is that a copy?

MR. SCARBOROUGH: It is.

THE DISCOVERY COMMISSIONER: All right. Does plaintiffs' counsel have a copy?

MR. SCARBOROUGH: Sure does.

THE DISCOVERY COMMISSIONER: Do you have it accessible?

MR. BOYLAN: I do, Your Honor, and I know that someone I think -- I think you did have it because there are actually some notes on it. I saw one with some notes on it from the department. So at one point in time I think you did have it. In fact, local counsel, Ms. Katie Weber, submitted both of ours. I think they were both delivered to you at the same time. So I understand there may have been some confusion,

but I know with certainty that you did have it at one point.

THE DISCOVERY COMMISSIONER: Okay.

MR. SCARBOROUGH: The one thing I would say, this is the first time we've heard that there was anything with any notes on it in terms of our discourse here.

THE DISCOVERY COMMISSIONER: All right. It might be a problem on our end. We have made some procedural changes. We have reorganized my department. We are doing our best to stay on top of everything, but it may have fallen through the cracks. So I don't want defense counsel to think that I'm blaming you. I just don't know what happened that I don't have it, but I was concerned enough as to what -- because I did -- what I did receive were the letters back and forth between counsel, or I saw Ms. Weber's letter that said, Please enclosed find the original, but I don't know why I don't have that in this set. So that's what I'm concerned about, but it's fixable because I haven't signed anything yet, which is why we're here today to discuss it.

MR. BOYLAN: We --

THE DISCOVERY COMMISSIONER: So what are the areas of dispute? And please don't tell me everything.

MR. SCARBOROUGH: So I've handed away my notes to --

THE DISCOVERY COMMISSIONER: Let's make a copy, one copy.

MR. SCARBOROUGH: Here, I think Ms. Schuler-Hintz can

help us.

I can say as a general -- as a general matter without trying to restate anything this Court has said, but speaking from memory, when Your Honor ordered the phased discovery, Phase 1, 2 and 3 in response to a series of motions that were before you that day --

THE DISCOVERY COMMISSIONER: Right.

MR. SCARBOROUGH: We are obviously in Phase 1, so focused on Phase 1, and the difference between us is the -- between us meaning plaintiffs and defendants -- is the difference between what in terms of access to communications with the class as a whole -- let's forget the individual plaintiffs -- that's clearly Phase 1. We all know that, but what kinds of communications, if any, belong in Phase 1 that go beyond the individual plaintiffs and do not relate to our client's policies, procedures, method of operation, which absolutely is fair game for purposes of phase one?

And I think that devolves into conversations about lists of all the telephone calls that were ever made to the plaintiff class. We're saying that belongs in class discovery --

THE DISCOVERY COMMISSIONER: Phase 2.

MR. SCARBOROUGH: -- somewhere, not in Phase 1, and in what I hope -- I won't say it. I won't ascribe good faith to us. I'd rather have the Court conclude that, but

notwithstanding where we are with these competing orders, we have proceeded apace. Our client's 30(b)(6) witness has been deposed.

There may be motion practice about it because Mr. Boylan would say that we didn't prepare on certain topics. I would respond by saying those seem like Phase 2 topics. The Court's already made its view clear that if there needs to be two 30(b)(6)'s, one in each phase, that's going to happen, but we've tried to deal with this as best we could, and I think from our perspective -- I'm sorry to sit down --

THE DISCOVERY COMMISSIONER: Oh, no, please do. It's fine.

MR. SCARBOROUGH: -- we're looking at under Roman II, No. 1, we say, Defendants, we're allowed to propound written discovery to the plaintiffs who are not to be deposed more than once for any reason, and then it says, Plaintiffs may propound written discovery, take the 30(b)(6) depositions as they relate to policies and procedures, and then the source of the dispute is plaintiffs are not entitled to seek discovery or question defendants on class-certification issues until Phase 2.

And Mr. Boylan, who obviously can speak for himself, would say that, no, we need to produce lists of phone calls or names of borrowers with whom we dealt beyond the plaintiffs, and that's where we have an analytical issue with respect to what we thought we had discussed on July 20.

THE DISCOVERY COMMISSIONER: If you all will just give me a minute, let me look through your report and recommendations.

MR. SCARBOROUGH: Thank you.

THE DISCOVERY COMMISSIONER: Perhaps it'll help if I get the pages in the right order.

(Pause in the proceedings.)

THE DISCOVERY COMMISSIONER: I am going to ask you if you wouldn't mind if I stepped off the bench for a minute. I want to see if I can figure out what happened to this document.

(Proceedings recessed 10:16 a.m. to 10:18 a.m.)

THE DISCOVERY COMMISSIONER: Okay. So please have a seat, and you all can remain seated.

MR. BOYLAN: Thank you.

THE DISCOVERY COMMISSIONER: I'm okay with that. We have a lot to get through today, and I don't want you to have to stand the entire time.

I do not have the defendants logged in. I do not know what happened. I have read it, or I've looked at it. I am fine with the transcript references being in the report and recommendation. What I will not do is have the report and recommendation attached to -- or the transcript attached to the report and recommendations.

And, Plaintiffs' Counsel, just so you know, I am changing some policies and procedures. This set of documents